On behalf of the Ohio Civil Rights Commission (OCRC), thank you for allowing the agency this opportunity to address our serious concerns with the As Introduced version of Senate Bill 268.

First, let us be on record that from our perspective, this bill is unwarranted. The Ohio Civil Rights Commission is unaware of any current pervasive problems with our process or procedures which would be solved by the provisions of this bill. While it is true, Ohio's employment discrimination law is not parallel to Federal employment law in every way, our laws tend to be stronger and offer additional protections for Ohioans. This should be a point of pride and we have no reason to believe that it causes great confusion or miscarriages of justice. Many of the bill's provisions impact OCRC's processes only; however, we have not received complaints from charging parties or respondents about these issues. Ohio has a long and proud history of dedication to civil rights above and beyond the Federal floor and we urge you to reject the notion that it is now appropriate to go backward in that measure.

SB 268 is extensive in its scope and complexity. It touches everything from affirmative action to common law claims. Our primary concerns with the bill are those that would materially impact this agency's work. This bill as written would substantially change the way we investigate employment cases. It would require retraining for OCRC investigators and administrative staff, causing extensive burden in administrative rule creation and review. We understand that the substitute bill is intended to fix many of the concerns with the As Introduced version of the bill. However, in some instances, the sub-bill's attempts to address concerns could lead to greater confusion. Indeed, the mere fact that employment cases are separated and given a different process, statute of limitations, and resolution from other charges of discrimination could cause more confusion than the bill's intended alignment with Federal law. Because the bill is so extensive and complicated, OCRC cannot do justice to all of the problematic provisions in this testimony. Instead, we will highlight those that remain the most problematic under the sub-bill and urge you to delay passage of the bill until these concerns can be addressed.

Inconsistent Statutes of Limitation - Sec. 4112.051 (B) – sub-bill lines 1188-1191: The bill extends the statute of limitations for filing an unlawful discriminatory practice relating to employment, but leaves language in Sec. 4112.05(B)(1), requiring the statute of limitations of six months for retaliation and aiding and abetting charges[1]. The effect of this ambiguity could be that a charging party and respondent could be required to address a charge in two forums. For example, an employee might filed dual employment-related charges of race discrimination and retaliation 7 months after an alleged unlawful event. The race claim would be timely filed with OCRC under the one-year statute of limitations

[1] 4112.02 (I) and (J)

in the sub-bill; however, the retaliation charge would have exceeded the 6-month statute of limitations. Consequently, the employee would be required to file the retaliation charge with the EEOC or file a private action. Meanwhile, OCRC could investigate the employment race discrimination charge.

Confidentiality of No Probable Cause Charges - Sec. 4112.051 (E) – lines 1199-1209: The sub-bill requires that all materials in the investigation of cases that are dismissed as "no probable cause" must remain confidential before the commencement of conference, conciliation, or persuasion. However, the OCRC does not commence conference, conciliation, or persuasion in "no probable cause" findings, because the matter is essentially resolved in the respondent's favor. Indeed, this sub-bill amendment has the same impact as the As Introduced language – because conference, conciliation, or persuasion would never commence, all materials of the investigation would remain confidential indefinitely. This withholding of public documents goes against Ohio's public policy of transparency in government operations and denies respondents a chance to access materials which would clear their name.

Declaratory Statements - Sec. 4112.051 (H)(3) - lines 1291-1295: The requirement for OCRC to issue a declaratory order stating that a respondent has "ceased to engage in the unlawful discriminatory practices" is flawed. While OCRC could reasonably declare that a respondent has complied with all of the relief requested in the Commission's final order, to declare that the respondent has completely ceased the discriminatory practices would be inherently speculative. To attempt to verify the truth of such a statement would require OCRC to conduct significant additional compliance reviews and inspections, which will be a burdensome intrusion for respondents. The resulting additional oversight of respondent's practices in order to ensure that the respondent has completely ceased discriminatory practices would also burden the agency, creating an unfunded mandate of increased time and expense to complete the needed layers of review.

***Genaro* Extension - Sec. 4112.08 (A) - lines 1520-1526:** The language in bill prohibiting the ability to sue supervisors as provided in *Genaro* specifies that "other employees" are also exempted from individual liability. We believe this may unintentionally extend to limitations on retaliation and aiding and abetting charges, which under continuing law Sec. 4112.02 (I) and (J) extend to "any person." Unfortunately, the Civil Rights Commission does see cases of retaliation and aiding and abetting by coworkers. Indeed, right now the Civil Rights Commission is faced with a situation in which a respondent's family member – who does not hold a managerial position in the respondent's company – is sending harassing and threatening messages to witnesses outside of work hours. If this provision of the sub-bill stands, the Commission may not be able to enforce the retaliation statute because a low-level employee acting outside of work hours may not incur liability on the behalf of the employer and, under the sub-bill, the same employee could not be held individually liable for retaliation or aiding and abetting.

Omitted from bill - Necessary and Indispensable Parties to a Hearing: In shifting employment discrimination law to a new ORC section (4112.051), the bill drops language providing the right of persons who claim an interest in a case but are not joined

to present evidence, examine witnesses and be represented by counsel. This could threaten the fair hearings of cases in which an organization or individual files on the behalf of another person. For example, we sometimes receive charges filed on the behalf of minors and individuals with severe and persistent disabilities. The absence of this language could drive complainants to the EEOC or private court. This could also prevent the continuation of cases like the one in which a Charging Party filed discrimination on the basis of disability because of her cancer diagnosis. During the course of the hearing, the Charging Party died and her mother joined her case to continue the fight against the injustice her daughter faced. Under the bill's language, the mother may not have been able to honor her daughter's wish.

Voluntary dismissal and tolling - Sec. 4112.053 (C)(2)(a) - lines 1372-1374: The As Introduced version of the bill did not include a way to stop the "tolling" on the statute of limitations to file a private civil action for circumstances in which Charging Parties voluntarily dismissed (withdrew) their charge with the OCRC. The sub-bill addresses this oversight by giving the Charging Party 30 days to voluntarily dismiss a charge and stop tolling, allowing them to file a private civil action. However, 30 days is likely inadequate timing for good-faith voluntary dismissals. For example, both parties have 45 days after a charge is filed to attempt a mediation through the OCRC. A 30-day limitation could prohibit a Charging Party from making a full attempt at mediation and then making the decision to voluntarily dismiss.

Affirmative Action Policies and Procedures – R.C. 4112.051(L) - lines 1313-1318: This language appears to open the door to challenges to affirmative action policies and procedures (e.g., use of utilization studies and EEO-1 reports). Specifically, the bill states that "nothing in this section *authorizes* or requires any person to *observe* in hiring [emphasis added]," a person's membership to any protected class or "any other criteria than qualifications of applicants." Nothing in the section – which deals solely with OCRC administrative practices – could reasonably be construed to explicitly *authorize* a person to use affirmative action policies, so this language could be construed as legislative intent to "deauthorize," or prohibit the consideration and collection (i.e., *observation*) of this information by any person.

Omitted from bill – OCRC case time limits: In shifting employment discrimination law to a new ORC section (4112.051), the bill eliminates the requirement that OCRC resolve all employment cases within one year.[2] It is in the interest of all parties to complete cases as quickly as possible. The one year timeframe operates as a measure of efficiency and prevents evidence from becoming stale.

[2] R.C. 4112.05(B)(7)