On behalf of the Ohio Civil Rights Commission (OCRC), thank you for allowing the agency this opportunity to address our concerns with the As Introduced version of House Bill 2. We would like to thank the sponsor, the Ohio Chamber of Commerce and the Society for Human Resource Management (SHRM) for their willingness to discuss our issues with prior versions of this legislation. While we still have hesitancy, the bill has improved substantially from its initial language and we appreciate the thoughtfulness with which they have engaged this process.

In spite of its improvements over the months since its last introduction, from our perspective, this bill remains 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. We have not received complaints from charging parties or employers about these issues. Ohio has a long and proud history of dedication to civil rights above and beyond the federal floor. The fact that our state enacted many of these protections five years before the federal government did and that Ohio's laws remain stronger in some ways is strong evidence of the importance our state has historically placed on equal employment opportunity. We urge you to reject the notion that it is now appropriate to go backward in that measure.

Additionally, this bill does not mirror federal law in all ways; it picks and chooses portions of federal law that are believed to be in the best interest of employers, while ignoring other portions of federal law.

HB 2 is extensive in its scope and complexity. Our primary concerns with the bill are those that would materially impact this agency's work. We understand that the bill is intended to make our system less confusing by aligning Ohio law with federal law, however the cherry-picking of federal provisions only shifts which provisions are inconsistent, instead of eliminating 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. This bill would substantially change the way the agency investigates employment cases. It would require retraining for OCRC investigators and administrative staff, causing extensive burden in administrative rule creation

and review. This testimony highlights what the OCRC views as the most problematic aspects of these changes, with the understanding that it is the sponsor's intent to address some of the following issues, possibly even by amendment in committee today. Without certainty about which amendments would be adopted in today's committee, the OCRC wants to be on record about all of the following concerns:

Election of Remedies (Lines 1154, 1162, 1294-1553, 1680-1699): The bill adds a series of new complex statutes. This language, coupled with the rewriting of several statutes well known to the agency for other principles, adopts the "election of remedies" doctrine. Election requires a party, who has two co-existing remedies to a legal problem, to elect to pursue one remedy over the other. By including an election provision, it appears the authors of the bill intended to eliminate duplicative civil rights actions in Ohio and to bring R.C. Chapter 4112 in greater alignment with federal law. However, the drafters of the bill overlooked a more effective approach to achieving the goals of administrative efficiency for employers, namely the "exhaustion of administrative remedies" doctrine.

Under this concept, where relief is available from an administrative agency, such as the OCRC, a plaintiff is required to initially pursue that avenue of redress before proceeding to courts. Until that recourse is exhausted, a lawsuit is premature and will be dismissed.[1] The administrative exhaustion requirement is a long-standing practice under the federal scheme of Title VII. Employees must first file discrimination charges alleging violations of Title VII with the federal agency charged with investigating discrimination, the EEOC, prior to filing a civil action in federal court. Should that person desire to file in court, s/he must receive a "Notice of Right to Sue" (NORTS) letter from the EEOC, which in essence, operates as a ticket to filing a civil action. Without the NORTS, a person is barred from raising alleged Title VII violations in federal court and may only pursue causes of action under other theories of law.

The OCRC respectfully submits that requiring employees to first file their complaints with the agency would provide benefits to employees and employers alike. First, the parties would have the option of engaging in the OCRC's free mediation programs. Second, the OCRC would operate as a screen, vetting all potential charges through a more cost-efficient investigative and administrative process. For example, employers are not required to retain lawyers during an OCRC investigation or mediation. Employers may, and often do, represent themselves, thereby avoiding legal fees and expenses. Third, exhaustion affords the parties an opportunity to vet facts and arguments and weigh a case's merits and defenses prior to costly court discovery and motion practice.

[1] See, e.g., *Reiter v. Cooper*, 507 U.S. 258, 113 S.Ct. 1213, 122 L.Ed.2d 604 (1993)

Moreover, the OCRC is tasked with studying problems of discrimination in our state. Recently, the OCRC learned the Ohio judiciary does not currently track the number civil rights cases filed in Ohio courts of common pleas. Under a theory of exhaustion of administrative remedies, while charges of employment discrimination would have to be first filed with the OCRC, employees would still have an option to seek a NORTS and file a private civil action. Consequently, exhaustion would enable the OCRC to track civil actions, affording opportunity to better measure and analyze the problems and trends of discrimination in Ohio. An exhaustion, compared to an election, requirement would represent a positive change in public policy and would more greatly mirror federal law, which is a large intent behind this bill.

To address any potential opposition to exhaustion, the OCRC would dispute any argument or suggestion that the agency does not have the resources or funding to take on additional employment cases. Over the past ten years, the OCRC has adapted to increasing demands and decreasing resources, and the agency is confident a workable procedure can be adopted to effectively process and potentially resolve cases that would not involve the complicated changes and statutory additions to R.C. Chapter 4112 as this bill brings. While the agency can only speculate on the degree to which the state's investigative caseload might increase, the OCRC stands ready to adjust to any influx of cases in exchange for the ability to accomplish its statutory mission of analyzing the problems of discrimination in Ohio.

Inconsistent Statutes of Limitation - Sec. 4112.051 (B) – lines 1314-1317: 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)[2], requiring the statute of limitations of six months for retaliation and aiding and abetting charges.[3] In effect, this creates two contradictory and inconsistent statutes of limitations on charges of retaliation and aiding and abetting that relate to employment. The sponsor believes the language is clear enough to distinguish that retaliation and aiding and abetting charges should be captured under the "relating to employment" catch-all. However, the OCRC respectfully disagrees and suspects when faced with this inconsistency, courts may resolve the conflict contrary to the sponsor's interpretation and to the detriment of those who seek assistance from our agency or the courts.

This ambiguity could result in a situation in which a charging party and employer could be required to address two parts of a charge in two separate forums. For example, an employee might file dual employment-related charges of race discrimination and retaliation seven months after an alleged unlawful event. The race claim would be timely

[2] This continuing law can be found in lines 1021-1025 of the bill.
[3] R.C. 4112.02 (I) and (J)

filed with the OCRC under the one-year statute of limitations in the bill; however, the retaliation charge would have exceeded the six-month statute of limitations. Consequently, the employee would be required to file the retaliation charge with the EEOC or file a private action. Meanwhile, the OCRC could investigate the employment race discrimination charge. This is certainly a consequence, whether intended or not, that would not accomplish the goals of this bill.

Prohibition of Charges of Retaliation against Coworkers - Sec. 4112.08 (A) - lines 1667-1673: The language in the bill prohibiting the ability to sue supervisors as provided in *Genaro* specifies that "other employees" are also exempted from individual liability. The OCRC believes 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." The OCRC receives charges alleging acts of retaliation and aiding and abetting by non-managerial coworkers outside the scope of the work required by their employer. For example, the OCRC has had a case in which the employer's family member, who does not hold a managerial position in the employer's company, is sending harassing and threatening messages to witnesses outside of work hours. If this provision of the 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 bill, the same employee could not be held individually liable for retaliation or aiding and abetting.

Definition of "Employer" – Sec. 4112.01(A)(2) – lines 172-177: The bill redefines the term "employer" from four or more employees to employers who employ four or more people for each working day in each of 20 or more calendar weeks. This change would likely exclude the employees of small seasonal or part-time employers from protections under the Ohio Civil Rights Law. For example, if an ice cream shop is in business only from May through August (18 weeks) and has four or more employees during that time, a teenage employee working during the summer would have full protection under Ohio's current discrimination law. However, under the bill, that same ice cream shop could have any number of employees but would not be covered under Ohio's Civil Rights laws unless four or more worked every day for two additional weeks. Because of this provision, a young woman could face sexual harassment or a young man could be refused a reasonable religious accommodation to attend church on Sunday, and neither would have any legal recourse under Ohio's Anti-Discrimination laws. The architects of R.C. Chapter 4112 intended to include small employers. Why now, when civil rights protections are needed more than ever, would we strip them away?

Definition of "Tangible Employment Action" – Sec. 4112.054 – lines 1526-1528: The OCRC acknowledges that this bill adopts federal case law by providing an affirmative defense to employers in harassment cases when no tangible employment action was taken against the employee. However, the bill departs from settled case law and defines "tangible employment action" to further require proof of a "material economic detriment" to the employee. This raises the standard higher than the standard followed in federal courts relating to Title VII, which includes changes to job responsibilities, location changes, and other noneconomic detriment.

Omitted from bill - Necessary and Indispensable Parties to a Hearing: In shifting employment discrimination law to a revised section of 4112 (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.[4] This could threaten the viability of cases in which an organization or individual files on the behalf of another person. For example, the OCRC sometimes receives 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 courts, which is not necessarily in the interest of an employer.

This statutory change could also prevent the continuation of cases like one of the OCRC's recent matters in which a charging party filed discrimination against an employer 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 dying daughter's wish.

Again, thank you for the opportunity to provide testimony today and for listening to the Commission's concerns. I will be happy to take any questions you may have.

[4] R.C. 4112.05 (D) under existing law