



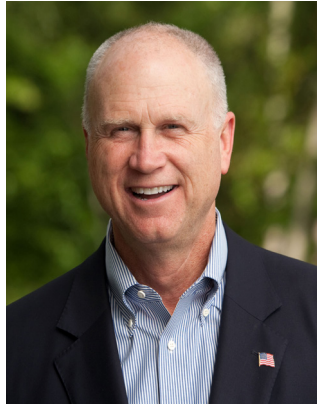
# AT ISSUE STATE EDITION



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On April 2, the 2019 Legislative Session of the Georgia General Assembly adjourned *Sine Die*. It was truly an honor to again serve as President Pro Tempore during a session when we passed a record budget with salary increases for all teachers and support staff; addressed ways to expand access to reliable broadband services; and continued our efforts to help those citizens affected by Hurricane Michael by increasing tax credit opportunities.

I want to commend Governor Brian P. Kemp and Lt. Governor Geoff Duncan on their first session in office. Their leadership on legislative issues was instrumental for the Georgia General Assembly to have a successful session. I want to thank my 55 colleagues and all of the great staff for working tirelessly to ensure we had a productive and efficient session. Please know that all of your hard work does not go unnoticed.

Your efforts on behalf of every Georgian are truly commendable, and I believe that by working together we have made positive strides to continue to make our state the best place to live, start a business and raise a family.

With each publication of the State Edition of *At Issue*, we will provide an overview of the work done during the session and other critical issues facing our great state. In this first edition, we address three critical topics – facial recognition technology, role of the courts and the legislature and Georgia’s hurricane relief efforts. If there are topics you would like for us to cover in future editions, please do not hesitate to reach out to my office. Our first Federal Edition of *At Issue* will be coming out soon.

**Butch Miller**  
 President Pro Tempore, Georgia Senate  
[butch.miller@senate.ga.gov](mailto:butch.miller@senate.ga.gov)

## Public Safety

### Facial Recognition Technology: From Social Media to Law Enforcement

Alex Azarian, Deputy Director  
 Senate Research Office  
[alex.azarian@senate.ga.gov](mailto:alex.azarian@senate.ga.gov)

In the dystopian novel, *1984*, the State uses technology to maintain its powerful grip over the citizens of Oceania. The novel’s protagonist, Winston Smith, is constantly monitored by telescreens, which George Orwell describes as devices that “received and transmitted simultaneously. Any sound that Winston made, above the level of a very low whisper, would be picked up by it, moreover, so long as he remained within the field of vision which [was] commanded, he could be seen as well as heard.” It’s frightening to think of a government having this ability to intrude in our everyday lives. But are we already there when today’s law enforcement can use facial recognition technologies to locate and identify people – whether they’ve committed a crime or not?

Facial recognition is a type of biometric identification. It’s similar to fingerprinting or DNA matching because our faces are a biometric indicator that identifies or verifies a person using their physical characteristics. Despite popular belief, face recognition technology does not attempt to match different photographs of a person’s face and return a single match. Instead, the technology uses algorithms to pick out specific, distinctive details about a person’s face from photographs or from video. Certain details, such as the distance between the eyes or the shape of the nose, are then converted into a mathematical representation and compared to data on other faces previously collected and stored in a face recognition database. The data about a particular face is often called a “face template.” Instead of positively identifying an unknown person, many face recognition systems calculate a probability match score between the unknown person and specific face templates stored in the database. These programs will then produce several potential matches, ranked in order of likelihood of correct identification.

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Many local law enforcement agencies, as well as the FBI, use this technology to combat crime. Law enforcement and government use of facial recognition systems are generally designed to do one of three things: To identify an unknown person captured from surveillance camera footage who is suspected of committing a crime; to seek out a previously-identified person, such as a wanted criminal or missing person; and to verify someone's identity, like when we apply for a driver's license.

### Commercial Uses

While most people equate facial recognition systems with law enforcement and government, there are other commercial and practical uses for facial recognition technology. Millions of people interact every day with facial recognition software without realizing it, such as when you use a Snapchat face filter or tag someone on Facebook.

A few years ago, when Apple released the iPhone X, one of its most touted features was facial recognition. People were amazed at how they could simply unlock a phone with just a look and bypass the entire “rigmarole” of remembering and using a 4-digit passcode.

Other uses of facial recognition include advertising, locating the missing, and assisting the impaired. Delta Airlines recently unveiled kiosks at Hartsfield-Jackson allowing passengers to board a flight using facial recognition technology. The TSA uses similar technology to screen passengers.

But social media is still, by far, the largest user of facial recognition technology. In fact, Facebook/Instagram has the largest database of facial images in the world – even dwarfing the FBI's collection. Every time a user tags someone in an image, they are directly adding to Facebook's collection of faces, improving the accuracy of its facial recognition system and algorithms, and linking personal information from the individual's profile with a name and a face. It's not a stretch to claim that Facebook probably has at least one facial image of each of its nearly 2.4 billion users.

### Law Enforcement

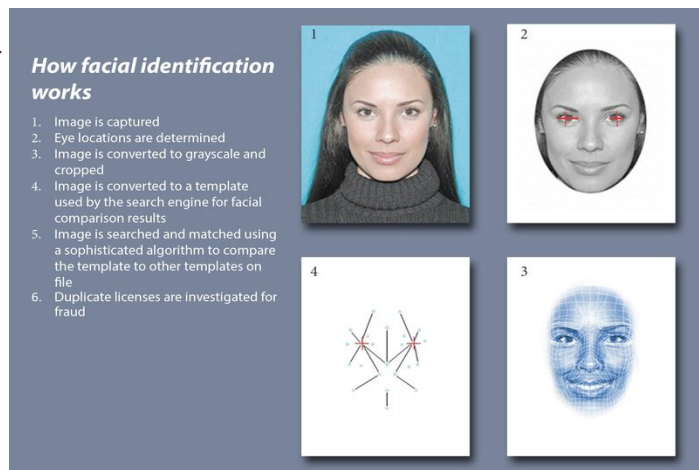
As already noted, the law enforcement community is the largest user of facial recognition technology outside of the social media platforms. Even though billions of people worldwide voluntarily submit to facial recognition through their social media accounts, thus undermining their own privacy, when government uses the technology to combat crime, it's viewed as a threat to our First and Fourth Amendment protections. Additionally, the safe and secure storage of the images and data is an increasing concern.

Although most civil libertarians concede that we haven't reached the point where face recognition is being used broadly to actively track and monitor the public, they do fear that the technology and the accumulation of easily identifiable photographs could someday undermine free speech and freedom of association rights. Especially because face-identifying photographs of crowds or political and social demonstrations can be easily captured in public and then compared and matched through social media or other face recognition databases without an individuals' consent or even knowledge. Could these images be used someday in the future to follow us in real time, or worse, target and harass political enemies?

Even when facial recognition systems are being used responsibly within an established protocol or framework, security risks posed by the collection and retention of face recognition data does exist. The many recent data breaches and email hacks indicate that the government needs extremely rigorous security measures and audit systems in place to protect against breaches.

The FBI's Next Generation Identification system (NGI) is an extensive biometric database that includes fingerprints, iris scans, and palm prints collected from millions of individuals, not just as part of an arrest, but also for noncriminal reasons like biographic data collected from members of the military, employment background checks, and immigration records. The NGI's criminal repository includes records on people arrested at the local, state, and federal levels as well as biometric data taken from crime scenes and data on missing and unidentified persons. The Interstate Photo System (IPS) is the part of NGI that contains photographs searchable through face recognition. It's unknown how many images the FBI has access to, but a 2016 GAO report indicates that the FBI can access over 410 million images – over 50 million of which are searchable through face recognition.

States have been actively involved in developing and contributing to the NGI database, not just by state and local law enforcement agencies, but through state DMVs. Although Georgia's Department of Driver Services (DDS) is one of more than 40 state DMVs that uses facial recognition to detect fraud, it is not one of the approximately 20 states that submit images from its driver's license and state ID image database to the FBI. The Department's technology also does not detect wanted criminals. DDS uses its facial recognition technology to verify the identity of applicants, combat identity fraud, and prevent people from concealing their true identity by applying for a fake driver's license or ID.



Source: Iowa Department of Transportation

But DDS can also serve as essentially a ready-made database for law enforcement. When requested by a law enforcement agency, including the FBI, the DDS image database can be used to help verify a suspect's identity. DDS searches its database on behalf of the law enforcement agency conducting a criminal investigation, but no one outside of the Department is granted access to the database.

A major catalyst behind the DMV systems is a provision in the 2005 federal Real ID Act that requires driver's licenses to be stored in digital format. Although the Act itself does not mandate facial recognition technology, it encourages states to find ways to reduce fraud. Many states have seen facial scans as a logical way of accomplishing this goal.

The Georgia Department of Corrections was another early user of this technology when it adopted a facial recognition system for inmate intake and release around 15 years ago. The primary use of the Department's system is to prevent the accidental release of inmates. Prisoners set to be released may sometimes switch identities with someone else, enabling the wrong person to go free. While fingerprints take hours or even days for process, the Department can obtain facial recognition technology results in a matter minutes to identify an inmate attempting to use a false identity or alias.

While identifying an unknown face in a crowd in real time from a very large database of face images is still particularly challenging in the United States, other countries claim they are well on the way to solving this problem. Real time facial recognition involves the constant scanning of live video feeds to match moving faces with a database of still images. China recently announced real time facial recognition covering several of its provinces and cities, and similar systems are being tried in Russia, India, and even Great Britain.

### *Next Steps*

Currently, there are no federal or state standards on the use of facial recognition systems. The Electronic Frontier Foundation encourages legislators to consider the following principles and protections when crafting a legal framework for this technology: Limit when and how data may be collected; Limit the amount and type of data stored and retained; Limit the combination of more than one biometric in a single database; Define clear rules for use and sharing; Enact security procedures to minimize fraud on the front end and avoid data breaches on the back end; and Mandate notice procedures. Ideally, these principles should apply not only to the government but also to private actors, such as social media.

Clearly, when used responsibly within an established and transparent framework, data recognition technology is a useful tool for combatting crime and undermining identity theft and fraud. Would 1984's Winston Smith be horrified how today's law enforcement is embracing the technology? Probably not, since we have not reached Oceania's level of government surveillance and intrusion. What he would find troubling is how many of us voluntarily surrender our privacy through social media, dating apps, smart phones, and web browsers. At any given moment, our phone knows our exact location using GPS technology, a technology that was initially intended for military use only. An innocuous selfie on a city street that is uploaded to Facebook contains numerous identifying information and data, including the image of your face, which now becomes stored in the social media giant's endless sea of identifiable faces. This information is easily accessible to advertisers, marketers, creepers, and yes, even to the government and law enforcement. The government is indeed utilizing facial recognition technology, but we're helping them perfect it at an alarming rate. - AA

## Judiciary

### **Some Assembly Required? Recent Comments from Georgia's Appellate Court Judges Calling for Legislative Action**

**Beth Vaughan, Senior Policy Analyst**

**Senate Research Office**

[beth.vaughan@senate.ga.gov](mailto:beth.vaughan@senate.ga.gov)

A common refrain in opinions from Georgia's appellate courts is that, when courts consider the meaning of a statute, they must presume that "the General Assembly meant what it said and said what it meant." Simply put, the appellate courts apply the statute as written, but in doing so, they often send a message to the General Assembly that additional work may be required to correct statutory provisions that state public policy. This growing trend in Georgia jurisprudence has highlighted numerous areas of the law that may be ripe for further legislative action.

#### *Recent Legislative Action*

##### (1) Rape Shield Statute

The General Assembly recently made significant revisions to O.C.G.A § 24-4-412, otherwise known as Georgia's Rape Shield statute, in response to the Supreme Court's decision in *White v. State*, 305 Ga. 111 (2019). In the *White* case, the victim was a twelve-year old girl who was found to be molesting other children. When questioned about her own sexual misconduct, she disclosed that she had been sexually abused by White. During White's trial, the prosecution briefly elicited testimony from the victim regarding her prior sexual misconduct and presented expert testimony in which the expert noted that, in general, young children who act sexually toward other children may be exhibiting behavior consistent with having themselves been victims of sexual abuse.

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The version of the Rape Shield statute applicable at that time provided that evidence relating to a victim or complaining witness's past sexual behavior was generally inadmissible in cases for the prosecution of specified sexual offenses, including but not limited to rape, statutory rape, and sexual battery. However, there were certain exceptions under this prior version of the Rape Shield statute, under which evidence of such past sexual behavior could be admissible. The defense could seek to introduce this type of past sexual behavior with the court serving as the gatekeeper for whether that evidence is admissible.

In *White*, the Supreme Court of Georgia held that only the criminal defendant could introduce evidence of past sexual behavior under the then-applicable Rape Shield statute, and the prosecution was barred from doing so. The Court acknowledged the value of allowing the prosecution to introduce evidence of a victim's prior sexual behavior. However, in a footnote, the Court stated that "...regardless of policy reasons to allow the State to introduce evidence of a victim's past sexual behavior in certain circumstances, we cannot rewrite Georgia's Rape Shield law to allow the State to do so. We must leave that job to the General Assembly."

The General Assembly did, in fact, revise the Rape Shield statute with the passage of House Bill 424, which was sponsored by Senator John Kennedy of the 18th and Representative Deborah Silcox of the 52nd. Among other things, House Bill 424 added provisions to the Rape Shield statute that allow the prosecution to offer evidence of specific instances of a victim or complaining witness's sexual behavior with respect to the defendant or another person. The bill also added to the categories of criminal offenses in which this type of evidence of past sexual behavior may be used pursuant to the Code section, to include trafficking for labor or sexual servitude, keeping a place of prostitution, pimping, and pandering. These changes to the Rape Shield statute became effective with Governor Kemp's approval on April 18, 2019.

### (2) Implied Consent

Another recent call to action from the Supreme Court of Georgia to the General Assembly came in *Elliott v. State*, 305 Ga. 179 (2019). The Court held that two parts of statutory law violated the Georgia Constitution: (1) O.C.G.A. § 40-5-67.1(b), relating to the notice read by an officer to the driver regarding implied consent to a breath test; and (2) O.C.G.A. § 40-6-392(d), regarding a refusal to submit to a breath test being admissible as evidence in a criminal trial. The Court observed that, even though there are compelling reasons to support the State prosecuting DUI offenses, "the right to be free from compelled self-incrimination does not wax or wane based on the severity of a defendant's alleged crimes." Furthermore, the Court noted that it "cannot change the Georgia Constitution, even if we believe there may be good policy reasons for doing so; only the General Assembly and the people of Georgia may do that. And this Court cannot rewrite statutes. This decision may well have implications for the continuing validity of the implied consent notice as applied to breath tests, but revising that notice is a power reserved to the General Assembly."

During the 2019 legislative session, Senator Randy Robertson of the 29th and Representative Steven Sainz of the 180th sponsored House Bill 471, which rewrote the implied consent notice to be read by an officer to a DUI suspect under O.C.G.A. § 40-5-67.1(b). The revised implied consent notice, which the officer must read when conducting a DUI stop, states that Georgia conditioned the person's privilege to drive upon the highways of this state upon the person's submission to chemical tests of blood, breath, urine, or other bodily substances to determine if the driver is under the influence of alcohol or drugs. The statutory notice also states that the driver's refusal to submit to blood or urine testing may be offered into evidence against the driver at trial. The bill also made similar revisions to the notices that are read to individuals who are suspected of hunting under the influence or operating watercraft under the influence. House Bill 471 was signed by Governor Kemp on April 28, 2019 and went into effect on that date.

### ***Potential Issues for Future Legislation***

There are, of course, still items left on the "to do list" that the Georgia appellate courts are providing to the General Assembly on an ongoing basis. For example, O.C.G.A. §40-6-392(d), relating to the admissibility of the refusal to submit to a breath test, has not yet been revised by the legislature.

Another notable case is *Duncan v. Rawls*, 345 Ga. App. 345 (2018), which hotly divided the Court of Appeals regarding the application of Georgia statutory law and the inclusion of an in terrorem clause (otherwise known as a "no contest clause") in a trust. The Code section at issue, O.C.G.A. § 53-12-22(b), provides that a no contest clause will be void unless there are directions in the trust document regarding what happens to the property at issue if the no contest clause is violated and, in which case, the directions in the trust document regarding that property will be carried out. The challengers to the trust in question claimed undue influence was used to cause the grantor to change the terms of the trust.

However, a majority of the Court of Appeals held that there was no good faith or probable cause exception that would allow the challengers' claims of undue influence to be heard, and the trust's no contest clause was valid because it met the requirement in the statute. In a vigorous dissent, Judge Charles Bethel (now a Justice of the Supreme Court of Georgia) decried this result, stating that "[e]ven evidence of a proverbial gun to the head of the settlor would not suffice to give courts authority to inquire into whether the document at issue reflected, at a basic level, the intent and free will of its signer. Thus, while the individual holding the proverbial gun could well be subject to criminal prosecution and conviction, he could remain safe with the knowledge that he can still enjoy the fruits of that trust from prison."

Nevertheless, as Judge Elizabeth Branch (now a judge on the U.S. Court of Appeals for the Eleventh Circuit) stated in the majority opinion, “[e]ven though the General Assembly revised the Georgia Trust Code in 2010, it did not codify the good faith/probable cause exception at that opportunity. Because the legislature is presumed to act with full knowledge of the existing state of the law, it follows that the legislature chose not to adopt a good faith/probable cause exception to enforcement of no contest clauses in trusts.”

As of the date of this publication, Georgia’s statutory provision regarding no contest clauses in trusts and its twin provision relating to no contest clauses in wills (O.C.G.A. § 53-4-68(b)) remain unchanged following the decision in *Duncan*. The General Assembly has not yet taken up legislation that would add exceptions to allow good faith challenges that the testator or grantor was subjected to undue influence (including, but not limited to, the “proverbial gun to the head”).

In *Park v. State*, 825 S.E.2d 147, 158 (Ga. 2019), the Supreme Court of Georgia held that requiring an offender who was classified as a sexually dangerous predator to wear a GPS monitoring device for the rest of his life as required under O.C.G.A. § 42-1-14(e) was an unreasonable search, which violated the Fourth Amendment of the U.S. Constitution. As noted by Justice Keith Blackwell in a concurring opinion (joined by three other Justices), “nothing in our decision today precludes the General Assembly from authorizing life sentences for the worst sexual offenders, and nothing in our decision prevents the General Assembly from requiring a sentencing court in the worst cases to require GPS monitoring as a condition of permitting a sexual offender to serve part of a life sentence on probation.” The door is open for the General Assembly to reconsider the sentencing of the vilest sexual offenders and make adjustments to the Code in response to the Park decision and this illustrative concurrence.

### **Conclusion**

One takeaway from this string of cases (and the many others like it from the Court of Appeals and the Supreme Court) could be that the General Assembly passes statutory provisions and, like a newly purchased bookcase from IKEA, Georgia’s appellate courts are handing these Code sections back to the legislature because some additional assembly is required to address public policy concerns that the courts cannot or are unwilling to address on their own. However, one could also draw the conclusion that Georgia’s appellate courts truly believe that the General Assembly does, indeed, mean what it says. - *BV*

## **Finance**

# **Georgia’s Hurricane Relief Efforts: Special Times Call for Special Sessions**

**Ryan Bowersox, Senior Policy Analyst  
Senate Research Office**

[ryan.bowersox@senate.ga.gov](mailto:ryan.bowersox@senate.ga.gov)

As Georgia approaches eight months since Hurricane Michael passed through the state, it remains difficult to fully comprehend the complete magnitude of this storm and the extent of the destruction it left behind. Hurricane Michael swept through the state, disrupting the lives of millions in its path, causing unfathomable levels of damage, and claiming the life of one Georgian, an 11-year old girl in Seminole County. In the days and weeks following the storm’s destruction, elected officials across the state worked to assist the affected region, and began a recovery process likely to last years to come.

On October 10, 2018, Hurricane Michael made landfall on the Florida panhandle. Initially characterized as a Category 1 Hurricane, Michael quickly intensified to eventually become classified as a Category 5 Hurricane with wind speeds up to 161 mph. Hurricane Michael became just the third Category 5 strength Hurricane to make landfall on the continental United States and the first since Hurricane Andrew in 1992. Despite Hurricane Michael decreasing in intensity as it moved inland, Michael still entered Georgia classified as a Category 3 Hurricane. While Hurricane Michael is often compared to Hurricane Irma, which struck in 2017, Irma had significantly weakened to a tropical storm when it entered Georgia. Comparatively, Hurricane Michael became only the fifth major hurricane (defined as Category 3 or greater) to hit Georgia and the first in over 120 years. In anticipation of this monumental storm approaching, Governor Nathan Deal declared a state of emergency for 92 Georgia counties on October 9, 2018, adding an additional 17 counties on October 12, 2018.

Hurricane Michael carved a path of extreme destruction as it traveled from the southwestern region of the state arcing through Georgia. Thousands were left stranded without power as homes and infrastructure were destroyed and roads were left impassable due to flooding and debris. While every Georgia resident in the path of Hurricane Michael felt the effects of the storm, Georgia’s agricultural and forestry industries were particularly devastated. Initial estimates following the storm projected nearly \$3 billion in losses with heavy damage to the timber, cotton, pecan, and poultry industries. Agricultural industries represent a vital piece of the economy in the communities affected, and losses to these industries impact the community as a whole, resulting in less cash flow while causing the entire community to suffer. Georgia Agriculture Commissioner Gary Black summarized the damage stating, “These are generational losses that are unprecedented and it will take unprecedented ideas and actions to help our farm families and rural communities recover.”

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Hurricane Michael had an extreme impact on the timber industry. Georgia's timber industry ranks as the state's second largest industry, providing \$35.9 billion and 147,380 jobs to the state's economy. Furthermore, timber was particularly harmed due to the long-term investment of the product. While often harvested annually, timber is on an approximately 25 year replanting cycle, meaning acres of timber can represent an individual's long term investment and financial plans. This cycle was severely disrupted as Hurricane Michael downed nearly seven years' worth of timber. Early estimates following the storm showed that approximately 37,689,610 tons of timber were damaged or destroyed worth over \$762 million. Following Hurricane Michael, the price of timber dropped dramatically as individuals attempted to sell the downed timber in hopes of salvaging what is often their life's savings.

In light of the devastation experienced throughout the state, Georgia's elected officials quickly acted to provide relief to the region. On October 23, 2018, Governor Nathan Deal informed state lawmakers of his intention to call a special legislative session to begin on November 13. In a statement Governor Deal described the purpose of the special session explaining, "Georgia was severely impacted by Hurricane Michael and many communities across our state sustained heavy financial losses... In response, I will ask the General Assembly to take immediate action and lead the way in spurring rapid economic recovery for southwest Georgia communities." In the official proclamation issued on November 9, 2018, Governor Deal provided legislators with a limited agenda for the special session, instructing them to provide emergency funding for the area impacted by Hurricane Michael and to consider the ratification of an executive order suspending the collection of jet fuel sales tax.

The Georgia legislature adjourned from the special session after only five consecutive days, having passed three bills which were all immediately signed by Governor Deal on November 17, 2018. In addition to ratifying and temporarily extending the suspension of sales tax on jet fuel, Georgia's legislature passed two bills designed to aid in Hurricane Michael relief efforts. The first of these bills, House Bill 1EX, added \$270 million in emergency funding for hurricane relief efforts. These funds were provided to assist in debris removal, infrastructure repair, and overtime wages of workers required for this work.

The second of the bills passed by Georgia's General Assembly during the special legislative session, House Bill 4EX, aimed to provide economic assistance to the timber industry which experienced widespread loss resulting from Hurricane Michael. The General Assembly noted the importance of assisting those in southwest Georgia whose livelihood rested upon acres of timber impacted by the storm, and the risk that downed timber presented for both a public fire hazard and insect infestation. House Bill 4EX allows a qualified taxpayer to claim an income tax credit worth 100-percent of the taxpayer's timber casualty loss as a result of Hurricane Michael. This bill provides impacted Georgians a tax credit worth up to \$400 per acre of the taxpayer's affected eligible timber property that can exceed their income tax liability and can be claimed until December 31, 2024. This bill was designed not only to help those impacted financially, but to encourage the work necessary to ensure the land is not damaged for the foreseeable future. To encourage the clearing and replanting of timber, the bill mandates that a taxpayer may only claim the credit in the first year they complete replanting expected to result in 90 percent of the timber value lost. When the General



**Senator Dean Burke, District 11**  
Source: Georgia Senate Press Office

Assembly returned for the regularly scheduled 2019 legislative session, a second option was provided to claim this income tax credit outside of replanting the timber. House Bill 446, sponsored by Representative Knight and Senator Burke, in part, allowed the tax credit to be claimed in the first year restoration is completed of land that incurred timber casualty loss. This important bill ensures individuals can still claim the tax credit without replanting timber as long as the damaged land is restored to result in forest products or ecological services in the future.

These quick efforts by Georgia elected officials represent only the first steps on a long road to recovery. Undoubtedly the impact of Hurricane Michael will be felt by those affected for years to come and relief and rebuilding efforts continue daily. On June 3, 2019, Congress passed a long awaited disaster relief bill providing aid to various regions impacted by recent natural disasters. This \$19.1 billion aid package includes \$3 billion in funds to assist farmers in various states, including Georgia, who were impacted by Hurricane Michael. These congressional funds have been anxiously awaited by those devastated by the storm and should go a long way in rebuilding the lives of Georgia farmers. As recovery throughout Georgia continues, it is certain that those impacted will remain on the minds of elected officials. - RB

**Senate Research Office**

Elizabeth Holcomb, Director  
[elizabeth.holcomb@senate.ga.gov](mailto:elizabeth.holcomb@senate.ga.gov)

204 Coverdell Legislative Office Building  
404.656.0015

**Senate Budget and Evaluation Office**

Melody DeBussey, Director  
[melody.debussey@senate.ga.gov](mailto:melody.debussey@senate.ga.gov)

208 Coverdell Legislative Office Building  
404.463.1970

**Senate Press Office**

Ines Owens, Director  
[ines.owens@senate.ga.gov](mailto:ines.owens@senate.ga.gov)

201 Coverdell Legislative Office Building  
404.656.0028