UNPROTECTED TXTNG: IT’S NOT THE ONLY DRIVING DISTRACTION CONGRESS SHOULD BE WORRIED ABOUT

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INTRODUCTION

Advancements in modern technology continue to foster growth of a global communication network that allows individuals the ability to instantly connect and communicate with one another. Most recently by way of technology, individuals can access email, text messages, social networks, television, and GPS all on their cell phone. The mobility of cell phones has created a phenomenon known as distracted driving. Congress broadly defines “distracted driving” as that which takes a driver’s eyes, hands, or mind away from operating a motor vehicle while in motion. The definition of distracted driving encompasses all distractions associated with use of a cell phone; it also includes any sort of activity inside the vehicle which forces drivers to take their full time and attention away from the road.

Despite the notion that distracted driving is a relatively recent consequence to advances in modern technology, it is unquestionably not a new problem. Prior to the creation of cell phones and even automobiles, distracted driving has been problematic. City of Denver v. Peterson, a Colorado case, establishes the historical framework for this modern day problem. In that case, a woman driving a horse and buggy was deeply absorbed in conversation with her passenger. Unfortunately, she neither heard nor saw two specific warning signs indicating a steam roller ahead. Consequently, the horse was startled by the steamroller and overturned the buggy. The woman and her companion were violently thrown to the ground and sustained serious injuries.

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4 Id.
5 Id.
More than a century later, distracted driving still exists and presents a danger throughout society. Though developments in technology and transportation have changed the way people communicate and travel, distracted driving remains a serious social problem which often results in serious injury or death. Today, the most common technological distraction is in the form of text-based communication.

Cell phones and other wireless devices have spawned a rising number of legal issues. One legal issue posed is how to address and control the problem of distracted driving. Fortunately, the majorities of states across the country recognize text-based communication as a major distraction and have initiated appropriate legislation. However, there is very little uniformity and consensus among the states concerning legislation. Further complicating things, some states do not enforce any legislation banning distracted driving. Modern technology shows no signs of slowing down in the future. As text-based communication continues to infiltrate the everyday lives of individuals and collectively as a society, the urgency to combat distracted driving through national legislation has never been greater.

Currently, Congress is considering the Avoiding Life-Endangering and Reckless Texting by Drivers Act (ALERT Drivers Act). The bill calls on each state to ban the use of electronic devices designed to communicate with other persons or devices during the operation of a moving motor vehicle. The purpose the ALERT Drivers Act is to gain uniformity across the United States by preventing text-based-related car accidents. The mobility of cell phones and the

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ability to operate as televisions, computers, and a GPS, make them ideal and easy for people to use them anywhere, even behind the steering wheel of a car.  

This comment explores the history of cell phone use and the new era of text-based messaging while driving. It will detail the legislative response of the states and the federal government towards the problem of distracted driving. Further, it will explore the Constitutionality of the pending federal legislation. In addition, this comment will discuss the role that new technology may play in curtailing the problems associated with text-based communications while driving. Finally, this comment will offer why broader language in the ALERT Drivers Act will help address the dangers of all distracting activities that occur while driving.

**CELL PHONE STATISTICS**

Cell phones are an integral part of life for many Americans. According to a June 2005 report, approximately 194.4 million or sixty-six percent of the United States population owned a cell phone. Conversely according to a June 2010 report, 292.8 million Americans own a cell phone, which equals about ninety-three percent of the entire United States population. Further, 2010 statistics also reveal that 292.8 million Americans sent about 173.2 billion text messages per month, with an annual text messaging rate of 1.81 trillion.

The popularity of cell phone use has increased dramatically with the capability of wireless phone technology. The ability to email, text, browse the Internet, connect to Twitter and Facebook, and operate as a GPS device encourage constant use, especially when driving. More
than one in four Americans who download applications admit to using those applications while
driving.12 Despite the advances in technology, the number of Americans involved in tragic cell
phone-related accidents is increasing at an unprecedented rate.13

A considerable portion of text messaging occurs during the operation of a motor vehicle.
The National Highway Traffic Safety Administration (NHTSA) reports that nearly one million
people at any given time drive and use their cell phone in some way.14 A Driving While
Distracted survey by Nationwide Insurance Company reveals that four out of ten Americans
have been hit or nearly hit by distracted drivers using their cell phone.15 One in every four
American adults admits to texting while driving.16 Moreover, eighty-one percent of Americans
admit to receiving an email while driving.17 Eighty-four percent of Americans admit to text
messaging while driving.18 Seventy percent use of a GPS device while operating a moving
motor vehicle.19

12 See Nationwide Dangers of DWD, supra note 11; see also Nationwide Mutual Ins. Co., Nationwide Driving
While Distracted (DWD) Research Results 2010, available at http://static.nationwide.com/pdf/DWD-technology-
survey.pdf 2010 (noting that collection for this research was conducted from June 9, 2010 to June 13, 2010 via
CATI (Computer Assisted Telephone Interviewing)) [hereinafter Nationwide Research Results].
http://www-nrd.nhtsa.dot.gov/Pubs/811184.pdf. As reported by the National highway Traffic Safety Administration
(NHTSA), the 2008 National Occupant Protection use Survey (NOPUS) date revealed six percent of all drivers on
the road use electronic devices. Id. This percentage is translated into roughly one million American drivers using
electronic devices while driving at any given time each day. Id. This survey is conducted annually by the National
Center for Statistics and Analysis (NCSA) of the NHTSA and is the only nationwide probability-based observed
date on driver electronic use in the United States. Id. See also NHTSA, Traffic Safety Facts Research Note, Driver
in Table 1, the Driver Electronic use included surveyor’s observance of drivers with cell phones in their hands,
headsets with microphones or Bluetooth sets; cell phones may not be in sight, and cell phones, PDAs, videogames,
MP# Players, and other hand held devices).
15 Nationwide Dangers of DWD, supra note 11.
16 See Mary Madden & Lee Rainie, Adults and Cell Phone Distractions, Jun. 18, 2010, available at
based on the findings of a daily tracking survey on Americans’ use of the Internet. Id. The results in this report are
based on data from telephone interviews conducted by Princeton Survey Research Associates International between
April 29, 2010 and May 30, 2010. Id. [hereinafter Adults and Cell Phone Distractions].
17 Nationwide Research Results, supra note 12.
18 Id.
19 Adults and Cell Phone Distractions, supra note 16.
Such use of the phone while driving is called “distracted driving.” Between four thousand and eight thousand accidents related to distracted driving occur daily in the United States. In one year, these particular accidents contribute to as many as one-half of the six million U.S. accidents reported annually. While distracted driving comes in a variety of forms, the latest form is texting while driving. Texting while driving has catapulted state legislators to introduce legislation banning such activity. In 2010, fifteen states have joined the efforts to ban texting while driving.

Prior to the recent phenomena of text-based communication, the main cause for concern involved distracted drivers physically holding their phone while operating a vehicle. Such behavior initiated cell phone related legislation, which has evolved over time. New York became the first state in 2001 to pass legislation restricting cell phone use while driving. The ban was passed in an effort to reduce cell phone-related traffic accidents and prevent injuries and deaths. However, the New York ban only prohibited people from talking on their cell phones while physically holding it to their ear. The legislation did not stop people from speaking on their cell phone while using a hands-free device or Bluetooth. As of November 2010, eight

20 See H.R. REP. NO. 111-338 at 2 (2009). Congress defines distracted driving as “anything that takes a driver’s eyes, hands, or mind away from operating a motor vehicle while in motion.” Id.
22 Id.
25 Id.
26 See N.Y. VEH. & TRAF. § 1225-c (McKinney 2001). The statute provides the following:
[N]o person shall operate a motor vehicle upon a public highway while using a mobile telephone to engage in a call while such vehicle is in motion … [a]n operator of a motor vehicle who holds a mobile telephone to, or in the immediate proximity of his or her ear while such vehicle is in motion is presumed to be engaging in a call within the meaning of this section.
27 Id. The statute defines a “hands-free mobile telephone” as the following:
[a] mobile telephone that has an internal feature or function, or that is equipped with an attachment or addition, whether or not permanently part of such mobile telephone, by which a user engages in
states, including New York, the District of Columbia, and the Virgin Islands have a complete cell phone ban in place; meaning all drivers are prohibited from the physical use of a cell phone.\(^{28}\) Furthermore, these states do allow any form of hands-free devices to be used by the driver.\(^{29}\)

Cell phones today are essentially mini hand-held computers.\(^{30}\) Cell phones are capable of numerous forms of communication besides the traditional voice communication.\(^{31}\) The most popular form of communication today is text messaging.\(^{32}\) Text messaging has received national recognition as the newest craze among communicating Americans, noting the ability to text from anywhere at any time.\(^{33}\) Text messaging has become so popular that children, working professionals, and the most powerful man in the country agree that text messaging is the most efficient form of communication available.\(^{34}\) The enthusiasm and popularity of text messaging has carried beyond the personal vehicle to include buses and trains. Texting while driving has become quite possibly the most deadly form of behavior threatening the public on the nation’s

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\(^{28}\) Id. at § 1225-c(1)(e).

\(^{29}\) GHSA, supra note 23.

\(^{30}\) Id.

\(^{31}\) Edward C. Baig, Iphone Adds Notable Features; Text Functions, Voice Control Especially Handy, USA TODAY, June 18, 2009, at 3B (describing technological advancements to text messaging as one of many features of the new Iphone).

\(^{32}\) See id. (describing technological advancements to text messaging as one of many features of the new Iphone).


\(^{34}\) See Laura M. Holson & Jennifer Steinhauer, Cellular Alert: As Texts Fly, Danger Lurks, N.Y. TIMES, Sept. 20, 2008, at A1 (noting that texting as a form of communication has become extremely widespread, as it has become the preferred form of communication for millions of people in less than three years). Such preference was demonstrated by then Senator, President Obama using texting as the means by which to announce his running mate in the 2008 Presidential Election and the thousands of Americans who vote via text message for their favorite American Idol contestant on a weekly basis. Id.
roads. Since that first piece of cell phone legislation, the popularity of cell phones has increased simultaneously with the technological advances of the cell phone itself. As of November 2010, thirty-two states plus the District of Columbia, Guam, and the Virgin Islands enforce a texting while driving ban. 

**Overview of State Legislations**

Cause for concern within state legislatures is a direct effect of the increasing number of car accidents and lives lost due to drivers’ attention to their cell phone text messages. One particular text-related car accident in Seattle, Washington, in December 2006, induced legislation prohibiting texting while driving. The Washington State Legislature proposed a bill that expressly banned texting while driving in January 2007. The bill was signed into law and went into effect January 1, 2008, making it the first state to pass explicit texting while driving legislation. Also following a text-based-related car accident, New Jersey became the second

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35 *Schumer Releases New Report, supra* note 33 (stating the advent of the cell phone brought an increase in the number of accidents caused by people’s driving while dialing—now the newest concern is texting while driving).

36 *See e.g.*, Karen Brown, *Sending a Message to Enterprises; Business-Oriented SMS Products Are Starting to Arrive, But They Face Competition From Other Messaging Options*, WIRELESS WEEK, Aug. 1, 2004, at 20 (discussing the growing trend of consumers sending text messages and the corporate world’s efforts to join this fast growing trend); *see also* Sue Marek, *Internal Antenna Craze; As Mobile Handsets Morph into Music Players and Video Devices, Embedded Antennas Become More Critical. In Fact, Developers Say the Average Handset could Have Four or More Antennas by 2008*, WIRELESS WEEK, Sept. 1, 2006, at 16 (describing the requirements of new technologies in cell phones such as Bluetooth, Wi-Fi, mobile TV, and mobile music); *see also* Tom Murphy, *Microsoft Unveil Latest Media-Rich Cellular Platform; Stinger to Drive Demand for Headsets*, ELECTRONIC NEWS, Nov. 13, 2000, at 42 (announcing the capability to access Outlook e-mail services from a cell-phone); *see also* Brad Smith, *Mobile Navigation Finds its Way: Using a Cell Phone to Get Directions and Maps Hasn’t been Widely Available, But Some New Applications are on the Way*, WIRELESS WEEK, Aug. 15, 2006, at 20 (describing a new global positioning system navigation technology developed for a cell phone).


38 *See generally* Jason Stein, *Bill Aims at Driver Text Messaging*, WIS. ST. J. (MADISON), Oct. 25, 2007, at D1 (correctly predicting that text messaging while driving would soon be focus in upcoming lawmakers’ sessions).


40 H. 124, 60th Leg. 1st Reg. Sess., Act of May 11, 2007, ch. 416, § 2007 Wash. Sess. Laws 416 (codified as Wash. Rev. Code § 46.61.668 (2007)) (explaining that “[a] person does not send, read, or write a text message when he or she reads, selects, or enters a phone number or name in a wireless communications device for the purpose of making a phone call.”)

41 *Id.*
state to pass legislation specifically targeting text messaging while driving. The texting while driving accident that provoked New Jersey legislation involved the New Jersey Governor. In April 2007, the governor was involved in a near fatal accident because his driver “may have been distracted by e-mails sent to his mobile Blackberry.”

Other states also experienced an increase in text-related fatal car accidents and were forced to take reactive measures. Consequently, prohibitive legislation was passed, following in the footsteps of both the Washington State and New Jersey’s legislatures. Minnesota became the third state banning texting while driving in response to a growing number of teen-related text messaging while driving fatal car accidents. Three more states quickly followed Minnesota due to egregious texting while driving behavior in 2008. Louisiana, Alaska, and California all approved texting while driving bans to address the growing number of fatal accidents resulting from text messaging while driving.

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43 Jan Heller, Did Corzine’s Driver Get an E-mail?; A Police Officer Said He Sent a Message Confronting the Trooper Over an Extra-Marital Affair Just Before the April 12 Crash, PHILA. INQUIRER: JERSEY EDITION, Apr. 23, 2007, at B01 (reporting New Jersey Governor Corzine was involved in a serious accident in early Apr. 2007).

44 Id. (revealing the driver had received an e-mail regarding his extramarital affair just a minute before the accident).

45 See e.g., Matt Richtel, Not Driving Drunk, But Texting? Utah Law Sees Little Difference, N.Y. TIMES, Aug. 29, 2009, at A1 (reporting texting while driving forced itself upon Utah Legislature after a fatal accident).

46 See Emily Johns, Hands on the Wheel, Thumbs Off the Phone, STAR TRIBUNE (Minneapolis, Minn.), May 31, 2008, at 1B (reporting that proponents of the law pointed to one high-profile accident, which resulted in the deaths of two high school seniors and showed statistics that a teenager in Minnesota died every five days in a traffic accident). The Minnesota law banned drivers from texting-related activities including emailing and surfing the internet. See MINN. STAT. § 169.475 (2008).


48 Id.; see Joel Rubin et al., Metrolink Crash: Carnage in Chatsworth, L.A. TIMES, Sept. 13, 2008, at A1; see also Robert J. Lopez et al., Train Engineer Sent Text Message Just before Crash, L.A. TIMES, Oct. 2, 2008, at A1 (reporting that after legislation in California passed both the House and Senate, but before being signed into law, the engineer of a passenger train sent text messages just twenty-two seconds before colliding with a freight train, ironically only five seconds after passing a sign which would have warned him to stop and allowed the freight train to pull off the main track ensuring the passenger train safety. Instead of hitting the break, the passenger train hit the send button to send a text message, killing 25 people and leaving 135 injured).
The ban against text messaging while operating a moving motor vehicle has become a nationwide public-safety concern. In 2009, fatal accidents relating to text messaging while driving gained greater national attention through the media, and the public demanded a legislative response. New York led the states in 2009 with its January 2009 bill banning texting while driving. After New York’s enactment, a number of states followed suit and made it illegal for any operator of a moving motor vehicle to type or read a text message.52

By November 2010, thirty-three states plus the District of Columbia, Guam, and the Virgin Islands had signed legislation in place banning texting while driving.53 Furthermore, legislation aimed at banning texting while driving behavior has now been proposed in every state that does not currently have a ban in place.54 The majority of states have primary enforcement of

49 See generally Senator Amy Klobuchar, Minnesota, Address at the National Distracted Drivers Summit in Washington D.C.; “Texting While Driving” Evidence Demands Action (Sept. 20, 2009), available at http://ecmpostreview.com/index.php?option=com_content&task=view&id=3759 (stating that text messages are not so urgent or important that they are worth “dying over” and that it was a national problem that “deserves a national response”).

50 Not Driving Drunk, But Texting? Utah Law Sees Little Difference, supra note 45 (reporting results of a study showing that eighty-seven percent of people considered texting while driving to be “very serious” and a safety threat).

51 N.Y. VEH. & TRAF. LAW § 1225-d (McKinney 2009); see Text Messages Sent on Phone of Driver Before Fatal Wreck, N.Y. TIMES, July 14, 2007, at B3 (reporting that the driver received a text message on her cell phone about thirty seconds before the accident was reported); see also James Barron, Friends and Graduates, Now Victims in a Fiery Crash, N.Y. TIMES, June 28, 2007, at B1 (reporting that the drivers vehicle was wedged under a tractor-trailer and all five girls were trapped in the car by fire and died).

52 See N.Y. VEH. & TRAF. LAW § 1225-d (McKinney 2009); see also ARK CODE ANN. § 27-51-1501-1506 (2009); COLO. REV. STAT. § 42-4-239 (2009); MD. CODE ANN., TRANSP. § 21-1124.1 (West 2009); N.H. REV. STAT. ANN. § 265:105-a (2009); N.C. GEN. STAT. § 20-137.4a (2009); OR. REV. STAT. § 811.507 (2009); R.I. GEN. LAWS § 31.22-30 (2009); TENN. CODE ANN. § 55-8-199 (2009); UTAH CODE ANN. § 41-6a-1716 (West 2009); VA. CODE ANN. § 46.2-1078.1 (2009).

53 See GHSA, supra note 23; CONN. GEN. STAT. ANN. § 14.296aa (West 2010); DEL. CODE ANN. 21§ 4176C (West 2010); GA. CODE ANN., § 40-5-57 (West 2010); IDAHO CODE ANN. § 321.276 (West 2010); ILL. COMP. STAT. 625 § 5/12-610.2 (2010); KAN. STAT. ANN. 8-15,111 (West 2010); KY. REV. STAT. ANN. § 189.292 (West 2010); MD. CODE ANN., TRANSP. § 21-1124.2 (2010); MASS. GEN. LAWS ANN. 90 § 1 (West 2010); Mich. COMP. LAWS ANN. 257.602b (West 2010); NEB. REV. STAT. § 60-6,179.01 (2010); N.H. REV. STAT. ANN. § 265:105-a (West 2010); 20 V.I. CODE. ANN. § 509a (2010); 23 VT. STAT. ANN. § 1099 (West 2010); WIS. STAT. ANN. 346.89 (West 2010); WYO. STAT. ANN. 1977 § 31-5-237 (West 2010); see also OKLA. STAT. ANN. 47 § 11-901b (2010) (effective Nov. 1, 2010).

legislative bans prohibiting texting while driving.\textsuperscript{55} Primary enforcement allows an officer of the law to pull over any driver that he or she observes using a cell phone while driving.\textsuperscript{56} However, four states have secondary enforcement of their texting while driving bans, which means that drivers can only be sanctioned for use of their cell phone while driving coupled with a standard traffic violation.\textsuperscript{57}

LACK OF UNIFORMITY AMONG STATES

The lack of uniformity among the states is made clear by a review of the legislation of each state. For example, Oklahoma has the broadest language in its legislation of all the states.\textsuperscript{58} Oklahoma’s statute states, “[t]he operator of every vehicle, while driving, shall devote their [sic] full time and attention to driving.”\textsuperscript{59} Further, the statute states that law enforcement officers have the authority to issue citations to drivers who are involved in an accident.\textsuperscript{60} Citations are warranted by a law enforcement officer when he observes any driver operating the car in such a way that it poses a danger to others on the roadway.\textsuperscript{61} The language is not specific to any one form of distraction. Consequently, any distraction is covered by the statute. To the contrary, the Michigan state statute explicitly prohibits the driver’s use of “wireless 2-way communication device for text messages.”\textsuperscript{62} The statute expressly states that GPS or navigation systems are

\textsuperscript{55} GHSA, supra note 23.
\textsuperscript{56} Id.
\textsuperscript{57} Id. The four states are Virginia, New York, Nebraska, and Iowa. Id.
\textsuperscript{58} OKLA. STAT. ANN. 47 § 11-901b (2010) (effective Nov. 1, 2010).
\textsuperscript{59} Id.
\textsuperscript{60} Id.
\textsuperscript{61} Id.
\textsuperscript{62} MICH. COMP. LAWS ANN. § 257.602b (West 2010).
excluded from the statue. Therefore, any email, Internet surfing, social site updates on Twitter or Facebook by a driver of a vehicle on the road is permitted. A balance of both Oklahoma and Michigan statutes is Georgia’s statute. Georgia’s statute prohibits any use of a “wireless telecommunications device.” The statute explains that a “wireless telecommunications device means a cellular telephone, a text messaging device, a personal digital assistant, a computer, or any other substantially similar wireless device that is used to initiate or receive a wireless communication with another person.” Therefore, Georgia specifically prohibits electronic devices. The Georgia statute is thereby broader than Michigan, but narrower than Oklahoma. An examination of these three states’ 2010 legislation illustrates the complete lack of consistency between the states. Despite the best efforts of Georgia, Michigan, and Oklahoma to pass such important legislation in 2010, the legislation of these three states highlights the complete lack of uniformity among the nation in addressing the problem of texting while driving.

PROPOSED FEDERAL LEGISLATION- THE ALERT DRIVERS ACT

The federal government has also taken notice of the public safety concern that texting while driving poses on the nation’s roads and highways. While Congress has agreed that every state must take necessary action, there is a debate as to the best course of action. Currently, the ALERT Drivers Act is pending proposed federal legislation expressly directing each state to prohibit texting while driving. Upon the passage and signing of this legislation, the Federal Aid Highways Chapter would be amended to reduce the amount of federal highway funding

63 Id.
64 Id.
66 Id.
68 Id.
available to States that do not enact a law as required by the bill. Specifically, chapter one of the Federal Aid Highways portion would be amended to include a new section titled “Operation of Motor Vehicles While Texting.” Proponents of the bill conclude that a federal law is necessary to address the problem of texting while driving and to establish minimum standards of protection across the United States.

The ALERT Drivers Act is a joint bill that would require every state across the country to pass legislation prohibiting drivers of motor vehicles from texting while driving. Each state would have two years to write and pass such legislation. If the requirements are not met, those states lacking such legislation would risk losing twenty-five percent of its highway funding each year without the minimal federal legislation. The laws enacted in each state would be required under the ALERT Drivers Act to adhere to certain minimum requirements. Further, each state’s laws must specify a minimum penalty for the first offense and must stipulate that penalties will increase for each repeated offense. The Alert Drivers Act does not enumerate a minimum penalty to which each state would be mandated to adhere. Instead, it grants that responsibility to the Secretary of Transportation, specifically to “promulgate . . . requirements

71 Id. (stating that section 167 would be added).
72 Id. The ALERT Drivers Act was first introduced to the Senate, but advocates for federal movement against texting while driving introduced an identical bill in the House less than two months later (introduced Sept. 8, 2009).
73 Id.; see also Press Release, Sen. Charles Schumer, supra note 7.
74 ALERT Drivers Act states the following:
A State shall meet the requirement under this paragraph if the State has enacted and is enforcing a law that: (A) except in the event of emergency, prohibits an operator of a moving motor vehicle from writing, sending, or reading a text message using a hand-held mobile telephone; and (b) requires, upon conviction of a violation of that prohibition, the imposition of penalties in accordance with the requirements for minimum penalties described in the regulation promulgated.
Id. at § 3(a).
75 Id.
76 The ALERT Drivers Act declares the following:
On October 1 of the second fiscal year beginning after the date of promulgation of the regulations, and annually thereafter, the Secretary shall withhold 25 percent of the amount required to be apportioned to any State under the federal highway funding act for the fiscal year if the Secretary determines that the State does not meet the requirement[s] . . . as of that date.
Id. at (b)(1).
for minimum penalties” for persons who violate the prohibition of texting while driving.\textsuperscript{77} The Department of Transportation has not given any indication as to what the minimum penalties will entail if the ALERT Drivers Act is passed.\textsuperscript{78} After an inquiry regarding the substance of the minimum penalties introduced in the ALERT Drivers Act during the annual Driven to Distraction Hearing, the United States Transportation Secretary, Ray LaHood declined to comment but responded that he was “dedicated to working with Congress.”\textsuperscript{79}

There are key components that make up the ALERT Drivers Act. First, Congress defines cell phones and other electronic devices as “instruments and products of interstate commerce.”\textsuperscript{80} Subsequently, cell phone regulation is “covered by the power of Congress to regulate interstate commerce as enumerated in article I, section 8 of the Constitution.”\textsuperscript{81} Second, the Constitution empowers Congress to “lay and collect [t]axes, [d]uties, [i]mposts, and [e]xcises, to pay the [d]ebts and provide for the common [d]efence [sic] and general [w]elfare of the United States.”\textsuperscript{82} Incident to this power, Congress may attach conditions on the receipt of federal funds.\textsuperscript{83} Third, the power is “to further broad[en] policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.”\textsuperscript{84}

**DEFINITIONS**

The ALERT Drivers Act defines a hand-held mobile telephone as a “mobile telephone or any other portable electronic communication device with which a user

\textsuperscript{77} See id. (directing that the states must pass a law requiring “the imposition of penalties in accordance with the requirements for minimum penalties described in the regulations promulgated.”).

\textsuperscript{78} See Driven to Distraction Hearing at 18-82 (statement of Ray LaHood, Sec’y, Dept’ of Transp., Nov. 4, 2009), available at http://energycommerce.house.gov/Press_{111}/20091104/lahood_testimony.pdf. On Nov. 4, 2009, Sec. LaHood was asked to give a ballpark figure of what the minimum penalties might be if the ALERT Drivers Act was to become law. Id. He answered that the Dept. of Transp. would not endorse any particular bill, but that he was committed to working with Congress toward the goal of banning texting while driving. Id.

\textsuperscript{79} Id.

\textsuperscript{80} See ALERT Drivers Act, S. 1536 111th Cong. § § 2(1), (b)(2)(A) (stating “except in the event of an emergency”).

\textsuperscript{81} Id.; see also U.S. CONST. art.I, § 8 (commonly known as the Taxing & Spending Power).

\textsuperscript{82} U.S. CONST. art. I, § 8, cl. 1.

\textsuperscript{83} See Fullilove v. Klutznick, 448 U.S. 448 (1980).

\textsuperscript{84} Id.; see also Lau v. Nichols, 414 U.S. 563 (1974); Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275 (1958).
engages in a call or writes, sends, or reads a text message, using at least one hand.”

However, the ALERT Drivers Act does not specifically prohibit any sort of voice-activated devices. Additionally, text messages include any sort of text-based message, instant message, electronic message, or email. “Writing, [s]ending, or [r]eading” includes the “manual entry, sending, or retrieval of any text based communication for purposes of communicating with any person or device.”

However, these narrowly tailored definitions do not address other distractions drivers face everyday aside from texting while driving. For example, conversations with passengers, crying children in the backseat, applying makeup, and reading a book or magazine while operating a moving motor vehicle, among many other distractions are overlooked by the ALERT Drivers Act.

STUDIES

The ALERT Drivers Act cites studies to statistically illustrate the sort of problem Congress is attempting to combat. A 2008 study by Nationwide Insurance Company found that twenty percent of drivers in the United States send text messages while operating motor vehicles.

Further, nine out of ten Americans surveyed agreed to support a complete ban on all cell phone use. Another study conducted by Car and Driver Magazine suggested texting while driving was more dangerous than driving while intoxicated. The study compared the reaction times of

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86 Id. at § 3(a)(1)(B) (including Bluetooth devices).
87 Id. at § 3(a)(3).
88 Id. at § 3(a)(4).
89 Id.
90 Id. at § 2(7) (noting that the survey was updated in 2010, finding that twenty-one percent of drivers text while driving).
91 Nationwide Research Results, supra note 12.
an individual driving while intoxicated to an individual driving while texting. The study concluded that text messaging distracts any driver from the “primary task of keeping one’s mind and eyes on the road.” Further, text messaging while driving distracted the driver and delayed their reaction time significantly. The magazine notes that if the drivers had been on a real road instead of a closed track for this test, there would probably have been an accident. Moreover, the Virginia Tech Transportation Institute study found drivers who sent text messages while driving had a twenty-three times greater risk of a car accident than those drivers who did not text and drive. Another school-conducted study by the University of Utah concluded that college students were eight times more likely to have an accident when texting while driving.

**South Dakota v. Dole**

The ALERT Drivers Act relies heavily upon decisional law, specifically *South Dakota v. Dole* in support of Congress’ power to condition federal highway funding on State compliance.

In 1987, the United States Supreme Court was presented with issues concerning South Dakota’s drinking age and the depth of Congress’ Taxing and Spending power through article I, section 8, clause 1 of the United States Constitution. The State of South Dakota brought an action challenging the constitutionality of a federal statute. The federal statute required South Dakota to impose a minimum drinking age of twenty-one instead of nineteen or forfeit federal highway funds. The court of appeals affirmed, and the state petitioned for writ of certiorari.

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94 Id.
95 Id.
96 ALERT Drivers Act, S. 1536 111th Cong. § 2(9) (2009).
97 Id. at § 2(10).
98 Id. at § 2(3).
100 Id.
101 Id.
102 Id.
The Supreme Court, led by the opinion of Chief Justice Rehnquist, held that the statute conditioning receipt of highway funds on the adoption of a minimum drinking age of twenty-one is a “valid use of Congress’ spending power.”\textsuperscript{103} Regulated by South Dakota Codified Laws, South Dakota allowed nineteen-year olds to purchase beer containing up to 3.2\% alcohol.\textsuperscript{104} However, in 1984, the Secretary of Transportation was permitted to “withhold a percentage of federal highway funds . . . [where] purchase or public possession . . . of any alcoholic beverage by a person who is less than twenty-one years of age is lawful.”\textsuperscript{105}

In \textit{United States v. Butler}, the Supreme Court defined the scope of the Spending Clause as “the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution” may be attained through the use of the spending power.\textsuperscript{106} The significance of \textit{Butler} is that the taxing and spending power is found to be an independent power; specifically spending is an enumerated power.\textsuperscript{107} Congress’ spending power is not unlimited and is subject to several restrictions that are articulated through case law.\textsuperscript{108} First, “[i]n considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress.”\textsuperscript{109} Second, where Congress wants to condition receipt of funding in exchange for compliance by each state, it is necessary to explicitly declare the obligation of the state along with the condition attached so that the states are clear regarding the consequences to their decision to comply or not to comply.\textsuperscript{110} Third, the conditions attached to federal grants may be

\textsuperscript{103} \textit{Id} at 211.
\textsuperscript{104} \textit{Id} at 205; see S.D. Codified Laws § 35-6-27 (1986).
\textsuperscript{106} \textit{United States v. Butler}, 297 U.S. 1, 65 (1936).
\textsuperscript{108} \textit{Id}.
\textsuperscript{109} \textit{Id.}; see Helvering v. Davis, 301 U.S. 619, 640 (1937).
connected to any “federal interest in a national project or program.”\textsuperscript{111} Finally, the Court noted that “other constitutional provisions may provide an independent bar to the conditional grant of federal funds.”\textsuperscript{112}

The Court concluded that the federal provision to enforce a twenty-one year of age minimum for the sale and consumption of alcoholic beverages was established to benefit the general welfare as proposed by Congress.\textsuperscript{113} Congress found that states with lower legal drinking ages provided incentives for those to combine ability to drink with their ability to drive, thus creating an interstate problem, requiring a national solution.\textsuperscript{114} Next, the Court found that the conditions by which the states may be subject to are clearly defined within the federal legislation.\textsuperscript{115} Moreover, the Court agreed that Congress conditioned the receipt of federal funds in a way that reasonably calculated and addressed the problem to a purpose for which the funds are spent.\textsuperscript{116}

Further, the Court briefly addressed the issue of coerciveness. Financial inducement offered by Congress appeared that it may be so coercive as to pass the point where persuasion turns into forcefulness.\textsuperscript{117} Justice Rehnquist reasoned that Congress “offered relatively mild encouragement to the States to enact higher minimum drinking ages than they would otherwise choose.”\textsuperscript{118} In her dissenting opinion, Justice O’Connor disagreed on a narrow application of the spending power by the majority.\textsuperscript{119} Specifically, the majority’s connection between the

\textsuperscript{111} \textit{Dole}, 483 U.S. at 207; \textit{see also} Mass. v. United States, 435 U.S. 444, 461 (1978); Ivahoe Irrigation Dist. v. McCracken, 357 U.S. 275, 295 (1958) (stating “the Federal Government may establish and impose reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof”). \textit{Id}.
\textsuperscript{112} \textit{Dole}, 483 U.S. at 208; \textit{see} Lawrence Cnty. v. Lead-Deadwood Sch. Dist., 469 U.S. 256, 269-70 (1985); Buckley v. Valeo, 424 U.S. 1, 91 (1976) (per curiam).
\textsuperscript{113} \textit{Dole}, 483 U.S. at 207.
\textsuperscript{114} \textit{Id}. at 208.
\textsuperscript{115} \textit{Id}.
\textsuperscript{116} \textit{Id}. at 210 (directing that the power may not be used to induce the States to engage in activities that would themselves be unconstitutional).
\textsuperscript{117} \textit{Id} at 211.
\textsuperscript{118} \textit{Id}. at 212 (finding encouragement mild because only five percent of federal highway funds were at risk per state).
\textsuperscript{119} \textit{Id} at 213.
minimum drinking age and interstate highway driving was the main disagreement. Justice O’Connor expressed her concern for use of spending for the general welfare:

When Congress appropriates money to build a highway, it is entitled to insist that the highway be a safe one. But it is not entitled to insist as a condition to the use of the highway funds that the State impose or change regulations in other areas of the State’s social or economic life because of an attenuated or tangential relationship to highway use or safety. Indeed, if the rule were otherwise, the Congress could effectively regulate almost any area of a State’s social, political, or economic life on the theory that use of the interstate transportation system is somehow enhanced.

Moreover, Justice O’Connor highlighted the fine line between spending and legislating, stating that “Congress has the power to spend for the general welfare, [and] it has the power to legislate only for delegated purposes . . .” However, the majority in Dole concluded that Congress’ spending, or threat to not spend on those states that did not enforce a twenty-one years of age minimum alcohol requirement, was properly justified.

THE TENTH AMENDMENT

The Tenth Amendment states that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” A Tenth Amendment limitation on congressional regulation of individual state affairs establishes a balance between the powers of the federal government with the rights of individual states. However, the Supreme Court held in Oklahoma v. Civil Service Commission that the Tenth Amendment limitation on congressional regulation of state affairs does not concurrently “limit the range of

\[\text{Id. at 214.} \]
\[\text{Id. at 215 (O’Connor, dissenting).} \]
\[\text{Id. at 216.} \]
\[\text{Id.} \]
\[\text{U.S. CONST. amend. X.} \]
conditions legitimately placed on federal grants.”125 The federal government has the power to “fix the terms upon which its money allotments to states shall be disbursed.”126 It is accepted that the offer of benefits to a state by the United States “dependent upon cooperation by the state with federal plans, assumedly for the general welfare, is not usual.”127 Further, the power to tax and spend for the general welfare is a power specifically delegated by the United States Constitution.128

**THE FIRST AMENDMENT**

The First Amendment states that “Congress shall make no law . . . prohibiting the free exercise thereof; or abridging the freedom of speech . . .”129 Speech is considered any form of oral, written, or symbolic communication.130 The government has the authority to channel or alter the speech instead of prohibiting it altogether.131 Government can amend the time, place, or manner by placing a restriction on the speech.132 To be a valid, time, place, or manner restriction, the restriction itself must be content neutral.133 Content neutral means that the speech cannot be regulated simply because the government disapproves of the speech.134 In addition, “the regulation must be narrowly tailored to achieving a significant government interest” while leaving “open alternative channels of communication.”135

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126 *Id.* at 143.
127 *Id.* at 143–44.
128 U.S. CONST. amend. X.
129 U.S. CONST. amend. I
131 *Id.* at 282.
132 *Id.*
133 *Id.*
134 *Id.*
135 *Id.*
The Brady Handgun Violence Prevention Act, also known as the Brady Bill, was an amendment by Congress in 1993 to the Gun Control Act of 1968. The Brady Bill required the Attorney General to establish a national instant background check system. Before the system was established, local chief law enforcement officers (CLEOs) were required to perform the background checks on any prospective handgun purchasers. The CLEOs challenged the constitutionality of the interim obligation, contending that "compelling state officers to execute federal laws is unconstitutional." Congress asserted that power by use of the Necessary and Proper Clause justified the temporary requirement of the CLEOs. Justice Scalia found that the historical understanding, practice, and structure of the Constitution forced the Court to disagree with Congress. Most importantly, the Court held that state legislatures are not subject to federal direction.

PRE-EMPTION

State law is pre-empted under the Supremacy Clause in three circumstances. The Supremacy Clause states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
Further, “Congress may indicate pre-emptive intent through a statute’s express language or through its structure and purpose.”\textsuperscript{144}

Congress may provide explicitly its intent to pre-empt state law right in its regulation.\textsuperscript{145} When there is no express language by Congress, state law is pre-empted where it is “regulated conduct in a field that Congress intended the Federal Government to occupy exclusively.”\textsuperscript{146} Moreover, Congressional intent can be inferred from the proposal of the federal regulation itself.\textsuperscript{147} The method behind the federal legislation must be “so convincing that there is no room for the states to change it.”\textsuperscript{148} The inference of Congressional intent must be “reasonable,” meaning clear and obvious.\textsuperscript{149} Further, state law is pre-empted when it conflicts with federal law.\textsuperscript{150} Specifically, where it is impossible to comply with the state and federal requirements, state law is pre-empted.\textsuperscript{151}

**Constitutionality**

Currently, many states regulate texting while driving differently. While some states differ with the language of the law and type of enforcement embodied in the legislation, other states do not have any form of regulation in place. Similar to the legal age requirements to consume and purchase alcoholic beverages that were at issue in *Dole*, the states are currently disputing the best way to regulate text messaging while driving.\textsuperscript{152}

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\textsuperscript{146} Id. at 79.
\textsuperscript{147} Id.
\textsuperscript{148} Id.
\textsuperscript{149} Id.
\textsuperscript{150} Id.
\textsuperscript{151} Id.
\textsuperscript{152} South Dakota v. Dole, 483 U.S. 203, 205 (1987).
Further, like *Dole*, the federal government’s desire is to set a minimum standard for each state to follow.\textsuperscript{153} The federal legislation at issue in *Dole* was merely designed to unite the states and fund safe highways by way of defining a nationwide drinking age of twenty-one years.\textsuperscript{154} In order to encourage the states to adhere to the federal legislation, Congress utilized its spending power because Congress may not regulate each state’s drinking age directly.\textsuperscript{155} Further, Congress has proposed incredibly similar initiatives to *Dole*, including a desire to unite the states and fund safe highways by setting regulations prohibiting text messaging by drivers. Congress also proposed to utilize its taking and spending power to accomplish such regulation.

The federal legislation in *Dole* passed a four-part test set up by the Supreme Court. By passing the test, the Court determined the “conditioning of federal funds by Congress was reasonably calculated to address a particular impediment for which the funds [were] expended.”\textsuperscript{156} By applying the four-part test to the ALERT Drivers Act, it can be determined whether the Congress’ power under the Taxing and Spending Clause is appropriate.

First, the spending by Congress must “be in pursuit of the general welfare.”\textsuperscript{157} The ALERT Drivers Act is designed to serve the general welfare.\textsuperscript{158} Because of the differing legislative actions taken by each state and the ability for persons to travel across state lines on national highways at any given time, it presents a national problem.\textsuperscript{159} The means by which Congress chose to address the danger of distracted driving can

\textsuperscript{153} *Id.*
\textsuperscript{154} *Id.*
\textsuperscript{155} *Id.*
\textsuperscript{156} *Id.* at 209.
\textsuperscript{157} *Id.* at 207; see Helvering v. Davis, 301 U.S. 619, 640 (1937).
\textsuperscript{158} ALERT Drivers Act, S. 1536 111th Cong. § 2(2) (2009).
\textsuperscript{159} *Id.* at § 2 (12)
reasonably be calculated to advance the general welfare. The goal of the national highway system has been frustrated by various car accidents as a result of distracted driving.\textsuperscript{160} The lack of uniformity among the states creates opportunity for persons to engage in distracted driving without any repercussion other than the likelihood of a serious car accident. The ALERT Drivers Act states that “the risks created by texting while driving are increasing nationwide as the use of texting increases nationwide.”\textsuperscript{161} The ALERT Drivers Act’s main goal is to keep Americans safe on the highways nationwide, which directly benefits the general public.\textsuperscript{162}

Second, when Congress enacts to condition the States’ receipt of federal funds, it must do so in a manner whereby each state can choose to comply with the conditions of the federal legislation or continue enforcing their own legislation.\textsuperscript{163} The ALERT Drivers Act details the benefits of passing the Congressional ban, as well as the repercussions applicable to states that do not. The ALERT Drivers Act spells out the particular language that is expected to be incorporated in the state’s legislation in order to comply with the federal regulation. The requirements include a ban, except in an emergency, of any operator of a moving motor vehicle from “writing, sending, or reading a text message using a hand-held mobile telephone.”\textsuperscript{164} The ALERT Drivers Act also requires each state to impose penalties in accordance with those set by the Secretary of Transportation.\textsuperscript{165}

\textsuperscript{160} Id. at § 2 (11).
\textsuperscript{161} Id. at § 2 (13).
\textsuperscript{162} Id. at § 2 (15).
\textsuperscript{164} ALERT Drivers Act, S. 1536 111th Cong. § 3(b)(2)(A) (2009).
\textsuperscript{165} Id. at § 3(b)(2)(B) (stating the Secretary must “specify a minimum penalty for the first offense and stipulate that penalties shall be granted for repeat offenses”).
The ALERT Drivers Act details the consequences of not complying with the requirements established by Congress.\textsuperscript{166} Specifically, “on October 1 of the year when the ALERT Drivers Act is to be enacted, twenty-five percent of the federal highway funds will be withheld from each state not in compliance.”\textsuperscript{167} The federal highway funds will continue to be withheld each year that the state does not comply.\textsuperscript{168} However, should the state choose to comply with the requirements established by Congress after the deadline and funds are withheld, “the state will recoup its lost funds immediately upon determination by the Secretary.”\textsuperscript{169}

Third, the conditions placed upon the federal grants must specifically relate to the federal interest in a national project or program.\textsuperscript{170} Specifically, there must be an “undeniable nexus” between the legislation and the legitimate exercise of the spending power.\textsuperscript{171} Certainly, the ALERT Drivers Act meets this requirement, as it relates directly to the safety of the federal funded roads and highways.\textsuperscript{172} Further, Congress believes it’s necessary to act to “protect the safety of all people in the United States on highways and roads in the United States.”\textsuperscript{173} Most importantly, however, the federal law will specifically address the problem of texting while driving, which is necessary to “ensure minimum standards of protection across the United States.”\textsuperscript{174} The national project is explicitly stated within the pending legislation as Congress strongly urges all states to

\textsuperscript{166} Id. at § 3(b)(1).
\textsuperscript{167} Id.
\textsuperscript{168} Id.
\textsuperscript{169} Id. at § 3(c).
\textsuperscript{171} Id.
\textsuperscript{172} ALERT Drivers Act, S. 1536 111th Cong. § 2(15) (2009).
\textsuperscript{173} Id.
\textsuperscript{174} Id. at § 2(16) (stating “in the same manner as the national minimum drinking age provides a uniform standard of protection”).
collectively prohibit the same behavior of texting while driving by drivers. The third requirement from the Court in Dole is met. 175

Finally, conditions placed on a federal grant must not disregard “other Constitutional provisions [that] may provide an independent bar to the conditional grant of federal funds.” 176 Congress cannot use a conditional grant to induce states to engage in unconstitutional activities. 177 Therefore, a determination must be made as to whether the ALERT Drivers Act proposal of conditioning federal funds upon the adherence of each state to the minimum standards set by Congress is an unconstitutional activity. 178

Justice Rehnquist addressed the issue by distinguishing constitutional activities from unconstitutional activities. For example, Justice Rehnquist referenced “a grant of federal funds conditioned to invidiously discriminatory state action or the inclusion of cruel and unusual punishment would be an illegitimate exercise of the Congress’ broad spending power.” 179 Clearly, the conditioning of federal highway funds upon the state action regarding texting while driving bans is not an unconstitutional activity. The prohibition of text message based communication by drivers operating moving motor vehicles is constitutional and promotes public safety on all roads and highways across the nation. 180 Specifically, if each state were to succumb to the federal requirements and implement the necessary minimum standards, the state’s action would not violate the constitutional rights of anyone. 181

175 Dole, 483 U.S. at 208. “South Dakota does not seriously claim that § 158 is inconsistent with any of the first three restrictions.” Id.
176 Id.
177 Id. at 209.
178 Id.
179 Id. at 210-11.
181 Dole, 483 U.S. at 211.
Because the ALERT Drivers Act passes the requirements in the *Dole* four-part test, the federal legislation is a constitutional use of the Congress’ broad taxing and spending power.\(^\text{182}\) Therefore, the ALERT Drivers Act was appropriate in using *Dole* as decisional law to support its contentions.

**THE TENTH AMENDMENT**

The four-part test used in *South Dakota v. Dole* directly ties into the Tenth Amendment.\(^\text{183}\) Although the ALERT Drivers Act passed the requirements, it may violate the state’s Tenth Amendment protection and therefore, it may not be constitutional. State sovereignty is essential for each state to function as a state and to occupy its proper place in the federal system. Further, powers not directly delegated to the federal government are reserved for the states.\(^\text{184}\) Specifically, “[t]he United States . . . has no power to regulate, local political activities as such of state officials . . .”\(^\text{185}\)

The powers to tax and spend for the general welfare are both expressly listed in the powers of Congress; however, the power to regulate all activities on highways or roads is not.\(^\text{186}\)

Nonetheless, Congress “does have the power to fix the terms upon which its money allotments to states shall be disbursed.”\(^\text{187}\) Congress is not attempting to regulate all of the activities on highways or roads.\(^\text{188}\) Instead, Congress is attempting to modify the

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\(^\text{182}\) ALERT Drivers Act, S. 1536 111th Cong. § 2(15) (2009); *Dole*, 483 U.S. at 209.

\(^\text{183}\) U.S. CONST. amend. X. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectfully, or to the people. *Id.*

\(^\text{184}\) *Id.*

\(^\text{185}\) *Dole*, 483 U.S. at 210.

\(^\text{186}\) U.S. CONST. amend. X.


\(^\text{188}\) *See generally* ALERT Drivers Act, S. 1536 111th Cong. (2009) (encouraging states to comply with texting while driving minimum standards by attaching conditions upon the receipt of federal funds).
terms by which states are eligible to receive federal funds.\textsuperscript{189} Congress is not overstepping its bounds by abusing its control over federal highway funds.\textsuperscript{190} The ALERT Drivers Act proposes the very same change to the terms of federal fund disbursement as Congress did in \textit{Dole}.\textsuperscript{191}

\textbf{THE FIRST AMENDMENT}

Many drivers may believe that the government is violating their right to free speech by prohibiting text-based communication while driving in their own private vehicle. Text-based communications are private speech and can be regulated by the government.\textsuperscript{192} Although the speech itself is not at issue in the ALERT Drivers Act, the effects of such speech is. The effects are dangerously distracted drivers on roads and highways across the country. The ALERT Drives Act does not prohibit people from text messaging or communicating electronically.\textsuperscript{193} Instead, the ALERT Drivers Act simply rearranges the speech and implements a time, place, and manner restriction upon it.\textsuperscript{194}

The ALERT Drivers Act calls for all drivers to not participate in any text-based communication while driving.\textsuperscript{195} The speech is simply restricted to a time and place where the individual is not driving a car.\textsuperscript{196} Any driver may simply pull the vehicle off the roadway to send or receive a text-based communication. Speech via any text-based form of communication is not prohibited by the government; it is only secluded to a time and place when an individual is not operating a moving motor vehicle.\textsuperscript{197}

\textsuperscript{189} \textit{Id.} at §( b)(2)(c).
\textsuperscript{190} \textit{Id.}
\textsuperscript{191} \textit{See id; see also Dole}, 483 U.S. at 207.
\textsuperscript{192} \textsc{Prygoski}, supra note 130.
\textsuperscript{193} ALERT Drivers Act, S. 1536 111th Cong. § (b)(2)(a) (2009).
\textsuperscript{194} \textit{Id.}
\textsuperscript{195} \textit{Id.}
\textsuperscript{196} \textsc{Prygoski}, supra note 130.
\textsuperscript{197} \textit{Id.}
The driver’s manner of communication is also regulated by the ALERT Drivers Act. Consequently, the ALERT Drivers Act allows use of a cell phone with a hands-free device or Bluetooth device. Technology that reads aloud the driver’s email or text message is also acceptable. However, the ALERT Drivers Act simply prohibits the use of a hand-held cell phone for text messaging, emailing, or browsing the Internet. The individual can participate in any of those activities as long as he is not driving while doing so.

Moreover, the government’s restrictions upon text-based communications through the ALERT Drivers Act are content neutral. Congress is not regulating the content of driver’s text based communications. Further, the ALERT Drivers Act is narrowly tailored to achieve a significant governmental interest which is to maintain driver safety on roads and highways across the country. Finally, the ALERT Drivers Act only prohibits speech through text-based communications by the driver. It does not prohibit the driver from engaging in conversations with passengers, or from using technology such as a hands-free device, Bluetooth, or similar technology to listen to incoming text-based communications. Therefore the ALERT Drivers Act leaves open ample alternative channels of communication to the driver while operating a moving motor vehicle.

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198 Id.
200 Id.
202 Id.
204 Id.
205 Id.
206 Id.
COERCIVENESS

Justice Rehnquist acknowledged that financial inducement by Congress might be “so coercive as to pass the point in which pressure turns into compulsion” in *Dole*.\(^{207}\) However, South Dakota only risked losing five percent of its federal highway funds.\(^{208}\) With a loss of five percent, the Court determined that it was only “mild encouragement.”\(^{209}\) The ALERT Drivers Act is distinguishable from *Dole*. Rather than losing five percent of federal highway funds, each state that does not comply with the minimum standards will lose twenty-five percent of its federal highway funding each year.\(^{210}\) Certainly, twenty-five percent is not a “relatively small percentage of certain federal highway funds” as it was for South Dakota.\(^{211}\)

Especially in the economy the United States finds itself in, the threat of losing twenty-five percent of federal highway funding may seem extreme. Each state’s Constitutional power may appear to be taken away. Consequently, each state may be forced to adhere to the federal legislation for fear of losing such essential funding.

Nevertheless, states are not forced to adopt the federal legislation. The “offer of benefits to a state by the United States is dependent upon cooperation by the state with federal plans, assumedly for the general welfare, is not unusual.”\(^{212}\) Some sort of encouragement and inducement is necessary in order to convince each state to comply with federal legislation. The risk of losing federal funds demonstrates the necessity and urgency of the federal regulation implementation. Similar to the Court’s finding in *Dole*,

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\(^{208}\) *Dole*, 483 U.S. at 211; *see Steward Mach. Co.*, 301 U.S. at 590.

\(^{209}\) *Dole*, 483 U.S. at 211.

\(^{210}\) ALERT Drivers Act, S. 1536 111th Cong. § 3(c) (2009).

\(^{211}\) *Dole*, 483 U.S. at 211.

\(^{212}\) *Id.*; *see Okla. v. Civil Serv. Comm’n.*, 330 U.S. 127, 143 (1947); *Steward Mach. Co.*, 301 U.S. at 590.
there is no violation of any state’s sovereignty because the state has the option to refuse to yield to what it believes is federal coercion.\textsuperscript{213}

**ENFORCEMENT BY STATE OFFICIALS**

Similar to the Brady Handgun Prevention Act in *Printz*, the ALERT Drivers Act will require state officials to enforce the provisions of the federal legislation.\textsuperscript{214} State police departments will become required to enforce the ban on text messaging and driving. It is highly unlikely federal officials will amend their duties to include enforcement of the ALERT Drivers Act. According to *Printz*, forcing state officers to execute federal laws is unconstitutional.\textsuperscript{215}

However, federal laws are enforced by state officials on a daily basis; particularly with the age limit for alcohol purchases and consumption.\textsuperscript{216} Federal authorities do not distribute underage drinking citations or arrest bar owners who serve minors. Instead, it is the state police who enforce the federal drinking law. Similarly, the state police currently enforce the state driving laws. Therefore, it would be possible for them to enforce prohibition of text messaging while driving.

Also, a distinguishing factor from *Printz* is whose law the state police are enforcing.\textsuperscript{217} In *Printz*, it was a true federal law. But, with the ALERT Drivers Act, Congress is merely providing each state with a minimum standard regulation.\textsuperscript{218} If a state decides to apply beyond the minimum requirements of the federal legislation, then the legislation is less of a federal law enforced by state authorities. Rather, the legislation becomes more like a state law enforced by state authorities.

\textsuperscript{213}Id.  
\textsuperscript{214}Printz v. United States, 521 U.S. 898, 904 (1997).  
\textsuperscript{215}Id.  
\textsuperscript{216}Dole, 483 U.S. at 210.  
\textsuperscript{217}Printz, 521 U.S. at 904.  
\textsuperscript{218}Id.
PRE-EMPTION

The ALERT Drivers Act does not contain a clause which explicitly directs the federal regulation to pre-empt state laws already in existence.\textsuperscript{219} Therefore, Congressional intent remains at issue.\textsuperscript{220} The purpose of the legislation is to effectively address the nationally recognized problem of distracted driving by implementing standard regulations throughout the states.\textsuperscript{221} By language within the ALERT Drivers Act, that intent is reasonably inferred.\textsuperscript{222} The ALERT Drivers Act proposes to set the minimum standards and sanctions for each state to enforce.\textsuperscript{223} Those standards and sanctions are non-negotiable by the states.\textsuperscript{224} By unifying every state with the same basic legislation regarding distracted driving, the roads and highways across the country will be presumably safer.\textsuperscript{225}

Traditionally, individual states manage their own affairs such as creating driving regulations and citing traffic violations. The Congressional intent in the ALERT Drivers Act is reasonable that it will supersede the states’ distracted while driving regulations.\textsuperscript{226} Further, in instances where the federal law conflicts with the state law, the federal law will prevail.\textsuperscript{227} In the states that already have a distracted while driving regulation in place, the standards set by the Secretary of Transportation through the ALERT Drivers Act may conflict with state laws.\textsuperscript{228} Therefore, it would be impossible for drivers to

\textsuperscript{219} See generally ALERT Drivers Act, S. 1536 111th Cong. (2009) (noting that there is not specific language indicating that Congress intends the ALERT Drivers Act to pre-empt state laws).
\textsuperscript{221} ALERT Drivers Act, S. 1536 111th Cong. § 2(16) (2009).
\textsuperscript{222} Id.
\textsuperscript{223} Id.
\textsuperscript{224} Id.
\textsuperscript{225} Id.
\textsuperscript{228} See generally ALERT Drivers Act, S. 1536 111th Cong. (2009) (noting that the ALERT Drivers Act intends to implement minimum standards for all states to follow).
comply with both the ALERT Drivers Act regulation and state regulations. Ultimately, the ALERT Drivers Act would pre-empt all state laws.

The language in the ALERT Drivers Act makes it uncertain whether each state would be able to supplement the federal minimum standards by placing additional restrictions on distracted driving behaviors by drivers.\textsuperscript{229} At the very least, any state with distracted while driving legislation in place at the time the ALERT Drivers Act is passed, must ensure it conforms to the minimum standards.\textsuperscript{230} Those states that do not have any legislation in place, must consequently pass legislation which conforms to the minimum standards set by the ALERT Drivers Act.\textsuperscript{231} Ultimately, once the ALERT Drivers Act is passed, the states will become unified, finally, with distracted while driving laws.

\textbf{TECHNOLOGY v. TECHNOLOGY}

The second annual Distracted Driving Summit was led by U.S. Transportation Secretary Ray LaHood in 2010. There, transportation officials, safety advocates, law enforcement addressed challenges and opportunities for national anti-distracted driving efforts.\textsuperscript{232} Many companies made use of the second annual Distracted Driving Summit to promote the most recent innovations designed to prevent dangers of text messaging while driving.\textsuperscript{233}

\textsuperscript{229} See generally id. (noting that there is not specific language within the ALERT Drivers Act that allows states to add to the minimum standards set by Congress).

\textsuperscript{230} See generally id. (stating that each state has two years to conform to the regulation or risk losing twenty-five percent of their federal highway funds every year not in compliance).

\textsuperscript{231} Id.


Among those in attendance at the Distracted Driving Summit was the tech-company **ZoomSafer**.\(^{234}\) ZoomSafer’s software automatically disables texting and calls on smart phones when the driver gets into a vehicle.\(^{235}\) ZoomSafer’s solution is to shut off access to phones when the driver turns the car on.\(^{236}\) The software also automatically deactivates once the vehicle stops and the GPS or Bluetooth is disconnected.\(^{237}\) If there is a passenger in the vehicle with ZoomSafer software installed, there are policy settings available allowing an exit out of the application and full access to the smart phone.\(^{238}\) Further, use of the software can be customized with settings that include auto reply to incoming calls, emails, or texts.\(^{239}\) A person calling, emailing, or texting, will be notified that the person he is trying to communicate with is unavailable because the person is driving.

The problem with this software and similar technology is that it can always be shut off by a determined driver.\(^{240}\) Ultimately, the temptation to use the phone while driving may be suppressed somewhat by use of this software. However, any resolute driver can turn it off and drive distracted while using the cell phone.

Additionally, carmakers Ford and General Motors have added services to their vehicles in 2010 that enable Internet-based smart phone functions in the car.\(^{241}\) Functions include not only Bluetooth capabilities to make phone calls hands free, but also access to a driver’s Twitter and Pandora music accounts through in-car voice recognition systems.

\(^{234}\) ZoomSafer, http://zoomsafer.com/about/ (last visited Nov. 7, 2010).
\(^{235}\) Id.
\(^{236}\) Id.
\(^{237}\) Quain, supra note 233; see ZoomSafer, supra note 234.
\(^{238}\) ZoomSafer, supra note 234.
\(^{239}\) Quain, supra note 233; see ZoomSafer, supra note 234.
\(^{240}\) Quain, supra note 233; see ZoomSafer, supra note 234.
\(^{241}\) Quain, supra note 233; see ZoomSafer, supra note 234.
and in-dash controls.\textsuperscript{242} It will also read the driver’s text messages aloud.\textsuperscript{243} On-Star from General Motors is even testing a Facebook application and along with more accurate text-to-speech technology.\textsuperscript{244}

Although additional functions are safer when used with voice recognition technology, the question remains, are these functions necessary while driving? Albeit the driver’s hands are free to stay on the steering wheel and eyes are more focused on the road, but the driver can still be distracted. Reducing countless manual and visual distractions behind the wheel is certainly beneficial to the driver’s focus.\textsuperscript{245} However, cognitive focus is also an important part of focused driving, which hands-free technology functions subsequently decrease.\textsuperscript{246}

**Solution**

Distracted driving is a major concern throughout the entire United States. Congress has recently introduced federal legislation designed to address the problems of texting while driving through a systematic coordinated effort among the states.\textsuperscript{247} Both state and federal governments agree that additional legislation is needed to curtail drivers from texting while driving. Though the ALERT Drivers Act is persuasively written, it fails to address distractions that do not relate to text-based communication.\textsuperscript{248} To be more effective, Congress needs to implement legislation that is not limited to one particular

\textsuperscript{243} Id.
\textsuperscript{244} Id.; see Quain, supra note 233.
\textsuperscript{246} Id.
\textsuperscript{247} See ALERT Drivers Act, S. 1536 111th Cong. § 2(16) (2009).
\textsuperscript{248} See generally id. (noting that the focus of the proposed legislation is specifically text-based communications).
distraction. Although text-based communication is the latest trend of distracted driving, it may not be in the future.

The ALERT Drivers Act cites a Nationwide study whereby one in every four Americans use cell phone applications while driving. Conversely, that means that three out of four Americans do not use cell phone applications while driving.\textsuperscript{249} The studies cited in the ALERT Drivers Act include surveys of other distracting behaviors and activities other than texting.\textsuperscript{250} However, the other activities included music searching, video monitor use, and GPS use by drivers.\textsuperscript{251} The studies upon which Congress relies in the ALERT Drives Act only focus on technological distractions in the vehicle rather other non-technological distractions.\textsuperscript{252}

Therefore, Congress should adopt language similar to the Oklahoma’s state statute. The statute provides that “[t]he operator of every vehicle, while driving, shall devote their [sic] full time and attention to such driving.”\textsuperscript{253} Under this statute, Oklahoma allows enforcement officers to sanction drivers in two circumstances. First, if the enforcement officer learns that the driver of the car is the cause of an accident due to distracting activities or behavior, the driver can be sanctioned.\textsuperscript{254} Second, if the enforcement officer observes the driver operating the car while posing an obvious danger on the road, the officer can sanction the individual.\textsuperscript{255}

The significance of the broad language used in the statute directly addresses the vast number of distractions that can overcome a driver on the road. Although, the majority of

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\item \textsuperscript{249} Nationwide Dangers of DWD, supra note 11.
\item \textsuperscript{250} Id.
\item \textsuperscript{251} Id.
\item \textsuperscript{252} Id.
\item \textsuperscript{253} 47 OKLA. ST. ANN. § 11-901b (West 2010).
\item \textsuperscript{254} Id.
\item \textsuperscript{255} Id.
\end{enumerate}
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people text and drive, others read books, apply makeup, and even tend to children in the backseat.\textsuperscript{256} In Oklahoma, all activities that distract while driving are prohibited and sanctioned by an enforcement officer.\textsuperscript{257} Further, the Oklahoma legislation includes broad language that allows the enforcement officers to use discretion in assessing whether there is sufficient evidence to sanction the driver.\textsuperscript{258} The main point of the legislation is to promote full time and attention to driving.\textsuperscript{259}

Enforcement officers nationwide should only able to sanction drivers when they directly observe vehicles driving in dangerous manners. Federal legislation should encourage people nationwide to devote their full time and attention to driving, regardless of the form of distraction. If the states and federal legislation only ban text-based-communications by drivers of moving motor vehicles, the law will likely be too narrow. The ALERT Drivers Act in its current condition allows drivers to engage in other careless and reckless activities without the possibility of any sanction.\textsuperscript{260}

Moreover, if the ALERT Drivers Act is passed the way it is currently written, the law would prohibit only one type of distraction but allow but condone numerous other distracting activities while driving. Text-based message communication is not the only distraction that drivers deal with while on the roads and highways on a daily basis. Congress defined distracted driving as anything that takes a driver’s eyes, hands, or mind away from operating a motor vehicle while in motion.\textsuperscript{261} Studies show that any

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\item AAA, \textit{supra} note 21.
\item 47 OKLA. ST. ANN. § 11-901b (West 2010).
\item \textit{Id.}
\item \textit{Id.}
\item See \textit{generally} ALERT Drivers Act, S. 1536 111th Cong. (2009) (finding that the ALERT Drivers Act specifically prohibits text-based communications only).
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intellectual activity distracts drivers.\textsuperscript{262} Intellectual activities include a wide variety of activities by the driver that impair their ability to drive safely and retain control of the vehicle.\textsuperscript{263}

In one study, drivers were given simple concentration exercises to perform while driving.\textsuperscript{264} Interestingly, none of the exercises required drivers to remove their eyes from the road.\textsuperscript{265} However, performing the exercises significantly diminished the drivers' ability to drive.\textsuperscript{266} Consequently, specific changes in driving behavior included tunnel vision, decreased road scanning, and decreased use of rear-view mirrors.\textsuperscript{267} Further, drivers also reduced their speed when performing the exercises.\textsuperscript{268} Therefore, the federal bill should include all types of distractions and not focus solely on text messaging while driving.

In addition to broader language, further education about the dangers of texting while driving is both urgent and necessary. Similar to the successful ad campaigns warning against the dangers of drinking and driving, the government should fund a national campaign addressing and educating the public of the dangers of distracted driving. Currently, AAA is working to help educate drivers by launching a national education campaign.\textsuperscript{269} Through the AAA national education campaign, brochures and other educational materials are available in AAA offices around the country.\textsuperscript{270}

\textsuperscript{262} AAA, \textit{supra} note 21.

\textsuperscript{263} \textit{Id.} (stating the study was funded by the AAA Foundation for Traffic Safety).

\textsuperscript{264} \textit{Id.}

\textsuperscript{265} \textit{Id.}

\textsuperscript{266} \textit{Id.}

\textsuperscript{267} \textit{Id.}

\textsuperscript{268} \textit{Id.}

\textsuperscript{269} \textit{Id.}

\textsuperscript{270} \textit{Id.}
Not only should an ad campaign help educate, but more foundations like the AAA need to work with state departments of motor vehicles to educate novice drivers.271 Young individuals receiving driver’s education to secure a state license will understand and learn about the dangers of distracted driving.272 If people are educated from the beginning of their time behind the wheel, they will be more likely to form safe habits devoting all time and attention to the road.273 Moreover, driver manuals should be revised to reflect new instructions on driving without distractions along with the dangers of distracted behavior behind the wheel.274

Lastly, the language regarding the amount of federal highway funds each state risks losing by noncompliance to the federal bill should be lowered. When compared to Dole, the case that the ALERT Drivers Act solely relies upon, twenty-five percent is seemingly coercive.275 In Dole, each state risked only five percent of their federal highway funds for each year of non-compliance.276 The ALERT Drivers Act should remain close to Dole precedent and have a lower percentage of federal funding at risk.

CONCLUSION

Although many states have made vast improvements in making the nations’ roads and highways safer by prohibiting text-based messaging, there remains some discrepancy among the legislation of individual states nationwide. Although the ALERT Drivers Act intends to combat a growing nationwide epidemic of text-based messaging while driving, it does not address any other forms of driving distractions. Ultimately a federal law needs to be implemented that includes language banning all types of distractions by

271 Id.
272 Id.
273 Id.
274 Id.
276 Id.
drivers. Such language will unify each state and promote even safer roads and highways across the country.

Federal legislation of this nature is not only constitutional, but has been implemented previously with the national alcohol consumption age. Therefore, future federal legislation prohibiting distracted driving should emulate Dole’s percentage of federal highway funding at risk. Clearly, every state recognizes the problem distracted driving poses, because every state has legislation pending, if not already passed. Therefore enforcement of a federal minimum standard should not need such an extreme risk of loss of funds attached to the legislation. Moreover, the federal legislation should use broader language, similar to the Oklahoma state statute, to address all distractions behind the wheel to create even safer roads across the country.

Awareness of the dangers of distracted driving also needs to continue to grow substantially. With more companies and individuals joining programs such as AAA, GHSA, and the Annual Distracted Driving Summit, people can easily become more educated, thus creating safer driving habits and roads. Additionally, the problem of distracted driving has been amplified by new technology, specifically with text-based communications. With the continued growth of technology, new ways to discourage distracting behaviors and activities while driving will additionally help combat the problem it created. Most importantly, Congress should not focus their attention on only text-based communications as the only distraction while driving. All forms of distractions while driving deserve federal legislation.