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STATE GOVERNMENT

Illegal Immigration Reform and Enforcement Act of 2011: Enact the “Illegal Immigration Reform and Enforcement Act of 2011”; Amend Article 3 of Chapter 10 of Title 13 of the Official Code of Georgia Annotated, Relating to Security and Immigration Compliance, so as to Provide Penalties for the Failure of a Public Employer to Utilize the Federal Work Authorization Program; Require Certain Private Employers to Utilize the Federal Work Authorization Program; Provide for Review by the State Auditor and the Department of Labor; Provide for Definitions; Amend Title 16 of the Official Code of Georgia Annotated, Relating to Crimes and Offenses, so as to Provide for Offenses Involving Illegal Aliens; Provide for the Offense of Aggravated Identity Fraud; Provide for Penalties; Amend Chapter 5 of Title 17 of the Official Code of Georgia Annotated, Relating to Searches and Seizures, so as to Provide for the Investigation of Illegal Alien Status; Amend Title 35 of the Official Code of Georgia Annotated, Relating to Law Enforcement Officers and Agencies, so as to Provide Authority for Law Enforcement Officers to Enforce Federal Immigration Laws Under Certain Circumstances and to Provide Immunity for Such Officers Subject to Limitations; Provide for Civil and Criminal Penalties; Modify Provisions Relating to Training Peace Officers for Enforcement of Immigration and Custom Laws; Establish Grant Funding for Local Law Enforcement Agencies to Enter into Agreements with Federal Agencies for the Enforcement of Immigration Law; Amend Chapter 60 of Title 36 of the Official Code of Georgia Annotated, Relating to General Provisions Applicable to Local Governments, so as to Require Proof that Private Businesses Are Participating in the Employment Eligibility Verification System Prior to the Issuance of a Business License or Other Documents; Amend Title 42 of the Official Code of Georgia Annotated, Relating to Penal Institutions, so as to Provide for the Verification of the Immigration Status of Foreign Nationals Arrested and Held in a County or Municipal Jail; Provide that Local Governing Authorities that Have Entered or Attempted to

Enter into Certain Memorandums of Agreement with the Federal Government Shall Receive Additional Funding for Confinement of State Inmates; Provide for a Funding Contingency; Amend Title 45 of the Official Code of Georgia Annotated, Relating to Public Officers and Employees, so as to Provide for Penalties for Failure of Agency Heads to Abide by Certain State Immigration Laws; Amend Chapter 36 of Title 50 of the Official Code of Georgia Annotated, Relating to Verification of Lawful Presence within the United States, so as to Provide for Identification Documents by Applicants for Public Benefits; Enact the “Secure and Verifiable Identity Document Act”; Provide Penalties for the Failure of an Agency Head to Verify the Lawful Immigration Status of Certain Applicants for Public Benefits; Establish the Immigration Enforcement Review Board; Establish a Study on the Impact of Immigration Reform on Georgia’s Agricultural Industry within the Department of Agriculture; Provide for Related Matters; Provide for an Effective Date and Applicability; Repeal Conflicting Laws; and for Other Purposes.

CODE SECTIONS: O.C.G.A. §§ 13-10-90, -91 (amended); 16-9-121.1 (new), 16-9-126, -128 (amended); 16-11-200, -201, -202, -203 (new); 17-5-100 (new); 35-1-17 (new); 35-2-14 (amended); 35-6A-10 (new); 36-60-6 (amended); 42-4-14 (amended); 42-5-51 (amended); 45-10-28 (amended); 50-36-1 (amended); 50-36-2, -3 (new)

BILL NUMBER: HB 87

ACT NUMBER: 252

GEORGIA LAWS: 2011 Ga. Laws 794

SUMMARY: The Act provides penalties for failure of a public employer to utilize the federal work authorization program, requires certain private employers to utilize the federal work authorization program, and requires proof of such participation. The Act creates offenses

involving illegal aliens, including knowingly transporting, harboring, or inducing an illegal alien, and creates the offense of aggravated identity fraud. The Act gives law enforcement officers the authority to enforce federal immigration laws, allows them to investigate illegal alien status under certain circumstances, and provides for their immunity. The Act provides penalties for the failure of agency heads to verify the lawful immigration status of applicants for public benefits. The Act also creates the “Secure and Verifiable Identify Document Act” and the Immigration Enforcement Review Board.

EFFECTIVE DATE: July 1, 2011

History

House Bill (HB) 87 was introduced “to address social and economic consequences” caused by the federal government’s failure to adequately secure our borders over the last thirty years.¹ Representative Matt Ramsey (R-72nd) cited to a U.S. Government Accountability Office study which estimated that the U.S. Border Patrol has operational control of only forty-four percent of the southwest border.² “No doubt about it, our federal government has

1. Interview with Rep. Matt Ramsey (R-72nd) (Mar. 29, 2011) (on file with the Georgia State University Law Review); Video Recording of House Proceedings, Mar. 3, 2011 at 11 min., 07 sec. (remarks by Rep. Matt Ramsey (R-72nd)), http://mediam1.gpb.org/ga/leg/2011/ga-leg-house_030311_AM.wmv [hereinafter March House Video].

2. March House Video, *supra* note 1, at 1 hr., 25 min., 9 sec. (remarks by Rep. Matt Ramsey (R-72nd)). See BORDER SECURITY: PRELIMINARY OBSERVATIONS ON BORDER CONTROL MEASURES FOR THE SOUTHWEST BORDER, U.S. GOV’T ACCOUNTABILITY OFFICE (Feb. 15, 2011) available at <http://www.gao.gov/products/GAO-11-374T> (“Border Patrol reported achieving varying levels of operational control for 873 of the nearly 2,000 southwest border miles at the end of the fiscal year 2010 . . .”).

failed us,” he explained during his presentation of HB 87 to the House, “and our citizens in Georgia are suffering the consequences.”³

The number of illegal aliens present in Georgia is a major consequence of the lack of border control. Representative Ramsey cited a few statistics during his presentation of the bill: Georgia ranks seventh⁴ in the country with approximately 425,000 illegal aliens;⁵ the Department of Homeland Security estimates that over the last ten years, Georgia has led the country with an estimated 115% increase of illegal aliens as a percentage of the general population, while Arizona, with less illegal aliens, only had a forty-two percent increase;⁶ and it has been argued that the presence of 425,000 illegal aliens in Georgia costs state taxpayers approximately \$2.4 billion per year.⁷ The social costs identified by Representative Ramsey include burdens on Georgia schools, law enforcement communities, and healthcare infrastructure.⁸

Due to the “tremendous economic burden that is placed on our citizens,” Representative Ramsey identified responsibility to the taxpayers as a reason compelling the enactment of this legislation.⁹ However, he candidly stated that the state legislature cannot “secure our nation’s borders. That’s within the federal government’s exclusive province. We don’t have the authority to deport illegal

3. March House Video, *supra* note 1, at 1 hr., 25 min., 09 sec. (remarks by Rep. Matt Ramsey (R-72nd)).

4. Representative Ramsey said Georgia ranks sixth, but the Pew Hispanic Center study reports Georgia ranks seventh. Pew Hispanic Center, *Unauthorized Immigrant Population: National and State Trends, 2010*, Feb. 1, 2011, at 14, <http://pewhispanic.org/files/reports/133.pdf>.

5. March House Video, *supra* note 1, at 1 hr., 24 min., 44 sec. (remarks by Rep. Matt Ramsey (R-72nd)).

6. March House Video, *supra* note 1, at 1 hr., 24 min., 44 sec. (remarks by Rep. Matt Ramsey (R-72nd)). See MICHAEL HOEFER, NANCY RYTINA, & BRYAN C. BAKER, OFF. OF IMMIGRATION STAT., POL. DIRECTORATE, DEP’T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2009, at 4 (2010), http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2009.pdf.

7. Video Recording of House Judiciary Non-Civil Committee Hearings, Feb. 4, 2011 at 13 min., 15 sec. (remarks by Rep. Matt Ramsey (R-72nd) and Q&As), http://media.legis.ga.gov/hav/11_12/2011/committees/judiNon/judiNon020411EDITED.wmv [hereinafter House Committee Video].

8. March House Video, *supra* note 1, at 1 hr., 28 min., 14 sec. (remarks by Rep. Matt Ramsey (R-72nd)); House Committee Video, *supra* note 7, at 13 min., 15 sec. (remarks by Rep. Matt Ramsey (R-72nd) and Q&As).

9. March House Video, *supra* note 1, at 1 hr., 43 min., 51 sec. (remarks by Rep. Matt Ramsey (R-72nd)); House Committee Video, *supra* note 7, at 12 min., 41 sec. (remarks by Rep. Matt Ramsey (R-72nd) and Q&As).

aliens that we identify.”¹⁰ Recognizing that, as state policy makers, any action must be within the bounds of the United States Constitution, the Georgia Constitution, and existing laws, the proposal sought to “remove every single incentive [possible] that lures illegal aliens to come to Georgia.”¹¹ Those are the incentives that the “taxpayers are footing the bills for.”¹²

Georgia’s initiative followed the nation-wide immigration reform movement set off by Arizona’s state legislature in 2010 with the passage of Senate Bill (SB) 1070.¹³ Just like Georgia’s motivations for HB 87, economic concerns and a perceived lack of action by the federal government were among the reasons for Arizona’s law.¹⁴ Arizona’s law makes it a state crime to be in the United States illegally and allows state law enforcement officers to determine a person’s immigration status if “reasonable suspicion” exists that the person is an illegal alien.¹⁵ Supporters and critics alike called SB 1070 the “broadest and strictest immigration measure in generations.”¹⁶ The measure has also sparked concerns about racial profiling: “Opponents have called it an open invitation for harassment and discrimination against Hispanics regardless of their citizenship status.”¹⁷ President Barack Obama has also criticized the bill.¹⁸ The United States Department of Justice (DOJ) sued Arizona to stop implementation of the law on the basis of federal preemption, challenging it as an “unconstitutional attempt to usurp federal authority over immigration policy.”¹⁹ Other groups, such as the American Civil Liberties Union and the Mexican American Legal

10. March House Video, *supra* note 1, at 1 hr., 26 min., 26 sec. (remarks by Rep. Matt Ramsey (R-72nd)).

11. *Id.*

12. *Id.*

13. S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

14. Dan Nowicki, *Arizona Immigration Law Ripples Through History, U.S. Politics*, ARIZ. REPUBLIC, July 25, 2010, <http://www.azcentral.com/news/articles/2010/07/25/20100725immigration-law-history-politics.html>.

15. S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

16. Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration*, N.Y. TIMES, Apr. 24, 2010, at A1, available at <http://www.nytimes.com/2010/04/24/us/politics/24immig.html>.

17. *Id.*

18. *Id.* At a naturalization ceremony for active duty service members, President Barack Obama said that Arizona’s law threatened “to undermine basic notions of fairness that we cherish as Americans, as well as the trust between police and our communities that is so crucial to keeping us safe.” *Id.*

19. *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010); see also Dan Nowicki, *supra* note 14.

Defense, sued on civil rights grounds.²⁰ In the DOJ suit, the federal district court did not enjoin SB 1070 in its entirety due to the law's severability clause.²¹ Instead, the district court granted an injunction as to four specific sections of SB 1070 that the court found were likely preempted by federal law:²² section 11-1051(B) requiring immigration status verification of all arrestees,²³ section 13-1509(A) making unauthorized presence of illegal aliens a state crime,²⁴ section 13-2928(C) criminalizing unauthorized work,²⁵ and section 13-3883(A)(5) authorizing warrantless arrests based on probable cause of removability.²⁶ The Ninth Circuit has affirmed the injunction on those four sections of Arizona's law.²⁷

In Georgia, the process leading to the introduction of HB 87 began when Speaker of the House David Ralston (R-7th) and Lieutenant Governor Casey Cagle (R) appointed a Special Joint Committee on Immigration Reform (the Study Committee) in the summer of 2010.²⁸ The purpose of the Study Committee was to provide a comprehensive review of Georgia's illegal immigration issue and ultimately develop a recommendation in the form of legislation to address the problem.²⁹ Representative Ramsey was appointed as the House co-chair of the Study Committee, and Senator Jack Murphy (R-27th) was appointed as the Senate co-chair.³⁰ Over the course of several months during the summer of 2010, the Study Committee conducted multiple hearings and heard testimony from a variety of groups, including the law enforcement community, private employers, public agencies, and the education community.³¹ The hearings provided Study Committee

20. United States v. Arizona, 703 F. Supp. 2d 980 (D. Ariz. 2010).

21. *Id.* at 986. Severability means that if a provision of the act is found invalid, it does not affect the other provisions. Thus, "the Court cannot and will not enjoin S.B. 1070 in its entirety, as certain parties to lawsuits challenging the enactment have requested. The Court is obligated to consider S.B. 1070 on a section by section and provision by provision basis." *Id.*

22. *See generally* United States v. Arizona, 703 F. Supp. 2d 980.

23. Ariz. Rev. Stat. Ann. § 11-1051(B) (2010).

24. Ariz. Rev. Stat. Ann. § 13-1509(A) (2010).

25. Ariz. Rev. Stat. Ann. § 13-2928(C) (2010).

26. Ariz. Rev. Stat. Ann. § 13-3883(A)(5) (2010).

27. United States v. Arizona, No. 10-16645, 2011 WL 1346945 (9th Cir. Apr. 11, 2011).

28. House Committee Video, *supra* note 7, at 9 min., 32 sec. (remarks by Rep. Matt Ramsey (R-72nd) and Q&As).

29. *Id.*

30. *Id.*

31. *Id.*

members an opportunity to hear testimony and gain insight into the type and scope of the problems faced in Georgia.³² After the Study Committee finished its fact finding mission, the House members of the Study Committee worked to draft the legislation that would become HB 87.³³

Some of the major provisions of HB 87 are similar to provisions in the Arizona law.³⁴ For these provisions, Representative Ramsey noted that the federal district court in Arizona has already ruled them constitutional as a result of the challenge to the Arizona law.³⁵ The fact that HB 87 has “language that’s been passed on already by a federal judge,” he argued, would be helpful in the event of a future legal challenge.³⁶

One issue identified by the Study Committee was that SB 529, which the Georgia General Assembly passed in 2006, did not have any enforcement mechanisms.³⁷ SB 529 required local and state governments to enroll in the federal SAVE program to verify the eligibility of an applicant for state or local benefits, as well as verify that applicant’s lawful presence in the United States.³⁸ SB 529 also required public works contractors to enroll in the “federal work authorization program,” also known as “E-verify,” to verify employment eligibility of all new employees.³⁹ However, SB 529 specifies no penalty for failing to enroll in these programs, and affected parties have not uniformly complied with the statute.⁴⁰ Therefore, one goal of HB 87 was to establish an effective enforcement mechanism to hold accountable those who violate the E-verify provision of SB 529.⁴¹

32. *Id.*

33. House Committee Video, *supra* note 7, at 11 min., 49 sec. (remarks by Rep. Matt Ramsey (R-72nd) and Q&As).

34. *Id.*

35. *Id.* See *supra* text accompanying notes 13–27.

36. *Id.*

37. *Id.*; 2006 Ga. Laws 105.

38. O.C.G.A. § 50-36-1 (Supp. 2011). SAVE is the Systematic Alien Verification of Entitlement program operated by the United States Department of Homeland Security that is used to verify a lawfully present alien’s eligibility for benefits. O.C.G.A. § 50-36-1(e) (Supp. 2011).

39. O.C.G.A. § 13-10-91 (Supp. 2011); March House Video, *supra* note 1, at 1 hr., 30 min., 31 sec. (remarks by Rep. Matt Ramsey (R-72nd)).

40. March House Video, *supra* note 1, at 1 hr., 30 min., 31 sec. (remarks by Rep. Matt Ramsey (R-72nd)).

41. *Id.*

An egregious part of the immigration problem, as explained by Representative Sharon Cooper (R-41st) at the House Judiciary Non-Civil Committee hearing, is the people who prey on illegal immigrants seeking work within the United States.⁴² Such immigrants are often smuggled into the country illegally under very bad circumstances, then mistreated and robbed once they arrive.⁴³ Representative Ramsey even recognized the policy of “get[ting] at and treat[ing] more seriously the folks that are doing this for commercial profit, individuals that are operating an enterprise.”⁴⁴

Lastly, a major motivation for the bill was to combat the root cause of illegal immigration: illegal employment.⁴⁵ As Representative Ramsey noted, “We know why they’re coming here, They’re coming here for jobs.”⁴⁶ In his opinion, an immigration reform bill that does not address private employment would be a “sham.”⁴⁷ He refused to acquiesce to the notion put forth by the bill’s opponents that the state cannot prosper economically without relying on those that cross the border illegally.⁴⁸ Representative Ramsey argued that particularly in this tough economic time, it would be unacceptable for even one Georgian to be without a job because it was taken by an illegal immigrant.⁴⁹

Bill Tracking of HB 87

Consideration and Passage by the House

Representatives Matt Ramsey (R-72nd), Rich Golick (R-34th), Katie Dempsey (R-13th), Rick Austin (R-10th), Stephen Allison (R-8th), and Edward Lindsey (R-54th) sponsored HB 87.⁵⁰ The House

42. House Committee Video, *supra* note 7, at 51 min., 23 sec. (remarks by Rep. Sharon Cooper (R-41st)).

43. House Committee Video, *supra* note 7, at 51 min., 23 sec. (remarks by Rep. Sharon Cooper (R-41st)).

44. House Committee Video, *supra* note 7, at 47 min., 25 sec. (remarks by Rep. Matt Ramsey (R-72nd) and Q&As).

45. March House Video, *supra* note 1, at 1 hr., 39 min., 29 sec. (remarks by Rep. Matt Ramsey (R-72nd)).

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. HB 87, as introduced, 2011 Ga. Gen. Assem.

read the bill for the first time on January 27, 2011, and Speaker of the House David Ralston (R-7th) assigned it to the House Judiciary Non-Civil Committee (the House Committee).⁵¹ The bill was read for a second time on January 31, 2011.⁵²

The bill, as originally introduced, created a private cause of action in Code sections 2–6 to enforce the E-verify,⁵³ prohibition on sanctuary policies,⁵⁴ and SAVE program⁵⁵ provisions.⁵⁶ Under sections 2–6, Georgia citizens would be able to seek injunctive relief against any government official or agency that fails to comply with the specified Code sections.⁵⁷

Section 7 created several new criminal offenses—both misdemeanors and felonies—and penalties for violators.⁵⁸ A person would be guilty of an offense when that person transports, harbors, or induces an illegal alien to enter the state while knowing or recklessly disregarding the fact that the person being transported, harbored, or induced is an illegal alien.⁵⁹

Section 8 provided that when a law enforcement officer has probable cause to believe a suspect has committed a criminal offense, and the officer develops a reasonable suspicion that the person is an illegal alien, the officer shall, when reasonably practicable, attempt to determine the suspect's immigration status.⁶⁰ In addition, this provision provided a list of documents that the suspect could provide to verify immigration status.⁶¹ The provision also allowed law enforcement officers to detain the suspect while his or her immigration status is determined.⁶² Moreover, officers would be prohibited from considering race, color, or national origin when

51. State of Georgia Final Composite Status Sheet, HB 87, May 24, 2011.

52. *Id.*

53. O.C.G.A. § 13-10-91 (Supp. 2011).

54. O.C.G.A. § 36-80-23 (Supp. 2011).

55. O.C.G.A. § 50-36-1 (Supp. 2011). *See supra* note 38 and accompanying text.

56. HB 87, as introduced, §§ 2–6, 2011 Ga. Gen. Assem.

57. *Id.*

58. *Id.* § 7.

59. *Id.*

60. *Id.* § 8(b).

61. *Id.* § 8(c). Acceptable documents include a valid Georgia driver's license, a valid Georgia identification card issued by the Department of Driver Services, or a secure and verifiable document as defined in Code section 50-36-2. *Id.*

62. HB 87, as introduced, § 8(d), 2011 Ga. Gen. Assem.

determining the suspect's immigration status.⁶³ Once an officer receives verification that the suspect is an illegal alien, the officer would be authorized to arrest and transport the suspect to a federal facility.⁶⁴ This section exempted criminal victims and witnesses who contact law enforcement.⁶⁵

The next set of sections addressed the enforcement of federal immigration laws. Section 9 created a new Code section to encourage state law enforcement officials to work with federal immigration authorities and to utilize available resources to enforce federal immigration laws.⁶⁶ Section 10 provided for the training of law enforcement officers.⁶⁷ Section 11 provided for a grant or incentive program for funding of law enforcement agencies as an incentive to enforce federal immigration laws.⁶⁸ Section 12 provided that reasonable efforts shall be made by law enforcement officers to verify a foreign national's nationality and lawful status.⁶⁹

Section 14 required a person with more than five employees to provide an affidavit affirming that the employer uses E-verify before the county or municipality is permitted to issue or renew the employer's business license or tax certificate.⁷⁰ Section 15 required agencies to compel a person applying for a public benefit to provide at least one secure and verifiable document.⁷¹ Section 16 defined "secure and verifiable document," provided for penalties for willfully violating the section, and listed exemptions.⁷²

The House Committee on Judiciary Non-Civil offered a substitute to HB 87 and favorably reported the substitute on February 28, 2011.⁷³ In Part II, entitled "Private Cause of Action for the Enforcement of Provisions to Prevent Illegal Immigration," the Committee substitute amended the citizen suit provisions allowing a private cause of action for a public agency's or employer's violation

63. *Id.* § 8(e).

64. *Id.* § 8(f).

65. *Id.* § 8(g).

66. *Id.* § 9.

67. *Id.* § 10.

68. HB 87, as introduced, § 11, 2011 Ga. Gen. Assem.

69. *Id.* § 12.

70. *Id.* § 14(b).

71. *Id.* § 15.

72. *Id.* § 16.

73. State of Georgia Final Composite Status Sheet, HB 87, May 24, 2011.

of or failure to enforce E-verify, the prohibition on immigration sanctuary policies, and federal SAVE provisions.⁷⁴ First, the Committee substitute added a notice requirement: the person wishing to bring a suit, and who is entitled to bring a claim, shall serve a copy of the proposed claim within six months of the discovery of the alleged failure or violation. Upon service, the alleged violator shall have thirty days to correct the deficiency.⁷⁵ The purpose of this addition was to address concerns of frivolous lawsuits.⁷⁶ The changes requiring notice of the nature of noncompliance would have provided the agency or employer an opportunity to get into compliance.⁷⁷ A lawsuit could proceed only if there is noncompliance after the thirty days and a good faith basis to go forward.⁷⁸

The House Committee substitute also added an additional mechanism to prevent meritless claims: a forty-five-day stay on all discovery activities when a motion to dismiss is filed, along with a requirement that the judge must rule on the motion within forty-five days.⁷⁹ This stay would provide the defendant an opportunity to test the sufficiency of the pleadings.⁸⁰ The purpose of this additional security is to ensure that meritless claims get filtered out to avoid the excessive costs of litigation.⁸¹

The House Committee substitute also provided that the Attorney General shall be authorized to bring an enforcement action against a political subdivision of the State to enforce compliance.⁸² And lastly, the House Committee substitute made civil actions brought under these provisions subject to the abuse of litigation provisions of Code section 51-7-5.⁸³

74. HB 87 (HCS), §§ 2–6, 2011 Ga. Gen. Assem.

75. *Id.* §§ 2, 4, 5; March House Video, *supra* note 1, at 1 hr., 32 min. (remarks by Rep. Matt Ramsey (R-72nd)).

76. March House Video, *supra* note 1, at 1 hr., 32 min. (remarks by Rep. Matt Ramsey (R-72nd)).

77. *Id.* For a discussion about the concern regarding the addition of an opportunity to cure, see House Committee Video, *supra* note 7, at 20 min., 51 sec. (remarks by Rep. Matt Ramsey (R-72nd) and Q&As).

78. March House Video, *supra* note 1, at 1 hr., 32 min. (remarks by Rep. Matt Ramsey (R-72nd)).

79. HB 87 (HCS), §§ 2, 4, 5, 2011 Ga. Gen. Assem; March House Video, *supra* note 1, at 1 hr., 33 min., 18 sec. (remarks by Rep. Matt Ramsey (R-72nd)).

80. March House Video, *supra* note 1, at 1 hr., 33 min., 18 sec. (remarks by Rep. Matt Ramsey (R-72nd)).

81. *Id.*

82. HB 87 (HCS), §§ 3, 4(f), 6, 2011 Ga. Gen. Assem.

83. *Id.*

In Part III, entitled “Criminal Offenses,” the House Committee substitute added a new offense and made changes regarding the transporting, harboring, or inducing illegal aliens provisions.⁸⁴ Section 7 created the offense of “aggravated identity fraud,” which occurs when a person willfully and fraudulently uses any counterfeit or fictitious identifying information for the purpose of obtaining employment.⁸⁵ Section 8 provided penalties for violation of the aggravated identity fraud provision, and Section 9 created exemptions to the offense.⁸⁶ The House Committee aimed to “get at those [individuals] that are trying to pass off fraudulent identification for the purpose of obtaining employment” and, in the process, jeopardizing employers who may inadvertently hire an illegal alien based on false identification.⁸⁷

In the harboring provision of section 10, the House Committee substitute added a definition for “harboring” that includes “any conduct that tends to substantially help an illegal alien to remain in the United States in violation of federal law.”⁸⁸ It also excluded from that definition a “person providing services to infants, children, or victims of a crime; a person providing emergency medical service; or an attorney or his or her employees for the purpose of representing a criminal defendant.”⁸⁹

The Committee substitute also made two major changes to the offenses for transporting, harboring, and inducing illegal aliens. First, the substitute removed “recklessly disregards” from all three provisions so that only a person who “knowingly” transports, harbors, or induces an illegal alien would be in violation of the statute.⁹⁰ Representative Ramsey said that his friends with experience in appellate litigation recommended removing “recklessly disregard” to eliminate any potential for legal ambiguity.⁹¹ Second, the House

84. *Id.* §§ 7–10.

85. *Id.* § 7.

86. *Id.* §§ 8–9.

87. March House Video, *supra* note 1, at 1 hr., 41 min., 38 sec. (remarks by Rep. Matt Ramsey (R-72nd)).

88. HB 87 (HCS), § 10, 2011 Ga. Gen. Assem.

89. *Id.*

90. *Id.* House Committee Video, *supra* note 7, at 46 min., 10 sec. (remarks by Rep. Matt Ramsey (R-72nd) and Q&As).

91. House Committee Video, *supra* note 7, at 46 min., 10 sec. (remarks by Rep. Matt Ramsey (R-72nd) and Q&As).

Committee substitute made the offense a counterpart offense, meaning it cannot be charged as a standalone crime; it can only be brought if the transporting, harboring, or inducing was “committed in connection with another criminal offense.”⁹² One reason for these two changes is that similar provisions were upheld by the Ninth Circuit in the Arizona bill challenge.⁹³ The House Committee intended to make this section able to withstand judicial scrutiny in the event of a challenge.⁹⁴ Furthermore, the House Committee aimed to narrow the offense to ensure that unwitting acts are not “swept up” in the provision.⁹⁵

Ultimately, the goal of section 10 was to target people who are profiting from intentionally and knowingly transporting, harboring, or inducing in a systematic way as part of a commercial enterprise.⁹⁶ These provisions are intended to give prosecutors the authority to charge those persons who prey on illegal aliens and profit from bringing them into the country.⁹⁷ To further achieve this goal, the House Committee substitute made a distinction in terms of the number of illegal aliens being transported or harbored.⁹⁸ On the first offense, a person who transports or harbors seven or fewer illegal aliens is only guilty of a misdemeanor, whereas a person who transports or harbors eight or more aliens (or seven or fewer for a second time) is guilty of a felony.⁹⁹ Also, a person who transports, harbors, or induces an illegal alien with the intent of making a profit is guilty of a felony.¹⁰⁰ The purpose of these changes is “to get at and

92. *Id.* at 46 min., 51 sec. (remarks by Rep. Matt Ramsey (R-72nd) and Q&As).

93. *Id.* at 44 min., 31 sec. (remarks by Rep. Matt Ramsey (R-72nd) and Q&As). For a discussion of the Arizona bill, see *supra* text accompanying notes 13–27.

94. House Committee Video, *supra* note 7, at 58 min., 18 sec. (remarks by Rep. Matt Ramsey (R-72nd) and Q&As).

95. *Id.* at 48 min., 38 sec. (remarks by Rep. Matt Ramsey (R-72nd) and Q&As).

96. March House Video, *supra* note 1, at 1 hr., 36 min., 11 sec. (remarks by Rep. Matt Ramsey (R-72nd)); House Committee Video, *supra* note 7, at 57 min., 29 sec. (remarks by Rep. Matt Ramsey (R-72nd) and Q&As).

97. March House Video, *supra* note 1, at 1 hr., 41 min., 38 sec. (remarks by Rep. Matt Ramsey (R-72nd)).

98. HB 87 (HCS), § 10, 2011 Ga. Gen. Assem.; House Committee Video, *supra* note 7, at 46 min., 51 sec. (remarks by Rep. Matt Ramsey (R-72nd) and Q&As).

99. HB 87 (HCS), § 10, 2011 Ga. Gen. Assem.

100. *Id.*

treat more seriously the folks that are doing this for commercial profit, individuals that are operating an enterprise.”¹⁰¹

Lastly, the House Committee substitute made some changes to the exemptions from the transporting, harboring, and inducing offenses. The Committee substitute added to the exemptions a person who transports an illegal alien to or from a judicial or administrative proceeding when that individual is required to appear, and also a person who transports an illegal alien to a law enforcement agency or a judicial officer for an official government purpose.¹⁰² Also, the House Committee substitute added an exemption to the harboring provision that covers a government employee (or a person who acts at the express direction of a government employee) who harbors an illegal alien who is a victim of or witness to a criminal offense.¹⁰³

In Part IV, entitled “Law Enforcement Officers and Enforcement of Immigration Law,” the House Committee substitute made a number of specific revisions to the section of the bill that requires an immigration status check. First, it removed the “reasonable suspicion to also suspect that such person is an illegal alien” language so that an officer would need only to have probable cause to believe a suspect has committed a criminal offense before conducting an immigration status check in the absence of sufficient proof of identity.¹⁰⁴ Thus, the officer need not subjectively have a “reasonable suspicion” that the individual is in the country illegally.¹⁰⁵ The goal was to have objective criteria for the law enforcement officials to follow.¹⁰⁶ If the officer has probable cause to believe the suspect has committed a crime—misdemeanor or felony—and the suspect cannot provide evidence of identity, then the officer is authorized to conduct an investigation of the suspect’s immigration status.¹⁰⁷ As Representative Ramsey observed, “It’s truly about your ability as a criminal suspect to demonstrate your identity in the context of a

101. House Committee Video, *supra* note 7, at 46 min., 51 sec. (remarks by Rep. Matt Ramsey (R-72nd) and Q&As).

102. HB 87 (HCS), § 10, 2011 Ga. Gen. Assem.

103. *Id.*

104. HB 87, as introduced, § 8(b), 2011 Ga. Gen. Assem.; HB 87 (HCS), § 11(b), 2011 Ga. Gen. Assem.

105. March House Video, *supra* note 1, at 1 hr., 38 min., 50 sec. (remarks by Rep. Matt Ramsey (R-72nd)).

106. *Id.* at 1 hr., 38 min., 33 sec. (remarks by Rep. Matt Ramsey (R-72nd)).

107. *Id.*

criminal investigation,” and not about an officer’s subjective suspicion as to a suspect’s immigration status.¹⁰⁸

Next, the House Committee substitute changed the nature of the provision from a mandate to simply an authorization. Originally, if the officer had “reasonable suspicion” that the suspect was an illegal alien, the provision mandated the officer to determine the immigration status of the suspect.¹⁰⁹ Under the House Committee substitute, the officer is simply authorized to investigate the immigration status of a suspect who cannot provide evidence of identity.¹¹⁰ In the House Committee hearing, Representative Ramsey explained that the mandate was removed because law enforcement communities in different parts of the state have access to different levels of resources to seek verification, and the process is something that is evolving from month to month and year to year.¹¹¹ The House Committee substitute also removed the provision allowing a suspect to be “detained for a reasonable period of time necessary to determine the immigration status of such suspect, even after the basis for the original probable cause for the stop has expired.”¹¹² Representative Ramsey explained that “once that probable cause expires on whatever that predicate offense is, you’re going to have a really tough time from a constitutional standpoint making an argument that it’s okay to detain an individual beyond that point.”¹¹³

In addition, the House Committee substitute would have added to the list of documents permissible to verify a suspect’s identity “other information as to the suspect’s identity that is sufficient to allow the peace officer to independently identify the suspect.”¹¹⁴ The goal is to “keep our citizens safe, our community safe” by giving the law enforcement community every tool possible to identify criminals

108. March House Video, *supra* note 1, at 1 hr., 39 min., 11 sec. (remarks by Rep. Matt Ramsey (R-72nd)).

109. HB 87, as introduced, § 8(b), 2011 Ga. Gen. Assem.

110. HB 87 (HCS), § 11, p. 13, ln. 430–34, 2011 Ga. Gen. Assem.

111. House Committee Video, *supra* note 7, at 1 hr., 08 min., 43 sec. (remarks by Rep. Matt Ramsey (R-72nd) and Q&As).

112. HB 87, as introduced, § 8(d), 2011 Ga. Gen. Assem.

113. House Committee Video, *supra* note 7, at 1 hr., 14 min., 21 sec. (remarks by Rep. Matt Ramsey (R-72nd) and Q&As).

114. HB 87 (HCS), § 11(b)(5), 2011 Ga. Gen. Assem.

suspects.¹¹⁵ This addition would have given an officer another way to verify the suspect's identity.

Lastly, in the "Authority to transport illegal aliens" section, the House Committee substitute removed "probable cause to believe" the person is an illegal alien, so that the officer needs verification that the person is an illegal alien before being authorized to detain and securely transport the illegal alien to a federal facility.¹¹⁶

The officer training,¹¹⁷ grant/incentive program,¹¹⁸ foreign inmate immigration status,¹¹⁹ and county reimbursement¹²⁰ sections were kept substantially the same in the House Committee substitute.

In Part V, entitled "Verification Requirements," the House Committee substitute added a new provision to specifically extend the E-verify requirement to private employers with five or more employees.¹²¹ Representative Ramsey explained that the root cause of illegal immigration is illegal employment, so the purpose of requiring private employers to enroll in the E-verify program is to combat this "root cause" of illegal immigration.¹²² According to Representative Ramsey, the E-verify program is simple and efficient and is "hands down the very best tool available to us to verify the eligibility of our state's workforce."¹²³ He defended the ease and accuracy of the program.¹²⁴ Furthermore, Representative Ramsey observed that given the high rate of unemployment in the state,¹²⁵ the time was perfect to address the problem of Georgians being without jobs because of illegal aliens occupying them.¹²⁶ In addition, the

115. March House Video, *supra* note 1, at 1 hr., 38 min., 43 sec. (remarks by Rep. Matt Ramsey (R-72nd)).

116. HB 87, as introduced, § 9(c), 2011 Ga. Gen. Assem.; HB 87 (HCS), § 12(c), 2011 Ga. Gen. Assem.

117. HB 87 (HCS), § 13, 2011 Ga. Gen. Assem.

118. *Id.* § 14.

119. *Id.* § 15.

120. *Id.* § 16.

121. *Id.* § 17(a).

122. *Id.*

123. March House Video, *supra* note 1, at 1 hr., 40 min., 53 sec. (remarks by Rep. Matt Ramsey (R-72nd)).

124. *Id.* at 1 hr., 38 min., 43 sec. (remarks by Rep. Matt Ramsey (R-72nd)).

125. Representative Ramsey noted that the unemployment rate was 10.4%, the highest in the state's history. March House Video, *supra* note 1, at 1 hr., 42 min., 38 sec. (remarks by Rep. Matt Ramsey (R-72nd)).

126. *Id.*

Committee substitute removed the five employee exemption,¹²⁷ so that “any person” seeking to obtain or renew a license or occupational tax certificate must provide evidence in the form of a sworn affidavit that they are authorized to use, and do use, E-verify.¹²⁸

The House Committee on Judiciary Non-Civil favorably reported the Committee substitute on February 28, 2011.¹²⁹ HB 87 was read to the House for the third time on March 3, 2011, and Representative Roberts (R-154th) (and others) offered a Floor Amendment to the House Committee substitute—which made a minor technical change—that the House passed, without objection, by a vote of 113 to 54.¹³⁰ On the same day, the House passed HB 87 by a vote of 113 to 56.¹³¹

Consideration and Passage by the Senate

The bill was first read in the Senate on March 4, 2011.¹³² Lieutenant Governor Casey Cagle (R) assigned it to the Senate Judiciary Committee (the Senate Committee), which favorably reported a substitute on March 31, 2011.¹³³ The substitute revamped several sections of the House’s version of the bill.¹³⁴

First, the Senate Committee substitute removed the sections of HB 87 that created a private cause of action for individuals to enforce the provisions of HB 87 against the State.¹³⁵ The House version would

127. HB 87, as introduced, § 14(b), 2011 Ga. Gen. Assem.

128. HB 87 (HCS), § 17(c), 2011 Ga. Gen. Assem.

129. State of Georgia Final Composite Status Sheet, HB 87, May 24, 2011.

130. Georgia House of Representatives Voting Record, HB 87 (Mar. 3, 2011); State of Georgia Final Composite Status Sheet, HB 87, May 24, 2011; March House Video, *supra* note 1, at 1 hr., 33 min., 22 sec. (remarks by Speaker of the House David Ralston (R-7th)). HB 87 (HCSFA), 2011 Ga. Gen. Assem.

131. Georgia House of Representatives Voting Record, HB 87 (Mar. 3, 2011); State of Georgia Final Composite Status Sheet, HB 87, May 24, 2011; March House Video, *supra* note 1, at 1 hr., 36 min., 17 sec. (remarks by Speaker of the House David Ralston (R-7th)). HB 87 (HCSFA), 2011 Ga. Gen. Assem.

132. *Id.*

133. *Id.*

134. *See* HB 87 (SCS), 2011 Ga. Gen. Assem.

135. *Compare* HB 87 (CSFA), § 2–6, ln. 42–277, 2011 Ga. Gen. Assem. (creating a private cause of action for the enforcement of provisions to prevent illegal immigration, including provisions requiring employers to use E-verify, provisions prohibiting local governments from adopting a sanctuary policy, and provisions mandating the use of the federal system SAVE before issuing certain government benefits), *with* HB 87 (SCS), § 2–6, ln. 49–282, 2011 Ga. Gen. Assem. (removing and replacing sections two through six with their own sections).

have provided a section for each cause of action for individuals to file suit against the State for purposes of enforcing the E-verify requirements,¹³⁶ prohibiting sanctuary policies,¹³⁷ and using the federal SAVE system prior to issuing certain government benefits.¹³⁸ By comparison, the Senate Committee substitute removed these private causes of action sections entirely and instead created one new section that allowed a “resident of Georgia who is also a registered voter” to file a complaint based on a failure to enforce the E-verify requirements, the prohibiting sanctuary policies, or using the federal SAVE system.¹³⁹ The Senate Committee substitute, however, filtered the suit through the Attorney General rather than allowing the individual to file suit in a superior court.¹⁴⁰ The Senate Committee created section 16 to provide “for a citizen to go to the Attorney General and say I do not think this county, or city, or state department is complying with the law,” and to provide for penalties if the city or state department is not complying with the law.¹⁴¹

The Senate Committee substitute replaced the House versions of sections 2 through 6 with new sections that amended current law, which requires contractors and subcontractors to use E-verify when entering into a contract with a public agency.¹⁴² Section 2 of the Senate Committee substitute amended the definition of “subcontractor and sub-subcontractor” to reach any person “having privity of contract” with a contractor or subcontractor.¹⁴³ Section 3 required the contractor, subcontractor, and sub-subcontractor to use E-verify prior to entering into a contract with a public employer.¹⁴⁴ In addition, section 3 clarified the affidavit process by which contractors, subcontractors, and sub-subcontractors declare that they

136. HB 87 (CSFA), § 2, ln. 45–104, 2011 Ga. Gen. Assem.

137. HB 87 (CSFA), § 4, ln. 114–211, 2011 Ga. Gen. Assem.

138. HB 87 (CSFA), § 5, ln. 212–27, 2011 Ga. Gen. Assem.

139. HB 87 (SCS), § 16, 2011 Ga. Gen. Assem.

140. Compare HB 87 (CSFA), § 2–6, ln. 42–277, 2011 Ga. Gen. Assem. (allowing a private cause of action to be filed in the superior court of the county having jurisdiction over the agency or where the violation occurs), with HB 87 (SCS), § 16, 2011 Ga. Gen. Assem. (providing for an individual to file suit with the Attorney General’s office).

141. Video Recording of Senate Proceedings, Apr. 11, 2011 at 1 hr., 46 min., 01 sec. (remarks by Sen. Bill Hamrick (R-30th), http://mediam1.gpb.org/ga/leg/2011/ga-leg-senate_041111_PM2.wmv [hereinafter Senate Video Apr. 11]).

142. See HB 87 (SCS), 2011 Ga. Gen. Assem.

143. HB 87 (SCS), § 2, ln. 48–76, 2011 Ga. Gen. Assem.

144. *Id.* § 3, ln. 158–203.

use E-verify and mandated public employers to submit annual reports certifying compliance to the state auditor.¹⁴⁵ Moreover, section 3 would have provided for penalties for public employers, contractors, and subcontractors who failed to follow the E-verify requirements.¹⁴⁶ If the political subdivision, state department, or state agency failed to follow the E-verify requirements, it would risk loss of funding;¹⁴⁷ if the contractor or subcontractor knowingly made a false or fraudulent statement, they would risk being prohibited for twelve months from bidding on or entering into any public contract.¹⁴⁸

The Senate Committee substitute amended current law to “close[] a big loophole” whereby subcontractors or sub-subcontractors could avoid using E-verify by claiming that they do not hire employees, but instead hire independent contractors.¹⁴⁹ By clarifying the definition of a subcontractor and sub-subcontractor, the Senate Committee sought to ensure that contractors cannot avoid the E-verify requirements by having several “sub-subs down the line,” and also that the law covers “all subcontractors including the sub-subcontractors.”¹⁵⁰ The Senate Committee substitute mirrored the language introduced in SB 40, the Senate’s companion bill to HB 87, which would have sought to amend current law regarding public contracts and E-verify.¹⁵¹ SB 40 passed the Senate but was not acted upon by the House as HB 87 advanced.¹⁵² By replacing sections of

145. *Id.* § 3, ln. 158–66.

146. *Id.* § 3, ln. 167–203.

147. *Id.* Section 3 provided thirty days for the political subdivision to correct any deficiencies, and if after thirty days the subdivision fails to comply with the requirements of section 3, then the subdivision will be excluded from the list of qualified local governments. *Id.* Furthermore, if any state department or agency violates the provisions in section 3 twice in a five year period, the funds appropriated to that department or agency will not be greater than 90% of the amount so appropriated in the second year. *Id.*

148. *Id.* § 3, ln. 204–24 (providing that any person who “knowingly and willfully makes a false, fictitious, or fraudulent statement in an affidavit” will be guilty of making false statements, and “any contractor or subcontractor convicted for false statements shall be prohibited from bidding on or entering into any public contract for twelve months following a conviction” and will be listed on the Department of Labor website for their violation).

149. Senate Video Apr. 11, *supra* note 141, at 1 hr., 37 min., 59 sec. (remarks by Sen. Bill Hamrick (R-30th)).

150. *Id.*

151. *See* SB 40, as passed Senate, 2011 Ga. Gen. Assem.; Senators Jack Murphy (R-27th), Chip Rogers (R-21st), Jeff Mullis (R-53rd), Steve Gooch (R-51st), and Butch Miller (R-49th) sponsored SB 40. *Id.*

152. State of Georgia Final Composite Status Sheet, SB 40, May 24, 2011. SB 40 was introduced to the Senate on February 2, 2011, and passed the Senate on March 14, 2011. *Id.* It was not acted upon by the House, and was recommitted to committee when the 2011 session ended on April 14, 2011. *Id.*

HB 87 with provisions from SB 40, the Senate was able to address concerns about public contracts and to require all individuals in privity of contract to use E-verify.¹⁵³

The Senate Committee substitute also made additional minor changes to the bill. Section 17 of the Senate Committee substitute added a new Code section to provide penalties for employers who do not use E-verify.¹⁵⁴ Under section 17, employers who fail to use E-verify are not allowed to receive tax deductions for those employees whose status is not verified.¹⁵⁵ Section 20 amended current law to create a penalty for an “agency head” who intentionally and knowingly fails to comply with the law.¹⁵⁶

Despite a different numbering system, the other sections of the Senate Committee substitute mirrored the House version including the sections that provided for criminal status for aggravated identity fraud, transporting illegal aliens, harboring illegal aliens, or inducing or enticing illegal aliens to enter the state.¹⁵⁷ The Senate Committee substitute also mirrored the House version regarding the verification requirements and encouraging local governments and law enforcement officers to cooperate with federal immigration authorities.¹⁵⁸

On March 31, 2011, the Senate Committee substitute was favorably reported and the bill was read for a second time in the Senate. The bill was read for a third time on April 11, 2011, and several Senators offered amendments to the Senate Committee substitute during the floor debate on the bill.¹⁵⁹ The first amendment, offered by Senators Vincent Fort (D-39th), Robert Brown (D-26th), and Jason Carter (D-42nd), sought to delete section 8 of HB 87.¹⁶⁰ The amendment, which failed by a vote of 19 to 36, would have allowed officers having probable cause that a suspect has committed

153. Senate Video Apr. 11, *supra* note 141, at 1 hr., 36 min., 39 sec. (remarks by Sen. Bill Hamrick (R-30th)).

154. HB 87 (SCS), § 17, 2011 Ga. Gen. Assem.

155. *Id.* § 17, p. 20, ln. 668–85.

156. *Id.* § 20 (providing that it is a violation of the code of ethics for government service and a high and aggravated misdemeanor when an agency head acts willfully to violate the code).

157. *See* HB 87 (SCS), §§ 4–7, 2011 Ga. Gen. Assem.

158. *Id.* §§ 8–11.

159. State of Georgia Final Composite Status Sheet, HB 87, May 24, 2011.

160. Failed Senate Floor Amendment 1 to HB 87, introduced by Sen. Vincent Fort (D-39th), Apr. 11, 2011.

a crime to verify the suspect's immigration status.¹⁶¹ The second amendment offered by Senators Carter and Doug Stoner (D-6th) sought to amend the bill by defining “another criminal offense” or “criminal offense” as a “felony violation of state or federal law” and “illegal alien” as “a person who is verified by the federal government to be present in the United States in violation of federal immigration law.”¹⁶² The amendment applies these definitions to the provisions for transporting, harboring, or inducing illegal aliens, and also to verifying the immigration status of a criminal suspect.¹⁶³ The second amendment passed by a vote of 31 to 17.¹⁶⁴

A few of the amendments to the Senate Committee substitute would have amended section 12, which required private employers who obtained a professional or business license and had five or more employees to use E-verify. The third amendment offered by Senator John Bullock (R-11th), which deleted section 12 of the Senate Committee substitute in its entirety, passed by a vote of 30 to 20.¹⁶⁵ The fourth amendment offered by Senator Chip Rogers (R-21st), however, sought to reinstate section 12 into the bill and provide that private employers with more than ten employees would have to use E-verify.¹⁶⁶ This amendment failed by a vote of 24 to 28.¹⁶⁷ The fourth amendment also had amendments to it, amendments 4a and 4b, which would have increased from ten to twenty-five the minimum number of employees a private employer must have before being subject to the E-verify requirement, and also would have replaced “Department of Audits and Accounts” with “Attorney General,” but they were ruled moot when the fourth amendment failed.¹⁶⁸

161. *Id.*; Senate Video Apr. 11, *supra* note 141, at 4 hr., 5 min., 28 sec. (voting on amendments).

162. HB 87, Senate Floor Amendment 2 (AM 29 1047), 2011 Ga. Gen. Assem.

163. *Id.*

164. *See* HB 87 (SCSFA), 2011 Ga. Gen. Assem.; Senate Video Apr. 11, *supra* note 141, at 4 hr., 6 min., 22 sec. (voting on amendments).

165. HB 87, Senate Floor Amendment 3 (AM 35 0255), 2011 Ga. Gen. Assem.; Senate Video Apr. 11, *supra* note 141, at 4 hr., 7 min., 10 sec. (voting on amendments).

166. Failed Senate Floor Amendment 4 to HB 87, introduced by Sen. Chip Rogers (R-21st), Apr. 11, 2011.

167. *Id.*

168. Failed Senate Floor Amendment 4a to HB 87, introduced by Sen. John Bulloch (R-11th), Apr. 11, 2011; Failed Senate Floor Amendment 4b to HB 87, introduced by Sen. Jack Murphy (R-27th), Apr. 11, 2011.

Amendment five, offered by Senators Emanuel Jones (D-10th), Steve Henson (D-41st), and Stoner, would have deleted section 16, which created a private cause of action for registered voters of Georgia against the State when the State failed to enforce E-verify requirements, prohibit sanctuary policies for local governments, or use the federal system SAVE before issuing public benefits.¹⁶⁹ Amendment five failed by a vote of 16 to 29.¹⁷⁰ Amendment six offered by Senator Steve Thompson (D-33rd) would have added a new subsection to section 7 and made it a felony for any person to furnish false identification, visas, or social security numbers.¹⁷¹ Amendment six failed by a vote of 20 to 33.¹⁷² The Senate floor then voted on the bill and passed HB 87 by a vote of 39 to 17.¹⁷³

Further Considerations and Amendments by the House and Senate

On April 12, 2011, the House adopted the Senate substitute to HB 87 as amended by the House by a vote of 115 to 59.¹⁷⁴ Representative Ramsey explained that in addition to making clarifying changes, the House amendment aimed to restore many of the provisions that the Senate removed.¹⁷⁵ First, the House kept the Senate's definitions and language in sections 2 and 3 of the bill regarding the collection of E-verify affidavits from public works contractors.¹⁷⁶ Representative Ramsey acknowledged the ambiguity that "potentially put government and the top tier [general contractor] legally on the hook for the collection of affidavits seven or eight contractors downstream,

169. Failed Senate Floor Amendment 5 to HB 87, introduced by Sen. Emanuel Jones (D-10th), Sen. Steve Henson (D-41st), and Sen. Doug Stoner (D-6th), Apr. 11, 2011.

170. *Id.*; Senate Video Apr. 11, *supra* note 141, at 4 hr., 26 min., 50 sec. (voting on amendments).

171. Failed Senate Floor Amendment 6 to HB 87, introduced by Sen. Steve Thompson (D-33rd), Apr. 11, 2011.

172. *Id.*; Senate Video Apr. 11, *supra* note 141, at 4 hr., 29 min., 59 sec. (voting on amendments).

173. State of Georgia Final Composite Status Sheet, HB 87, May 24, 2011; HB 87 (SCSFA), 2011 Ga. Gen. Assem.; Senate Video Apr. 11, *supra* note 141, at 4 hr., 30 min., 30 sec.

174. Video Recording of House Proceedings, Apr. 12, 2011 at 2 hr., 28 min., 15 sec. (remarks by Speaker of the House David Ralston (R-7th)), http://mediam1.gpb.org/ga/leg/2011/ga-leg-house_041211_AM.wmv [hereinafter April House Video]; State of Georgia Final Composite Status Sheet, HB 87, May 24, 2011.

175. April House Video, *supra* note 174, at 2 hr., 19 min., 46 sec. (remarks by Rep. Matt Ramsey (R-72nd)).

176. *Id.*; HB 87 (AM 35 0260), §§ 2–3, 2011 Ga. Gen. Assem.

people that the contractor may not even know exist.”¹⁷⁷ The House accepted the Senate’s provision that clarified that the person responsible for collecting the affidavit is the person in privity of contract with the “downstream” contractor, in addition to requiring all affidavits (collected by subcontractors and sub-subcontractors) to be submitted “upstream” to the general contractor and the local or state government.¹⁷⁸ The purpose of this clarification was to close the loophole that excused a subcontractor from having to comply with E-verify requirements, and to “make very clear from a liability standpoint who is legally responsible for collecting [the] affidavits.”¹⁷⁹ The House also added a provision requiring the contractor to submit copies of all affidavits and other required documents to the public employer within five days of receipt.¹⁸⁰ Further, the House added “sub-subcontractors and any person” to expand the group of people—previously only contractors and subcontractors were included—prohibited from bidding or entering into public contracts for twelve months following a conviction for fraudulent statements in a submitted affidavit.¹⁸¹

The House amendment also revised section 12 of the bill by increasing the number of employees necessary to trigger the E-verify requirement.¹⁸² For private employers, the minimum would increase from five to ten employees.¹⁸³ After working closely and discussing the language with a variety of groups, Representative Ramsey found ten to be “reasonable” and sensible from an administrative standpoint.¹⁸⁴ He also said this language is a “giant leap forward” in addressing the number one incentive for illegal aliens to come Georgia: access to jobs.¹⁸⁵

The House also accepted the Senate’s removal of the citizen lawsuit provisions in the bill that initially passed out of the House.

177. April House Video, *supra* note 174, at 2 hr., 19 min., 46 sec. (remarks by Rep. Matt Ramsey (R-72nd)).

178. *Id.*

179. *Id.*

180. HB 87 (AM 35 0260), § 3(b)(6), 2011 Ga. Gen. Assem.

181. *Id.* § 3(b)(9).

182. *Id.* § 12.

183. *Id.* § 12.

184. April House Video, *supra* note 174, at 2 hr., 22 min., 33 sec. (remarks by Rep. Matt Ramsey (R-72nd)).

185. *Id.*

There was concern that frivolous lawsuits would cause state and local governments to use resources in defending meritless claims.¹⁸⁶ Therefore, after input from local governments, the House replaced the citizen suit provisions with an administrative review process.¹⁸⁷ The aggrieved party can submit a complaint to an administrative panel, which would have the authority to prescribe remedial action if the government is not in compliance.¹⁸⁸

In response to concerns about the application of crimes for transporting or harboring illegal aliens, a provision was inserted in section 7 to “make absolutely crystal clear” that the bill does not apply to a person providing privately funded social services, such as driving a church bus.¹⁸⁹ Also, the House removed the definition of “criminal offense” from the transporting, harboring, and encouraging provisions found in section 7 of the bill. Furthermore, the House added a provision regarding proof of verification that a person is an illegal alien, including testimony by a witness with knowledge of certain documents.¹⁹⁰

In section 8, the House removed “including any traffic offense” as an acceptable basis upon which an officer is authorized to verify the suspect’s immigration status when the officer has probable cause and the suspect cannot provide an accepted document.¹⁹¹

The House also removed sections 15 and 16. In section 15, the Senate had added a new Code section allowing a Georgia resident who is also a registered voter to file a complaint with the Attorney General for an alleged violation by a public agency or employer of section 13-10-91, 36-80-23, or 50-36-1. Section 15 also prescribed the related procedures and penalties for such a claim.¹⁹² Section 16 was amended to prohibit a taxpayer from claiming wages or remuneration over \$600 paid to an individual for state income tax

186. April House Video, *supra* note 174, at 2 hr., 23 min., 03 sec. (remarks by Rep. Matt Ramsey (R-72nd)).

187. *Id.*

188. *Id.*

189. HB 87 (AM 35 0260), § 7, 2011 Ga. Gen. Assem.; April House Video, *supra* note 174, at 2 hr., 23 min., 48 sec. (remarks by Rep. Matt Ramsey (R-72nd)).

190. HB 87 (AM 35 0260), § 7, 2011 Ga. Gen. Assem.

191. *Id.* § 8(b).

192. HB 87 (SCSFA), § 15, 2011 Ga. Gen. Assem.

purposes unless that individual is an authorized employee, subject to certain exceptions.¹⁹³

From section 18, the House removed “in addition to any other person authorized by law” from subsection (o)(2), leaving only the Attorney General with authority to conduct a criminal and civil investigation of an alleged failure to verify immigration status before providing public benefits.¹⁹⁴

Lastly, section 20 was amended to add a new Code section, 50-36-3, and created the Immigration Enforcement Review Board.¹⁹⁵ The duty of the Board is to review or investigate complaints alleging a public agency’s or employee’s violation or failure to enforce certain provisions of the law, and also to take such remedial action as deemed appropriate.¹⁹⁶ This Code section would have established the administrative review process that replaced the citizen suit provisions in the original bill.¹⁹⁷ The purpose of this change was to address the concerns about frivolous lawsuits.¹⁹⁸

On April 14, 2011, the Senate, after making two significant changes to the bill, agreed to the House’s amendment to HB 87 by a vote of 37 to 19.¹⁹⁹ First, the Senate amended section 12, which required private employers with more than ten employees to use E-verify, to become effective on July 1, 2012 only for employers with 500 or more employees.²⁰⁰ For private employers with fewer than 500 employees, the E-verify requirement would not become effective until either July 1, 2012, if they had more 100 or more employees, or on July 1, 2013, if they had at least ten but fewer than 100 employees.²⁰¹ These extensions also apply to private employers renewing business licenses.²⁰² The Senate further amended section 12 by providing private employers a grace period to cure any violations

193. *Id.* § 16.

194. HB 87 (AM 35 0260), § 18, 2011 Ga. Gen. Assem.; HB 87 (SCSFA), § 19, 2011 Ga. Gen. Assem.

195. HB 87 (AM 35 0260), § 20, 2011 Ga. Gen. Assem.

196. *Id.*

197. April House Video, *supra* note 174, at 2 hr., 22 min., 03 sec. (remarks by Rep. Matt Ramsey (R-72nd)).

198. *Id.*

199. State of Georgia Final Composite Status Sheet, HB 87, May 24, 2011; HB 87 (AM 35 0271), 2011 Ga. Gen. Assem.

200. HB 87 (AM 35 0271), 2011 Ga. Gen. Assem.

201. *Id.*

202. *See id.* § 12(d).

of the E-verify requirement.²⁰³ The amendment provided that the Attorney General shall provide an employer with 30 days to correct the violation if the Attorney General finds that the violation was in good faith.²⁰⁴

The Senate's second significant change to the House's amended version of HB 87 revised section 20 by adding a new section that addressed the potential impact of HB 87 on Georgia's agricultural industry.²⁰⁵ This amendment was a response to the outcry of concern over the detrimental effect the bill might have on the state's agricultural industry due to the expected difficulties farmers would have in finding workers to harvest and pick their crops.²⁰⁶ Senator John Bulloch (R-11th) appealed to the Senate by explaining that when "Vidalia onions are ready to be harvested you have to have workers that are ready to go out there bend their backs, pick those onions, cut off the tops out, and put them in a sack. You can't wait."²⁰⁷ The Senate amendment was intended to address the concerns of farmers and businesses by directing the Department of Agriculture to conduct a study of the potential issues and problems that HB 87 might have on Georgia's agriculture industry.²⁰⁸ The new section, section 20.1, provided that the Department of Agriculture must specifically address the need for reform of the federal H-2A program, which is the federal guest worker program for seasonal and agriculture immigrant workers.²⁰⁹ After careful study, the Department of Agriculture must then provide recommendations for any actions or legislation it considers necessary in a written report by January 1, 2012.²¹⁰

The House, on April 14, 2011, agreed to the Senate's amendments by a vote of 112 to 59.²¹¹

203. HB 87 (AM 35 0271), 2011 Ga. Gen. Assem.

204. *Id.*

205. *Id.* § 20.1.

206. Senate Video, *supra* note 141, at 2 hours, 25 min., 55 sec. (remarks by Sen. John Bulloch (R-11th)) (referencing a letter signed by 220 different entities including many farming businesses and associations).

207. *Id.* at 2 hr., 28 min., 59 sec. (remarks by Sen. Bulloch (R-11th)).

208. HB 87 (AM 35 0271), § 20.1, 2011 Ga. Gen. Assem.

209. *Id.*

210. *Id.*

211. State of Georgia Final Composite Status Sheet, HB 87, May 24, 2011.

The Act

The Act is entitled the “Illegal Immigration Reform and Enforcement Act of 2011.”²¹² Section 2 of the Act amends Code section 13-10-90 which adds the definition of “Contractor” and Sub-subcontractor” to the existing E-verify Code sections in an effort to clarify the affidavit collection and submission process.²¹³ Section 3 amends Code section 13-10-91, which now requires local governments that do not have a website to submit the information required by the existing E-verify Code section—the employer’s federally issued user identification number and date of authorization—to the Carl Vinson Institute of Government of the University of Georgia, which must then post such information on a website created for such reporting.²¹⁴ The Code section also requires a subcontractor to participate in E-verify and submit an affidavit or notice of an affidavit received from a sub-subcontractor to the general contractor.²¹⁵ It also extends E-verify requirements to sub-subcontractors.²¹⁶ Further, public employers are required to submit compliance reports annually.²¹⁷ In place of an affidavit, a contractor or subcontractor that does not intend to hire employees for the purpose of completing the original contract with the public employer must instead submit a copy of a state issued driver’s license of each independent contractor.²¹⁸

The next set of sections relates to the new offense of “aggravated identify fraud.” Section 4 creates Code section 16-9-121.1 under which a person is guilty of “aggravated identity fraud” when he willfully and fraudulently uses counterfeit or fictitious information for the purpose of obtaining employment.²¹⁹ Section 5 revises Code section 16-9-126, which provides the penalties for the offense.²²⁰

212. 2011 Ga. Laws 795.

213. O.C.G.A. § 13-10-90(2), (6), (7) (Supp. 2011).

214. O.C.G.A. § 13-10-91(a) (Supp. 2011).

215. *Id.* § 13-10-91(b)(3).

216. *Id.* § 13-10-91(b)(4).

217. *Id.* § 13-10-91(b)(7)(A).

218. *Id.* § 13-10-91(b)(5).

219. O.C.G.A. § 16-9-121.1 (2011).

220. O.C.G.A. § 16-9-126(a.1) (2011).

Section 6 revises Code section 16-9-128 containing exemptions to the offense.²²¹

Section 7 contains new criminal offenses. A person who, while committing another criminal offense, knowingly transports, harbors,²²² or induces (to enter the state) an illegal alien, when such person knows that the person being transported, harbored, or induced is an illegal alien, is guilty of that offense.²²³ The penalties for these offenses are as follows: a first offense of transporting or harboring seven or fewer illegal aliens is a misdemeanor; a first offense of transporting or harboring eight or more illegal aliens is a felony; a second offense of transporting or harboring illegal aliens, regardless of the number, is a felony;²²⁴ a first offense of inducing an illegal alien to enter the state is a misdemeanor, while a second or subsequent offense is a felony;²²⁵ committing the offense of inducing an illegal alien to enter the state with intent to make a profit is a felony.²²⁶

The transporting and harboring provisions also list exemptions.²²⁷ The transporting provision does not apply to the following: government employees transporting an illegal alien as a part of their official duties; a person transporting an illegal alien to or from judicial or administrative proceedings when the illegal alien is required to appeal pursuant to legal process (e.g., subpoena); a person transporting an illegal alien to a law enforcement agency or judicial officer for official government purposes; an employer transporting a lawfully hired employee; or a person providing privately funded social services.²²⁸ The harboring provision does not apply to a government employee who holds an illegal alien in a detention facility (e.g., jail) or conceals, harbors, or shelters an illegal alien who is a victim of or a witness to a criminal offense.²²⁹

221. O.C.G.A. § 16-9-128 (2011). Note that O.C.G.A. § 16-9-128 already contained exemptions and section 6 revised it by adding O.C.G.A. § 16-9-121.1 (“aggravated identity fraud”) to the list of Code sections that shall not apply when the exempting circumstances are present. *Id.*

222. “Harboring” or “harbor” is also defined in section 7. O.C.G.A. § 16-11-201(a)(1) (2011).

223. O.C.G.A. § 16-11-200(b), -201(b), -202(b) (2011).

224. *Id.* § 16-11-200(c), -201(c).

225. *Id.* § 16-11-202(c).

226. *Id.* § 16-11-202(d).

227. O.C.G.A. § 16-11-200(d), -201(d) (2011).

228. *Id.* § 16-11-200(d).

229. *Id.* § 16-11-201(d).

In section 8, Code section 17-5-100 authorizes a peace officer, when such officer has probable cause to believe a suspect has committed a criminal violation, to use reasonable means to verify the suspect's immigration status when the suspect cannot provide an acceptable form of identification.²³⁰ This Code section prohibits an officer from considering race, color, or national origin in implementing the requirements.²³¹ Further, if the officer receives verification that the suspect is an illegal alien, he is authorized to take action authorized by federal and state law, which includes detainment, transporting to a federal facility, or notifying Department of Homeland Security (DHS).²³² The Code section exempts witnesses to and victims of crimes who contact law enforcement.²³³ Lastly, an officer acting in good faith has immunity from damages or liability.²³⁴

Section 9 adds the new Code section 35-1-16, which encourages law enforcement officials to work with federal immigration authorities and use available resources to enforce immigration laws.²³⁵ It also gives officers the authority to securely transport and arrest illegal aliens when authorized by state or federal law, and grants immunity to an officer acting in good faith.²³⁶ Section 10 amends Code section 35-2-14, which provides for annual officer training.²³⁷ Section 11 adds the new Code section 35-6A-10, which provides for grant or incentive programs to encourage agencies to use the federal DHS's Secure Communities initiative.²³⁸

Section 12 amends Code section 36-60-6, which now requires private employers with more than ten employees to use E-verify, and lists separate effective dates—depending on an employer's number of employees.²³⁹ Further, before a county or municipality can issue or renew any document required to operate a business to any person, that person shall provide an affidavit attesting that he uses E-verify or

230. O.C.G.A. § 17-5-100(b), (c) (Supp. 2011).

231. *Id.* § 17-5-100(d).

232. *Id.* § 17-5-100(e).

233. *Id.* § 17-5-100(f).

234. *Id.* § 17-5-100(g).

235. O.C.G.A. § 35-1-17(a), (b) (Supp. 2011).

236. *Id.* § 35-1-17(c).

237. O.C.G.A. § 35-2-14(d) (Supp. 2011).

238. O.C.G.A. § 35-6A-10 (Supp. 2011).

239. O.C.G.A. § 36-60-6(a) (Supp. 2011).

is subject to an applicable exemption.²⁴⁰ Counties and municipalities also must provide the Department of Audits and Accounts with a report demonstrating compliance with the section.²⁴¹ Lastly, the Attorney General is authorized to conduct an investigation and bring an action against an employer if necessary to ensure compliance.²⁴² If the Attorney General determines that a violation has occurred, then an employer has 30 days to cure the deficiency.²⁴³

Under section 13, Code section 42-4-14, relating to the determination of nationality of a person charged with a felony, now contains the definition of an “illegal alien.”²⁴⁴ It provides that reasonable efforts shall be made to seek verification of a confined foreign national’s lawful status, and if that person is an illegal alien, he or she may be detained, arrested, or transported as authorized by law.²⁴⁵ Section 14 amends Code section 42-5-51, relating to reimbursement for the confinement of state inmates in local facilities.²⁴⁶

Section 15 amends Code section 45-10-28, which adds penalties for agency heads who violate the E-verify or SAVE program requirements.²⁴⁷ Section 16 then amends Code section 50-36-1, which defines “agency head” for the purpose of the penalty provision.²⁴⁸

The next set of sections relates to “secure and verifiable” documents for the purpose of determining a person’s identity. Section 17 amends Code section 50-36-1(e), which now mandates agencies to require applicants for public benefits to provide at least one secure and verifiable document.²⁴⁹ Section 18 amends Code section 50-36-1(o) which creates penalties for an agency’s failure to abide by the secure and verifiable document provisions, with higher penalties

240. *Id.* § 36-60-6(d).

241. *Id.* § 36-60-6(e).

242. *Id.* § 36-60-6(j).

243. *Id.*

244. O.C.G.A. § 42-4-14(a) (Supp. 2011). “[T]he term ‘illegal alien’ means a person who is verified by the federal government to be present in the United States in violation of federal immigration law.” *Id.*

245. *Id.* § 42-4-14(c), (d).

246. O.C.G.A. § 42-5-51(c) (Supp. 2011).

247. O.C.G.A. § 45-10-28(c) (Supp. 2011).

248. O.C.G.A. § 50-36-1(1) (Supp. 2011).

249. O.C.G.A. § 50-36-1(e)(1) (Supp. 2011).

applicable for willful violation.²⁵⁰ It also gives the Attorney General the authority to investigate a violation and bring an action against an agency.²⁵¹ Section 19 creates the new Code section 50-36-2, entitled the “Secure and Verifiable Identity Document Act,” which requires agencies and political subdivisions to only accept or use secure and verifiable documents.²⁵² This Code section also defines key terms such as “secure and verifiable document,” prescribes penalties for violation, and lists exemptions.²⁵³ A “secure and verifiable document” is a document issued by a state or federal jurisdiction, or recognized by the United States government, and is verifiable by federal or state law enforcement, intelligence, or homeland security agencies.²⁵⁴ Knowingly accepting documents that are not “secure and verifiable” is a misdemeanor punishable by a maximum of twelve months imprisonment and/or a \$1000.00 fine.²⁵⁵ Exemptions from the requirements of this Code section include attorneys (and their employees) who represent a criminal defendant, an agency official accepting a crime report or conducting a criminal investigation, a provider of emergency medical services, or a person reporting a crime.²⁵⁶

Section 20 adds the new Code section 50-36-3, which creates the Immigration Enforcement Review Board and sets up related procedures.²⁵⁷ This new Code section establishes the administrative review process that replaces the citizen suit provisions in the original bill.²⁵⁸ The administrative review process ensures an enforcement mechanism without the concerns about frivolous lawsuits and burdens on judicial resources.²⁵⁹ The Board’s duties are to review or investigate complaints, take appropriate remedial action, make and adopt rules and regulations, and subpoena documents and witnesses

250. *Id.* § 50-36-1(o).

251. *Id.*

252. O.C.G.A. § 50-36-2(a), (c) (Supp. 2011).

253. *Id.* § 50-36-2(b), (d), (e).

254. *Id.* § 50-36-2(b)(3). The definition of “secure and verifiable document” specifically excludes *matricula* consular cards and similar identification cards issued by foreign governments. *Id.*

255. *Id.* § 50-36-2(d).

256. *Id.* § 50-35-2(e).

257. O.C.G.A. § 50-36-3 (Supp. 2011).

258. April House Video, *supra* note 174, at 2 hr., 22 min., 03 sec. (remarks by Rep. Matt Ramsey (R-72nd)).

259. *Id.*

in matters before the Board.²⁶⁰ Specifically, the Board has the authority to review or investigate complaints regarding the E-verify,²⁶¹ the sanctuary policies,²⁶² and the SAVE program²⁶³ provisions.²⁶⁴ The Code section prescribes further procedures relating to meetings, reports, hearings, remedial actions, and appeals.²⁶⁵

In section 20.1, the Georgia General Assembly recognizes the importance of Georgia's agricultural industry and the potential impact of the Act on that industry.²⁶⁶ It then directs the Department of Agriculture to conduct a study on the impact of immigration on the agriculture industry and make appropriate recommendations.²⁶⁷

Analysis

Verification Requirements

The Act creates a new Code section, 17-5-100, which gives law enforcement officers the authority to verify the immigration status of a criminal suspect when the law enforcement officer has probable cause to believe the suspect violated a state or federal law.²⁶⁸ This provision mirrors a provision in Arizona's SB 1070 that was passed in 2010.²⁶⁹ Arizona's law resulted in, not only a significant amount of media attention, but litigation as well when the United States government sued Arizona on the basis of federal preemption.²⁷⁰ The district court granted the United States government's motion for a preliminary injunction based upon Arizona's law being preempted by federal immigration law.²⁷¹ In early 2011, the Ninth Circuit Court of

260. O.C.G.A. § 50-36-3(d) (Supp. 2011).

261. O.C.G.A. § 13-10-91 (Supp. 2011).

262. O.C.G.A. § 36-80-23 (Supp. 2011).

263. O.C.G.A. § 50-36-1 (Supp. 2011).

264. O.C.G.A. § 50-36-3(e) (Supp. 2011).

265. O.C.G.A. § 50-36-3 (Supp. 2011).

266. 2011 Ga. Laws 817.

267. *Id.*

268. O.C.G.A. § 17-5-100 (Supp. 2011).

269. Telephone Interview with Charles Kuck, Managing Partner, Kuck Immigration Partners LLC (Apr. 27, 2011) [hereinafter Kuck Interview] (on file with the Georgia State University Law Review); see S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

270. *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010).

271. *Id.* at 1008.

Appeals affirmed this injunction.²⁷² Section 6 of Arizona’s law provided that an officer “may arrest a person if the officer has probable cause to believe . . . [t]he person to be arrested has committed any public offense that makes the person removable from the United States.”²⁷³ The Ninth Circuit found section 6 of Arizona’s law to be preempted by federal law, because Arizona did not have the “authority to unilaterally transform state and local law enforcement officers into a state-controlled DHS force to carry out its declared policy of attrition.”²⁷⁴

Based on the rulings for the Arizona legislation, HB 87 might be invalidated by federal courts as being preempted by federal law.²⁷⁵ However, the Georgia legislature has attempted to distinguish the Act from Arizona’s SB 1070 in the hopes of avoiding such a preemption challenge.²⁷⁶ Senator Bill Hamrick (R-30th), the sponsor of the bill in the Senate, emphasized that the Committee tried to learn from the Arizona law and use the Arizona’s district court’s decision to the legislature’s benefit.²⁷⁷ The Committee reviewed the language of the court decision to ensure that the Act “does set some hurdles for law enforcement officers” such that: first, “the officer must have probable cause to believe a suspect has committed a crime”; and second, the suspect must fail to provide “certain identifying documents.”²⁷⁸ It is not clear, however, if this revised language cures the constitutional issues relating to federal preemption.²⁷⁹ At the time of this writing, in July of 2011, a lawsuit has been filed against the Act in federal court in the Northern District of Georgia on grounds of federal preemption.²⁸⁰ Charles Kuck, an immigration attorney in Atlanta representing one of the many groups suing the Governor of the State of Georgia in his official capacity, emphasized that the problem with

272. *United States v. Arizona*, No. 10-16645, 2011 WL 1346945 (9th Cir. Apr. 11, 2011).

273. *Id.* at *1.

274. *Id.* at *17.

275. See Kuck Interview, *supra* note 269.

276. Senate Video, *supra* note 141, at 1 hr., 41 min., 05 sec. (remarks by Sen. Bill Hamrick (R-30th).

277. *Id.*

278. *Id.*

279. See Kuck Interview, *supra* note 269.

280. See Jeremy Redmon, *Law’s Foes Sue To Bar It*, ATLANTA J.-CONST., June 3, 2011, available at <http://www.ajc.com/news/georgia-politics-elections/civil-rights-groups-file-965219.html> (“The American Civil Liberties Union of Georgia, the Southern Poverty Law Center and several immigrant-rights organizations and individuals are challenging the law in Atlanta’s federal district court.”).

the provision of Arizona's law was not the language but the effect.²⁸¹ Kuck argues that the effect of section 8 of the Act is the same as the effect of section 6 of Arizona's law and therefore will be found unconstitutional.²⁸²

Moreover, there are concerns that the Act has the unintended consequence of allowing racial profiling.²⁸³ Representative Stacey Abrams (D-84th) emphasized that while the author may have not intended section 8 to allow racial profiling by government officials, it has that effect by giving police officers the authority to target individuals of certain backgrounds.²⁸⁴ While she noted that this portion of the Act does include a subsection prohibiting officers from considering "race, color, or national origin," this was not enough to prevent officers from racially profiling.²⁸⁵ Senator Vincent Fort (D-39th) also warned of the potential of law enforcement officers to use racial profiling, and he noted that Latino immigrants have already come forward to testify about the racial profiling they have experienced.²⁸⁶ The State, however, in defending the Act in federal court, argued that while racial profiling may occur, "the presumption is that law enforcement will conduct themselves in a constitutional manner."²⁸⁷

Transporting, Harboring, and Inducing Illegal Immigrants

Code sections 16-11-200, to -202 similarly present both constitutional issues and interpretation issues.²⁸⁸ Code section 16-11-

281. *Id.*

282. *Id.*

283. See Jeremy Redmon, *Immigration Bill OK'd: Arizona Laws Set Stage for Georgia Crackdown on Illegal Immigrants*, ATLANTA J.-CONST., Apr. 15, 2011, at A16, available at <http://www.ajc.com/news/georgia-lawmakers-pass-illegal-909988.html> (discussing opponents who fear that the legislation "opens the door for racial profiling by law enforcement").

284. March House Video, *supra* note 1, at 1 hr. 18 min., 38 sec. (remarks by Rep. Stacey Abrams (D-84th)).

285. *Id.* (arguing that the "traffic stop has often been the legal pretext for racial profiling because it is the most subjective of criminal activities and the hardest to disprove").

286. Senate Video Apr. 11, *supra* note 141, at 2 hr., 53 min., 14 sec. (remarks by Sen. Vincent Fort (D-39th)).

287. Response in Opposition to Plaintiff's Motion for Preliminary Injunction, Georgia Latino Alliance for Human Rights v. Deal, No. 1:11-CV-1804-TWT, 2011 WL 2447441 (N.D. Ga. June 17, 2011).

288. See Kuck Interview, *supra* note 269; March House Video, *supra* note 1, at 1 hr., 30 min., 31 sec. (remarks by Rep. Matt Ramsey (R-72nd)).

200 makes it a crime for an individual to “knowingly and intentionally” transport an illegal alien, knowingly harbor an illegal alien, and knowingly encourage or entice an illegal alien to enter Georgia.²⁸⁹ The Senate Committee was cautious not to use the language found in Arizona’s law that the district court judge enjoined, and instead used language the judge found “okay” because it “mirrors federal law.”²⁹⁰ Yet this change in language may not be sufficient to cure the preemption problem with the Act.²⁹¹ As one of the attorneys suing the State of Georgia to enjoin implementation of the Act, Kuck is arguing that the provisions in this Code section “clearly require federal government involvement in their enforcement” and therefore are preempted.²⁹² As in the Arizona law, Kuck argues that this Code section interferes with the federal government’s authority to make determinations about the enforcement of civil immigration laws, making those provisions unconstitutional.²⁹³

Furthermore, Code section 16-11-200 might present issues of judicial interpretation. It is a crime to knowingly and intentionally transport an illegal alien in a motor vehicle “for the purpose of furthering the illegal presence of the alien in the United States.”²⁹⁴ Senator Jason Carter (D-42nd) admitted that he “honestly cannot imagine what that means,” but thought that it could apply to an individual dropping off a housekeeper at the bus stop or anywhere else “between here and the border.”²⁹⁵ Kuck noted that HB 87 does not define “furthering the illegal presence.”²⁹⁶ He also argued that the provision is impracticable to enforce because of the definition of “illegal alien.”²⁹⁷ Code section 16-11-200(a)(1) defines an illegal alien as a person “who is verified by the federal government to be

289. O.C.G.A. § 16-11-200, -201, -202 (2011).

290. Senate Video Apr. 11, *supra* note 141, at 1 hr., 39 min., 50 sec. (remarks by Sen. Bill Hamrick (R-30th)).

291. See Kuck Interview, *supra* note 269.

292. Charles Kuck, *What HB 87 Means for You, Your Business and for Georgia (and it’s not good)*, MUSINGS ON IMMIGRATION BLOG (Apr. 2011), http://musingsonimmigration.blogspot.com/2011_04_01_archive.html [hereinafter Kuck Blog].

293. Kuck Blog, *supra* note 292.

294. O.C.G.A. § 16-11-200(b) (2011).

295. Senate Video Apr. 11, *supra* note 141, at 3 hr., 19 min., 21 sec. (remarks by Sen. Jason Carter (D-42nd)).

296. Kuck Blog, *supra* note 292.

297. *Id.*

present” in violation of federal immigration law,²⁹⁸ and Kuck noted that if you read the definition into the statute, it requires the person transporting the illegal alien to have received verification that the person being transported is present in violation of federal immigration law.²⁹⁹ Under this reading, the prosecutor would have to prove that the individual had federal government verification that a person was an illegal alien, thus making it very difficult to prosecute the crime.³⁰⁰

Similar problems may arise in efforts to enforce the harboring part of the Act, Code section 16-11-201. This Code section makes it a crime to harbor an illegal alien and defines harboring as “any conduct that tends to substantially help an illegal alien remain in the United States in violation of federal law.”³⁰¹ It affords exceptions for a person who is providing services to children or victims of crimes, a person who is providing “privately funded social services,” a person who is providing emergency medical services, or an attorney who is providing criminal services for a defendant.³⁰² While the Code section criminalizes an individual who “substantially helps” an illegal alien, it fails to define “substantially help,” thereby leaving it to prosecutors and judges to speculate as to the significance of the term.³⁰³ In the House, Representative Matt Ramsey (R-72nd) assured the floor that the harboring provision would not affect churches or mission groups and called such concerns “patently absurd.”³⁰⁴ He emphasized that the provision was aimed at traffickers.³⁰⁵ The State picked up this argument, in defending the Act in federal court, and emphasized not only that privately funded social services were exempt under the legislation but also that the requirement of another criminal offense demonstrated that the law targeted individuals seeking to exploit aliens rather than churches.³⁰⁶

298. O.C.G.A. § 16-11-200(a)(1) (2011).

299. Kuck Blog, *supra* note 292.

300. *Id.*

301. O.C.G.A. § 16-11-201(a)(1) (2011).

302. *Id.*

303. Kuck Blog, *supra* note 292.

304. March House Video, *supra* note 1, at 1 hr., 35 min., 16 sec. (remarks by Rep. Matt Ramsey (R-72nd)).

305. *Id.*

306. Response in Opposition to Plaintiff’s Motion for Preliminary Injunction, Georgia Latino Alliance for Human Rights v. Deal, No. 1:11-CV-1804-TWT, 2011 WL 2447441 (N.D. Ga. June 17,

The Senate floor debate demonstrated a different interpretation. Senator Carter, in response to questions, did not consider members of churches outside the potential realm of prosecution for violating the harboring provision and stated that a church bus driver could be prosecuted for picking up undocumented individuals to take them to church if the driver knew they were illegal and was committing another criminal offense.³⁰⁷ Moreover, the provisions for the exceptions are unclear as to who would be included. Senator Lester Jackson (D-2nd) asked whether free dental clinics would be considered providing services that “substantially help” an undocumented individual remain in the United States.³⁰⁸ Senator Carter replied that if the clinic was providing “emergency medical services,” it would fall within the exception; but if it was providing “teeth cleanings,” the exception would not apply and the dentists could be prosecuted if they were also committing another criminal offense.³⁰⁹ This ambiguity in the law, and its potential to have an effect on charities and churches, has led many legislators to criticize the law for preventing Good Samaritans from offering help to individuals in need out of fear of being prosecuted.³¹⁰ Furthermore, the State argued that the criminalization of transporting, harboring, or enticing undocumented immigrants into the state is necessary for the protection of aliens from exploitation.³¹¹

Other Criticism of HB 87

A major criticism of HB 87 is the negative impact it will have on Georgia’s economy.³¹² Legislators presented many concerns that HB

2011).

307. Senate Video Apr. 11, *supra* note 141, at 3 hr., 23 min., 42 sec. (remarks by Sen. Jason Carter (D-42nd)).

308. Senate Video Apr. 11, *supra* note 141, at 3 hr., 26 min., 27 sec. (remarks by Sen. Lester Jackson (D-2nd)).

309. Senate Video Apr. 11, *supra* note 141, at 3 hr., 26 min., 27 sec. (remarks by Sen. Jason Carter (D-42nd)).

310. Senate Video Apr. 11, *supra* note 141, at 3 hr., 26 min., 27 sec. (remarks by Sen. Lester Jackson (D-2nd)) (telling the story of the Good Samaritan and that he never asked the individual his immigration status and was not afraid of being prosecuted for helping an individual in need).

311. Response in Opposition to Plaintiff’s Motion for Preliminary Injunction, Georgia Latino Alliance for Human Rights v. Deal, No. 1:11-CV-1804-TWT, 2011 WL 2447441 (N.D. Ga. June 17, 2011).

312. See Jeremy Redmon & Aaron Gould Shelnin, *As Foes Vow Veto Push, Deal Says He’ll Sign the*

87 will hurt the hospitality business, tourism industry, and the agricultural sector of Georgia's economy.³¹³ Senator John Bulloch (R-11th) distributed a letter to the floor signed by 220 different entities in Georgia—including business associations such as the Georgia Agri-business Council, the Georgia Agriculture Commodities Commission for Cotton, Georgia Blueberries Association, Georgia Foreign Bureau, Georgia Fruit and Vegetables Association, Georgia Green Industry Association, and Georgia Horticulture—that are concerned about the legislation.³¹⁴ While he recognized that many agriculture and farming businesses criticized the bill, Senator Bulloch emphasized that the Act raised concerns in all sectors of Georgia businesses.³¹⁵ Since the Act has gone into effect, immigrants have fled the state, resulting in farm labor shortages and leaving “millions of dollars’ worth of blueberries, onions, melons and other crops unharvested and rotting in the fields.”³¹⁶

Representative Elena Parent (D-81st) specifically warned against the effect the Act would have on the tourism industry.³¹⁷ Highlighting the importance of tourism to Georgia's economy, she noted that 241,500 jobs in the state were directly or indirectly linked to the lodging industry, which generated \$4.2 billion in tax revenue for local governments.³¹⁸ She also stressed that the tourism industry

Bill: Crackdown on Illegal Immigration Fulfills Promise, Governor Says, ATLANTA J.-CONST., Apr. 16, 2011, at A9, available at <http://www6.lexisnexis.com/publisher/EndUser?Action=UserDisplayFullDocument&orgId=574&topicId=100020422&docId=l:1400116223&start=5> (“Georgia’s \$14.1 billion restaurant industry has been particularly critical of HB 87 and will press for its veto.”).

313. See Senate Video Apr. 11, *supra* note 141, at 2 hr., 16 min., 03 sec. (remarks by Sen. Nan Orrock (D-36th)); Senate Video Apr. 11, *supra* note 141, at 2 hr., 27 min., 30 sec. (remarks by Sen. John Bullock (R-11th)).

314. Senate Video Apr. 11, *supra* note 141, at 2 hr., 25 min., 55 sec. (remarks by Sen. John Bullock (R-11th)).

315. *Id.* Senate Video Apr. 11, *supra* note 141, at 2 hr., 25 min., 55 sec. (remarks by Sen. John Bullock (R-11th)).

316. Jay Bookman, *State Officials Reaping What They Have Sown*, ATLANTA J.-CONST., June 17, 2011, <http://blogs.ajc.com/jay-bookman-blog/2011/06/17/gas-farm-labor-crisis-playing-out-as-planned/> (“According to a survey of 230 Georgia farmers conducted by Agriculture Commissioner Gary Black, farmers expect to need more than 11,000 workers at some point over the rest of the season, a number that probably underestimates the real need, since not every farmer in the state responded to the survey.”); see Willoughby Mariano, *Ag Leader’s Wage Estimate A Bit Optimistic*, ATLANTA J.-CONST., June 14, 2011.

317. March House Video, *supra* note 1, at 56 min., 02 sec. (remarks by Rep. Elena Parent (D-81st)).

318. *Id.*

was “interlinked” with many other industries such as “transportation, restaurants, agriculture, manufacturing, and recreation,” which produced \$20.9 billion in total sales throughout Georgia.³¹⁹ The Act would devastate this industry, according to Representative Parent, by “sending a signal to foreign visitors that they are not welcome.”³²⁰ She cited the Act’s encouragement of racial profiling as the factor that would discourage other Americans from visiting Georgia.³²¹

Many of the legislators pointed to Arizona and the effect of its immigration law on Arizona’s economy.³²² Representative Parent stressed that the Arizona’s convention business lost \$45 million in two months in 2011, 40 conventions, 4,236 jobs, \$217 million in direct spending, and \$388 million in economic input.³²³ It is undisputed that Arizona’s law hurt the industry.³²⁴ She warned that Georgia would have a similar fate if HB 87 passed and that “negative impacts will likely be felt for years to come.”³²⁵ Senator Orrock (D-36th) also pointed to Arizona as an example, and she stressed that this year when five immigration bills arose in the Senate, they were all defeated.³²⁶ She claimed that the Republican Senate in Arizona did not pass the bills because of the “outpouring from [members of] the business community in Arizona” who appealed to their legislators saying, “You have done enough. You have damaged our economy,” and “Please in your best wisdom withdraw from pursuing these bills.”³²⁷ Senator Orrock asked the floor to hear the message that Arizona’s legislators heard this year and not pass HB 87.³²⁸

Laila Aziz & Nicole Sykes

319. *Id.*

320. *Id.*

321. *Id.*

322. *See Id.*; Senate Video Apr. 11, *supra* note 141, at 2 hr., 17 min., 13 sec. (remarks by Sen. Nan Orrock (D-36th)); Senate Video Apr. 11, *supra* note 141, at 2 hr., 35 min., 54 sec. (remarks by Sen. Curt Thompson (D-5th)).

323. March House Video, *supra* note 1, at 1 hr., 01 min., 16 sec. (remarks by Rep. Elena Parent (D-81st)).

324. *Id.*

325. *Id.*

326. Senate Video Apr. 11, *supra* note 141, at 2 hr., 17 min., 13 sec. (remarks by Sen. Nan Orrock (D-36th)).

327. *Id.*

328. *Id.*

