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LEGISLATIVE OFFICE

Testimony of Timothy Sparapani
Senior Legislative Counsel, Washington Legislative Office

American Civil Liberties Union

AMERICAN CIVIL LIBERTIES UNION
WASHINGTON
LEGISLATIVE OFFICE
915 15th STREET, NW, 6TH FL
WASHINGTON, DC 20005
T/202.544.1681
F/202.546.0738
WWW.ACLU.ORG

Caroline Fredrickson
DIRECTOR

NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500

Opposing the Creation of a "No-Work" List through Mandated Employment Eligibility Verification Prescreening

U.S. House of Representatives Committee on the Judiciary
Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law

Hearing Regarding: Electronic Employment Verification Systems: Needed Safeguards to Protect Privacy and Prevent Misuse

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Chairwoman Lofgren, Ranking Member King and Subcommittee Members, on behalf of the American Civil Liberties Union ("ACLU"), America's oldest and largest civil liberties organization, and its more than half a million members and 53 affiliates across the country, we are pleased to submit this testimony. The ACLU writes to oppose any legislative proposal that would impose a mandatory, electronic employment eligibility verification pre-screening system on America's workforce. Under any name, the original Basic Pilot Employment Verification System (also known as E-Verify, hereinafter "Basic Pilot") or another mandatory employment eligibility prescreening system would impose unacceptable burdens on America's workers, businesses and society at large without resolving America's undocumented immigration dilemma. The costs associated with this program cannot be denied and cannot be overstated; any benefits are speculative, at best.

The numerous bills pending before Congress to mandate electronic employment eligibility verification prescreening are touted by proponents as a technological cure-all to assist beleaguered American workers who are fearful of a perceived threat to jobs and wages from undocumented immigration. Yet, this proposed legislative medicine may only cause the workers more harm without resolving the underlying societal problems. After close study, we conclude that the mandatory imposition of E-Verify or similar systems cannot prevent the hiring of undocumented workers and, therefore, will not resolve the nation's immigration dilemma. Proponents' claims to the contrary, we expect E-Verify and similar systems as currently proposed only to make life miserable for American workers. Mandatory electronic employment verification will entangle them in a massive knot of government red tape and bungling bureaucracy both to get hired and resolve inevitable data errors. During the period these unfortunate workers are wrongly denied employment, they will be unable to work lawfully, which will surely cause them severe economic distress. We thus urge Congress to refuse to mandate a system that will create a new "No-Work List" that causes problems similar to the infamous No-Fly List - to be populated by thousands of Americans who are wrongly blocked from working by their own government.

Mandating eligibility pre-screening of all workers will endanger the privacy of law-abiding Americans because it will create an entirely new market for identities. Reports estimate that American businesses currently employ more than seven million undocumented immigrants, with more arriving each day seeking employment. Tremendous economic pressure encourages each of these individualsto take on another person's identity, aided in many cases by their profiteering smugglers. This is an economic imperative for those individuals and their families in order to remain in the United States. Mandating pre-screening makes a work-eligible identity a highly valuable commodity. **In short, E-Verify or a similar electronic**

employment eligibility verification system will exacerbate, not decrease, the incidence of identity theft. Requiring each worker to present his or her identity to be granted permission to work will lead some desperate undocumented immigrants – and those who smuggle and illegally employ them – to steal the identities of work-eligible American workers. In short, the identities of work-eligible individuals will become commodities for borrowing and sale.

Worse still, this potential threat to Americans' privacy rights is wholly unnecessary because the E-Verify system and similar systems are so easily evaded. For example, all that will be needed to evade the system is for an ineligible worker to present forged or stolen identity documents of another eligible worker. Neither the employer nor government databases will be able to detect this type of identity fraud. Congress should ask itself: why endanger Americans' privacy rights if it will not prevent the hiring of undocumented immigrants or resolve our immigration problems? The best way to avoid creating this new identity-theft market is to block any legislation mandating the creation of such a system in the first place.

In addition to our concerns about law-abiding Americans' privacy rights, the ACLU opposes such a mandatory system for six reasons:

(i) well-documented data error rates in both Social Security Administration ("SSA") and Department of Homeland Security ("DHS") files concerning work-eligible U.S. citizens, lawful permanent residents and visa holders will wrongly delay the start of employment or block the ability to work altogether for hundreds of thousands or millions of lawful American workers;

(ii) current proposals lack sufficient due process procedures for workers injured by such data errors;

(iii) current proposals provide no reasonable likelihood of redress to resolve such data errors and make workers wrongly denied the right to work economically whole;

(iv) both SSA and DHS are unprepared and ill-equipped to implement such a system and doing so would lead to the failure of SSA to continue to fulfill its primary obligations to the nation's retirees and disabled individuals;

(v) pre-screening for eligibility does not prevent unscrupulous employers from illegally employing undocumented workers and imposing such a system

would expand, not contract, the black market labor economy; and

(vi) as the Westat report highlights, we can expect rampant employer misuse in both accidental and unintentional ways.

I. Mandating Electronic Employment Eligibility Verification Poses Unacceptable Threats to American Workers' Privacy Rights

Requiring workers to present themselves for work under a work-eligible individual's name will pose new, unacceptable privacy dangers for authorized American workers. Although we have had a similar statutory requirement for 20 years, nearly all observers believe this paper-based system is widely ignored or circumvented. Switching to an electronic system is at first blush a tempting approach to resolve the widespread circumvention of this requirement. Instituting such a mandate, however, will not stop undocumented immigrants from attempting to work to support their families. Instead, it simply will drive them to impersonate work-eligible individuals when attempting to be hired. The system under consideration rests solely on the presentation of a work-eligible identity by whomever arrives at the workplace to work. This heightens the value of every identity of each and every person who is authorized to work in the United States. By heightening the value of identity, the risk of identity misappropriation increases exponentially and those without such identities face increased pressure to choose between "borrowing" the identities of those who are permitted to work – or letting their families go hungry.

This is not "identity theft" in the classic sense that leads to the draining of bank accounts and the opening of credit accounts to achieve theft, but rather creates a threat of "identity imposters" who will only borrow another's identity to surpass this new threshold of electronic employment verification pre-screening. But, such identity imposters pose a new threat to law-abiding, work-eligible workers' privacy because the next time the authorized individual attempts to start a new job he or she will surely run afoul of E-Verify and could be wrongly deemed ineligible to work. In short, mandating worker pre-screening through a system such as Basic Pilot will dramatically increase the incidence of identity and document fraud.

Although identity theft has been heretofore committed primarily by criminal syndicates and thieves – in 2005 the Federal Trade Commission reported 8.3 million cases –E-Verify or a similar mandatory system will engender a new type of <u>document and identity fraud</u>. This new type of document and identity fraud - <u>not identity theft</u> - will be perpetrated not to obtain numbers to unlock others' financial accounts and obtain credit, but rather simply to evade detection at the moment of electronic employment

eligibility verification. After that instant, this "borrowed" identity becomes irrelevant and the wise undocumented immigrant would forgo taking additional action in that name for fear of increasing the chance of detection and deportion.

Similarly, the repositories of work-eligible employees' identities – including employers' databases and human resources files and the very government databases used for eligibility screening – will become increasingly inviting targets of attack for identity thieves. Recent experience shows us that no database can be entirely secured from dedicated hackers, and, that companies and the government are both poor protectors of the public's sensitive, private data. A number of pending bills also create new databases for pre-screening purposes, in part no doubt to resolve the inaccuracy rates that plague the current databases and make them virtually useless for enforcement purposes. These new databases will likely aggregate American workers' now somewhat disparate data held in numerous government databases into a large, central data repository. These new mega-databases will become especially inviting targets for identity fraudsters because they will contain troves of rich personally identifiable data.

II. Data Errors Will Injure Lawful Workers by Delaying Start Dates or Denying Them Work Opportunities

As the Subcommittee well knows, recent government reports acknowledge that huge numbers of SSA and DHS files contain erroneous data that would cause "tentative non-confirmation" of otherwise work-eligible employees and, in some cases, denial of their right to work altogether. SSA itself reports that approximately 17.8 million of its files contain erroneous data, 12.7 million of which concern U.S. citizens. The SSA's Office of Inspector General reports that the Social Security database has a 4.1 percent error rate. Even cutting this data error rate by 90% would leave approximately 1.78 million workers –more than 1.2 million of whom will be U.S. citizens – at the mercy of a system that provides no adequate due process for challenging and correcting erroneous data. DHS files fare no better. According to a DHS-commissioned report released in September 2007 undertaken jointly by Westat and Temple University, 0.1% of native-born citizens and 10% of naturalized citizens have erroneous data in their DHS files that would cause them to be tentatively nonconfirmed.[1] That report concluded that "the database used for verification is still not sufficiently up to date to meet the [Illegal Immigration Reform and Immigrant Responsibility Act] requirements for accurate verification."[2]

[1] Findings of the Web Basic Pilot Evaluation (Westat, Sept. 2007), www.uscis.gov/files/article/WebBasicPilotRprtSept2007.pdf, at 50.
[2] Id., at xxi.

The causes of these data errors are similarly well known. First, legacy files produced on paper before the onset of the information age contained numerous inconsistencies or may have been lost or never updated. Second, women or men who changed their names at marriage, divorce or re-marriage may have inconsistent files or may never have informed either SSA or DHS of name changes. Third, simple key stroke errors contribute to the volume of erroneous data. Fourth, individuals with naming conventions that differ from those in the Western world may have had their names anglicized, transcribed improperly or inverted. Fifth, individuals with common names may have had their files wrongly conflated or merged with others sharing the same or similar name. Sixth, systems designed for one agency data function may not be readily adapted to sharing information with other systems designed to rapidly review and interpret work eligibility, thus leaving an incomplete data set to evaluate a prospective employee's eligibility or to clarify or resolve confused or erroneous data.

All of these problems make implementation of such a mandatory pre-screening system difficult, if not impossible. Congress should not mandate such a system unless and until these databases and the files they contain are substantially improved. A first step, however, to aid both SSA and DHS in carrying out their disparate but primary missions -- other than employment eligibility prescreening -- would be for Congress to mandate that both agencies systematically audit and review their files' data quality to eliminate errors. Only after such a systematic "scrub" to improve data is completed should Congress even consider mandating use of these files to pre-screen worker eligibility.

III. Pending Legislative Proposals Lack Meaningful Due Process Protections for Lawful Workers Injured by Data Errors

Workers injured by data errors will need a means of quickly and permanently resolving data errors so they do not become presumptively unemployable. Yet, all pending legislative proposals lack sufficient due process provisions to aid workers who are wrongly denied the right to start their next job. Congress must prevent the creation of a new employment blacklist – the ACLU foresees a "No-Work List" – that will consist of would-be employees who are blocked from working because of data errors and government red tape.

To resolve data errors, Congress must prevent the enactment of a mandatory pre-screening system unless it has meaningful due process provisions. Such procedures should mirror the Fair Information Practices that undergird the Privacy Act of 1974, 5 U.S.C. §§ 552, et seq. and control

how the government should handle data it collects about the public. Therefore, Congress should block any legislation unless it mandates that:

(i) the systems and databases used to collect and disseminate information about those attempting to work be publicly disclosed so that workers and employers are aware of them;

(ii) information collected by both government agencies and employers that is gathered for one purpose shall not be used for another purpose without individuals' consent;

(iii) workers can access information held about them in a timely fashion and without petitioning the government for access;

(iv) workers may correct, amend, improve or clarify information held about them by both the government and employers;

(v) information about employees be kept relevant, accurate, and up to date; and

(vi) information is protected against unauthorized losses such as data breaches or identity theft.

None of the legislation pending in Congress satisfies these Fair Information Practices, which can be summarized as assuring workers of the right to (i) transparency; (ii) single use; (iii) access; (iv) correction; (v) accuracy; and (vi) privacy.

Given the inordinately high database error rates described above, it is further incumbent upon Congress to prevent the imposition of a mandatory system that fails to provide workers with a fair and just set of administrative and judicial procedures to resolve data errors promptly and efficiently. Although some pending proposals take some steps towards erecting such a system, none provide the true due process required to make imposition of such a system workable for employees and their employers. True due process would require the creation of a system to expedite workers' inquiries at both agencies, in addition to the existing opportunity – too often not communicated to employees wrongly tentatively non-confirmed according to DHS' Westat report– to submit additional information to SSA and DHS.[3] In demanding due process for workers in such a system, any worker who challenges erroneous government data deserves a presumption of work eligibility. No undocumented worker would intentionally undertake the

[3] Id.

bureaucratic nightmare of dealing with at least two federal agencies and fighting the U.S. government through separate administrative and judicial procedures.

True due process requires congressional establishment of open, accessible, efficient and quick administrative procedures so as to get any aggrieved worker back to work and so as not to deprive an employer of its chosen employee. First, Congress must ensure that SSA and DHS hire and train sufficient staff to handle the millions of additional inquiries they will surely receive as workers try to resolve data errors. Those new government employees will be needed for the substantial increase in the manual verification workload, each verification often taking more than two weeks to complete. Thus, the ACLU urges the creation and full-staffing of 24-hour help lines at SSA and DHS. Second, when data provided by a worker conflicts with government files, the aggrieved worker must be provided a right to a quick, efficient, and fair review before an administrative law judge. Third, costs should be borne by the government for each such procedure so as to minimize injury to the worker. Fourth, the administrative law judge, or other arbiter, should be able to order the government to correct and supplement the government records at issue. Fifth, government employees should be required to correct data errors expeditiously. Sixth, the administrative law judge must be empowered to order the government to reimburse the worker's costs and to reimburse for lost wages plus interest. We would urge a strict liability standard so as to encourage the government to improve its data quality.

If the administrative process fails to resolve data discrepancies, then due process requires the right to a judicial process. Because of the costs of bringing suit, including filing fees, retaining counsel, obtaining documents, finding and presenting witnesses, and hiring experts, the government must bear the burden of any judicial process. What undocumented worker would contest a tentative nonconfirmation before a federal judge – toward what end? Congress should place the legal burden on the government's shoulders to demonstrate a worker's ineligibility rather than forcing the worker to prove his or her eligibility. The Federal Tort Claims Act does not provide an adequate procedure or remedy for the hundreds of thousands who would surely be aggrieved by the imposition of a mandatory procedure. The U.S. Court of Claims reported an extensive backlog of cases and requires a worker to exhaust a six-month long waiting period before filing suit. **During that entire period of a Federal Tort Claims Act administrative procedure, plus the pendency of the lawsuit, the worker would be barred from working.** Thus, Congress must mandate an expedited federal court procedure, and judges should be empowered to order the government to correct any erroneous files and to reimburse a worker for costs and fees for bringing suit, including attorney's fees. Furthermore, federal judges should be required to order agencies to reimburse a worker for any lost

wages and lost opportunity costs, plus interest. The legal standard should be one of strict liability, so that any government error leads to redress that makes the injured worker whole. Any lesser legal standard, such as negligence or recklessness, will fail to (i) assist the aggrieved worker and his or her family; and (ii) encourage the agencies to improve data quality so as to reduce the harm from such a system going forward.

IV. Congress Must Mandate True Redress for Workers Aggrieved by Government Data Errors

Imagine the horror of a constituent who has worked for years and who is suddenly unable to start a new job due to government bungling and bureaucracy, probably after the constituent has left his or her previous job. Such is the specter that would confront at least hundreds of thousands of workers upon implementation of an E-Verify type of system. Denied their right to work, many of these workers and their families would quickly fall into economic distress. Prudence and basic fairness dictate that Congress must insist that SSA and DHS provide true redress for any aggrieved worker, including the correction of erroneous data once and for all and making the aggrieved worker economically whole.

The first key to redress is ensuring that an aggrieved worker need only fight government red tape once. Thus, if Congress imposes a mandatory pre-screening system, that system must allow a worker to force federal agencies to correct all erroneous data. Further, Congress should require agencies to make notations in files should there be future questions about a worker's eligibility. Workers and employers will only have confidence in a mandatory prescreening system if bad data is actually corrected. Failure to mandate data correction will surely result in a list of employees who are lawfully eligible to work, but whom employers are unable to lawfully employ. This blacklist will truly be a No-Work List.

V. Government Agencies are Unprepared to Implement a Mandatory Employment Eligibility Prescreening System

As recent government reports evaluating Basic Pilot have made clear, both SSA and DHS are woefully unprepared to implement a mandatory employment eligibility pre-screening system. In addition to the data errors that plague their databases, both agencies are, in some cases, still using paper files. In order to implement such a system, both agencies would need to hire hundreds of new, full-time employees and train staff at every SSA field office. DHS has an enormous backlog of unanswered Freedom of Information Act requests from lawful immigrants seeking their immigration files. Those files, many of which are decades old, are the original source of numerous data errors. If DHS cannot respond to the pending information

requests in a timely fashion now, how much worse will the problem be when lawful immigrants, including naturalized citizens, lawful permanent residents, and visa holders need the documents immediately to start their next jobs? Consequently, DHS must hire hundreds more employees to respond to these FOIAs.

Businesses seeking to comply with any newly imposed system will also strain these government agencies. Additional problems can be anticipated in attempting to respond to employers' requests and in establishing connectivity for businesses that are located in remote locations or that do not have ready access to phones or the internet at the worksite. These agency deficiencies will surely wreak havoc on independent contractors and the spot labor market for short-term employment.

If history is our guide, agency officials will be unable to scale up the existing software platform for Basic Pilot to respond to the enormous task of verifying the entire national workforce and all the nation's employers. It makes little sense to adopt a system that is predestined to wreak havoc within these agencies, not to mention the lives of the thousands of Americans wrongfully impacted.

VI. Mandatory Employment Eligibility Prescreening Cannot Eliminate Unlawful Employment of Undocumented Immigrants and May Exacerbate the Growth of the Black Market Labor Economy

Already, by some reports, more than 7 million undocumented immigrants are working in the United States. No doubt many of these workers are part of the black market, cash wage economy. Unscrupulous employers who rely on below-market labor costs will continue to flout the imposition of a mandatory employment eligibility pre-screening system. These unscrupulous employers will game the system by only running a small percentage of employees through the system or by ignoring the system altogether. In the absence of enforcement actions by agencies that lack resources to do so, employers will learn there is little risk to gaming the system and breaking the law. Employers will, however, be forced to deal with the hassle and inconvenience of signing up for Basic Pilot, and then watching as they are blocked from putting lawful employees to work on the day they are to start their employment. The inevitable result will be more, not fewer, employers deciding to pay cash wages to undocumented workers. Similarly, cash wage jobs will become attractive to workers who have seemingly intractable data errors. Instead of reducing the number of employed undocumented workers, this system creates a new subclass of employee – the lawful yet undocumented worker.

VII. Employers Will Misuse a Mandatory Employment Eligibility Prescreening System

Employers have misused and will continue to misuse any mandatory employment eligibility verification system resulting in discrimination and anti-worker behavior. From the inception of the Basic Pilot, the U.S. Government Accountability Office and DHS studies have documented various types of misuse. Some employers have even self-reported that they screen out workers with "foreign" surnames or fail to explain tentative non-confirmations to employees. Other employers have self-reported that they have punished employees with tentative non-confirmations by withholding wages and assignments during the period until any discrepancy is resolved.

If Congress imposes a mandatory system, it will also need to create effective enforcement mechanisms that prevent the system from being a tool for discrimination in hiring. Such discriminatory actions will be difficult to prevent and even more difficult to correct. Congress should ask: how will the government educate employers and prevent misuse of the Basic Pilot or any similar system?

VIII. Conclusion: Congress Should Not Enact a Mandatory Employment Eligibility Pre-Screening System

The ACLU urges the Subcommittee on Immigration, Citizenship, Refugees, and Border Security to block the imposition of a mandatory employment eligibility pre-screening system. All pending legislative proposals are inadequate to protect American workers' privacy and their right to work. None of the pending legislative proposals would resolve the substantial database inaccuracy rates containing information on America's workforce that plague E-Verify. Congress must be careful not to create a No-Work List that would cause great harm to lawful workers and their families.