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Bill Analysis

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Primary Sponsors: Reps. Click and Santucci

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SUMMARY

America First Act

- Names the bill the America First Act.

Unlawful presence in Ohio

- Prohibits any person who is unlawfully present in the U.S. from knowingly entering, attempting to enter, or being present in Ohio.
- Makes a violation a fifth degree felony in general, and a fourth degree felony upon a repeat violation or under certain other circumstances and provides special sentencing requirements.
- Provides an affirmative defense for a person who was approved for benefits under the federal Deferred Action for Childhood Arrivals (DACA) program between 2012 and 2021.
- Requires the court to stay the proceedings in certain cases while a defendant is applying for permission to remain in the U.S. or is in the process of leaving Ohio, and requires the charge to be dismissed with prejudice if the defendant ceases to be unlawfully present in Ohio.
- Explicitly requires all state and local law enforcement agencies to enforce the bill's provisions.

Cooperation with federal immigration authorities

- Requires Ohio law enforcement agencies and detention facilities to take certain actions to cooperate with federal officials in enforcing federal immigration law, including participating in U.S. Immigration and Customs Enforcement (ICE)'s Criminal Alien Program, honoring ICE detainer requests, and allowing its officers to participate in ICE's 287(g) Program.

Local government funding penalties

- Specifies that if a county, township, or municipal corporation's law enforcement agency fails to comply with the bill, the subdivision's Local Government Fund (LGF) distributions from the state must be reduced by $500 for each instance of noncompliance.

DETAILED ANALYSIS

America First Act

The bill specifies that it must be known as the America First Act.[1]

Unlawful presence in Ohio

Background – unlawful presence under federal law

Under federal immigration law, a person generally is considered to be unlawfully present in the U.S. if the person is an alien (not a U.S. citizen or national) and either (1) entered the U.S. without permission and has not since received permission to be in the U.S. or (2) entered the U.S. with permission, such as on a temporary visa, but that permission has expired. In this context, permission to remain might include a permanent or temporary visa or status under a humanitarian program, such as parole or temporary protected status.

Improper entry to the U.S. is a federal crime. An alien who does any of the following is guilty of a Class B misdemeanor, which is punishable by a maximum of six months in prison and a $5,000 fine:

- Enters the U.S. without going through a designated port of entry and receiving permission to enter;
- Eludes examination or inspection by authorities;
- Enters the U.S. by making a willfully false or misleading representation or willfully concealing a material fact.

A repeat offender is guilty of a Class E felony, which is punishable by a maximum of two years in prison and a $250,000 fine.

However, entering the U.S. legally and then overstaying a visa or other temporary permission to be in the U.S. is a civil matter, not a federal crime. The person may be ordered removed from the U.S. (deported) and barred from applying to reenter the U.S. for a given period. But, the person would not be sentenced to prison based on the person's immigration status.

An unlawfully present person also may apply for permission to remain in the U.S. under certain programs. For example, a person may apply for asylum on the ground that the person is unable or unwilling to return to the person's home country because the person is persecuted, or has a well-founded fear of persecution, on account of the person's race, religion, nationality,

[1] Section 3 of the bill.

membership in a particular social group, or political opinion. (This is the same standard used to determine whether a person is eligible to enter the U.S. as a refugee.)[2]

State-level felony offense

The bill prohibits any person who is unlawfully present in the U.S. from knowingly entering, attempting to enter, or being present in Ohio. (See "**Federal preemption**," below.) Whoever violates that prohibition is guilty of unlawful presence in Ohio, a fifth degree felony, except that a violation is a fourth degree felony if either of the following apply:

- The person has previously been convicted of unlawful presence in Ohio.
- The person is inadmissible to the U.S. under federal law because the person falls into one of the following categories (generally, the person has reentered the U.S. after being ordered to be removed in the past):
  - The person was ordered to be removed from the U.S. upon arrival in the U.S. or at the end of proceedings initiated upon the person's arrival in the U.S. and the person reentered the U.S. without the consent of the U.S. Attorney General (1) within five years after being removed, (2) within 20 years after being removed for a second or subsequent time, or (3) at any time if the person has been convicted of an aggravated felony.
  - The person was ordered to be removed or departed while under an outstanding removal order and the person reentered the U.S. without the consent of the U.S. Attorney General (1) within ten years after departure or removal, (2) within 20 years after being removed for a second or subsequent time, or (3) at any time if the person has been convicted of an aggravated felony.
  - The person was previously unlawfully present in the U.S. for an aggregated period of more than one year or was ordered to be removed, then left and reentered the U.S., unless the Secretary of Homeland Security gives the person a waiver under the Violence Against Women Act (VAWA) or the person waits at least ten years after the person's last departure from the U.S. and receives the consent of the Secretary.

In the case of any violation, regardless of whether it is a fifth degree or fourth degree felony, the bill requires the court to impose a mandatory prison term of 12 months, except that the court may allow the offender to be remanded into federal custody before the conclusion of the 12-month sentence. The offender is not eligible for probation or parole. Under continuing law, the standard possible prison term for a fifth degree felony is a definite term of 6-12 months, and the standard possible prison term for a fourth degree felony is a definite term of 6-18 months, but the court is not necessarily required to sentence the person to prison.

[2] 8 United States Code (U.S.C.) 1101(a)(42)(A), 1158, 1182(a)(9)(B)(ii), and 1325 and 18 U.S.C. 3559 and 3571.

For a fifth degree felony, the court also must impose a fine of at least $500 (the continuing maximum fine is $2,500). For a fourth degree felony, the court must impose a fine of at least $1,000 (the continuing maximum fine is $5,000).

The bill requires the sentencing court to order the arresting law enforcement agency, if it has not already done so, to collect all available identifying information from the offender, including fingerprints, photographs, and other biometric measures, and check that information against all relevant local, state, and federal criminal databases and federal lists or classifications used to identify threats or potential threats to national security.

Finally, the sentencing court must order the offender to exit Ohio within 72 hours after being released.[3]

Affirmative defense for DACA recipients

The bill makes it an affirmative defense (an element the defendant has the burden to prove) to a charge of unlawful presence in Ohio that the person was approved for benefits under the federal Deferred Action for Childhood Arrivals (DACA) program. The person must have received DACA between the program's start on June 15, 2012, and July 16, 2021, when federal court orders prevented the U.S. Department of Homeland Security (DHS) from granting any new DACA requests. In general, to be eligible to apply for DACA, an applicant must have been born on or after June 16, 1981, came to the U.S. before the age of 16, and (1) been enrolled in school, (2) completed high school or a GED, or (3) was honorably discharged from the U.S. military.[4]

Stay for federal immigration proceedings

The bill requires that, if the court finds that any of the following apply to a defendant, the court must order a stay in the case for a renewable period of 90 days until the defendant's citizenship or immigration status is determined:

- The defendant has applied for and is awaiting an asylum determination.
- The defendant has been in the U.S. for less than 30 days and will apply for asylum before the defendant has been in the U.S. for 30 days.
- The defendant entered the U.S. lawfully, is currently unlawfully present, and (1) has applied for and is awaiting a visa renewal or other legal permission to remain in the U.S. or (2) is in the process of leaving Ohio or the U.S.

If the court stays the case and the defendant either becomes lawfully present in the U.S. or leaves Ohio, the court must dismiss the charge with prejudice, meaning that the case will not be reopened if the person returns to Ohio. (But, if the person is still unlawfully present and returns to Ohio, the person could face new charges.)

[3] R.C. 2965.04 and 2965.05 and conforming changes in R.C. 2929.15, 2929.16, 2929.17, and 2929.25. See also R.C. 2929.14 and 2929.18, not in the bill.

[4] R.C. 2965.04(B). See also U.S. Citizenship and Immigration Services, *Consideration of Deferred Action for Childhood Arrivals (DACA)*, available at uscis.gov/DACA.

However, if the defendant is also charged with another offense, other than a minor misdemeanor, the court is not required to grant a stay pending federal immigration proceedings.[5]

Potential application to children

Other than for DACA recipients, the bill does not make an exception to its felony prohibition for a child who is unlawfully present in the U.S. and who is knowingly present in Ohio. If a child (a person under 18) commits an act that would be a fourth or fifth degree felony if committed by an adult, the child generally cannot be charged as an adult, but a court may rule the child delinquent and impose a penalty.

However, under Ohio's continuing laws governing criminal liability, a person of any age would not be guilty of unlawful presence in Ohio if the person's presence was involuntary. A child in the custody of the child's parent or another adult probably would not have a choice about where to live. In such a case, it appears that the child could not be found delinquent under the bill. But, a child who chose to be in Ohio might be found delinquent.

If a child were found delinquent under the bill, the bill's mandatory 12-month prison term would not apply. Instead, continuing law would allow the court to do one or more of the following:

- If the child is ten or older, commit the child to Department of Youth Services (DYS) custody for secure confinement for an indefinite term of at least six months, not to exceed the child's 21st birthday;
- Impose a fine of up to $300 in the case of a fifth degree felony or $400 in the case of a fourth degree felony;
- Take other measures, such as placing the child in a local youth facility, putting the child on probation or electronic monitoring, or requiring the child to complete up to 500 hours of community service.

The court would not be required to impose any punishment.[6]

Enforcement requirement

The bill explicitly requires all state and local law enforcement agencies to enforce the bill's provisions. However, a prosecutor would still have discretion regarding whether to prosecute any violation.[7]

Federal preemption

The U.S. Constitution gives the federal government exclusive authority over matters of immigration and foreign affairs.[8] The U.S. Supreme Court has ruled that, in general, any state law that attempts to regulate immigration is preempted by federal law because the federal

[5] R.C. 2965.04(C).

[6] R.C. 2152.01, 2152.02, 2152.16, 2152.19, 2152.20, 2901.21, and 5139.05, not in the bill.

[7] R.C. 2965.02(E) and *State ex rel. Master v. City of Cleveland,* 75 Ohio St.3d 23, 27 (1996).

[8] U.S. Constitution, Article I, Section 8, cl. 3 and 4 and art. VI, cl. 2.

government has occupied the entire field of immigration law. For example, federal courts have overturned state laws that require aliens to register with the state or that implement state or local penalties for violating federal immigration laws, such as laws that prohibit persons from entering or remaining in the U.S. without permission.[9]

Texas, Oklahoma, and Iowa have recently enacted laws containing similar criminal prohibitions against unlawful presence in those states. The laws are not currently being enforced because federal courts ruled that the laws are likely unconstitutional under the principles discussed above. These cases are still being litigated, and the courts have not yet issued final rulings.[10]

Cooperation with federal immigration authorities

The bill also requires every law enforcement agency and detention facility in Ohio to take certain actions to cooperate with federal officials in the enforcement of federal immigration law. "Law enforcement agency" means a municipal or township police department, the office of a sheriff, the State Highway Patrol, and any other state or local governmental body that enforces criminal laws and that has employees who have a statutory power of arrest. "Detention facility" means any Department of Rehabilitation and Correction (DRC) facility such as a state prison, any DYS facility such as a juvenile detention facility, and any county or municipal correctional facility such as a local jail, regardless of whether the facility is managed by the government or a private entity.

Federal law allows federal immigration authorities to request, but not require, assistance from state and local officials. Both federal law and current Ohio law require state and local government entities to allow their employees to exchange citizenship or immigration status information with federal immigration officials. But, under the Tenth Amendment to the U.S. Constitution, the federal government cannot otherwise require state or local officials to assist federal immigration authorities.[11]

Arrests on state or local charges

Under the bill, a law enforcement agency must participate in any available program operated by U.S. Immigration and Customs Enforcement (ICE) or its successor agency that allows

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[9] *Hines v. Davidowitz*, 312 U.S. 52 (1941); *Arizona v. United States*, 567 U.S. 387 (2012); and *United States v. Alabama,* 691 F.3d 1269 (11th Cir. 2012), cert. denied by *Alabama v. United States,* 569 U.S. 968 (2013).

[10] *United States v. Texas,* 97 F.4th 268 (5th Cir. 2024) and *Las Americas Immigrant Advocacy Center v. Texas,* Case No. 1:23-CV-01537 (W.D. Texas 2025); *United States v. Oklahoma*, now *Padres Unidos de Tulsa v. Drummond,* Case No. 5:24-CV-00511 (W.D. Okla. June 3, 2025), appeal pending in *Padres Unidos de Tulsa v. Drummond,* Case No. 25-6080 (10th Cir. 2025)*;* and *United States v. Iowa,* 2024 U.S. Dist. LEXIS 109474, Case No. 4:24-CV-00162 (S.D. Iowa June 17, 2024) and *Iowa Migrant Movement for Justice v. Iowa,* Case No. 24-2263 (8th Cir. 2025). In March 2025, the U.S. Department of Justice voluntarily dismissed its complaints against the states of Texas, Oklahoma, and Iowa, but the litigation continues because in each state, private plaintiffs also challenged the laws on the same grounds.

[11] R.C. 9.63. See also 8 U.S.C. 1373; *Arizona v. United States*, 567 U.S. 387, 411 (2012); and *Printz v. United States*, 521 U.S. 898, 935 (1997).

the law enforcement agency, when it arrests a person on state or local charges, to submit information to federal authorities about the arrestee to enable those authorities to determine whether the arrestee is unlawfully present in the U.S.

Currently, this would be the Criminal Alien Program. Under the program, when a state or local law enforcement agency arrests a person and submits the person's fingerprints to the Federal Bureau of Investigation (FBI) under standard booking procedures, the FBI notifies ICE of the person's identity. An agency currently cannot opt out of having the FBI share that booking information with ICE. If ICE determines that the person appears to be unlawfully present in the U.S. and decides to pursue the person's removal based on ICE priorities, ICE submits a detainer request to the state or local agency (see below).

Further, the bill requires an officer of a law enforcement agency or detention facility immediately to report to ICE the identity of any person the officer has reasonable cause to believe is unlawfully present in the U.S. within 24 hours after arresting the person or admitting the person into the detention facility, as applicable. The bill exempts DRC facilities from this requirement because, as is explained below, those facilities already issue separate reports to ICE regarding suspected aliens in custody.[12]

Federal warrants and detainers

The bill requires both law enforcement agencies and detention facilities to comply with any lawful federal request or order to detain a person who is unlawfully present in the U.S. pending transfer into federal custody and to otherwise cooperate and comply with federal officials in enforcing federal immigration laws. The bill defines "lawful federal request or order" to include any judicial or administrative request or order, such as a warrant issued by a court or a warrant or detainer request issued by DHS, including on form I-200, I-205, or I-247.

Under existing law, a state or local agency cannot necessarily prevent federal authorities from arresting a person on a valid federal warrant, but the agency does not have to hold the person in state or local custody to facilitate that process. Federal law allows ICE to submit a detainer request to a state or local agency, asking the agency to keep a person in custody for up to 48 hours after the person is scheduled to be released, so that ICE can arrange to take the person into federal custody.[13] The state or local agency is not required to honor the detainer request. If a court later finds that a detainer was not constitutionally valid, the state or local officials – not ICE – may be held liable for wrongfully imprisoning the person.[14]

The bill requires an agency or facility to hold a person who is unlawfully present in the U.S. for up to 48 hours after the person otherwise would have been released, pending transfer to federal custody. In other words, a person who was just arrested must be released on bond in the person's state or local case before being transferred to ICE custody, and a person who has

[12] R.C. 2965.01, 2965.02, and 2965.03.

[13] 8 U.S.C. 1357(d), 1373, and 1644 and 8 Code of Federal Regulations (C.F.R.) 287.7. See also U.S. Immigration and Customs Enforcement, *Criminal Alien Program*, available at ice.gov under "Immigration Enforcement."

[14] See, for example, *Galarza v. Szalczyk*, 745 F.3d 634, 639 (3d Cir. 2014).

been convicted of a state or local offense must serve any sentence of prison or jail time before being transferred to ICE custody.

Current Ohio law does require state and local governmental entities to cooperate with immigration enforcement in at least some circumstances. In the case of felony offenders, existing law requires a court that convicts a suspected alien of a felony offense to notify ICE and requires DRC to send ICE monthly reports of suspected aliens in DRC custody and their earliest possible release dates. The bill retains those provisions but changes the definition of "alien" from an individual who is not a U.S. citizen to an individual who is not a U.S. citizen *or national.*[15] Under federal law, all U.S. citizens are considered U.S. nationals, but certain persons born in American Samoa are nationals but not citizens. Those persons have the right to live and work permanently in the U.S., but not to vote or hold office.[16]

Existing law also requires DRC to comply with ICE detainer requests for persons who are being released from state custody after serving a prison term for a felony. The bill expands that requirement to apply to any detention facility.

With respect to law enforcement agencies, the current statute requires state and local governments to comply with lawful requests for assistance from federal immigration authorities, "to the extent that the request is consistent with the doctrine of federalism." A local government that violates that requirement is ineligible to receive homeland security funding from the state. It appears that this provision of law has never been enforced or interpreted by a court.[17]

Since 2014, several agencies in Ohio have refused at least one ICE detainer request. However, all of those agencies grant most of the detainer requests they receive. Between 2014 and 2023, Ohio agencies denied a total of 353 out of 33,693 detainer requests, a 1% refusal rate. The Franklin County Jail – Ohio's agency with the most refusals – refused 298 out of 8,096 requests, for a refusal rate of about 4%. The other Ohio agencies that refused requests during that period refused a total of 1-7 requests each. It is not clear from the available data why the agencies refused the requests. The refusals might have been for reasons other than policies against cooperating with ICE, such as that the agencies determined that they did not actually have the relevant person in custody.[18]

287(g) Program

The bill also requires each law enforcement agency and detention facility to allow its officers or employees to participate in ICE's 287(g) Program.[19] That program, which is authorized under Section 287(g) of the federal Immigration and Nationality Act, allows ICE to enter into agreements with state and local law enforcement agencies to delegate limited immigration

[15] R.C. 2965.01 and 2965.03.

[16] 8 U.S.C. 1408.

[17] R.C. 2965.01, 2965.02, and 2965.03. See also R.C. 9.63, not in the bill.

[18] Syracuse University, *Transactional Records Access Clearinghouse (TRAC),* "Immigration and Customs Enforcement Detainers," available at tracreports.org under "Immigration," "Tools."

[19] R.C. 2965.02 and 2965.03.

enforcement functions to them under ICE supervision. Participation is at ICE's discretion. 287(g) agreements use one of three models:

- The Jail Enforcement Model, in which state or local officers assist ICE in identifying and processing unlawfully present persons who have pending criminal charges;
- The Warrant Service Officer Model, in which state or local officers can be certified to serve federal administrative warrants on unlawfully present persons in a jail;
- The Task Force Model, in which state or local officers can conduct limited immigration enforcement during their routine police duties, subject to ICE oversight.

Currently, four agencies in Ohio have active 287(g) agreements.[20]

Current 287(g) agreements in Ohio			
Agency	**Jail Enforcement Model**	**Warrant Service Officer Model**	**Task Force Model**
Butler County Sheriff	✓		✓
Lake County Sheriff		✓	✓
Portage County Sheriff		✓	✓
Seneca County Sheriff		✓	✓

Local government funding penalties

Under the bill, if a county, township, or municipal corporation's law enforcement agency fails to comply with the bill, the subdivision's Local Government Fund (LGF) distributions from the state must be reduced by $500 for each instance of noncompliance. The amount of the reduction must be deposited in the General Revenue Fund. If the subdivision also has its LGF reduced due to its use of traffic cameras under continuing law, those reductions are calculated after the bill's reductions.

The bill allows any person who believes that a county, township, or municipal law enforcement agency is not complying with the bill's requirements to file a complaint with the Attorney General. Upon receiving the complaint, the Attorney General must investigate it. If the Attorney General finds any instance of noncompliance, the Attorney General must submit a report to the Tax Commissioner that lists each instance of noncompliance and ascribes it to a county, township, or municipal corporation. If the noncompliance is ongoing, the Attorney

[20] 8 U.S.C. 1357(g) and ICE, *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, available at ice.gov under "Immigration Enforcement."

General must send no more than one report each month, and the Tax Commissioner must make the reductions monthly.

If a county sheriff fails to comply, the relevant county's LGF distribution is reduced. In the case of a municipal or township law enforcement agency that serves only one subdivision, such as a city police department, that subdivision's LGF distribution is reduced. If a joint police district fails to comply, each subdivision the district serves receives a $500 LGF reduction. For example, if a joint police department serves two townships and a municipal corporation, any instance of noncompliance by the department results in a $500 penalty for each subdivision, for a total of $1,500 in LGF reductions.[21]

Home rule

Municipal corporations and chartered counties have the authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary, and other similar regulations as are not in conflict with general laws. If challenged, a reviewing court might examine whether the bill violates the home rule power to decide whether to participate in voluntary federal immigration enforcement programs. The Ohio Supreme Court has ruled that the General Assembly may reduce LGF funds to discourage certain local policies. However, to the extent that the bill might allow a member of the public to seek a court order that a municipal corporation or chartered county comply with the bill, a reviewing court might examine whether the bill is unenforceable.

The General Assembly enacted a less specific law in 2006 that requires municipalities to comply with federal requests for assistance and to allow their employees to communicate with federal authorities. That law has not been challenged.[22]

HISTORY

Action	Date
Introduced	03-25-25

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[21] R.C. 2965.06, 5747.504, and 5747.505, with conforming changes in R.C. 5747.50, 5747.502, 5747.51, and 5747.53.

[22] Ohio Constitution, Article X, Section 3 and art. XVIII, sec. 3 and R.C. 9.63. See also *Village of Newburgh Heights v. State*, 168 Ohio St.3d 513 (2022).