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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument
now in Number 01-1229, Pierce County v. Ignacio Guillen.
Mr. Hamilton.

ORAL ARGUMENT OF DANIEL R. HAMILTON
ON BEHALF OF THE PETITIONER

MR. HAMILTON: Thank you, Mr. Chief Justice, and
may it please the Court:

From the enactment of the 1966 Highway Safety
Act, a congressional report, specifically number 17 to the
89th Congress, which is quoted on page 2 of the blue
brief, congressional reports noted that, quote, no other
part of the State program is as basic to ultimate success,
nor as demanding of complete cooperation, end quote, as
State collection of accident reports, because they are the
basis for hazard identification and correction.

However, soon after the 1973 Highway Safety Act
made accident data collection a condition to Federal
hazard elimination funds the Secretary of Transportation
reported to Congress that States strongly objected,
because they feared that their collection of accident data
would be used against them in damage actions. Because of
this, unintended liability exposure threatened the
integrity and proper operation of a cooperative Federal-

1 State program that has saved thousands of lives --

2 QUESTION: Would you help us figure out how to
3 interpret this statute?

4 MR. HAMILTON: Yes, Your Honor.

5 QUESTION: It says data, highway safety data
6 compiled or collected by a State. Now, I suppose that in
7 a crossing like we have here, where there might have been
8 accidents from time to time, that there would be police
9 reports or highway officer reports of motor vehicle
10 accidents at that site, right?

11 MR. HAMILTON: Yes, Your Honor.

12 QUESTION: And those presumably are not either
13 compiled or collected for the purpose of getting highway
14 funding from the Federal Government. They're compiled, I
15 gather, to serve the normal functions of law enforcement.

16 MR. HAMILTON: Your Honor, no, that's not
17 completely correct.

18 QUESTION: No?

19 MR. HAMILTON: They are collected and compiled
20 for purposes of highway hazard identification --

21 QUESTION: Isn't --

22 MR. HAMILTON: -- from the very beginning.

23 QUESTION: Well, don't you suppose that at least
24 in some jurisdictions, maybe not Tacoma, but in some
25 jurisdictions you will find just ordinary police

1 reports --

2 MR. HAMILTON: Well, it's my --

3 QUESTION: -- of accidents, and sometime later,
4 perhaps the State might decide, or the county, I'd like to
5 have some Federal money to make some changes at that
6 crossing, and maybe we can use some of the data to
7 assemble it to try to apply for Federal money. Now, how
8 should we interpret that statute?

9 MR. HAMILTON: Well, in the -- if I understand
10 the hypothetical, the -- Your Honor is postulating a
11 situation where there is an accident report purely State
12 in origin. Just to help the Court, I don't know that such
13 a thing exists after the crash data forms. It's to be
14 understood that the Department of Transportation has been,
15 since 1966, working with the States to develop a uniform
16 crash data form, and that -- I think it's becoming more
17 and more successful as that goes on, so I'm --

18 QUESTION: So your point is that the police
19 officers are using a kind of a unified Federal traffic
20 report --

21 MR. HAMILTON: Essentially --

22 QUESTION: -- when there's an accident?

23 MR. HAMILTON: The forms are not all the same,
24 because each State has the right to choose how to put it
25 together, but the elements of the forms are dramatically

1 Federal in their nature, and they're Federal totally
2 directed toward the issue of highway design. That's
3 why -- Nation-wide there was a report cited by the
4 Washington State amici and multi-State amicus, amici
5 briefs that pointed out that Nation-wide before 1966 there
6 was no standard at all.

7 QUESTION: Well, let me ask you this. At page
8 20 of the respondent's brief we have four different
9 interpretations, possible interpretations of the acts set
10 forth. Do we have to choose among those in order, as a
11 predicate before reaching the constitutional issue, and
12 I'll just -- and this is in line with Justice O'Connor's
13 question. If we took the most expansive view of the
14 alternatives that she presents, then the opinion that we
15 would write, it seems to me, would be different than if we
16 took the more narrow, the most narrow view, and that leads
17 me to the question, do we have to have a statutory
18 construction at the beginning point of our holding?

19 MR. HAMILTON: I don't believe so, Your Honor,
20 and the county's position, and we believe it's well-
21 founded, is that the constitutional issue is not an excuse
22 for artificially narrowly interpreting --

23 QUESTION: Well, but I think that our Court has
24 always preferred, along the lines suggested by Justice
25 O'Connor and Justice Kennedy, to construe a statute to

1 avoid constitutional problems if we can, and certainly the
2 respondents here at least suggest there are several
3 different constructions. Are you not prepared to say
4 which of those you favor?

5 MR. HAMILTON: Well, I've -- I'm happy -- in
6 fact, I had intended to, if given the opportunity, to
7 provide the Court the way the county believes the statute
8 should be interpreted.

9 QUESTION: Well, I'll give you that opportunity
10 right now.

11 MR. HAMILTON: Okay.
12 (Laughter.)

13 QUESTION: Yes, that's our question, and you
14 might bear in mind if you wish that I think we generally
15 construe evidentiary privileges narrowly.

16 MR. HAMILTON: Yes. However, as the Court
17 pointed out on that issue of narrow construction that --
18 in the Shapiro case, I believe, which was also a raw data
19 case whose purpose was to encourage participation, that
20 even after quoting the standard, the test of a narrow
21 construction -- the test was first put to Congress'
22 intent, and that the issue of, you know, that particular
23 rule of construction is not to be used in a way to
24 artificially narrowly interpret what Congress meant, and
25 if Congress meant something, then that's the test.

1 To answer Justice -- Chief Justice Rehnquist's
2 question, how does the county say the statute should be
3 interpreted, pretty much we agree with the logic of the
4 United States Solicitor General, but just would suggest
5 that the, their logic be extended to what we believe is
6 the logical conclusion. In other words, we disagree with
7 plaintiffs that it only covers generated documents,
8 because under 409 that's interpretation conflicts with
9 what this Court has said the plain meaning of compiled
10 means, as this Court has discussed in the John Doe case
11 cited to the Court.

12 Also, this reads out of 409 the express
13 protection also of data collected, not just generated. It
14 ignores the legislative history of why 409 was amended,
15 and why it used the language compiled -- .

16 QUESTION: You're telling us what's wrong with
17 the other reading. Which is your reading?

18 MR. HAMILTON: Our reading, Your Honor, is that
19 there should be -- this Court should establish a bright
20 line rule that documents collect -- as the language says,
21 for -- we would ask the Court to enforce the language of
22 the statute, which reads, documents and data, quote,
23 compiled or collected for the purpose, end quote, of
24 specified highway safety programs, and here's the
25 operative language, quote, shall not be subject to

1 discovery or admitted into evidence in a Federal or State
2 proceeding or considered for any other purposes in any
3 action for damages arising from any occurrence at a
4 location mentioned or addressed in those documents or
5 data. In other words --

6 QUESTION: It doesn't say documents. I mean,
7 you quoted it, you began the quote after --

8 MR. HAMILTON: Yes --

9 QUESTION: -- after the noun.

10 MR. HAMILTON: Yes. I --

11 QUESTION: The noun you inserted was documents.

12 MR. HAMILTON: Yes. There are specific --

13 QUESTION: It says --

14 MR. HAMILTON: -- references to specific types.

15 QUESTION: It says data, doesn't it?

16 MR. HAMILTON: It says data, and also lists
17 reports, lists -- and that sort of thing, and I was trying
18 to condense it down, but yes.

19 QUESTION: To be plain, do you mean that
20 everything that goes to the Public Works Department,
21 everything that eventually gets to the Public Works
22 Department and is relevant to the safety of highway
23 crossings is exempt from discovery?

24 MR. HAMILTON: Yes, Your Honor, that is what
25 we're saying.

1 QUESTION: Every fact, so that if the Department
2 of Environmental Protection has prepared a report saying
3 the accidents are wrecking the grass and the flowers at an
4 intersection, and that report is then given to whatever
5 the data collection agency here is for this purpose, that
6 all of that data, including the data in the Department of
7 Environmental Protection, is then covered by the
8 privilege? Is that your position?

9 MR. HAMILTON: To the extent that that
10 characterization goes to the data that's in the reports.
11 It's not to say that -- all we're saying --

12 QUESTION: That's my question.

13 MR. HAMILTON: Yes.

14 QUESTION: The same data is in the environmental
15 report. That data is then given to the collection agency.
16 Does the data, even in the hands of the Environmental
17 Department, become subject to the privilege at that point,
18 on your reading?

19 MR. HAMILTON: We believe the -- again, if it
20 meets the test of dealing with an occurrence at a --
21 again, following the language of the statute, an
22 occurrence at the location mentioned or addressed in such
23 reports in the damage action, then that report that it's
24 collected and compiled by --

25 QUESTION: I'm not talking about the report.

1 I'm talking about the fact which is reported.

2 MR. HAMILTON: Yes.

3 QUESTION: The data in the report.

4 MR. HAMILTON: Well --

5 QUESTION: Does that -- does that data --

6 QUESTION: You can answer that yes or no.

7 QUESTION: -- become subject to the privilege?

8 MR. HAMILTON: Yes, if Your Honor means, when

9 you say data, going to the report to get the data, to --

10 if you were to -- if that person wanted to raise that

11 issue were to go to the person who, or the entity that

12 created that information, and were to depose that, those

13 people, they could get the information that way. All

14 we're talking about --

15 QUESTION: Then your -- then the answer to my

16 question, I guess, is no, the data does not become, as

17 such, subject to the privilege. It's only the data as

18 held by the collection agency. You can still go to the

19 Environmental Department, depose them, get your

20 information?

21 MR. HAMILTON: Yes, you can.

22 QUESTION: Okay.

23 MR. HAMILTON: Yes, and I'm sorry I

24 misunderstood you.

25 QUESTION: Well, could you --

1 QUESTION: What if you don't have to depose
2 them?

3 QUESTION: -- go to the Police Department under
4 this uniform Federal form you were telling us about it?

5 MR. HAMILTON: I'm sorry, I missed the question.

6 QUESTION: You said at the outset that there's a
7 uniform document for collisions or crashes or something.

8 MR. HAMILTON: Yes.

9 QUESTION: And the Police Department fills it
10 out. Can you go to the Police Department and get that
11 information?

12 MR. HAMILTON: Under our interpretation, you
13 could find the officer, you could depose the officer, but
14 you cannot get the report if it's collected and filed for
15 hazard identification.

16 QUESTION: Well, so then Justice Souter's
17 hypothetical is different from this. You said in Justice
18 Souter's hypothetical that you could go to that Department
19 and get the document, but if you go to the Police
20 Department you can't get the document.

21 MR. HAMILTON: No --

22 QUESTION: You didn't say he could get the
23 document.

24 MR. HAMILTON: No.

25 QUESTION: You said you could depose him --

1 MR. HAMILTON: Yes.

2 QUESTION: -- and that was what my question was
3 going to be. Are you drawing a distinction between
4 getting the document that was generated in the
5 Environmental Agency and deposing the person who made the
6 document?

7 MR. HAMILTON: Yes, Your Honor. That's a
8 distinction that the cases make --

9 QUESTION: Why? It says data. I don't care
10 about the cases. I care about the text of the statute.
11 It says data. It's data whether it's in a document or
12 whether it's in some deponent's head. Data is data.

13 MR. HAMILTON: I think that certainly is a fair
14 interpretation of the statute. What we're trying to do is
15 synthesize how the courts have looked at this, and they
16 have drawn the distinction saying that really what the
17 purpose of this was to put plaintiffs back in the position
18 they were before. All this mechanism of creating accident
19 data existed beforehand. That's what they had to do.
20 They didn't have this silver platter.

21 QUESTION: They could get a police report of an
22 accident. Isn't that standard routine in negligence
23 cases?

24 MR. HAMILTON: Your Honor, before the 1966
25 Highway Safety Act they could not get an accident, a

1 collection of accident reports, at least in Washington
2 State, and it's my understanding Nation-wide, just by
3 asking for them --

4 QUESTION: But you could certainly get a
5 police -- at least judging from my own practice in Arizona
6 you could certainly get an individual police report of an
7 accident.

8 MR. HAMILTON: Yes. If you knew the -- and
9 that's the point. You essentially have to know what
10 plaintiffs are trying to find out to get the document,
11 because you couldn't ask for all the accidents at this
12 intersection. You could ask for a date and people
13 involved, but you couldn't ask for, give me all the
14 accidents at a particular intersection.

15 QUESTION: No, but you could ask for the police
16 report of the particular accident that you were concerned
17 with.

18 MR. HAMILTON: Prior to 1966, yes, Your Honor,
19 that's correct. That's --

20 QUESTION: I'm still slightly mixed up.

21 MR. HAMILTON: Okay.

22 QUESTION: Imagine the forest service in the
23 State collects, because they have tree lovers, a piece of
24 paper that says the elm trees at the intersection of such-
25 and-such were diseased, all right. Now, that's done for

1 purposes of tree health, and there's a piece of paper in
2 the environmental tree section which has that written
3 right on it, and one day the Transportation Department for
4 safety reasons says, send us a Xerox of that, okay.

5 The question I think Justice Souter was asking
6 and Justice Scalia, and I would certainly ask, is, in your
7 view, when they send a subpoena or discovery to the tree
8 department to get that piece of paper, can they get it?

9 MR. HAMILTON: No.

10 QUESTION: No?

11 MR. HAMILTON: No.

12 QUESTION: Very well. Suppose that the
13 Transportation Department one day wrote a witness' name
14 down, an address which they got from the internal State
15 government telephone book. In your opinion, could a
16 plaintiff go and ask for a telephone book? The answer, I
17 guess, is no.

18 MR. HAMILTON: Let me think about that for a
19 minute.

20 QUESTION: Well, I don't see what the difference
21 would be. They didn't collect the telephone book for
22 purposes of -- they didn't make the telephone book for the
23 purposes of accidents, but one day somebody went to the
24 telephone book and copied some information out of it for
25 the purpose of accidents --

1 MR. HAMILTON: I think what they copied --

2 QUESTION: -- and that's why, you see, exactly

3 why I find your interpretation of the statute rather

4 strained, so what is the answer to what my hypothetical

5 suggests?

6 MR. HAMILTON: Well, since my answer would be

7 strained if I said the photo, the telephone book, what I'm

8 referring to would be what was written down for the

9 purposes, and collected for the purposes --

10 QUESTION: But you said that they could not get

11 the piece of paper --

12 MR. HAMILTON: Yes.

13 QUESTION: -- in the Tree Division --

14 MR. HAMILTON: The --

15 QUESTION: -- and all I'm having trouble is

16 distinguishing between the piece of paper written for tree

17 health and the address in the telephone book written so

18 people can know where people should be phoned.

19 MR. HAMILTON: The piece of paper written for

20 tree help -- and I'm sorry I misunderstood the question.

21 I thought the Court was asking about the telephone book.

22 The telephone book, no. The piece of paper that was

23 written down from that, yes, because that's collected and

24 compiled, and that's really what the SHOTS case said, that

25 if there's a question about this of whether this was

1 really fairly included for the purposes of 152, then for
2 that purpose you have an in camera inspection.

3 QUESTION: But what is there that suggests that
4 Congress wanted to change the game to that extent? One
5 can understand what you've suggested before, wanting to
6 keep personal injury plaintiffs in the same place they
7 were before this legislation, but your interpretation
8 takes away from plaintiffs things that they would have had
9 access to before.

10 MR. HAMILTON: Your Honor, we -- respectfully,
11 we disagree with that characterization of our position.

12 QUESTION: Well, you just, in response to the
13 Chief's question, said that at least the police report of
14 this accident was routine.

15 MR. HAMILTON: The police report of this
16 accident, when you go and ask for -- and the reason why is
17 because -- because of the Highway Safety Act, 1966 Highway
18 Safety Act, the accident reports were indexed by location.
19 You could go and get a specific report if you knew the
20 facts enough of the accident, but only that accident
21 report, not all of them, and that is how 409 --

22 QUESTION: But that's not because of a
23 privilege, is it?

24 MR. HAMILTON: Yes. It is because of a
25 privilege.

1 QUESTION: I thought the reason for that is the
2 police said, look, we don't have to do your homework for
3 you. If you know what you want, we'll give it to you. If
4 you don't know what you want, we don't have to search for
5 it. Isn't that the reason?

6 MR. HAMILTON: Yes, because the police don't do
7 that. The police don't care about highway design factors
8 other than because the form asks them to.

9 QUESTION: Okay, so in the past, then, and in
10 accordance with Justice Ginsburg's question, you could
11 have asked for the police report, and in Justice Breyer's
12 example, I presume you could have gone to the Tree
13 Division and said, let's have the slip of paper that says
14 the elm trees are diseased. Now, you can't do that.

15 MR. HAMILTON: Well, Your Honor, I believe
16 that --

17 QUESTION: And Justice Ginsburg's question is, I
18 thought it was supposed to leave things, as it were,
19 level, the way they were, that a disadvantage was not
20 being created, it was simply, the intent was simply to
21 avoid creating a new advantage which would deter the
22 State. Isn't that the way we should read the statute?

23 MR. HAMILTON: I think the purpose, yes, Your
24 Honor, is to avoid discouraging States from participating,
25 and allowing them to get accident reports from the hands

1 of third parties does discourage States from
2 participating.

3 QUESTION: Would you like to reserve your time?

4 MR. HAMILTON: Yes, I would, Your Honor. Thank
5 you very much.

6 QUESTION: Mr. Clement.

7 ORAL ARGUMENT OF PAUL D. CLEMENT

8 ON BEHALF OF THE UNITED STATES, AS INTERVENOR

9 MR. CLEMENT: Thank you, Mr. Chief Justice, and
10 may it please the Court:

11 The 1995 amendment to section 409 is, contrary
12 to the determination of the Washington State Supreme
13 Court, constitutional. The provision protects data that
14 is compiled and collected for purposes of applying for
15 Federal highway funds from being used in State and Federal
16 court litigation. The documents at issue are inherently
17 Federal in character, and so Congress has the power to
18 prohibit the use of those documents in both Federal and
19 State court litigation.

20 QUESTION: Well, what about documents created
21 not for the purpose of getting Federal funds, not for
22 section 152, but for some other purpose, some of which are
23 later incorporated in a Federal funding application --

24 MR. CLEMENT: I think those documents --

25 QUESTION: -- by a different agency?

1 MR. CLEMENT: I think those documents, Justice
2 O'Connor, would be discoverable and admissible if the
3 documents were sought from the party that collected them
4 for a purpose different than the Federal highway funding
5 purposes, but what the statute, I think, does prohibit is
6 somebody going to the State Highway Traffic Department and
7 essentially engaging in a one-stop shopping enterprise
8 where they can get all sorts of documents that have been
9 collected --

10 QUESTION: But you differ from petitioner in
11 your reading of the statute. Yours is much narrower, I
12 take it.

13 MR. CLEMENT: That's exactly right, Justice
14 O'Connor, and so as a result of our interpretation of the
15 statute, the typical police accident report can be
16 obtained from the Police Department and, I think with
17 respect to Justice Breyer's hypothetical, the report about
18 the tree can be obtained from the State Tree Department or
19 the State Environmental Department.

20 QUESTION: Let me ask a somewhat different
21 question, although I'm not sure we've resolved the point
22 that we've been inquiring about. Would a State have the
23 right to waive this privilege?

24 MR. CLEMENT: I think that's a difficult
25 question, Justice Kennedy. I think that as you know, as a

1 general matter evidentiary privileges are waivable, and
2 so -- and that's the proposition this Court has
3 established in cases like *Menzonato* and *Hill*, but there is
4 a sense in which this privilege exists, in our view,
5 primarily for the benefit of the Federal Government, so
6 that we can obtain accurate, complete, and candid
7 assessments of highway traffic safety requirements, and
8 so, there's a suggestion, for example, in the *Hill*
9 decision at footnote 3 that, when a third party's
10 interests are at stake, that the court may not find waiver
11 under those circumstances as readily as it would
12 otherwise, so our view I think would be that although the
13 Court need not definitively resolve it in this case,
14 there's a strong argument that the privilege would not be
15 waivable.

16 QUESTION: Let me just interrupt you, if I may.
17 Are you saying that the lawyer defending the county, if
18 the plaintiff called him up and said, I'd like to see
19 these reports, and the lawyer said, well, they're
20 privileged, but I think I'll give them to you because I
21 think it's in everybody's interests to know the facts,
22 that would violate the Federal statute?

23 MR. CLEMENT: I think the admissibility of those
24 materials --

25 QUESTION: I'm just asking you about showing

1 them to the plaintiff.

2 MR. CLEMENT: I think there's a sense in which
3 it would violate the Federal statute, but I'm not
4 suggesting that the Department of Transportation is going
5 to be able to leap to the defense of the statute in that
6 hypothetical and assert the interests of the statute. I
7 think, however, if a State wanted to take a systematic
8 policy of disregarding section 409, I think that would
9 implicate the Federal interests, and I'm not sure that a
10 State would be able to do it.

11 QUESTION: Well, supposing this simply comes up
12 during a trial. A witness is put on the stand, asked
13 about the preparation of a report, and the State doesn't
14 object, and it would be objectionable under the statute.
15 Now, is that something that could be challenged on appeal,
16 say?

17 MR. CLEMENT: I don't think so, Chief Justice.
18 I think it is something that could be procedurally
19 defaulted, but I do think if in a case like that the State
20 went to the trial judge and said, look, there is this
21 provision of Federal law, section 409, that says this
22 material can't come in, but we're happy to just disregard
23 that provision, I think the trial court might well be
24 within its rights to say that no, we're not going to
25 disregard that provision of Federal law, we're going to

1 keep the material out, but I do think it could be --

2 QUESTION: With these rights, is it a matter of
3 discretion for the trial court? I mean, it would be one
4 thing to say it's mandatory, it's a Federal requirement,
5 and now you're suggesting that the lawyer can overlook it,
6 and the court could or must act on its own?

7 MR. CLEMENT: Well, I'm suggesting that the
8 language of the statute is mandatory. It says that it
9 shall not be admitted, so I think if the language is
10 brought to the attention of the trial court judge, he or
11 she would be in a position where they ought to exclude the
12 evidence.

13 QUESTION: How would this be enforced by the
14 Federal Government? I understand, and correct me if I'm
15 wrong, that the Federal funding is not tied to the 409
16 privilege, but is tied to the 152 reporting obligations,
17 so what Federal enforcement would there be for a county
18 that says, we think it's fair for the plaintiff to have
19 accident reports, so we'll give them

20 What Federal -- how would that mandatory
21 requirement that you just stated be enforced by Federal
22 authorities?

23 MR. CLEMENT: I think under the circumstances
24 that you're envisioning, Justice Ginsburg, the Federal
25 Government would not provide funds under 152 or 130 or 144

1 to that particular locality.

2 QUESTION: So you're saying that the 409
3 privilege is not simply a right of the State agency, but
4 is -- that the funding depends on the State's asserting
5 that privilege?

6 MR. CLEMENT: It certainly depends on the States
7 or the localities abiding by that privilege as a general
8 matter. I don't think a State or a locality can take a
9 cavalier position of saying, we're just not going to be
10 bound by the provisions of this Federal statute, but yet
11 we'd still like to take the money under those three
12 statutes. I don't think that's permissible, and the
13 reason is, is that section 409, although it may benefit
14 the State in a particular litigation, does serve an
15 important Federal interest, and that is the interest in
16 getting complete and candid information to assess and to
17 award Federal highway funds.

18 By analogy, I would suggest this Court look to
19 its decision in the Buckman Company v. Plaintiff's
20 Committee case, because in that case this Court recognized
21 that the FDA approval process, and the process for
22 applying for FDA approval, is inherently Federal in
23 character, and so this Court preempted State tort law that
24 might distort the effect of applying for FDA approval.

25 In the same way, the process of applying for

1 Federal highway funds and the documents that are used for
2 that purpose have an inherently Federal character, and so
3 the Federal Government has an interest in making sure that
4 the information provided to the Federal Government is
5 accurate and complete, and it has an ability, Congress has
6 the power to take those essentially Federal documents and
7 protect them both in State and Federal court litigation.

8 Now, I would suggest that the answer to the
9 waiver question, unlike the answer to the statutory
10 construction question, is not a necessary component of
11 this Court's decision. We think the better view is that
12 it could be -- is that it could not be waived, at least in
13 gross. Of course, if it could be waived, I think that is
14 an additional answer to any accountability questions that
15 may arise, but again, we think the better view is that it
16 can't be waived.

17 QUESTION: Mr. Clement, one of the arguments
18 made by respondent Guillen is that -- is a Tenth Amendment
19 argument. Do you think he has standing to make that
20 argument?

21 MR. CLEMENT: I think the better view is that he
22 doesn't have standing to raise that argument, and I'll
23 also suggest that if they wanted to make a Tenth Amendment
24 argument, and wanted this Court to decide the difficult
25 question of whether or not an individual had standing to

1 raise a Tenth Amendment argument, that they probably
2 should have raised the Tenth Amendment argument before the
3 conclusion section of their brief, and I think this Court
4 would be well-advised not to definitively decide whether
5 or not an individual had standing to raise a Tenth
6 Amendment issue. I --

7 QUESTION: Why -- what's special about the --
8 this is just an assertion that the Federal Government has
9 no authority to do what it has done, and you say an
10 individual who has been harmed by the Federal Government's
11 exceeding its authority does not have standing to
12 challenge? It seems to me we do it all the time.

13 MR. CLEMENT: Well, Justice Scalia, I don't
14 think all Tenth Amendment challenges are created equal,
15 and I think therein lies the difference. If all the Tenth
16 Amendment challenge is, is a mirrored reflection of
17 Congress not having the enumerated power to enact a
18 statute --

19 QUESTION: But that's all it --

20 QUESTION: How about a Commerce Clause
21 challenge?

22 QUESTION: Yes.

23 MR. CLEMENT: Absolutely. In those kind of
24 cases, the individual does have standing, but this Court
25 on various occasions has suggested that there's an

1 additional component to the Tenth Amendment, that it's not
2 just a reflection of the enumerated powers of Congress,
3 but, rather, there are certain special areas of State
4 prerogatives that the Federal Government can't intrude
5 through congressional acts.

6 QUESTION: Well, we allow those challenges all
7 the time in separation of powers cases.

8 MR. CLEMENT: I think that's right, but Justice
9 Kennedy, I think there's something that certainly seems
10 different. If the gravamen of the complaint is that
11 there's some element of State sovereignty that Congress
12 cannot intrude upon, and the State doesn't object to that
13 intrusion, it seems odd that the individual would have
14 third party standing to raise that objection.

15 QUESTION: Why couldn't you say the same thing
16 for the Executive and the legislature in a case like
17 Chadha?

18 MR. CLEMENT: Again, I think you could, and I
19 think that's why with respect to a more typical Tenth
20 Amendment challenge that's based on an enumerated power,
21 or the lack of an enumerated power, there would be
22 standing. I think what this Court suggested --

23 QUESTION: I don't -- whenever the Government
24 goes beyond its enumerated power, it is infringing upon
25 the powers of the States, isn't it?

1 MR. CLEMENT: Well --

2 QUESTION: All the Tenth Amendment says is, you
3 know, other than the enumerated powers, the other powers
4 continue where they used to be, with the States. In other
5 words, I don't see anything special about a Tenth
6 Amendment claim

7 QUESTION: In Buckley v. Valeo we held that the
8 Appointment Clause, where the President had signed the
9 legislation, could be raised by private individuals.

10 MR. CLEMENT: No, I understand that, and that
11 was also true in Chadha. I think if there is a
12 difference, and this Court suggested there might be a
13 difference in the TVA case, if there is a difference it's
14 because there are certain Tenth Amendment challenges that
15 have the nature of just an intrusion on State sovereignty
16 that's particularized. The hypothetical that the cases
17 have often talked about is moving a State capital, and if
18 the State doesn't object to moving the State capital, it's
19 hard to see why an individual ought to be able to raise
20 that question.

21 I think the more important point, though, for
22 this case is that there was a suggestion to this effect in
23 this Court's TVA decision. If this Court wants to revisit
24 that decision, it probably doesn't want to do it in a case
25 where the Tenth Amendment challenge is not properly raised

1 and isn't even raised at all in the briefing before this
2 Court until the conclusionary section of the brief.

3 With respect to the enumerated powers questions,
4 which I think are the gravamen of respondent's case and
5 the Washington Supreme Court's decision, there's no
6 question the individual has standing. That was true in
7 this case, in this Court's decision in *United States v.*
8 *Lopez* and would be equally true here.

9 And I think this Court can take comfort in
10 knowing that this is, at bottom, an enumerated powers
11 case, not a Tenth Amendment case in any specialized sense,
12 because the Washington State Supreme Court found it
13 unobjectionable that section 409 would apply in its pre-
14 1995 amendment version, and what that indicates is that
15 there's nothing sacrosanct about State courts' procedures,
16 or State evidentiary rules.

17 QUESTION: Don't you think that our opinion in
18 the Commerce Clause case, in order to have persuasive
19 force, should begin with an interpretation of the statute,
20 recognize that a privilege can be waived or not waived? I
21 find it very difficult to see how this opinion can be
22 written when we're not sure of the reach of the statute.

23 MR. CLEMENT: I agree with you entirely, Justice
24 Kennedy, that this Court should define the scope of the
25 statute before deciding whether or not it's

1 constitutional, and we would urge the United States'
2 construction of the statute.

3 I would say that the waiver question is somewhat
4 different. I don't think the constitutionality of the
5 statute turns on the waiver question. If the Court
6 disagrees, we would urge the Court first to find that this
7 privilege is not waivable at least in gross and, second,
8 that even if it is waivable, the statute remains
9 constitutional.

10 QUESTION: Do we have a final State decision
11 here, Mr. Clement?

12 MR. CLEMENT: I think you do have a final State
13 decision, and I think that's most clear with respect to
14 the PDA action -- that's the State Public Disclosure Act
15 that was brought -- because in that case the Washington
16 Supreme Court held that the four documents were
17 disclosable and said that attorney's fees would be
18 appropriate. In this --

19 QUESTION: There was a fifth document, though,
20 and they didn't -- there was no appeal on that one, right?

21 MR. CLEMENT: Well, but there was no cross-
22 appeal on that document either, Justice Scalia, so I think
23 that document is no longer part of the case. When the
24 Washington Court of Appeals held that four of the five
25 documents needed to be disclosed, Pierce County took an

1 appeal to the Washington State Supreme Court, but I don't
2 think that the Guillens filed a cross-appeal suggesting
3 that the fifth document ought to be disclosed, and so I
4 really think the fifth document is no longer in the case,
5 and since the Washington Supreme Court found that
6 attorney's fees were appropriate, that means that there
7 was a final judgment. That's true both at the --

8 QUESTION: Mr. Clement, there was -- you said
9 that the PDA suit, the four documents were required to be
10 turned over under that, but I thought the Washington
11 Supreme Court said that accident reports from nonofficers,
12 from witnesses, would not be disclosable under the PDA,
13 though they would be subject to discovery under rule
14 26(b), so the notion that the PDA suit was the one that
15 determined that these four documents were required to be
16 turned over, I don't understand that, because I thought
17 there was one part at least, the reports from nonofficers,
18 that the county prevailed on before the Washington Supreme
19 Court, but that it was a Pyrrhic victory because they lost
20 on that point under 26(b).

21 MR. CLEMENT: That's not how I read the
22 decision, Justice Ginsburg. I thought -- I read the
23 decision as the four documents were clearly going to be
24 disclosed as part of the PDA action.

25 QUESTION: Did you read the decision to say that

1 these documents are not disclosable under our Freedom of
2 Information Act, nevertheless they can be discovered in a
3 civil litigation?

4 MR. CLEMENT: That's not, with respect, how I
5 read the opinion. I read the opinion that those four
6 documents are disclosable under the PDA. The only
7 objection to disclosure under the PDA that was raised by
8 the county was section 409, and with that issue resolved
9 against the county, I took the import of the decision that
10 those documents would be disclosed.

11 At that point, I think it's clearly a final
12 decision, because this Court has held in the Beckton
13 Dickinson case in the context of section 1291 that the
14 fact that attorney's fees need to be resolved on remand
15 doesn't deprive a decision of finality, and in that
16 decision this Court relied on 1257 decisions, and so I
17 would think that the same rule would apply in both
18 contexts, so I think that the PDA action clearly is final.

19 I think the tort action is a more difficult
20 question as to whether that's final. I think this Court
21 might have to change its -- to modify its precedents a
22 bit, but I think it might be a wise course in light of
23 what Congress has done here. I think this case is quite
24 analogous to a case that this case found final called
25 National Mercantile Bank v. Langdow, and in that case

1 there was a State venue provision that a Federal statute
2 trumped, and the State supreme court found that the --
3 this Court found that the State's decision saying that
4 State law trumped the Federal statute was final, and I
5 think the cases are quite parallel.

6 They both involved congressional efforts to
7 modify State procedure in order to serve a Federal
8 interest, and in both cases when the State court
9 disregarded the Federal interest and either through
10 constitutional means or statutory means found the Federal
11 statute inapplicable, this Court found that there was a
12 final judgment in the Langdow case, and I think by
13 extension of that decision, they could find a final
14 judgment here.

15 I think the main difference between this case
16 and Langdow is that in Langdow this Court took the
17 position that upon remand there would be no further
18 litigation available in the State court where the lawsuit
19 was filed.

20 Here, there might be some litigation that would
21 go on in the tort action, for example, but I think the
22 important thing is that the Federal interest has been
23 extinguished, and I think if there's any play in the
24 joints in this Court's finality decisions, I think that
25 this would be a particularly important case to find a

1 final decision, because an act of Congress has been held
2 unconstitutional.

3 QUESTION: Do we need to find finality with
4 respect to both?

5 MR. CLEMENT: I don't think so, Your Honor. I
6 think that these actions are severable. They were
7 consolidated for purposes of appeal before the Washington
8 Supreme Court, and I think that --

9 QUESTION: So if I don't want to wrestle with
10 the complexities of the tort action, what would we do,
11 just dismiss that case as improvidently granted and decide
12 the other one?

13 MR. CLEMENT: I think that would be fair, or
14 this Court could just sort of ignore the tort case and say
15 that it's going to take jurisdiction over the PDA action
16 and decide this Federal statutory issue in the context of
17 the State PDA action, and --

18 QUESTION: Well, we can't ignore it. I mean,
19 we've taken the case. We've granted certiorari. We've
20 got to do something with it.

21 MR. CLEMENT: Well, I --

22 QUESTION: Just hide it under --

23 QUESTION: There's only one case --

24 MR. CLEMENT: I mean, I think that this Court
25 could say that to the extent that the tort action is

1 before it, that that action is not final, and that -- or
2 they're not going to -- the Court's not going to
3 definitively resolve that, and that the PDA action is
4 final.

5 I would -- this Court in a different context
6 actually managed to bifurcate a single case and say that
7 one part of the case was final and the accounting action
8 that was subject to remand was not final. That's the
9 W. W. --

10 QUESTION: We wouldn't want to do that too
11 often, I think.

12 (Laughter.)

13 MR. CLEMENT: No, no, but I think if you can do
14 that in a single case, I think you can certainly do it in
15 a case like this, where they started as separate actions,
16 were consolidated only for purposes of appeal, and really
17 have separate life.

18 If, for example, this Court hadn't exercised
19 jurisdiction, what would have happened is that the two
20 cases would have gone back down. The PDA action would
21 have been essentially over, because as the county
22 suggested, there's nothing left in the PDA action on
23 remand. The tort action would go on, and once the PDA
24 action went back to the trial court, then it would have
25 been appropriate to appeal that on a separate track from

1 the tort action, and there would have been really no point
2 to making the county go through that exercise, and so I
3 think the PDA action is final.

4 If there are no further questions, I think the
5 important submission from the Government is that the 1995
6 amendments can be given force in a way that renders them
7 still quite well within the Congress' power under the
8 Commerce, Spending, and Necessary and Proper Clauses.

9 QUESTION: Thank you, Mr. Clement.

10 Mr. Mungia, we'll hear from you.

11 ORAL ARGUMENT OF SALVADOR A. MUNGIA
12 ON BEHALF OF THE RESPONDENTS

13 MR. MUNGIA: Mr. Chief Justice, and may it
14 please the Court:

15 The statute does have to be construed, but
16 regardless of how the statute's construed, it clearly does
17 not meet this Court's requirements under South Dakota v.
18 Dole because 409 is not conditional. You read the plain
19 language of 409, and it's not conditional in nature. It's
20 a mandate, and if somehow it could be construed as being
21 conditional, it's certainly ambiguous, as we've seen many
22 interpretations and many questions as to the operation of
23 409.

24 409 cannot be justified under the Commerce
25 Clause. It does not regulate commercial or economic

1 activity. Instead, it regulates State courts, and that is
2 the peculiar nature of this dispute, because what is at
3 issue is, is what does a State -- this is completely an
4 intrastate concern.

5 QUESTION: Why is it intrastate? If you simply
6 have a -- if you interpret the statute to say, a document
7 that is prepared primarily for this -- for getting money,
8 primarily for getting money out of the Federal Government
9 can't be discoverable in a tort action? What part of the
10 Constitution would that violate, if that's how you
11 interpret it?

12 You'd get all your documents, I guess, and so
13 would anyone like you, but that seems to be basically what
14 the Government's arguing --

15 MR. MUNGIA: Justice --

16 QUESTION: I -- yes.

17 MR. MUNGIA: Justice Breyer, I agree with the
18 Solicitor General's interpretation of the statute, we
19 still get our documents, and I do want to make it clear
20 for the record, and I think it's clear in the briefs,
21 Pierce County took a different tack on this and had a very
22 wide scope of interpretation. However, despite that fact,
23 there still has to be authority under the Commerce or
24 Spending Clause, and I may not get it in this issue if we
25 get our documents, that's correct, but I'm saying that no

1 matter what, the act has to have authority under some
2 article I, section (a) basis.

3 QUESTION: Well, that's certainly right, and so
4 Congress says, we have a Federal interest in trying to
5 minimize accidents, and in order to do that, we want to
6 get information from the States when they want our money,
7 and to be sure the information is accurate, we want to be
8 sure that at least the information they give us, they're
9 collecting with an eye towards being accurate rather than
10 with an eye towards protecting themselves from tort
11 litigation.

12 MR. MUNGIA: Justice --

13 QUESTION: It sounds reasonable to me. What's
14 unreasonable about that?

15 MR. MUNGIA: Justice Breyer, because the
16 analysis starts, is this commercial or interstate activity
17 that in fact the Federal Government is regulating, and
18 they're not, they're regulating State courts. And
19 again --

20 QUESTION: But they're regulating in the
21 interest of a commerce-type thing that's preventing
22 automobile accidents.

23 MR. MUNGIA: That is the disputable part, as to
24 whether or not there's any evidence in, within -- not only
25 in the record, or anywhere that can be found, whether this

1 action, indeed, would prevent any further accidents. All
2 the statute does --

3 QUESTION: When Congress makes that judgment,
4 don't we owe it substantial deference? That is, we're not
5 going to sit as a committee of Congress to determine
6 whether there's a link between the condition of these
7 intersections and vehicles going in and out of States. If
8 Congress made that judgment, it's not for us to question
9 it, is it?

10 MR. MUNGIA: Justice Ginsburg, that is the
11 historic and that is the correct analysis. This Court has
12 been very deferential to Congress', even if there's
13 something within the information source that could support
14 that reasoning, and again I'll go to U.S. v. Lopez and
15 U.S. v. Morrison for that proposition, where in U.S. v.
16 Lopez, there were no congressional findings at least this
17 Court alluded to.

18 They do not have to make congressional findings,
19 as long as there's something out there, some information,
20 and the same thing with U.S. v. Morrison. Even when
21 Congress did make a congressional finding, this Court said
22 we're not going to necessarily find that in fact they had
23 a substantial effect on interstate commerce.

24 QUESTION: May I ask you just to back up for a
25 moment to address the question that Mr. Clement did about

1 the separateness of these two? Is there anything in the
2 tort action that you are seeking that's different from the
3 PDA action, or are these essentially two actions seeking
4 the same material?

5 MR. MUNGIA: Justice Ginsburg, no. They are
6 seeking different materials, and the materials we sought
7 in the tort action were much broader than what we sought
8 in the Public Disclosure Act, and the materials -- I do
9 want to say this as far as that, there is no judgment in
10 the tort action. I mean, that should be clear. There is
11 no final judgment. This is a discovery order that was
12 taken up on interlocutory appeal.

13 Now, whether or not there is a final judgment in
14 the PDA action is a closer question, but I would point out
15 to the Court, page 114 of the Washington State Supreme
16 Court's opinion that you'll find at Appendix A-114 directs
17 the lower courts to make their rulings in accord with the
18 court's opinion, and did not simply say these documents
19 either are or are not discoverable, and thus it is
20 debatable whether or not there is a final judgment even in
21 the Public Disclosure Act case.

22 QUESTION: But the way you interpreted it,
23 although you say it's debatable, is that everything that
24 falls under the PDA, everything that -- those four
25 documents, those are not available to you. That's what

1 Mr. Clement said, I think, that that's what rendered the
2 PDA action final.

3 MR. MUNGIA: Correct, and I read the opinion
4 differently, where in fact we do get those documents, and
5 I -- we may have a fight back at the trial court as to the
6 language of the Washington State Supreme Court, because I
7 realize in its opinion it said that those would normally
8 not be discoverable under the PDA, but then you have to
9 look at the purpose of the documents.

10 QUESTION: You set forth four alternative
11 interpretations at page 20 of your brief. Do any of the
12 documents involved in either of the tort action or the PDA
13 action comprise just those set forth in your category 1,
14 which is reports and data that the State agency actually
15 prepares itself?

16 MR. MUNGIA: Justice Kennedy, the documents that
17 we sought under the PDA, even under the narrowest
18 construction, under the narrowest construction, we get the
19 documents, just on a statutory construction under the PDA
20 request.

21 QUESTION: But some of the documents you
22 requested fit naturally within your category 1?

23 MR. MUNGIA: Correct.

24 QUESTION: All right.

25 MR. MUNGIA: And so at least in this case, this

1 Court need not address the constitutional issues, finding
2 no final judgment in the tort action and, in fact, a
3 narrow construction for the PDA action.

4 QUESTION: I'm sorry, I'm not sure I understood.
5 You say the documents that you requested fell within
6 category 1?

7 MR. MUNGIA: Of our interpretation, which is a
8 very narrow construction of the statute. That's correct,
9 Justice Stevens.

10 QUESTION: In other words, they were documents
11 that were actually prepared to get highway funds?

12 MR. MUNGIA: No, I'm sorry, if I --

13 QUESTION: That's what I understood you to say.

14 MR. MUNGIA: Oh, no, I'm sorry. I'm saying we
15 would get those documents under our construction. In
16 other words, they do not fall within the parameters of
17 that narrow construction, because these are documents that
18 in fact were prepared by another agency.

19 QUESTION: So in your view, none of the
20 documents that you're -- that are in dispute fall within
21 category 1.

22 MR. MUNGIA: Correct, under the PDA action, that
23 is correct, not the tort action but the PDA action.

24 QUESTION: Do they fall in category 2? Can you
25 tell us?

1 MR. MUNGIA: No. If they don't fall within
2 category 1 -- I'm sorry, Justice Kennedy. If they fall
3 within category 2, yes, they would. Under the PDA action,
4 those documents would fall within --

5 QUESTION: Documents the agency has in its
6 possession?

7 MR. MUNGIA: Correct, they fall within category
8 2. And I do want to point out to this Court that, in
9 fact, Pierce County's position, and it's shown in the
10 record, was that we could not even discover the names of
11 witnesses or the names of the people involved in the
12 accidents, and that's surely not part of the Federal
13 highway funding data, because why is the Federal
14 Government concerned with the names of the people involved
15 in the accidents, and I think this is a concern about
16 putting documents, if you will, in a black hole and
17 allowing certain information which our supreme court has
18 held is essential to the proper determination of these
19 claims, based upon State and local law.

20 They are essential to those determinations going
21 in, and now no longer being discoverable. I think that is
22 a very basic concern with this statute, and why at least
23 one reason it should take a narrow construction, or at the
24 very widest, the construction put forward by the Solicitor
25 General.

1 QUESTION: But the construction put forward by
2 the Solicitor General, as I understand it, is you can get
3 it from the agency, like a law enforcement agency, but not
4 from the Public Works Department if the purpose is to
5 implement the Federal program. That's the Government's
6 position?

7 MR. MUNGIA: Yes, Justice Ginsburg.

8 QUESTION: But under that position, I suppose,
9 in the day when we have this great data base and all
10 reports are there initially, then under the Government's
11 approach, everything would be exempt from discovery. Do
12 you read their position to say that?

13 MR. MUNGIA: Correct, Justice Ginsburg, I do,
14 and that is the day, if it's not today, that this court --

15 QUESTION: No, I didn't read it that way. I
16 thought what they were saying was consistent with if it --
17 and maybe it's in this case. I don't think it is, but I
18 mean, if you ever have the great single data base, you'd
19 look to see whether the document was primarily created for
20 the one purpose or the other. Where it's primarily
21 created for accident reports, you get it. Where it's
22 primarily created to get money from the Government, you
23 don't. I mean, does that work as an interpretation? I'm
24 not sure we have to reach it, but if we did?

25 MR. MUNGIA: Justice Breyer, as far as

1 interpreting the electronic portion, it probably is a
2 reasonable interpretation, and you're right, I mean, it's
3 not part of this case, but it probably will have to be
4 faced sooner or later.

5 Going back to the scope, again, because we are
6 talking about the interpretation of this, Pierce County
7 took the position they were -- and this is in the
8 companion Witmer case, which is the one -- there was a
9 companion case at the State level, where private highway
10 surveys done by, I believe it was the McDonald's and a
11 Chevron Company, which the county then took within its
12 possession, it was unwilling to disclose because under
13 409, so again I think the county's position was a very
14 broad one, that anything that goes in within their
15 possession then becomes nondiscoverable and you cannot use
16 it, which I think is a completely unreasonable
17 interpretation.

18 I do want to take a few minutes and talk about
19 the Spending Clause, because this is not a condition. If
20 you read section 409, the plain language of 409, it's
21 mandatory, and surely when Congress has intended to use
22 its Spending Clause powers, I think especially in the
23 Federal highway setting, it's been very clear.

24 QUESTION: I don't see how you can characterize
25 section 409 as a condition. It's an incentive provided

1 to -- for the State to participate in this Federal funding
2 program. The Federal Government hopes to get information
3 from the State, and thinks that they'll be more apt to get
4 it by providing the protections of section 409. I don't
5 see it as a condition at all.

6 MR. MUNGIA: Justice O'Connor, I agree. I don't
7 think it's a condition either. Whether you want to term
8 it as an incentive or something else -- they term it as a
9 mandate. I think regardless of how you term it, then it
10 cannot be authorized under the Spending Clause.

11 QUESTION: But --

12 QUESTION: Well, why not? It's a necessary and
13 proper means of ensuring that the Federal money is spent
14 wisely and efficiently. Now, I don't see the big issue
15 there, frankly.

16 MR. MUNGIA: Under the Spending Clause analysis,
17 this Court has long gone through through Pennhurst,
18 through South Dakota v. Dole, and just recently in Durham
19 v. Gorham, it's clear that the conditions have to be
20 spelled out.

21 Now, this is clearly some sort of imposition,
22 and if it's not Spending Clause, then they'd have to have
23 it under the Commerce Clause authority, which goes under
24 another analysis.

25 QUESTION: You'd have another --

1 QUESTION: No State has to participate in this
2 program if it doesn't want to. If a State wants to turn
3 down Federal money it can, can it not?

4 MR. MUNGIA: It can turn down Federal money, and
5 that's the interesting, Mr. Chief Justice, about 409.
6 Again, just reading the plain language of 409, it is
7 mandatory, and there's no provision -- even if you cross-
8 reference to 152, there's nothing which puts anybody on
9 notice about how this -- how a State can avoid the
10 mandates of 409.

11 QUESTION: Well, it can avoid --

12 QUESTION: But you can agree, nonetheless, that
13 a State can refuse to participate? You say you can't, by
14 reading 409, tell that it isn't just a legislative command
15 based on something other than the Spending Clause, but
16 don't -- you do agree, don't you, that if a State didn't
17 take the Federal money, it would not be bound by 409?

18 MR. MUNGIA: Mr. Chief Justice, I think that's
19 an open question, and I don't necessarily agree with that.
20 I think you have to read the plain language, and it seems
21 like Congress is saying you will do this.

22 QUESTION: You think it's just categorical,
23 then?

24 MR. MUNGIA: Correct.

25 QUESTION: But how could that be if -- how could

1 any document be collected for the purpose of participating
2 in the Federal program if the State doesn't participate in
3 the Federal program?

4 MR. MUNGIA: Because if you read section 152,
5 what it mandates States to do is come up with a list and a
6 survey of hazardous sites. That's all it says, in 52(a),
7 that's the mandatory part.

8 So Congress, if it has the authority, can tell
9 the States, do this list. Now, the question, that begs
10 the question whether or not Congress has that authority.
11 I think then that's when you have to turn to the
12 Commerce --

13 QUESTION: Do the list whether or not you have
14 any Federal money, is that what you're saying? This is
15 not tied to Federal spending. That's what you seem to be
16 saying. That it's independent Federal obligation on the
17 States whether or not they receive any Federal money. Is
18 that how you read 152?

19 MR. MUNGIA: Justice Ginsburg, that's correct.
20 I think if you read the plain language, 152, unlike 23
21 U.S.C. 131, 141, 159, 161, where it's clear that Congress
22 says you must control highway billboard signs or you lose
23 10 percent of your funding, you must control size and
24 weights of vehicles that go on interstate highways or you
25 lose 10 percent of your funding. Those are all clear.

1 In fact, in the Dole case, under 23 U.S.C. 158,
2 I think that the title of the act was withdrawal of
3 Federal funds.

4 QUESTION: Aren't we losing sight of the fact,
5 the rather plain fact that the States and the counties
6 wanted this? They weren't satisfied with the program
7 originally because they feared these documents would be
8 discoverable, and make the county liable. Do you have
9 another Spending Clause case where the States and the
10 counties came to Congress and said, please give us a
11 privilege, and then say, well, now it's mandatory and it's
12 some kind of a club rather than a carrot?

13 MR. MUNGIA: Justice Ginsburg, I have two
14 responses. One, I think actually this Court addressed
15 that same sort of analysis in New York v. U.S., where the
16 Solicitor General argued that because New York officials
17 wanted the benefits of the Low-Level Hazardous Waste Act,
18 therefore it cannot later challenge certain provisions of
19 that act, and this Court rejected that argument.

20 QUESTION: But this very provision they wanted,
21 not the thing in general.

22 MR. MUNGIA: And that goes -- then to my second
23 part of my response is, and I think it's a fundamental
24 part of the constitutional analysis, because here, if the
25 States wanted this protection they had the means to do it

1 themselves, and this Court has explained, again citing
2 from New York v. U.S., State sovereignty isn't for the
3 benefit of the States, it's for the benefit of the
4 citizens to derive the benefits of liberty from the
5 division of separate powers, so it really, just because
6 State officials want it, it's clearly that the people of
7 the State of Washington did not want this, because it
8 infringed upon a State cause of action. In fact, so much
9 so that the State supreme court was willing to hold it was
10 unconstitutional.

11 QUESTION: Well, that goes to the waiver point.
12 I assume the State can waive it if its citizens instruct
13 it to do so, or maybe not. The Government says no.

14 MR. MUNGIA: I -- Justice Kennedy, you look at
15 the language, and in fact you look at the early responses
16 by Pierce County, where Pierce County clearly said, we
17 cannot -- I mean, we must -- we don't have that choice.
18 We cannot --

19 QUESTION: The hypothetical is that the State
20 could waive it if it wanted to. That's the --

21 MR. MUNGIA: And Justice Kennedy --

22 QUESTION: -- hypothetical question.

23 MR. MUNGIA: Yes, and I -- Justice Kennedy, my
24 response is, I don't see how the State could, because I
25 think just for the very reasons, as was pointed out by the

1 Solicitor General, where do you cross that line between, I
2 guess, a single waiver, and then it becoming endemic. I
3 think that's the whole problem here.

4 Under the recent cases under the Commerce
5 Clause, and again I just want to spend a couple of minutes
6 on the U.S. v. Lopez and Morrison cases, it seems clear
7 that again this type of activity, what's being regulated
8 is, in fact, State courts, in fact, the admissibility, the
9 discovery of evidence, and that is certainly intrastate,
10 and there's no contention here that somehow justice, or
11 the discovery of documents is somehow commercial in
12 nature, and you cannot make that argument, so I think
13 there is no basis under either the Spending or the
14 Commerce Clause to support this legislation.

15 QUESTION: Well, is it irrelevant under your
16 argument that the object of the Federal legislation is
17 safety in an artery of commerce? Is that beside the
18 point?

19 MR. MUNGIA: Justice Souter, the object at least
20 for the Federal Highway Act is safety. I don't think the
21 same thing can be said about 409, because then you're
22 becoming -- as this Court said in U.S. v. Lopez, you're
23 building inference upon inference, because you have to go
24 and say, if these documents are no longer, in fact,
25 discoverable, would it result in safer interstate travel,

1 and there's just too many intermediate steps.

2 QUESTION: So you that think the Federal
3 interest in this case is comparable to the Federal
4 interest in Lopez, the ultimate interest?

5 MR. MUNGIA: I think that the -- Justice Souter,
6 the Federal interest in section 409 --

7 QUESTION: No, I'm talking about the ultimate
8 Federal interest that gives rise to all of this
9 regulation, which is the safety of an artery of commerce.
10 Are you either disputing that that is the object, or are
11 you saying that that object is on par for constitutional
12 purposes with the significance of the Government's object
13 in Lopez?

14 MR. MUNGIA: Justice Souter, I think it's more
15 the latter. I'm saying that the Federal Government
16 certainly has an interest in the safe passage of
17 interstate --

18 QUESTION: Thank you, Mr. Mungia.

19 Mr. Hamilton, you have 3 minutes remaining.

20 REBUTTAL ARGUMENT OF DANIEL R. HAMILTON

21 ON BEHALF OF THE PETITIONER

22 MR. HAMILTON: Thank you, Your Honor.

23 Very quickly -- 3 minutes, quickly -- I would
24 like to correct I think what was a misstatement by
25 respondent's counsel, or at least one of them, dealing

1 with what the Court should do if it adopts the United
2 States' position. Plaintiffs say that if you adopt that
3 position, then they get the documents.

4 I'll point out that on page 24 of their own
5 respondents' brief they say their -- interpretation
6 number 2, which they say the U.S. reflects, they say on
7 page 24, if the Court construes the statute in this
8 fashion, then a remand would be necessary to determine
9 which specific discovery requests would be precluded and
10 which would be, still be allowed. They're not entitled,
11 even under their own admission, under the U.S. position,
12 and in fact I would point out on page 20 of our reply,
13 yellow brief, where we point out that in fact, if that
14 were the case, even if the U.S. position were adopted,
15 these particular documents would have to be protected.

16 Furthermore, obviously there is some confusion
17 as to where we differ with the United States, and it's a
18 very narrow difference. We both agree that generated
19 documents are protected. We both agree that collected and
20 compiled documents in the hands of Public Works are
21 protected, and we both agree that in some situations
22 they're protected in the hands of third parties.

23 They, though, very narrowly define that in
24 situations where the third party gets it, is a transferee
25 agency, where you can only get it by indexing, or where

1 it's part of a computer base.

2 I would ask the Court to consider its own
3 St. Regis Paper Company case, where it addressed a statute
4 that only made a protection when it was in the hands of
5 third parties or officials, and it contrasted the language
6 of that statute with other statutes, 45 U.S.C. section 41,
7 and 49-320, whose wording is almost identical to 409. If
8 you would compare those, you would see that the case
9 distinguished those types of statutes from a statute only
10 protecting in the hands of third parties.

11 So whatever 409 does, it certainly protects more
12 than just in the hands of third parties, and I would also
13 like to point out, the reason why we differ from the U.S.,
14 we believe their logic is correct with protecting in the
15 transferee hands and in a computer data base and where
16 it's indexed, but if you carry that logic through, we
17 believe a bright line rule should be established by this
18 Court, because obviously the State courts have been
19 very -- some State courts, a minority of State courts have
20 been very resistant.

21 Other State courts have been trying to do their
22 best to comply with the language of the statute, but some
23 States, of course, have found every opportunity to try to
24 misinterpret the statute, and it required Congress at
25 least twice to amend the statute to get back to what they

1 intended.

2 When you look at the situation of why they
3 wanted, the Solicitor General believed that documents in
4 the hands of the transferee agency are protected, they
5 said that the reason for that was that they would not
6 exist but for the planning agency's collection of that
7 information. Well, so, too, accident reports would not
8 exist in their totally different form, they would not be
9 indexed and therefore accessible, and they would not be in
10 the county's possession but for the Highway Safety Act, so
11 you extend that logic through, then you come to a bright
12 line rule which we believe the Court should adopt.

13 Thank you, Your Honor.

14 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
15 Hamilton. The case is submitted.

16 (Whereupon, at 11:05 a.m., the case in the
17 above-entitled matter was submitted.)

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