ACLU AMERICAN CIVIL LIBERTIES UNION FOUNDATION IMMIGRANTS' RIGHTS PROJECT

PRELIMINARY ANALYSIS OF
South Carolina's Senate Bill 20

Summary of major provisions: South Carolina's Senate Bill 20 forces all South Carolinians to carry specific forms of identification at all times in order to demonstrate their lawful immigration status or risk extended detention. It creates a "show me your papers" police state in an unconstitutional, confused attempt to take over the federal government's enforcement of immigration law. Under the bill, when a law enforcement officer stops an individual for a perceived crime, the officer must attempt to determine a person's immigration status if the officer develops a "reasonable suspicion" that the person stopped is unlawfully present in the United States. However, the bill's vague provisions leave ample room for racial profiling. Officers will no doubt rely on unconstitutional factors such as race, ethnicity, national origin, and English-speaking ability to develop "reasonable suspicion" of unlawful presence.

Separately, the bill prohibits limiting in any way officers' enforcement of immigration law. As a result, police departments will no longer be able to determine how best to ensure the safety of their communities. Localities will have no choice but to invest their time and resources in enforcing federal immigration laws. In addition, the bill creates a series of state-based immigration crimes which will subject even *lawful* immigrants to felony or misdemeanor convictions. For example, immigrants lawfully present under asylum, as well as *victims* of human trafficking, will face felony convictions for self-smuggling (i.e. allowing themselves to be transported into the country). But these are only a few examples of how South Carolina's bill will give state law enforcement officers and employees license to intimidate, target, and punish immigrants and people of color.

This is not a comprehensive analysis of all the unconstitutional aspects of S. 20. The provisions discussed below represent some of the most troubling provisions of this bill.

Requires law enforcement officers to verify immigration status

Upon any routine stop, if an officer develops reasonable suspicion that an individual is unlawfully present, the bill requires the officer to prolong the stop in order to investigate status. *All* South Carolinians will be forced to carry specific forms of identification in what will become a "show me your papers" police state.

Under 17-13-170(A), any time a law enforcement officer develops a "reasonable suspicion" that an individual stopped for a perceived crime is unlawfully present in the United States, the officer must attempt to determine the person's status. 17-13-170(B)(1) creates a presumption of lawful presence when a person can supply an officer with one of four listed forms of identification. Thus, the bill will significantly burden all South

Carolinians, and in particular, lawfully present immigrants. It will make encounters with the police occasions on which anyone may need to show his or her "papers."

Indeed, because even minor acts like jaywalking are considered a crime in South Carolina, individuals will be subject to personal identification checks and status interrogations for virtually any reason.[1] The bill will prolong detention while an officer investigates status without reasonable suspicion or probable cause of criminal activity. The extended detention will violate the Fourth Amendment's protection against unlawful searches and seizures. The Supreme Court has ruled that the Constitution and federal laws are designed "to protect the personal liberties of law-abiding aliens…and to leave them free from the possibility of inquisitorial practices and police surveillance."[2] With respect to a similar provision, the district court ruled in Arizona that it would "impose[] an impermissible burden on lawfully-present aliens." This bill will create that same intolerable result.[3]

Despite requiring officers to make immigration status determinations whenever they develop "reasonable suspicion" of unlawful presence in the course of a stop, the bill does not define "reasonable suspicion." The limitation in 17-3-170(D) on the use of "race, color, or national origin" is a fig leaf, designed to cover the fact that apart from appearance and English-speaking ability, it is hard to imagine any legitimate basis for "reasonable suspicion" of unlawful presence. In addition, if a person cannot provide any of the listed forms of identification, the officer may still "otherwise verify" that the person has been issued any of those forms of picture identification. 17-13-170(B)(3). But 17-13-170(B)(3) does not specify how an officer may "otherwise" establish that a person possesses any of the listed identification documents that create a presumption of lawful presence. This lack of clarity opens the door to selective enforcement against people presumed to look or sound "foreign."

Once an officer has made a determination of status, 17-13-170(C)(1) and (2) will permit state officers to further extend an individual's detention solely on the basis of his or her inability to document presumed legal presence. An officer is not required to retain custody of a person solely based on the person's status, but nothing explicitly prohibits it. Moreover, under 17-13-170(C)(4), if an officer determines that a person is unlawfully present in the United States, the officer must cooperate with the Illegal Immigration Enforcement Unit within the South Carolina Department of Public Safety or Immigration and Customs Enforcement ("ICE") to determine whether the officer shall retain custody of the person or whether either of those agencies shall assume custody. This provision is preempted because it attempts to force South Carolina's own enforcement priorities onto the federal government.

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[1] *See e.g.*, S.C. Code Ann. § 56-5-730; S.C. Code Ann. § 56-5-3150.
[2] *Hines v. Davidowitz*, 312 U.S. 52, 74 (1941).
[3] *United States v. Arizona*, 703 F. Supp. 2d 980, 998 (D. Ariz. 2010) aff'd, 641 F.3d 339 (9th Cir. 2011).

Finally, the bill makes a meaningless effort to create a reporting system. 17-13-170(I) provides that when an officer stops a motor vehicle without issuing a citation and the officer contacts the Illegal Immigration Enforcement Unit, the officer who initiated the stop must complete a data collection form. The form must include information regarding the age, gender, and race or ethnicity of the driver of the vehicle. However, 17-13-170(I) makes contacting the Illegal Immigration Enforcement Unit optional, and the officer may avoid reporting simply by issuing any sort of citation. Thus, to the extent that the 17-13-170(I) reporting requirements aim to protect individuals from discriminatory or selective enforcement of the law, it mandates only empty mechanisms for doing so.

Jeopardizes public safety by forcing law enforcement officers to use their time and resources to enforce federal immigration law

South Carolina's S.20 bill poses a public safety risk to cities and towns across South Carolina. The bill wrests control from officers over law enforcement priorities and allocation of resources.

Multiple sections in the bill prohibit local law enforcement officers from deciding how best to use their time and resources to tackle crime and other pressing issues. First, 6-1-170(E)(1)(a) and (b) empower individual South Carolina residents to file lawsuits to block policies or ordinances that they think limit a law enforcement officer, local official, or local government employee from 1) seeking to enforce the state's immigration law; or 2) communicating with federal or state officials regarding the immigration status of persons in the state. Second, 6-1-170(E)(1)(c) empowers individual residents to file a lawsuit to block any ordinance, policy, regulation, or law that they think conflicts with a wide range of federal or state laws regarding immigration (i.e. employment). Third, 17-13-170(E) disallows prohibiting or restricting South Carolina officers and agencies from sending, receiving, or maintaining information related to the immigration status of any person or exchanging that information with other federal, state, or local government entities for four enumerated purposes. Fourth, 17-13-170(G) states that no official, agency, or political subdivision of the State may limit or restrict the enforcement of the bill or federal immigration laws.

The bill ultimately requires law enforcement officers to carry out the federal government's job of enforcing civil immigration law at the expense of their communities' own needs. It also clearly prohibits localities from having policies aimed at increasing trust within immigrant communities, such as not questioning victims and witnesses of crime about their immigration status. Finally, laws that prohibit any limits to a state employee's ability to cooperate directly with investigations or enforcement actions by federal agencies, such as ICE, are unnecessary. Federal law already allows state and local agencies to cooperate with federal immigration law enforcement efforts, and restricts the ability of states and localities to block communications between public employees and ICE.

Creates new immigration-related felonies

The bill creates felonies and misdemeanors that will mistakenly render innocent South Carolinians criminals.

The bill's smuggling and self-smuggling provisions will make felons out of various innocent groups. 16-9-460 makes it a felony to transport or harbor anyone who has "come to, entered, or remained in the United States in violation of law" with the intent of furthering that person's unlawful entry or avoiding apprehension or detection by state or federal authorities. 16-9-460(B), (D). It also makes it a felony for a person who has "come to, entered, or remained in the United States in violation of law" to subject *himself or herself* to transport or harboring. 16-9-460(A), (C). In other words, it makes self-smuggling a felony. Given that these provisions apply to people who have acquired lawful status, they will apply to *lawful* immigrants such as asylees. They will also further harm victims of human trafficking. In addition, these provisions will make criminals out of charitable individuals who may happen to drive a neighbor to the hospital, church, or grocery store. The penalties for violating this provision call for a fine not to exceed five thousand dollars or imprisonment for a term not to exceed five years, or both. Moreover, any person violating this section may not seek or obtain any state professional license.

16-9-460 is preempted because states may not establish their own immigration crimes. In fact, federal law already addresses the harboring and transporting of immigrants.[4] Thus, 16-9-460 creates a separate and independent state system of criminal immigration laws that will take away the federal government's prosecutorial discretion. The federal government will no longer be in control of deciding when to charge a person or what penalty to seek when it comes to harboring and transporting. 16-9-460 also lacks the safeguards found in federal law, and sets out penalties that conflict with those prescribed by federal statute.[5]

Criminalizes the failure to carry documents verifying status

The bill makes it a misdemeanor for an individual not to carry documents verifying status even in cases where the federal government does not provide such documents.

The bill will criminalize lawfully present individuals who fail to produce papers the federal government does not give them while creating a "show me your papers" state for *all* South Carolinians. 16-17-750 makes it unlawful for a person eighteen years of age or older to fail to carry in the person's personal possession any certificate of alien registration or alien registration receipt card issued to the person pursuant to federal law. However, many lawful immigrants lack official certificates or green cards verifying their status. Asylees, immigrants receiving Temporary Protected Status ("TPS"), and aliens entering under the federal government's Visa Waiver Program, for example, are never issued readily available documents certifying their lawful presence. After the 2010

[4] 8 U.S.C. § 1324.
[5] 8 U.S.C. § 1324(a)(1)(A)(iii) (harboring); § 1324(a)(1)(A)(ii) (transporting).

earthquake in Haiti alone, the Department of Homeland Security made up to 200,000 individuals eligible for TPS.[6] And in fiscal year 2009, more than 14 million aliens were admitted under the Visa Waiver Program.[7] Supreme Court precedent clearly establishes that states may not enact alien registration laws. Moreover, enforcement of 16-17-750 would interfere with the federal government's administration of federal immigration law, and would result in wrongful arrests and detention.

Requires jail keepers to detain individuals while attempting to verify immigration status

The bill leaves room for officers to hold persons in jail for extended periods even after all criminal charges have been dropped.

23-3-1100(A) requires jail keepers to make a reasonable effort to determine a prisoner's immigration status whenever a prisoner is charged with a criminal offense and placed in jail for any period. A jail keeper may detain a prisoner for up to seventy-two hours while verifying status. However, the bill's vague and confusing language leaves room for officers to keep a person in jail even after the person has been cleared of all criminal charges and even after the seventy-two hour period. Thus, 23-3-1100 likely violates the Fourth Amendment' protection against unlawful searches and seizures, and undermines the Constitution's guarantee of due process. Furthermore, this section is preempted by federal law, which sets out the exclusive terms under which individuals may be detained for immigration enforcement purposes.

Extends detention based only on immigration status

The bill authorizes officers to detain individuals solely for unlawful presence and transport them to federal facilities.

17-3-170(C)(4) and 23-3-1100(D) and (E) authorize officers and jail keepers to transport individuals to federal facilities within the State. In addition, officers and jail keepers may transport individuals to federal facilities outside of their jurisdiction if they obtain judicial authorization. As a consequence, even if all criminal charges against an individual are dropped, the bill authorizes state and local law enforcement officers to extend an individual's detention and transport him or her solely on the basis of unlawful presence without a directive from the federal government. These sections are unnecessary as to any person who the federal government has reason to believe is in the country illegally because federal law already provides a process by which those persons can be transported

[6]USCIS.gov, Temporary Protected Status – Haiti Questions and Answers, ://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=b7755a40a79b6210VgnVCM100000082ca60aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD (last visited June 27, 2011).

[7] Decl. of David V. Aguilar ¶24, filed in *United States v. Arizona*, No. 10-CV-1413 (D. Ariz. Filed July 6, 2010).

to federal custody. Local agencies can also contract with federal authorities to be reimbursed for the cost of detaining and transporting such persons.

Creates a state immigration police force

The bill will create a special state law enforcement unit for enforcing civil immigration laws.

Pending a 287(g) agreement with the federal government, 23-6-60 will create an Illegal Immigration Enforcement Unit within the Department of Public Safety. The Unit's purpose would be to enforce immigration laws as authorized pursuant to federal laws and laws of South Carolina.

Even if the state were to obtain a 287(g) agreement to authorize the creation of its own immigration enforcement agency – which seems highly doubtful – it is a recipe for racial profiling and distortion of the federal government's immigration enforcement priorities. Indeed, the federal Department of Justice has already initiated investigations of racial and ethnic profiling in several 287(g) jurisdictions around the country, including in Georgia and Arizona. And the U.S. Department of Homeland Security's own Office of the Inspector General (OIG) has criticized the program for its lack of oversight and accountability to ensure against racial profiling and civil liberties abuses. A recent OIG report shows that ICE's own enforcement priorities for the 287(g) program are not followed by local jurisdictions. ICE says 287(g)'s mandate is to focus on noncitizens who pose a threat to national security or are dangers to the community. But over 90 percent of those targeted by 287(g)-authorized jurisdictions were low-level, non-violent offenders, according to the OIG sample.