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MEMORANDUM

TO: Senate State Government Committee

FROM: Andy Hoover, Legislative Director

DATE: September 27, 2010

RE: OPPOSITION TO HOUSE BILL 1502

On Tuesday, the Senate State Government Committee is scheduled to consider House Bill 1502, legislation to force state contractors to use the federal E-Verify program. Current case law in Pennsylvania deems this legislation unconstitutional and illegal. If the Senate passes and the governor signs HB 1502, it will invite a federal challenge, and the commonwealth will lose that challenge, if current case law stands. A successful challenge to HB 1502 would cost Pennsylvania taxpayers thousands and maybe millions of dollars in legal fees and damages. The American Civil Liberties Union of Pennsylvania opposes HB 1502, and on behalf of the 18,000 members of the ACLU of PA, I urge you to **please vote “no” on the bill.**

E-Verify is a federal online database program. It combines databases from the Social Security administration and the Department of Homeland Security and places more than 400 million records of personal information on the internet. Employers then voluntarily participate in the program. Congress has hesitated to mandate the use of E-Verify due to concerns with errors in the databases and the possibility of discrimination against work-eligible persons.

On September 9, the Court of Appeals for the Third Circuit upheld a lower court’s decision to strike down Hazleton’s anti-immigrant ordinance. In *Lozano et al. v. Hazleton*, the court held that Hazleton’s ordinance is unconstitutional due to a constitutional concept known as “pre-emption.” There are certain areas of law that are the exclusive domain of the federal government, and immigration law is one of those. The Third Circuit found that Hazleton’s attempt to regulate immigration is pre-empted by the federal government’s comprehensive approach to regulating immigration.

The Hazleton ordinance included a provision that mandated the use of E-Verify by employers. In its opinion, the court addressed this provision and noted that Congress has refused to mandate the use of E-Verify and, in fact, has directed the Department of Homeland Security to emphasize the voluntary nature of the program. The court then said:

Despite its advantages, E-Verify also has significant problems, and accordingly mandating its use interferes with the balancing of interests embodied in (the

Immigration Reform and Control Act). The conclusion that mandating E-Verify is consistent with the goal of “greater enforcement” thus simply ignores that enforcement is not Congress’s only concern. Again, Hazleton has placed a priority on deterring employment of unauthorized aliens, but failed to concern itself with the costs its ordinance imposes on employers and on work-authorized aliens.¹

Similarly, the intention of the primary sponsor of HB 1502 is solely greater enforcement,² and unlike Congress, he has not publicly stated any concern about discrimination against work-authorized immigrants and naturalized citizens or lessening the burden on employers. Indeed, his rhetoric has been largely focused on attacking employers.

As the case law stands today in Pennsylvania, HB 1502 is unconstitutional. Meanwhile, the city of Hazleton has publicly announced its intention to ask for an *en banc* hearing before the court of appeals or to ask the United States Supreme Court to hear its case.

Guidance from the Supreme Court on the power of local and state governments to mandate E-Verify will be coming soon. This session the court will hear arguments in *Chamber of Commerce v. Candelaria*. This case is a challenge to Arizona’s law mandating the use of E-Verify by all employers. The Court of Appeals for the Ninth Circuit in San Francisco upheld Arizona’s law, but the Department of Justice was among the parties asking the Supreme Court to grant *certiorari* and hear the case. Like the Third Circuit’s ruling against Hazleton, DOJ argued that the Arizona law is preempted by federal law.

With the state of the law in such great flux on this issue and with a ruling in *Lozano* that is binding on Pennsylvania, it is unwise to consider HB 1502 at this time. The wise course of action would be for the committee to hold HB 1502 until the courts provide more guidance on what is and is not constitutional in this area of law. Short of that, the ACLU of Pennsylvania urges you to vote “no” on HB 1502.

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¹ *Lozano et al. v. Hazleton*. Available at <http://www.aclupa.org/downloads/3dCirOpinion.pdf>.

² *Galloway calls on state Senate to pass his EVerify bills*. Retrieved September 26, 2010, from <http://www.pahouse.com/PR/140092310%284%29.asp>.