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**TESTIMONY SUBMITTED BY
ANDY HOOVER, LEGISLATIVE DIRECTOR
AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA
TO
HOUSE JUDICIARY COMMITTEE
RE: HOUSE BILL 1298, EMAIL MONITORING IN THE WORKPLACE
JULY 1, 2009
STATE CAPITOL, HARRISBURG**

Good morning, Chairman Caltagirone and members of the committee. My name is Andy Hoover. I am the legislative director for the American Civil Liberties Union of Pennsylvania and am here today on behalf of our organization's 15,000 members in the commonwealth. Founded in 1920, the ACLU is one of the nation's oldest civil rights organizations and has more than half a million members nationwide. ACLU activity in Pennsylvania dates back to the 1930s.

Thank you for the opportunity to testify today about House Bill 1298. This bill requires employers that conduct electronic surveillance of employees to notify their workers of that surveillance. The ACLU of Pennsylvania supports HB 1298 and encourages the committee to move it to the floor of the House for consideration.

The ACLU of PA supports the bill because it is sound policy related to privacy. HB 1298 is sound policy because it sets clear boundaries. When people are being watched, whether it's a worker at his or her place of employment or it's residents walking the streets of a city, it is essential that they know that they are being watched.

Privacy is about how we present to the world. We communicate with people differently based upon the audience. The way a lobbyist talks with a legislator is different from how he or she talks with family. How we communicate with equal co-workers differs from how we communicate with supervisors. It is beneficial for

all parties if an employee at least knows who his audience is when communicating in the workplace. HB 1298 is fair because it stops a person from secretly intercepting the communications of another person.

It is also important to be clear about what the bill does not do. HB 1298 does not stop employers from monitoring the email communication on internal servers owned by the company. This bill is a measured step that carefully balances the rights of employers to run their companies as they see fit and the need for employees to know and understand the monitoring power of those for whom they work.

The positive impact of the bill potentially goes beyond simply drawing lines of privacy and increased knowledge of workplace surveillance for employees. HB 1298 also has the potential to deter worker mischief, from violations of basic company policies to criminal activity. If workers are aware that their employers may be monitoring their electronic communication, they are less likely to engage in inappropriate or illegal activity.

Although case law generally favors employers on these issues, the courts do not provide total direction. In one example from 1996, the federal Eastern District Court of Pennsylvania ruled against an employee in *Smyth v. Pillsbury* after the company terminated the employee for inappropriate email. The employee claimed that the employer stated that email would not be monitored, but the employer fired the worker for sending inappropriate messages. The court found that the company has an interest in preventing inappropriate and illegal activity.

Meanwhile, the Court of Appeals for the Ninth Circuit ruled last year that it is unconstitutional for communications providers to give employers emails and text messages from company-financed accounts. In *Quan v. Arch Wireless*, the

appeals court found that Arch Wireless and the Ontario, California, Police Department violated an employee's Fourth Amendment right to freedom from unreasonable searches and seizures when Arch gave the department the employee's text messages. The ruling bans providers from handing over emails and text messages to companies when the companies contract those services with the providers. It does not affect companies that maintain internal servers. Although the ruling is only binding in the Ninth Circuit, it does indicate that the courts are willing to consider cases regarding workplace privacy.

The courts have not given employees a clear constitutional right to privacy in the workplace, but the state government can always give the people more rights than what the constitution allows. HB 1298 is effective policy. It aids workers in knowing where their right to privacy in the workplace begins and ends, and it deters employees from engaging in inappropriate behavior. The ACLU of PA supports HB 1298 and encourages the committee to pass it. Thank you for the opportunity to testify today.