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MOTOR VEHICLES AND TRAFFIC Drivers' Licenses: Amend Chapter 5 of Title 40 of the Official Code of Georgia Annotated, Relating to Drivers' Licenses, so as to Provide That Examinations for Drivers' Licenses Shall be Administered Only in the English Language; Provide for an Exception; Provide for Usage of Licensed Defensive Driving Courses in Pretrial Diversion Programs; Provide That Certificates of Completion from Unlicensed Courses Shall Not Be Recognized; Provide for Related Matters; Repeal Conflicting Laws; and for Other Purposes.

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MOTOR VEHICLES AND TRAFFIC

Drivers' Licenses: Amend Chapter 5 of Title 40 of the Official Code of Georgia Annotated, Relating to Drivers' Licenses, so as to Provide That Examinations for Drivers' Licenses Shall be Administered Only in the English Language; Provide for an Exception; Provide for Usage of Licensed Defensive Driving Courses in Pretrial Diversion Programs; Provide That Certificates of Completion from Unlicensed Courses Shall Not Be Recognized; Provide for Related Matters; Repeal Conflicting Laws; and for Other Purposes.

CODE SECTIONS:	O.C.G.A. § 40-5-27 (amended), 40-5-81 (amended)
BILL NUMBER:	SB 67
ACT NUMBER:	N/A
GEORGIA LAWS:	N/A
SUMMARY:	The Bill requires that driver's license exams be taken only in the English language. An exception is provided for temporary drivers' licenses, which may be taken in a language other than English. The Bill also requires that defensive driving classes assigned as part of pretrial diversion programs be licensed by the state.
EFFECTIVE DATE:	N/A

History

English-only Provision (Section 1)

In Georgia, the Department of Driver Services (DDS) regulates the administration of driver's license examinations.¹ The Georgia driver's license exam has four different parts: the vision test, the road

1. Georgia Department of Driver Services, <http://www.dds.ga.gov/index.aspx> (last visited Apr. 7, 2009).

rules test, the road sign test, and the driving test.² The road rules test (hereinafter the written test) consists of twenty multiple choice questions.³ Anyone applying to take a driver's license test in Georgia has the option of taking the written test in twelve different languages, including English.⁴ The DDS was responsible for implementing the foreign language option for the written examination.⁵ The road sign test and the driving test, however, are only offered in English.⁶

Proponents of public safety argued that the DDS policy that allows people to take the written exam in a language other than English makes Georgia roads unsafe for motorists, because drivers who take examinations in a foreign language may not be able to read overhead road signs.⁷ Although the road sign test is given only in English, supporters were concerned with the inability of drivers not proficient in English to read signs that are crucial to safety that would *not* appear on the road sign test.⁸ These signs might include warnings such as “bridge out” or “hazardous spill.”⁹

Supporters of the English-only written exam asserted that people who drive on Georgia roads but cannot read the English language actually cause accidents; opponents of the English-only requirement, however, criticized this position, and admonished the lack of supporting evidence.¹⁰ Opponents of the English-only requirement explain that rather than making roads safer, “[t]he whole purpose [of the bill] is to stigmatize communities of those people who are

2. *Id.* (follow “Driver License Information” hyperlink; then follow “Testing Information” hyperlink).

3. *Id.*

4. Video Recording of Senate Proceedings, Mar. 10, 2009 at 11 min., 16 sec. (remarks by Sen. Jack Murphy (R-27th)), <http://www.gpb.org/lawmakers-tv/video-archive> (Windows Media Player link mms://mediam1.gpb.org/ga/leg/2009/senate_031009_1P.wmv) [hereinafter Senate Video]. In addition to English, the written driver's license exam could be taken in Korean, Russian, Laotian, Polish, Japanese, Spanish, Bosnian, Arabic, Cambodian, Chinese, and Vietnamese. *Id.*

5. *Id.* at 31 min., 11 sec. (remarks by Sen. Jack Murphy (R-27th)).

6. *Id.* at 37 min., 30 sec. (remarks by Sen. Jack Murphy (R-27th)); Georgia Department of Driver Services, *supra* note 1 (follow “Driver License Information” hyperlink; then follow “Testing Information” hyperlink).

7. Senate Video, *supra* note 4, at 11 min., 16 sec. (remarks by Sen. Jack Murphy (R-27th)).

8. Senate Video, *supra* note 4, at 37 min., 30 sec. (remarks by Sen. Jack Murphy (R-27th)).

9. Interview with Sen. Jack Murphy (R-27th) (Mar. 25, 2009) [hereinafter Murphy Interview].

10. Senate Video, *supra* note 4, at 20 min., 2 sec. and 47 min., 29 sec. (remarks by Sen. Nan Orrock (D-36th)).

different.”¹¹ Others have even called the English-only requirement “anti-immigrant and openly hostile towards immigrants.”¹² Many Georgians were concerned about the message the English-only requirement would send to foreign companies who have recently come to Georgia and are contributing to the local economy.¹³

There have been efforts on the state and national level to support English-only requirements, and on the flip side, to improve access to government services for people with limited English proficiency (LEP).¹⁴ On August 11, 2000, sitting President Bill Clinton signed an executive order requiring all federal agencies to “develop and implement a system by which LEP persons can meaningfully access those services consistent with, and without unduly burdening, the fundamental mission of the agency.”¹⁵ Clinton’s executive order rested on the Civil Rights Act of 1964, which bans discrimination based on national origin.¹⁶

On the other hand, the Federal Motor Carrier Safety Administration requires that drivers be able to read and speak English well enough to understand traffic signs and signals, respond to official inquiries, and complete reports.¹⁷ Some supporters of the English-only requirement for Georgia driver’s license exams have used this federal regulation to support their position.¹⁸

Georgia is not the only state that has considered an English-only driver’s license provision; Alabama passed its own version of the requirement.¹⁹ In 1990, Alabama made English the official language of the state by amending the state constitution, and under that amendment, mandated that driver’s license exams be administered

11. *English-only License Test Close to Approval*, *supra* note 7 (quoting Rep. Pedro Marin (D-96th)).

12. Jerry Gonzalez, *Anti-immigrant View Hurts State*, ATLANTA J.-CONST., Apr. 1, 2009, at A12, available at 2009 WLNR 6072062.

13. Senate Video, *supra* note 4, at 39 min., 10 sec. (remarks by Sen. Seth Harp (R-29th)) (speaking about the new Kia facility coming to the LaGrange area in his district); Gonzales, *supra* note 12 (explaining that although Kia Motors created 2,500 jobs in Georgia, English-only requirements discourage business by saying to the company “KIA GO HOME. We want your money but not your people.”).

14. Exec. Order No. 13,166, 65 Fed. Reg. 50,121 (Aug. 11, 2000).

15. *Id.*

16. *ProEnglish v. Bush*, 70 F. App’x 84, 85 (4th Cir. 2003).

17. 49 C.F.R. § 391.11 (1998).

18. Senate Video, *supra* note 4, at 35 min., 6 sec. (remarks by Sen. Chip Rogers (R-21st)).

19. *Alexander v. Sandoval*, 532 U.S. 275, 279 (2001).

only in English.²⁰ Martha Sandoval represented a class of non-English speaking individuals when she challenged Alabama's English-only requirement.²¹ Although her claim was successful in the lower courts, the case was appealed to the Supreme Court of the United States where the Court dismissed her claim without ruling on the merits of the case.²²

In 2008, Georgia also attempted to pass a constitutional amendment making English the official language of the state.²³ The amendment would have required all driver's license exams to be taken in English.²⁴ The bill did not pass the House because "opponents argued it would be bad for business," citing the potential disadvantage of turning away international companies that wanted to do business in Georgia.²⁵

Defensive Driving Provision (Section 2)

Some municipal courts in Georgia require convicted traffic offenders to take a six hour defensive driving course and then accept the course for ticket dismissal.²⁶ Many of these courts dismissed tickets for offenders who took defensive driving courses that were not licensed by the state.²⁷ In 2008, the legislature passed a bill that

20. ALA. CONST. art. I, § 36.01; *Alexander*, 532 U.S. at 279.

21. *Alexander*, 532 U.S. at 279.

22. *Id.* The Court stated that it would not address "whether the courts below were correct to hold that the English-only policy had the effect of discriminating on the basis of national origin," and instead only determined that Sandoval had no private cause of action to challenge Alabama's English-only policy. *Id.* The dissent left open the possibility that Sandoval could sue under another statute, 42 U.S.C. § 1983 (2006), and potentially be successful with her claim. *Id.* at 300.

23. HR 413 (HCS), 2008 Ga. Gen. Assem.

24. *Id.* The text of the bill stated the following: "No law, ordinance, decree, program, or policy of this state . . . including, but not limited to, the administration of driver's license examinations for all classes of licenses by the Department of Driver Services, shall use any language other than English for any documents, regulations, orders, transactions, proceedings, meetings, programs, or publications . . ." *Id.*

25. Posting of Rickey Bevington to GPB News Blog, English-Only Fails in State House, <http://gpbnews.blogspot.com/2008/02/english-only-fails-in-state-house.html> (Feb. 26, 2008).

26. Video Recording of House Committee Meeting, Mar. 24, 2009 at 55 min., 50 sec. (remarks by Rep. Tom Rice (R-51st)), http://www.legis.state.ga.us/legis/2009_10/house/Committees/motorVehicles/motorArchives.htm [hereinafter House Committee Video].

27. *Id.*

would allow some traffic offenders to take online defensive driving courses at the discretion of the court; however, the bill was later vetoed by Governor Sonny Perdue.²⁸ Critics of the bill were concerned that it would allow traffic offenders to easily side step punishment by either having someone else take the test for them, or taking the test while enjoying their favorite television show at home.²⁹

To illustrate the problems with unlicensed courses and to persuade the Governor to veto the bill, Driving Educators of Georgia signed “Scooby Doo” up for an online defensive driving class in Florida where there was a similar law to the Georgia bill the organization opposed.³⁰ The fictional cartoon character passed the course and received a certificate of completion.³¹

Bill Tracking of SB 67

Consideration and Passage by the Senate

Senators Jack Murphy (R-27th), Chip Rogers (R-21st), Chip Pearson (R-51st), Jeff Mullis (R-53rd), and Bill Heath (R-31st), respectively, sponsored SB 67.³² The Senate read the bill for the first time on January 29, 2009.³³

As the bill was originally introduced, it required that all written and oral driver’s license examinations “be administered only in the English language,” with an exception for applicants who were eligible for a temporary license.³⁴

The Senate Public Safety Committee amended SB 67 by adding a list of individuals who were eligible for temporary licenses.³⁵ The

28. Ben Smith, *Foes of Web Driving Class Team Up with Scooby Doo*, ATLANTA J.-CONST., May 8, 2008, at D1, available at 2008 WLNR 8613020 (explaining the potential problems with HB 1027, which passed both Houses in 2008 but was later vetoed by Georgia’s Governor).

29. *Id.*

30. *Id.*

31. *Id.*

32. See SB 67, as introduced, 2009 Ga. Gen. Assem.

33. State of Georgia Final Composite Status Sheet, SB 67, Apr. 3, 2009.

34. SB 67, as introduced, 2009 Ga. Gen. Assem.

35. The list of individuals eligible for a temporary license was already contained in O.C.G.A. § 40-5-21.1 (2007); SB 67 (SCS), 2009 Ga. Gen. Assem.

Committee changed the existing provision by adding a limitation that provided “no person shall, during his or her lifetime, be issued temporary licenses or permits by examination in any language other than English for a total combined period of six years.”³⁶ A temporary permit is valid for a maximum of three years; therefore, a non-permanent resident staying in Georgia for more than six years could only take the driver’s license exam twice in a language other than English.³⁷ One of the reasons the Senate removed the enumeration of individuals eligible for a temporary license is that this list was already a part of another code section.³⁸

The Senate Public Safety Committee favorably reported on the bill on March 4, 2009 and the Senate read it for the second time the following day.³⁹ On March 10, 2009, the Senate read the bill a third time and passed SB 67 by a vote of 37 to 14.⁴⁰ On April 3, 2009, after the House passed the bill by committee substitute by a vote of 104 to 58, the bill failed to pass as amended by the House; the final Senate vote was tied at 22 to 22.⁴¹

Consideration and Passage by the House

The House of Representatives first read SB 67 on March 12, 2009.⁴² The House removed the bill from the Transportation Committee and recommitted it to the Motor Vehicles Committee and read the bill for the second time on March 17, 2009.⁴³ The Motor Vehicles Committee amended SB 67 by adding section 2 which addresses defensive driving courses.⁴⁴ The amendment mandated misdemeanor traffic courts to require traffic offenders to complete a

36. SB 67 (SCS), p. 2, ln. 35–37, 2009 Ga. Gen. Assem.

37. O.C.G.A. § 40-5-21.1 (2007); SB 67 (SCS), 2009 Ga. Gen. Assem.

38. O.C.G.A. § 40-5-21.1 (2007); Murphy Interview, *supra* note 9.

39. State of Georgia Final Composite Status Sheet, SB 67, April 3, 2009.

40. *Id.*; Georgia Senate Voting Record, SB 67 (March 10, 2009).

41. Georgia Senate Voting Record, SB 67 (April 3, 2009); Georgia House of Representatives Voting Record, SB 67 (March 30, 2009).

42. State of Georgia Final Composite Status Sheet, SB 67, April 3, 2009.

43. *Id.*

44. House Committee Video, *supra* note 26.

licensed defensive driving course regulated by the Department of Driver Services.⁴⁵

At the House Motor Vehicles Committee meeting held on March 24, 2009, Chairman Tom Rice (R-51st) explained why the Committee added section 2 to amend SB 67.⁴⁶ Representative Rice stated that the section 2 amendment was meant to correct the problems with defensive driving courses from the 2008 session.⁴⁷ The members of the Committee unanimously voted in favor of SB 67 as amended by the Committee.⁴⁸ The Committee then favorably reported on SB 67 on March 25, 2009.⁴⁹ The House of Representatives read the bill for the third time on March 30, 2009, and passed the bill by a vote of 104 to 58.⁵⁰

The Bill

Section 1 of the Bill would have added a new subsection, 40-5-27(e), mandating that all written and oral examinations required for driver's license applicants be administered only in English.⁵¹ Section 1 does, however, provide for an exception to the English-only rule for persons eligible for temporary licenses under Code section 40-5-21.1.⁵² Representative Alan Powell (D-29th) explained the exception,

45. SB 67 (HCS), 2009 Ga. Gen. Assem.

46. House Committee Video, *supra* note 26, at 56 min., 20 sec. (remarks by Rep. Tom Rice (R-51st)).

47. *Id.*

48. *Id.* at 58 min., 3 sec.

49. State of Georgia Final Composite Status Sheet, SB 67, Apr. 3, 2009.

50. Georgia House of Representatives Voting Record, SB 67 (Mar. 30, 2009).

51. SB 67 (SCS), p. 1, ln. 13–16, 2009 Ga. Gen. Assem. The “road rules” test is currently available in multiple languages in addition to English. *See* Senate Video, *supra* note 4, at 11 min., 16 sec. (remarks by Sen. Jack Murphy (R-27th)).

52. SB 67 (SCS), p. 1, ln. 13–16, 2009 Ga. Gen. Assem. O.C.G.A. § 40-5-21.1 (2007) states that applicants may be issued a temporary license if they present documentary evidence of:

- (1) Admission to the United States in a valid, unexpired nonimmigrant status; (2) A pending or approved application for asylum in the United States; (3) Admission into the United States in refugee status; (4) An approved application for temporary protected status in the United States; (5) Approved deferred action status; or (6) Other federal documentation verified by the United States Department of Homeland Security to be valid documentary evidence of lawful presence in the United States under federal immigration law.

O.C.G.A. § 40-5-21.1 (2007).

noting that “it [has] been the policy of [Georgia] . . . that we make accommodation for those [individuals] who are going to be here on a short-term basis.”⁵³ For example, foreign executives from corporations such as Kia or Coca-Cola,⁵⁴ or seasonal migratory workers,⁵⁵ would still be permitted to take the driver’s license examination in any of the many languages currently available.⁵⁶

Section 2 of the Bill would have amended subsection of (a) of Code section 40-5-81 to require the licensing and approval of driver improvement programs “at which attendance is required by court order.”⁵⁷ The Department of Human Resources, currently charged with approving and certifying DUI Alcohol or Drug Use Risk Reduction Programs and staff,⁵⁸ would have been given licensing authority.⁵⁹

Analysis

Economic Impact

Critics of SB 67 worried about the message that the English-only license examination provision might send to immigrant communities in Georgia,⁶⁰ and that this message might deter future economic development in the state by signaling to foreign investors that they are not welcome in Georgia.⁶¹ Meanwhile, supporters of SB 67

53. Video Recording of House Proceedings, Mar. 30, 2009 (II) at 4 hr., 36 min., 19 sec. (remarks by Rep. Alan Powell (D-29th)), http://www.ga.gov/00/article/0,2086,4802_6107103_129987579,00.html [hereinafter House Floor Video].

54. See House Floor Video, *supra* note 53, at 4 hr., 36 min., 19 sec. (remarks by Rep. Alan Powell (D-29th)).

55. See Senate Video, *supra* note 4, at 15 min., 1 sec. (remarks by Sen. Jack Murphy (R-27th)) (“[SB 67] has nothing to do with migrant workers which we appreciate very much coming to this state and removing our crops.”).

56. SB 67 (SCS), p. 1, ln. 13–16, 2009 Ga. Gen. Assem. (“[T]he department may administer examinations to persons eligible for a temporary license . . . in a language other than English.”).

57. SB 67 (SCS), p. 1, ln. 13–16, 2009 Ga. Gen. Assem.

58. O.C.G.A. § 40-5-82 (2007).

59. SB 67 (SCS), p. 2, ln. 35–37, 2009 Ga. Gen. Assem.

60. Senate Video, *supra* note 4, at 17 min. 51 sec. (remarks by Sen. Nan Orrock (D-36th)) (“What message are we sending to people that are here as students enrolled in our schools and yet cannot take the exam in their native tongue?”).

61. See *infra* notes 63–66 and accompanying text.

downplayed any potential economic effects, insisting that the Bill is purely a public safety regulation.⁶²

In the Senate Floor debate, Senator Nan Orrock (D-36th) took the lead in expressing fears that Senate Bill 67 could potentially deter foreign investment:

What is our message that we send to the financiers and manufacturers of another nation who have seen fit to bring their capital and technology and build cars in our state? We say to them, 'No, we're real busy over here . . . so don't come . . . expecting that you're going to drive on our roads.'⁶³

In the House Floor debate, Representative DuBose Porter (D-143rd) reiterated the concerns of Senator Orrock by first noting that “a plant has just completed an eighty million dollar expansion in [Georgia], and it could have gone anywhere in the world, but it came to Georgia”⁶⁴ because the state has historically sought out and welcomed foreign investment.⁶⁵ He added that, in his opinion, SB 67 and the message it might send would “put a chill on [foreign investment].”⁶⁶

In response to these criticisms, Senator Jack Murphy (R-27th), the bill's sponsor, focused exclusively on the public safety purpose of the English-only examination provision: “the reason . . . [SB 67] was brought forth is strictly for public safety.”⁶⁷ Senator Murphy dismissed concerns about implicit discriminatory signals and the possibility of economic repercussions.⁶⁸ While Senator Seth Harp (R-29th) expressed particular concern in the Senate debate about the bill's effect vis-à-vis the new Kia facility that will be located in West

62. See, e.g., Senate Video, *supra* note 4, at 11 min., 16 sec. (remarks by Sen. Jack Murphy (R-27th)) (“[T]he reason the bill was brought forth is strictly for public safety.”).

63. Senate Video, *supra* note 4, at 46 min., 11 sec. (remarks by Sen. Nan Orrock (D-36th)).

64. House Floor Video, *supra* note 53, at 4 hr., 31 min., 42 sec. (remarks by Rep. DuBose Porter (D-143rd)).

65. See, e.g., Kia to Build Assembly Plant, Invest \$1.2 Billion in Georgia, http://gov.georgia.gov/00/press/detail/0,2668,78006749_90418617_114667987,00.html.

66. House Floor Video, *supra* note 53, at 4 hr., 31 min., 42 sec. (remarks by Rep. DuBose Porter (D-143rd)).

67. Senate Video, *supra* note 4, at 11 min., 16 sec. (remarks by Sen. Jack Murphy (R-27th)).

68. Senate Video, *supra* note 4, at 17 min., 21 sec. (remarks by Sen. Jack Murphy (R-27th)).

Point, Georgia, Senator Murphy noted that “during our hearings on this bill we never had one person come from the Kia plant . . . and testify against this bill.”⁶⁹

It is not clear at this point what economic effects Senate Bill 67 would have had on the Georgia economy. Georgia has made successful efforts in recent years to woo foreign investors such as Kia.⁷⁰ Though there is no evidence at this time that foreign investment would be deterred by the measure, several organizations representing immigrant communities opposed SB 67 and the message they believe it sends to their constituents.⁷¹ These organizations presumptively represent the views of their communities, but it remains to be seen whether they also represent the views of international investors.

Litigation

Supporters of SB 67 repeatedly stressed the public safety goals that motivated introduction of the bill.⁷² Notwithstanding the express intentions of SB 67’s supporters, however, the English-only license examination will undoubtedly be challenged in court if passed. The English-only provision does discriminate against non-English speakers on its face, and this could form the basis for various statutory and constitutional challenges.

Federal Statutory and Regulatory Challenges

Under Title VI of the Civil Rights Act of 1964, “No person in the United States shall on the ground of race, color, or national origin . . . be subjected to discrimination under any program or activity

69. Senate Video, *supra* note 4, at 42 min., 53 sec. (remark by Sen. Jack Murphy (R-27th)).

70. *See supra* note 65.

71. *See, e.g.*, Posting of Carl Zornes to GPB News Blog, Georgia Drives Closer to English-Only License Testing, <http://gpbnews.blogspot.com/2009/03/georgia-drives-closer-to-english-only.html> (Mar. 24, 2009) (noting opposition to the bill by the Mexican American Legal Defense and Educational Fund and the Korean American Coalition).

72. *See* Senate Video, *supra* note 4, at 20 min., 2 sec. and 47 min., 29 sec. (remarks by Sen. Nan Orrock (D-36th)); *see also* House Floor Video, *supra* note 53, at 4 hr., 14 min., 11 sec. (remarks by Rep. James Mills (R-25th)) (“This is a public safety issue . . .”).

receiving Federal financial assistance.”⁷³ Though the scope of Title VI is not explicit in the statute itself, it has been interpreted to prohibit only *intentional* discrimination.⁷⁴ SB 67 does clearly and intentionally discriminate against non-English speakers, but it is not clear whether the classification will be interpreted by a court as based on national origin (prohibited under Title VI), or just linguistic proficiency (not prohibited).⁷⁵ The Eleventh Circuit noted in *Sandoval v. Hagan* that “[t]he Supreme Court never has held that language may serve as a proxy for national origin for equal protection analysis.”⁷⁶ Thus, absent new precedent, it appears unlikely that a federal court will equate language with national origin, and therefore any challenge to an English-only provision under Title VI would be probably not be successful.

Challengers could in addition assert that SB 67 is invalid based not on intentional discrimination but instead on its discriminatory impact on non-English speakers. However, non-constitutional challenges to government action alleging discriminatory *impact*—rather than *intent*—took a serious blow in *Alexander v. Sandoval*.⁷⁷ In 1990, Alabama passed a constitutional amendment declaring that English was the official state language.⁷⁸ Alabama’s Department of Public Safety then implemented a policy of English-only driver’s license examinations.⁷⁹ The policy was challenged as violating a federal Department of Justice regulation promulgated pursuant to Title VI of the Civil Rights Act of 1964, which prohibited actions resulting in disparate racial impact.⁸⁰ In 2001, the Supreme Court dismissed the case.⁸¹ The Court first reinforced the notion that Title VI itself

73. 42 U.S.C. § 2000d (2000).

74. See *Alexander v. Choate*, 469 U.S. 287 (1985).

75. See Crystal Goodson Wilkerson, Comment, *Patriotism or Prejudice: Alabama’s Official English Amendment*, 34 CUMB. L. REV. 253, 276–79 (2003–2004).

76. *Sandoval v. Hagan*, 197 F.3d 484, 509 n.26 (11th Cir. 1999). The Eleventh Circuit did, however, admit that “existent case law is unclear as to whether language [proficiency] may serve as a proxy for *intentional* national original discrimination claims of either a constitutional or statutory nature.” *Id.* at 509.

77. *Alexander v. Sandoval*, 532 U.S. 275 (2001).

78. *Id.* at 278.

79. *Id.* at 279.

80. *Id.*

81. *Id.*

“prohibits only *intentional* discrimination.”⁸² But the Court did assume, in contrast, the validity of federal regulations promulgated under Title VI that “proscribe[d] activities that have a *disparate impact* on racial groups.”⁸³ However, the Court proceeded to reject the availability of private actions arising under those federal regulations, so the assumed validity of disparate impact regulations was of no avail.⁸⁴

In response to the Supreme Court’s holding in *Alexander*, there have been recent proposals introduced in Congress to amend Title VI to allow individuals to bring private actions for disparate impact.⁸⁵ For example, H.R. 5129, the Civil Rights Act of 2008, would have added language to Title VI specifically to codify the availability of a private disparate impact action under the statute.⁸⁶ H.R. 5129 was proposed in the previous Congress and failed to make it out of committee,⁸⁷ but if another Bill like it were passed, it might very well open the door to a successful challenge to SB 67 under Title VI.

82. *Id.* at 280 (emphasis added).

83. *Alexander*, 532 U.S. at 281–82 (emphasis added).

84. *Id.* at 291 (“[I]t is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress.”). The federal regulation at issue in *Alexander v. Sandoval* was a Department of Justice regulation promulgated under Title VI that forbid recipients of federal funds from “utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin” 28 C.F.R. § 42.104(b)(2). It is worth noting that the Court did not overturn the district court’s finding that the Alabama English-only policy “subjected non-English speakers to discrimination based on their national origin.” *Alexander*, 532 U.S. at 279 (“We do not inquire here whether . . . the courts below were correct to hold that the English-only policy had the effect of discriminating on the basis of national origin.”).

85. See Paul Taylor, *The Risks Posed to National Security and Other Programs by Proposals to Authorize Private Disparate Impact Claims Under Title VI*, 46 HARV. J. ON LEGIS. 57, 65 (discussing proposed legislation).

86. Civil Rights Act of 2008, H.R. 5129, 110th Cong. (2008). The bill states the following:

Discrimination (including exclusion from participation and denial of benefits) based on disparate impact is established under this title if (i) a person aggrieved by discrimination on the basis of race, color, or national origin . . . demonstrates that an entity . . . has a policy or practice that causes a disparate impact on the basis of race, color, or national origin and the covered entity fails to demonstrate that the challenged policy or practice is related to and necessary to achieve the nondiscriminatory goals of the program or activity”

Civil Rights Act of 2008, H.R. 5129, 110th Cong. (2008).

87. See Govtrack.us, H.R. 5129: Civil Rights Act of 2008, <http://www.govtrack.us/congress/bill?bill=h110-5129> (last visited Sept. 29, 2009).

Another possible avenue for statutory challenges to SB 57 is under 42 U.S.C. § 1983.⁸⁸ Section 1983 states the following:

Every person who . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding⁸⁹

In *Alexander*, Justice Stevens indicated in his dissenting opinion that a disparate impact claim could still be brought under § 1983 for violations of regulations prohibiting disparate impact—despite the Court's rejection of such claims under Title VI.⁹⁰ For instance, “a violation of regulations adopted pursuant to [T]itle VI may be established by proof of discriminatory impact in a § 1983 action against state actors,” even though an action could not be sustained under Title VI itself.⁹¹ Federal circuit courts are split, however, on the question “whether federal regulations [such as those issued under Title VI, which prohibit state actions with discriminatory effects] are ‘laws’ of the United States within the meaning of § 1983,”⁹² and the Supreme Court has “never squarely addressed the issue.”⁹³ Given the circuit conflict and Supreme Court silence, it is not clear whether a disparate impact claim could be sustained under § 1983. It does, however, remain at least a potentially viable option for challengers to

88. 42 U.S.C. § 1983 (2000).

89. *Id.*

90. *Alexander*, 532 U.S. at 300 n.6 (Stevens, J., dissenting) (“I [think] that a violation of regulations adopted pursuant to Title VI may be established by proof of discriminatory impact in a § 1983 action against state actors and also in an implied action against private parties.”); *see also* Adele P. Kimmel, Rebecca Epstein, & James L. Ferraro, *The Sandoval Decision and Its Implications for Future Civil Rights Enforcement*, 76 FL. B. J. 24, 27–28 (discussing the viability of a § 1983 claim for discriminatory impact). The Court assumed that federal regulations issued under section 602 of Title VI “may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under section 601.” *Alexander*, 532 U.S. at 281.

91. *Alexander*, 532 U.S. at 300 n.6.

92. Kimmel et al., *supra* note 90, at 27.

93. *Id.*

SB 67 given the Court's rejection of private actions under Title VI itself.

Federal Constitutional Challenges

The Equal Protection Clause of the U.S. Constitution provides that no state "shall deny to any person within its jurisdiction the equal protection of the laws."⁹⁴ The Supreme Court has long held, however, that the Fourteenth Amendment only prohibits *intentional* discrimination where non-fundamental rights are at issue.⁹⁵ Consequently, any challenge under the Fourteenth Amendment would face the same obstacle as a challenge under Title VI.⁹⁶ Namely, there is no Supreme Court precedent to support the claim that an English-only provision intentionally discriminates on the basis of race or ethnic origin rather than merely on the basis of linguistic proficiency. Moreover, the express intentions of SB 67's sponsor and General Assembly supporters is to protect public highway safety—a legitimate state interest.⁹⁷ As a result, it will be very difficult to prove that SB 67 is an example of arbitrary, invidious discrimination and made on the basis of race or ethnic origin. Although discriminatory intent may be inferred from circumstantial evidence,⁹⁸ such an inference is only warranted when the disparate impact is "stark."⁹⁹ Despite the bill's impact on non-English speakers, the threshold established by the Supreme Court would likely not be satisfied.¹⁰⁰

The Court has held that evidence of disparate impact may be sufficient to invalidate as unconstitutional a state action where a

94. U.S. Const. amend. XIV, § 1.

95. See *Washington v. Davis*, 426 U.S. 229 (1976).

96. See *supra* notes 74–76.

97. See *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 445 n.19 (noting that "highway safety regulations[] are entitled to a strong presumption of validity" because they are related to public safety).

98. See *Hunter v. Underwood*, 471 U.S. 222 (1985); *Rogers v. Lodge*, 458 U.S. 613 (1982).

99. *Arlington Heights v. Metro. Hous. Corp.*, 429 U.S. 252 (1977).

100. See, e.g., *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (holding that a facially neutral re-drawing of the city of Tuskegee's boundaries was motivated by a discriminatory purpose because it removed from the city all but four or five African-Americans, but not a single white resident); cf. *Washington*, 426 U.S. at 245–47 (rejecting an Equal Protection challenge resulting from the use of a hiring test that excluded a "disproportionately high number" of black applicants).

fundamental right is at issue;¹⁰¹ however, this branch of Supreme Court equal protection jurisprudence has been narrowly cabined over the years.¹⁰² The right to a driver's license has never been held to be a fundamental interest, and even if the right at issue is interpreted more broadly as a "right to travel," or "move freely," it is unlikely that the Supreme Court will invalidate SB 67 under an Equal Protection attack.¹⁰³

State Statutory Challenges

Unlike at the federal level, there simply are no general antidiscrimination statutes in the state of Georgia that might be used to invalidate SB 67.¹⁰⁴

State Constitutional Challenges

Article 1, Section 1, Paragraph II of the Georgia Constitution states that "[p]rotection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws."¹⁰⁵ The language closely mirrors the language of the Fourteenth Amendment of the U.S. Constitution, and the Georgia Supreme Court has noted that the clause and its effect are "substantially equivalent" to the federal Equal Protection Clause.¹⁰⁶ Accordingly, any challenge to SB 57 under the Georgia Constitution would be addressed in a similar

101. See, e.g., *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966).

102. See KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 638 (16th ed. 2007) ("[The] Court has developed this line of cases in only a very few areas.").

103. See Matthew A. Dombroski, Note, *Securing Access to Transportation for the Urban Poor*, 105 COLUM. L. REV. 503, 516–25 (2005) (discussing Supreme Court jurisprudence on the fundamentality of rights related to mobility).

104. See LEGAL ACTION CENTER, *GEORGIA LAWS REGARDING DISCRIMINATION* (2006).

105. GA. CONST. of 1986, art. I, § I, para. II.

106. *Henry v. State*, 507 S.E.2d 419 (Ga. 1998); see also *Ackerman v. Columbus*, 269 F. Supp. 2d 1354, 1361 (M.D. Ga. 2003) ("The Equal Protection Clause of the Georgia Constitution, Ga. Const., art. I, § 1, para. II, has been interpreted by Georgia courts to be consistent with the federal Equal Protection Clause. Therefore, the Court's analysis of Plaintiffs' state law equal protection claim mirrors its analysis of their federal equal protection claim.") (citations omitted); *Grissom v. Gleason*, 418 S.E.2d 27, 29 (Ga. 1992) ("[P]rotection of the equal protection clause in the 1983 Georgia Constitution and the United States Constitution is coextensive.").

manner—in other words, unless a “suspect class” or “fundamental right” is implicated, the law need only “survive the ‘rational basis’ test.”¹⁰⁷ SB 67 appears rationally related to Georgia’s legitimate interest in protecting highway safety,¹⁰⁸ thus weakening an inference of discriminatory animus. Consequently, the public safety nature of the requirement would likely prove sufficient to sustain it against future challenges under Georgia’s Equal Protection Clause.

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107. *Morgan County Bd. of Comm’rs v. Meador*, 626 S.E.2d 79, 82 (Ga. 2006).

108. *See Farley v. State*, 531 S.E.2d 100, 102 (Ga. 2000) (holding that a Georgia law requiring the use of seatbelts in passenger vehicles, but not pick-up trucks, did not violate equal protection because it bore a “direct relation to the goal of improving public safety”).