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MEMORANDUM

TO: The Senate of Pennsylvania

FROM: Andy Hoover, Legislative Director, ACLU of PA

DATE: May 20, 2011

RE: OPPOSITION TO SENATE BILL 637

The Senate calendar currently includes Senate Bill 637, and a vote on this bill is likely to happen shortly. SB 637 mandates all state contractors and sub-contractors to use the federal E-Verify program, a fatally flawed online database program. Because Congress has maintained E-Verify as a voluntary program for employers, SB 637 is pre-empted by federal law, and the passage of this bill would likely trigger costly litigation. Errors in the E-Verify databases also increase the likelihood of discrimination against ethnic minorities and could lead to the denial of employment to eligible workers. The American Civil Liberties Union of Pennsylvania opposes SB 637, and on behalf of the 17,000 members of the ACLU of Pennsylvania, I urge you to please vote “no” on this bill.

E-Verify is an online database program that uses databases from the Social Security Administration and the Department of Homeland Security. E-Verify contains more than 500 million personal records that include Social Security numbers, passport information, and visa data, and this honeypot of data is extremely attractive to identity thieves. If SB 637 passes, it suggests that the Senate is content with the federal government compromising our personal data in this way.

Under the direction of Congress, E-Verify has remained a voluntary program. In implementing immigration, Congress has carefully balanced enforcement, easing burdens on employers, and prohibiting discrimination against persons on the basis of ethnicity and race. Analysis of E-Verify indicates that the databases used for the program have errors that could lead to the denial of work for eligible workers.¹ In addition, a 2010 study commissioned by the federal government found that E-Verify misses undocumented workers a majority of the time. E-Verify cannot do the one job that it is intended to fulfill.²

¹ “Employment Verification: Federal Agencies Have Taken Steps to Improve E-Verify, but Challenges Persist.” Available at <http://www.gao.gov/new.items/d11146.pdf>.

² “Analysis of the E-Verify Program.” Available at http://www.uscis.gov/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%2012-16-09_2.pdf.

In September 2010, a unanimous panel of the U.S. Court of Appeals for the Third Circuit issued a lengthy opinion declaring an ordinance passed by the City of Hazleton, which imposed requirements on employers to verify employees' immigration status, unconstitutional based on federal pre-emption grounds. *See Lozano v. City of Hazleton* 620 F.2d 170 (3d Cir. 2010). The ruling is directly pertinent to SB 637 because the Hazleton ordinance coerced and in some cases mandated the use of E-Verify. Holding that Congress intended E-Verify to "remain fully voluntary for the vast majority of employers" 620 F.3d at 214, citing *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 878 (2000) (finding state law imposing a specific requirement conflict pre-empted where Congress "deliberately sought variety" and to provide "several different" options), the Appeals Court ruled specifically that Hazleton's effort to coerce employers' to use E-Verify was conflict pre-empted and thus unconstitutional. 620 F.3d at 216. The court's reasoning applies to any Pennsylvania scheme that mandates E-Verify.

In its opinion in the Hazleton case, the appeals court also recognized that E-Verify has been unreliable, which further explains why Congress has yet to mandate it for employers. The appeals court stated that E-Verify has been "alarmingly ineffective" and its lack of reliability has led to discrimination against work-authorized aliens and naturalized citizens.

Studies confirm the unreliable nature of E-Verify. A 2010 study commissioned by the federal government and conducted by the research firm Westat found that a majority of unauthorized workers run through the E-Verify program were verified to work. A report released in December, 2010, by the Government Accountability Office (GAO) found that "E-Verify errors persist" and that errors in the program were more likely to affect foreign-born employees than natural-born citizens.

Mandating the use of E-Verify at the state level interferes with federal laws on immigration. SB 637 creates a state-based immigration enforcement scheme that is pre-empted by federal law and, thus, unconstitutional. Congress has yet to mandate E-Verify because it is an unreliable program that can lead to discrimination against eligible workers, and the program exposes all of us to identity theft by uploading highly-sensitive personal information to the internet. Please vote "no" on SB 637.