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August 24, 2011

The Honorable Daryl D. Metcalfe  
Chairman, House State Government Committee  
43 East Wing  
PO Box 202012  
Harrisburg, PA 17120-2012

The Honorable Babette Josephs  
Chairwoman, House State Government Committee  
300 Main Capitol  
PO Box 202182  
Harrisburg, PA 17120-2182

Dear Chairman Metcalfe and Chairwoman Josephs,

Thank you for the opportunity to submit written testimony for the House State Government Committee's hearings on the immigration-related bills that the committee is currently considering. Founded in 1920, the American Civil Liberties Union is one of the nation's oldest civil rights organizations. Today half a million Americans are members of the ACLU, including 19,000 people in Pennsylvania. I submit these comments on behalf of the ACLU of Pennsylvania and its members.

The ACLU has a long and storied history of defending immigrants and ethnic minorities from discrimination. In fact, the ACLU was founded in the midst of a previous era of anti-immigrant hysteria in the late 1910s and early 1920s, when immigrants were unfairly arrested, detained, and deported with scant evidence of wrongdoing.

The bills that the committee is currently considering have the potential to inflict a great deal of damage on the commonwealth. If enacted, this legislation would adversely impact the state's economy, relations between immigrant communities and law enforcement, and the commonwealth's fiscal health. It would also lead to lengthy and costly litigation that the commonwealth would likely lose. The ACLU of Pennsylvania opposes this legislative package of bills and encourages you to oppose the legislation.

In this testimony, I will address several key proposals the committee is considering.

**Arizona-style law enforcement mandates**

House Bill 738 and House Bill 801 include elements of Arizona's notorious "papers please" law, which came to be known by its bill number, SB 1070. Both Pennsylvania bills require police to inquire about a person's immigration status if the officer has "stopped, detained or arrested" the person and if the "person...is or should reasonably be

suspected of being in the United States unlawfully(.)” How does an officer have reasonable suspicion that a person is in the United States unlawfully? Neither bill adequately defines how an officer will conclude that a person may be in the country without authorization. Thus, these bills increase the likelihood that citizens and residents who look or sound foreign will be excessively harassed by law enforcement.

In fact, the primary sponsor of House Bill 801 made this very point in an interview with *The Intelligencer Journal* of Lancaster in May, 2010.<sup>1</sup> He called an officer’s determination on whether or not to verify a person’s immigration status a “subjective decision.” It is inevitable that this subjective decision will lead to racial profiling of racial and ethnic minorities. That profiling could be carried out in several ways. Police could find reasons to stop or detain people based on the way they look and then demand their papers. Or police could stop people for legitimate reasons and then ask for immigration status based on their appearance or accent.

People come to the United States from all over the world. When you consider the long history of racial profiling against people suspected of being in this country illegally, it is easy to see how a law requiring police officers to demand papers based solely on their suspicions will be abused.

This legislation also does not define “stopped, detained or arrested.” It is completely reasonable to expect that witnesses and victims of crime could face questioning while interacting with law enforcement. Even if it is not the intent of the primary sponsors or police to question witnesses and victims, it is reasonable to expect that immigrants will fear contact with police. This is especially true for immigrants who come to the United States from countries where the police cannot be trusted.

Passage of an Arizona-style law enforcement bill will be a disaster for public safety as witnesses and victims from immigrant communities refuse to interact with police. And immigrants could become more susceptible to victimization. Criminals will know that immigrant victims will not talk with the police.

There is no positive public safety outcome from passing a law like Arizona’s SB 1070.

HB 738 and HB 801 would also face constitutional hurdles. No state has been able to enforce this type of law as federal courts have stopped their implementation in four different states- Arizona, Indiana, Georgia, and Utah. A decision is expected soon in the challenge to Alabama’s copycat law. If the General Assembly enacts these bills, it is inevitable that they will be tied up in litigation for years, costing the commonwealth time and money.

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<sup>1</sup> Murse, T. (2010) Local police oppose immigration law like Arizona’s. *The Intelligencer Journal*. May 5, 2010.

Enforcement of immigration law is a federal responsibility, not a responsibility of the state government. HB 738 and HB 801 go beyond federal law by creating new state laws and a new state system that requires local police to ask people they stop for their papers. HB 738 also creates a new state crime of failure to follow federal immigration law, going well beyond the state's jurisdiction.

Supporters of these bills can claim that they are simply picking up the slack for the federal government's lack of enforcement, but that talking point doesn't square with reality. Immigration enforcement has, in fact, increased under President Obama with more prosecutions and more deportations than in the final years of the Bush administration.<sup>2</sup> And this stepped up enforcement has occurred as the population of undocumented immigrants in the United States has decreased as a result of the economic downturn.<sup>3</sup>

The federal government has a responsibility to reform our immigration system in a way that is comprehensive and fair. But the commonwealth no more has the power to take over immigration enforcement than it has the power to take over foreign policy. Immigration law and its enforcement is the federal government's domain.

There also can be little doubt now that the passage of SB 1070 in Arizona adversely impacted the state's economy. According to a study by the Center for American Progress,<sup>4</sup> Arizona lost more than \$100 million in convention business alone and could ultimately lose more than \$700 million in convention business. The economic devastation to Arizona was so severe that a coalition of more than 60 business leaders felt compelled to send a letter to Arizona state senator Russell Pearce begging him to back off of his anti-immigrant agenda. The letter stated:

Last year, boycotts were called against our state's business community, adversely impacting our already-struggling economy and costing us jobs. Arizona-based businesses saw contracts cancelled or were turned away from bidding. Sales outside of the state declined. Even a business which merely had "Arizona" in its name felt the effects of the boycotts, compelling them to launch an educational campaign about their company's roots in Brooklyn. It is an undeniable fact that each of our companies and our employees were impacted by the boycotts and the coincident negative image.

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<sup>2</sup> Slevin, P. (2010) Deportation of illegal immigrants increases under Obama administration. *The Washington Post*. July 26, 2010. Retrieved August 24, 2011, from <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/25/AR2010072501790.html>.

<sup>3</sup> Passel, J. and Cohn, D. (2010) U.S. unauthorized immigration flows are down sharply since mid-decade. *Pew Hispanic Center*. September 1, 2010. Retrieved August 24, 2011, from <http://pewhispanic.org/reports/report.php?ReportID=126>.

<sup>4</sup> Available at [http://www.americanprogress.org/issues/2010/11/pdf/az\\_tourism.pdf/](http://www.americanprogress.org/issues/2010/11/pdf/az_tourism.pdf/)

Tourism, one of our state's largest industries and employment centers, also suffered from negative perceptions after the passage of SB 1070. The fact Governor Brewer directed \$250,000 to repairing Arizona's reputation strongly suggests these efforts – whether fair or unfair - are harmful to our image.<sup>5</sup>

In just a few short months, Georgia is already feeling the negative effects of passing a bill like Arizona's SB 1070. According to the Georgia Agribusiness Council, farmers in the state have lost more than \$300 million as immigrant workers have left the state, despite the suspension of enactment of the law. The Georgia Restaurant Association has also reported significant shortages of workers.<sup>6</sup>

Pennsylvania is a popular destination for tourists and business alike. Our history, great cities, and outdoor recreation opportunities draw visitors from around the country and around the world. The state and local governments have invested in convention centers in numerous municipalities to draw business travelers. The agriculture industry plays a major role in the commonwealth's economic health. The General Assembly has the ability to support and encourage this form of economic stimulus, but the legislature also has the power to tear it down with poor choices in policy. The passage of Arizona-style immigration laws sends a message that Pennsylvania is not a welcoming place for immigrants, and that undermines our economic standing.

### **Mandatory E-Verify**

House Bill 858 mandates all employers in the commonwealth to use the federal E-Verify database program. As you may know, 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, photos, and visa data, and this honeypot of data is extremely attractive to identity thieves.

Simply put, E-Verify is a failed system. It fails in two ways. First, the databases used for E-Verify contain errors that result in "tentative non-confirmations" (TNC), meaning that eligible workers are deemed ineligible to work by E-Verify. The most recent study commissioned by the federal government suggested an error rate of .7%, but businesses that use E-Verify report a much higher error rate of approximately 10-15%.<sup>7</sup>

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<sup>5</sup> Available at <http://graphics8.nytimes.com/packages/pdf/us/20110316-CEOS-IMMIGRATION-ARIZONA.pdf>.

<sup>6</sup> (2011) Not working. *The Miami Herald*. August 2, 2011. Retrieved August 24, 2011, from <http://www.miamiherald.com/2011/08/02/2342305/not-working.html>

<sup>7</sup> American Council on International Personnel, Comments on Proposed Rule Published at 73 Fed. Reg. 33374 (June 12, 2008), Aug. 11, 2008.

Fixing these errors takes more than a simple phone call. The federal government has no due process protections to ensure that citizens and authorized immigrant workers are not adversely impacted by a TNC. According to the Government Accountability Office (GAO), the average time to address an error in E-Verify in 2009 was 104 days. That's a long time for a worker to go without a paycheck and for an employer to operate minus an employee. The Department of Justice and the Department of Homeland Security have both acknowledged that some employers fail to inform the agencies of employee errors, and even when they do, the location of the error is initially unknown. A worker must contact multiple agencies to find the error and then fix it.

E-Verify is a failure in a second way. The program's only duty is to identify unauthorized workers, and it is unable to carry out that task. According to a 2010 study by Westat that was commissioned by the federal government, 54 percent of the unauthorized workers entered into E-Verify during the study were deemed eligible to work. E-Verify cannot even complete the one job for which it was built.

Finally, E-Verify creates the infrastructure for a national identity system. The databases used in E-Verify contain identifying information, including Social Security numbers and photos, and will soon include drivers' license data. All of this information is on the internet, and it is completely plausible that soon this system could be enhanced as an identification system for other areas of our lives. For example, it is not a stretch of the imagination to imagine E-Verify being converted into use for travel. Then all of the identity problems that Americans face in the workplace will follow them to other areas of their lives.

Americans reasonably expect that their government isn't watching them and that they have some level of privacy. The existence of E-Verify has the potential to significantly alter that reality.

### **The 14<sup>th</sup> amendment and the denial of constitutional citizenship**

House Bill 474 and House Bill 857 address the constitutional citizenship clause of the 14<sup>th</sup> amendment to the federal constitution. The provision states, "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." HB 474 authorizes the governor to enter into a compact with other states to issue different birth certificates to babies born in the United States based on the immigration status of the child's parents, and HB 857 defines citizenship of the commonwealth based on the same criteria. Both bills are blatantly and obviously unconstitutional.

The 14<sup>th</sup> amendment was passed in the aftermath of the Civil War and the infamous *Dred Scott* decision of 1857 that preceded it. In that decision, the United States Supreme Court ruled that all persons of African descent could not become citizens. In response, Congress

passed and the necessary number of states agreed to the 14<sup>th</sup> amendment, guaranteeing that citizenship would be above the politics and the prejudices of the day.

The constitutional citizenship clause of the 14<sup>th</sup> amendment has been challenged on multiple occasions since its passage. Not unexpectedly, racial and ethnic minorities have been the targets of those who challenge the right to citizenship at birth. African-Americans, Chinese-Americans, and Japanese-Americans have all been targeted for exclusion, but the Supreme Court has consistently ruled for more than 100 years that the American-born children of non-citizens are citizens. This guidance from the Supreme Court has included the American-born children of undocumented immigrants.<sup>8</sup>

Supporters of HB 474 and HB 857 have suggested that the 14<sup>th</sup> amendment's phrase "and subject to the jurisdiction thereof" provides an opening to deny citizenship to American-born children. It does not. The Supreme Court clearly explained that "subject to the jurisdiction thereof" simply means that children of foreign diplomats or occupying forces do not automatically become U.S. citizens by virtue of their birth in America.

Bills like HB 474 and HB 857 died quiet deaths in other states during the 2011 session, including in Arizona. The Pennsylvania General Assembly would be wise to also reject this extreme legislation.

### **Government-issued identification for public aid**

Senate Bill 9 and House Bill 41 mandate that all applicants for public assistance programs, with some exceptions, must show government-issued identification. If the applicant does not have government-issued ID, he or she will not have access to aid, despite eligibility. A significant percentage of United States citizens do not have government-issued ID and, thus, would be denied assistance if SB 9 becomes law. With no credible evidence of impersonation fraud by ineligible immigrants, SB 9 is an expensive solution in search of a problem.

In 2006, the state of Colorado passed a law similar to SB 9. Colorado spent \$2 million implementing the law but saved no money in stopping fraud.<sup>9</sup> Since then, multiple states have altered their verification process without including a government-issued ID provision like that in SB 9. Idaho, Missouri, Nebraska, Oklahoma, South Carolina, Utah, and Virginia have all passed verification-related bills without the government-issued ID requirement.

The experience of Bobby Hartwell of Colorado is instructive. Mr. Hartwell lives with cerebral palsy and intellectual disability. After Colorado passed its law like SB 9, Mr.

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<sup>8</sup> See, e.g., *Plyler v. Doe*, 457 U.S. 202, 211, 243 (1982).

<sup>9</sup> Couch, M.P. (2007) Colo. immigration law falls short of goal. *The Denver Post*. January 25, 2007. Available at [http://www.denverpost.com/ci\\_5081255](http://www.denverpost.com/ci_5081255).

Hartwell nearly lost his home due to the law's ID requirements. When Mr. Hartwell was a year old, his parents placed him in a group home and never returned. The home destroyed its residents' records when it closed in the 1980s. Mr. Hartwell did not have a driver's license or non-driving ID card, his birth certificate, or his Social Security card. He could not get replacement copies of those documents without the others. It was only with the assistance of a legal clinic for people with disabilities that Mr. Hartwell was able to secure the necessary documents he needed to continue receiving aid.<sup>10</sup>

In 2006, the Brennan Center for Justice at New York University School of Law conducted a survey to determine what percentage of United States citizens does not have government-issued photo identification. The study found that 11 percent of U.S. citizens do not have government-issued identification.<sup>11</sup> When the survey results were analyzed by demographics, it found that those without this form of ID are disproportionately those who might need public aid. Eighteen percent of citizens age 65 or over, 25 percent of adult African-Americans, and 15 percent of citizens who earn less than \$35,000 per year do not have government-issued photo ID.

If SB 9 passes into law, it will be a net loss for the commonwealth. Multiple state agencies have estimated that the total cost of SB 9 will be \$19 million. Meanwhile, no legitimate evidence exists that immigrants who are not eligible for benefits are fraudulently receiving aid. The 2009 study from the Federation for American Immigration Reform (FAIR), which is sometimes cited by supporters of SB 9, has been debunked as junk analysis.<sup>12</sup>

### **Conclusion**

Most people agree that Congress must address immigration reform. But the proposed solutions in the bills currently before this committee are not the answer to addressing what's wrong with our system of immigration. In fact, passage of any of these bills presents the potential for significant negative consequences.

As always, you are welcome to contact me with questions or concerns about this or any civil liberties issues.

Sincerely,  
Andy Hoover  
Legislative Director, American Civil Liberties Union of Pennsylvania

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<sup>10</sup> Augé, K. (2007) Disabled man wins ID bout. *The Denver Post*, April 11, 2007. Available at [http://www.denverpost.com/news/ci\\_5637737](http://www.denverpost.com/news/ci_5637737).

<sup>11</sup> NA. (2006) *Citizens Without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification*. Brennan Center for Justice at New York University School of Law. Available at [http://www.brennancenter.org/page/-/d/download\\_file\\_39242.pdf](http://www.brennancenter.org/page/-/d/download_file_39242.pdf).

<sup>12</sup> Ewing, W. (2009) FAIR Targets Immigrants and Children. Available at <http://immigrationimpact.com/2009/07/28/fair-targets-immigrants-and-children-in-pennsylvania/>.