



Governor John Kasich

August 8, 2014

The Honorable Senator Bill Seitz
Ohio Senate
Statehouse, Room 143
Columbus, Ohio 43215

Re: Analysis of Senate Bill No. 349

**OHIO
CIVIL RIGHTS
COMMISSION**

G. Michael Payton
Executive Director

Commissioners

Leonard Hubert, Chairman
Lori Barreras
Stephanie Mercado
William W. Patmon, III
Tom Roberts

Dear Senator Seitz:

On June 24th, the Civil Rights Commission (“Commission”) first learned that you introduced legislation, which would make several sweeping changes to Ohio’s Fair Housing Act, specifically R.C. §4112.02(H) and §4112.05. Since that time, we have been conducting research and consulting with stakeholders in an attempt to measure the potential implications this Bill would have on our agency.

In a memorandum sent to your Senate colleagues, you stated that Senate Bill No. 349 (SB 349) would “mirror federal fair housing laws in terms of the relief allowed to fair housing organizations under Ohio fair housing laws” in order to eliminate incentives to private fair housing organizations to aggressively file discrimination charges against housing providers. The isolated case of landlords Gary and Helen Grybosky - referenced as a “sham” in the press - was used as an illustration of fair housing organizations forcing settlements upon housing providers to avoid what was described as a costly and lengthy judicial procedure.

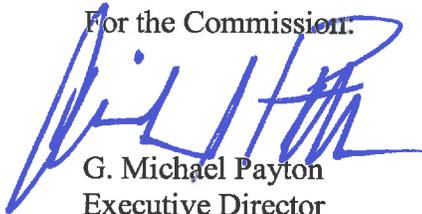
Respectfully, we do not believe you have been properly advised on the *Grybosky* case or the impact of SB 349. Touted as a Bill to amend damages and fees, this legislation, if passed, would legally immunize small landlords, allowing them to tell potential renters or buyers, I am not going to [sell] or [rent] my home to you because you are: Black...female...Hispanic...blind...Jewish...a soldier...pregnant. We are certain this was not the drafters' intent, but it will undoubtedly be the impact.

The U.S. Department of Housing & Urban Development (HUD) has confirmed that SB 349 threatens Ohio’s substantial equivalency status and jeopardizes the Commission’s annual receipt of \$1 million in federal funding. As the agency empowered to enforce the Ohio Civil Rights Act, we appreciate the opportunity to provide you with a meaningful analysis of the devastating impact the Bill would have on the Commission specifically and Ohioans in general. (**See the accompanying memorandum**).

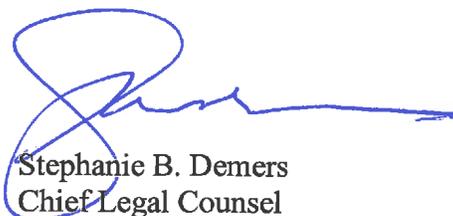
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We hope to further personally discuss these implications with you. We will follow up with your office to request a meeting. Thank you kindly for your attention and consideration.

For the Commission:



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cc: Chairman Hubert
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Commissioner Barreras

I. Legislative Background of Ohio's Fair Housing Laws– Substantial Equivalency

The Ohio Civil Rights Commission (Commission), created by legislative birth in 1959, celebrated its 55th birthday on July 29th. In considering SB 349, Ohio's venerable stance on civil rights cannot be overlooked. The Ohio General Assembly proactively enacted Ohio's Anti-Discrimination Laws five years before Congress passed the Civil Rights Act of 1964 and eight years before passage of Title VIII (the Fair Housing Act). As part of the newly enacted law, our predecessors were tasked with investigating discrimination (then primarily race) in all areas.

Beginning in 1962 and throughout 1963, the Commission began to explore issues with discrimination in housing. A review of the Commission's 1963 Annual Report details the efforts made to survey the climate. The Commission sent an invitation to a number of private and public constituents, including real estate brokers, landlords, banks, and trade associations. The Commission held 15 public forums in large and small cities throughout Ohio. Based on results gathered from 250 persons of various races, national origins and religions, the Commission's report contained substantial evidence that: "[T]he restrictions imposed on the African American community emanated largely from such institutional sources as real estate brokers and lending institutions, rather than solely from the wishes of white owners. In as much as those segments of the real estate industry were licensed and regulated by the state, the question emerged as to whether their existing power to discriminate constituted an example of unequal protection of the law." Based upon this report, the Commission sought the enactment of comprehensive fair housing legislation on the state level.¹

Fast forward two and one-half decades. In 1988, the Commission entered into its first agreement with the U.S. Department of Housing & Urban Development (HUD), which has evolved into a 25-year cooperative partnership between state and federal governments. Under a "Workshare Agreement," HUD pays the Commission, which is designated as a Fair Housing Assistance Program partner (FHAP), to receive and investigate "dual-filed" charges of housing discrimination.² The Commission has become one of the top five FHAP agencies in the nation.³

Since the 1965 addition of fair housing laws to R.C. 4112, the statute has seen other sweeping changes. For example, in 1992, Amended Substitute H.B. 321 brought Ohio's fair housing statute into conformity with federal fair housing legislation by adding "familial status" to the protected classes and a one year statutory filing period for housing discrimination charges.

Most recently, during a budget language cycle, the Commission successfully obtained changes to the Ohio Civil Rights Act in order to keep state fair housing laws substantially equivalent to the federal Fair Housing Act (FHA), 42 U.S.C. §3601, *et seq*, to avoid a possible federal sanction of disbarment as a FHAP agency. Enacted in 2009, House Bill No. 1 (HB 1) changed Ohio law by, among other things, codifying well settled case law of affording standing to private fair housing organizations (the technical term for these entities is Fair Housing Initiatives Program or

¹ See, Annual Report (1963), Ohio Civil Rights Commission. See also, <http://crc.ohio.gov/Portals/0/Book/History.pdf>

² Dual-filed means both the state and federal agencies have jurisdiction over the charge. Typically the state asserts primary jurisdiction and investigates dual-filed charges.

³ See, HUD's Annual Reports (2008-2011). <http://portal.hud.gov/>.

“FHIP”) as aggrieved persons to file housing claims in Ohio and clarifying the right of any aggrieved person to intervene in a Commission civil or administrative action and present evidence and testimony on his or her own behalf.

The statutory changes borne by HB 1 required the Commission to amend its accompanying rules, found in provisions of the Ohio Administrative Code Chapter 4112. Consequently, the Commission drafted proposed rule amendments and additions and vetted the potential changes with all interested parties, including the Ohio Realtors Association, the Ohio Apartment Association, the Ohio Homebuilders Association, and the Ohio Real Estate Investors Association. In what evolved into a four-year process, the final amendments were “approved” by these entities and final rule changes were successfully submitted to JCARR earlier this year and statutory/rule publication booklets have been printed. It seems fiscally imprudent to subject the Commission and Ohio taxpayers to further amendments when the General Assembly codified the rights of FHIPs just five years ago so that Ohio law would be deemed substantially equivalent to the federal FHA.

II. SB 349 is Not Substantially Equivalent to the Federal Fair Housing Act

This is a natural segue to discuss the impact of the Bill’s amendments. Despite what the Legislative Services Commission (LSC) suggests, the proposed changes to R.C. 4112 *are not* substantially equivalent to federal law. (See **Att. - Comparative Analysis**). SB 349 would bring about major changes to R.C. Chapter 4112. For the reasons set forth, only one change truly mirrors federal law.⁴

First, the proposed addition of §4112.02(K)(6) would carve out an exemption for the **owner** of a single-family residential dwelling, who owns no more than three single-family residential dwellings at one time. The Commission has spoken with regional and national representatives of HUD, who have clarified the agency *does not* consider this change substantially equivalent to the federal FHA. As HUD notes, federal law applies to the specific **property**, and an owner of less than four properties may still be liable for discriminatory conduct, such as harassment, threats, coercion, interference, and discriminatory statements.⁵ SB 349 would carve out an entire exemption from all R.C. 4112.02(H) prohibitions for property **owners** (versus the particular **property** associated with the alleged discrimination), regardless of the conduct or claim at issue.

Second, in examining the broad scope of SB 349, the exemption applies to every aspect of and violation under R.C. §4112.02(H). The Bill would carve out an exemption from eight statutes under Ohio law that are either not subject to exemption or do not appear to have a federal counterpart under the federal FHA. (See **Att. A**). This means that for every charge involving a violation of those statutes, the Commission would have to defer the charges to HUD if the landlord owned three or less properties. For example, the statute pertaining to threats, acts of intimidation, and coercion, R.C. 4112.02(H)(12), is exempted. Conversely, the federal exemption found in Section 803, 42 U.S.C. §3603(b)(1), applies only to Section 804 of the FHA. Section

⁴ The change from a mandatory to an optional award of actual damages and attorney fees is akin to federal law.

⁵ Nothing in section 3604 of this title (other than subsection (c)) shall apply to (1) any single-family house sold or rented by an owner... 42 U.S.C. §3603(b)(1).

818, the federal coercion provision, is not subject to the single property exemption in Section 803. These differences would likely render state law not substantially equivalent to federal law.

To illustrate the effects, the Commission is pursuing an egregious housing case where the landlord property owner repeatedly shouted racial epithets to his African-American tenants, defaced their property and even attempted to run a family member down with his automobile. If SB 349 were enacted in current form, assuming this landlord owns less than four houses, the Commission would be crippled in aiding this Ohio family; yet, the federal government could step in to protect them.

Fourth, SB 349's limitations on punitive damages would render Ohio law far from *substantially equivalent*. Under both state and federal law, the award of punitive damages is optional. In the administrative arena, the federal statute permits civil penalties in lieu of punitive damages, which is a distinction with the mere difference of the recipient (damages are awarded to the charging party while penalties are awarded to the government.) HUD administrative law judges frequently award civil penalties. Ohio's punitive caps currently imitate federal "civil penalties." See, 42 U.S.C. §3612(g)(3)(a),(b),(c); R.C. §4112.05(g)(1)(b)(i),(ii),(iii). Therefore, the law is currently substantially equivalent.

Conversely, SB 349 would invoke only two tiers for punitive damages (two times actual damages, capped at \$5,000 for first time offenses, and two times actual damages for two or more offenses in five years), regardless of whether the Commission pursues its housing case in the administrative arena or in court, thereby removing any similarity to federal remedies.⁶ Consider also the impact of this modification on a case the Commission pursued on behalf of Caucasian tenants in Cincinnati. The respondent had a pool party. Charging party's 10-year old bi-racial daughter visited periodically and attended a pool party at the complex. She was the only African-American present. The landlord, believing that African-Americans use a hair product detrimental to pool chemicals, informed the charging party his daughter would have to shower prior to using the complex pool. In fact after the party, the respondent posted a sign, "Public Swimming Pool – White Only."⁷ The egregiousness of such draconian conduct in today's society is astounding, to say the least. Assume this same landlord erected a similar sign in the future. The Commission would be limited to seeking \$5,000 in punitive damages against her.

⁶ LSC states punitive damages are not permissible in administrative proceedings under the Fair Housing Act. However, this is not a full portrait of the landscape. First, under federal law, awards may and often do include civil penalties:(A) in an amount not exceeding \$11,000 if the respondent has not been adjudged to have committed any prior discriminatory housing practice; (B) in an amount not exceeding \$27,500 if the respondent has been adjudged to have committed one other discriminatory housing practice during the 5-year period ending on the date of the filing of a charge; and (C) in an amount not exceeding \$55,000 if the respondent has been adjudged to have committed 2 or more discriminatory housing practices during the 7-year period ending on the date of the filing of a charge. 42 U.S.C. §3612(g)(3). When the Attorney General steps in to enforce the Act in court, the remedies are substantially increased. Civil penalties for first time offenders are increased to \$55,000 and repeat offenders to \$110,000. See, 42 U.S.C. §3614. Additionally as further outlined, in civil actions, private litigants and HUD (through the DOJ) can seek punitive damages for discrimination victims. See 42 U.S.C. §§3613(c), 3614(d).

⁷ See, *In the Matter of Michael Gunn v. Jamie Hein*, OCRC Complaint No. 11-HOU-DAY-22452 (Nov. 4, 2013).

In addition, similar to the FHA, Ohio statutes allow parties to "elect" a case into court, and in such cases, the Commission turns the matter over to the Ohio Attorney General (AG), and the AG files a civil action in court on behalf of discrimination victims. Like HUD's federal enforcement scheme, the Commission can authorize the AG to file a civil action in court in a pattern and practice case. See R.C. §4112.051; §4112.052. Enforcement of fair housing laws in Ohio currently mirrors enforcement of the federal FHA, and Ohio law permits awards of punitive damages in administrative and court actions. Even LSC overlooks the fact that when HUD turns a case over to the Department of Justice for civil prosecution, the government can recover compensatory and punitive damages on behalf of the victims of discrimination. See *United States v. Matusoff Rental Co.*, 494 F. Supp. 2d 740, 749 (S.D. Ohio 2007), citing, *Preferred Properties v. Indian River Estates, Inc.*, 276 F.3d 790, 799 (6th Cir. 2002) (holding that the "FHA provides that victims of discriminatory housing practices may recover actual and punitive damages").⁸ Consequently, the changes SB 349 would bring are unnecessary and harmful because current state law is already substantially similar to federal law.

Fifth, SB 349 would first impose a very stringent standard of "actual malice" for imposition of punitive damages. "Actual malice" is a condition required to establish libel against public officials. The term was officially defined by the U.S. Supreme Court in the landmark case of *New York Times Co. v. Sullivan*, 375 U.S. 254 (1964), as "knowledge that the information was false or published "with reckless disregard" of the truth. The purpose of punitive damages is not to compensate a plaintiff, but to punish a defendant for certain conduct and deter the conduct in the future, *Moskovitz v. Mt. Sinai Medical Ctr.*, 69 Ohio St.3d 638 (1994); *Barnier v. Szentmiklosi*, 810 F.2d 594, 598 (6th Cir.1987).

A plethora of case law outlines the standard for punitive damage awards in fair housing cases, which is whether "the defendants acted with malice or reckless indifference that their actions might violate a federal statute of which they were aware." (Emphasis added.) In *Kolstad v. American Dental Ass'n*, 119 S.Ct. 2118 (1999), the Supreme Court defined "malice" and "reckless indifference" using a subjective standard:

We gain an understanding of the meaning of the terms "malice" and "reckless indifference," as used in [42 U.S.C.] §1981a, from this Court's decision in *Smith v. Wade*, 461 U.S. 30 (1983)***. The Court concluded in *Smith* that "a jury may be permitted to assess punitive damages in an action under [42 U.S.C.] §1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." 461 U.S. at 56. While the *Smith* Court determined that it was unnecessary to show actual malice to qualify for a punitive award, *Id.*, at 45-48,

⁸ Reading the applicable statutes *in pari materia*, 42 U.S.C. § 3612(o)(3) provides that in a civil action brought by the Government to enforce the FHA, if a discriminatory housing practice is found to have occurred, the court may grant as relief any relief which a court could grant with respect to such discriminatory housing practice in a civil action under section 3613 of this title. Section 3613(c)(1) provides: "(1) In a civil action under subsection (a) of this section, if the court finds that a discriminatory housing practice has occurred or is about to occur, the court may award to the plaintiff actual and *punitive* damages***." See also, *United States v. Matusoff Rental Co.*, 494 F. Supp.2d 740 (S.D. Ohio 2007).

its intent standard, at a minimum, required recklessness in its subjective form. The Court referred to a "subjective consciousness" of a risk of injury or illegality and a "criminal indifference to civil obligations." *Id.*, at 37, n. 6.

As the Sixth Circuit Court of Appeals notes: "Because discrimination has harmful consequences no matter what its form, the goals of deterrence would be ill served if punitive damages attached only to outrageous discrimination." *United States v. Matusoff Rental Co.*, 494 F. Supp 2d 740, 755 (S.D. Ohio 2007); *Barnier v. Szentmiklosi*, 810 F.2d 594, 598 (6th Cir.1987). In fact, in applying punitive damages under R.C. Chapter 4112, an Ohio Appellate Court held "punitive damages serve to deter future discriminatory practices. However, the text does not indicate that there must be a finding of "malice" before punitive damages are awarded. Rather, when [the Ohio Civil Rights Commission] makes a determination that punitive damages are warranted, the overriding purpose that governs such an award is that the damages serve the purpose of deterring the accused from engaging in future discrimination." See, *Shoenfelt v. Ohio Civ. Rights Comm.*, 105 Ohio App. 3d 379, 384-85.

A codified condition of application of punitive damages is unnecessary because courts have defined the standard. The proposed requisite of actual malice does not account for this broader standard outlined by the courts and could very well strip state law of its substantial equivalency. The changes pertaining to punitive damages each independently, and certain collectively, would render §4112.05 *not substantially equivalent* to federal law.

Sixth, SB 349 carves out an entire class who is not entitled to receive restitution and remedies that is not found in the federal FHA. SB 349 states **no** actual or punitive damages can be awarded to a state or local fair housing agency. FHIP agencies have long been recognized by courts throughout the United States, including the U.S. Supreme Court in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). This is one of the most problematic portions of the Bill and would certainly alone cause the Commission to lose its federal funding.

Seventh, currently, R.C. 4112.05(G)(1)(b) requires respondents who are found by an ALJ or a court to discriminate to pay attorney fees to the government and charging party. SB 349 adds a provision to allow respondents to recover fees as well. While the modification of allowing respondents to recover fees does seem to mirror federal law at first blush, delving into the language reveals SB 349 is problematic for the State. Under the FHA, a prevailing party in an administrative proceeding is entitled to recover reasonable attorney fees and costs from the United States to the extent provided by the Equal Access to Justice Act, as amended, 5 U.S.C. § 504 ("the EAJA"). See 42 U.S.C. §3612(p). HUD regulations promulgated pursuant to the FHA further specify that where such recovery of attorney fees and costs is sought, HUD's EAJA regulations, set forth at 24 C.F.R. Part 14, are applicable. See 24 C.F.R. §104.940(a)(1).

Though HUD has had to pay attorney fees in a small amount of cases, the accompanying EAJA statute clarifies the limited circumstances in which the government has been forced to pay. The standard gives HUD leeway to challenge discrimination. First, the prevailing party must timely submit an application for fees. Second, the party must prove eligibility. An eligible party under the EAJA includes "an individual whose net worth did not exceed \$2,000,000 at the time the adversary adjudication was initiated. . . ." *Id.* at §504(b)(1)(B)(i). See also, 24 C.F.R. §14.120, §14.200(b), §14.205(a), §14.330(b) (emphasis in original).

Even, if all prerequisites to eligibility are satisfied, a respondent's application for fees may still be denied if the charging party or the government (HUD or DOJ) can show that their position was substantially justified or that special circumstances make an award unjust. The term "substantially justified" means "justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). Thus, the "substantial justification standard applied under the EAJA treads a middle ground between an automatic award of fees to the prevailing party and one made only when the government has taken a patently frivolous stand." *Losco v. Bowen*, 638 F.Supp. 1262, 1265 (S.D.N.Y. 1986). To meet its burden, the government must simply show a reasonable basis in truth for the facts alleged, a reasonably sound legal theory, and a reasonable connection between the facts alleged and the theory propounded. *Citizens Council of Delaware County v. Brinegar*, 741 F.2d 584, 593 (3rd Cir. 1984).

Conversely, as drafted, SB 349 makes no reference to any accompanying fee statute or criterion. The standard of imposing fees on the Commission for vigorously but unsuccessfully prosecuting discrimination cases is uncharted and unguided. The government, and ultimately Ohio taxpayers, would be at risk for paying successful respondents thousands of dollars for cases tried and lost – a most vicious and intimidating deterrent to challenging alleged discrimination.

The proposed changes to R.C. §4112.05(H) go much further than federal law, extending to the Commission's initial investigation. SB 349 proposes if the commission finds "that no probable cause exists for crediting charges of unlawful discriminatory practices, ***[t]he respondent may recover reasonable attorney's fees upon such finding."⁹ This would be a chilling deterrent to those believing to be a victim of discrimination, pushing them to the federal arena or discouraging them from even filing a charge. Federal law does not permit landlords to recover fees from charging parties who avail themselves of free governmental processes when HUD finds there is no cause to pursue a discrimination charge. This amendment too alone would render Ohio law substantially *unequivalent* to federal law.

III. If enacted, SB 349 would have negative financial implications on the Commission.

A. The Commission stands to lose a \$1 million annual contract with HUD.

The Commission believes that SB 349 would have a major negative fiscal impact on the agency for several reasons. First and foremost, as indicated above, HUD pays the Commission as a FHAP agency approximately \$1 million per fiscal year (FY) to process cases. For example, in FY 2014, HUD agreed to pay the Commission \$1,129,838 (\$936,383 for case processing under the annual Workshare Agreement and an additional \$193,000 as a one-time grant).

To qualify as a FHAP partner, the agency's accompanying state law must be substantially equivalent to federal law. HUD has strongly suggested that SB 349 would take Ohio's fair housing laws out of the realm of being "substantially equivalent" to the federal FHA. The

⁹ It makes no sense to award attorney fees at the investigative level prior to any formal adjudication. The majority of the charges the Commission investigates are either resolved pre-complaint or are dismissed with a finding of no probable cause. This piece of the proposed legislation would encourage investigators to find probable cause, discourage persons from filing charges, or both.

Commission therefore strongly believes SB 349 could be the death knell of its federal funding from HUD.

- B. SB 349 would cause a drastic decrease in charges filed with the OCRC, thereby costing the agency precious funds. Conversely, respondents would see a drastic increase in federal filings and a resulting spike in litigation costs and awards.**

Regardless of substantial equivalency, the changes SB 349 would bring to R.C. Chapter 4112 would in all likelihood cause a severe decline in housing charges and a resulting decline in revenue. First, because SB 349 carves out an exemption to nearly all of the provisions of §4112.02(H), the Commission would arguably lose jurisdiction to enforce statutory provisions that are not exempted under federal law. For example, over the past three fiscal years, the Commission enforced 129 charges¹⁰ alleging a violation of R.C. §4112.02(H)(12), which makes it unlawful for a person to coerce, intimidate, threaten or interfere with another person in exercising fair housing rights. The single owner exemption under federal law only applies to divisions under Section 804. See, 42 U.S.C. §3603(b). The federal equivalent of the coercion statute is found in Section 818 (42 U.S.C. §3617) and therefore applies to single owners. Thus, the Commission would stand to lose over \$100,000 each year from HUD as the agency could no longer process cases alleging a violation of (H)(12), while HUD could assert jurisdiction.¹¹

Additionally, changes to the punitive damage statute and restricting who is entitled to damages would be extremely costly to the Commission. The Commission investigates a number of charges either directly filed by a FHIP or by a bona fide victim, assisted by a FHIP. For example, since R.C. Chapter 4112 was amended in 2009 to specifically give FHIPs standing (See §I, supra), the Commission resolved 638 cases involving a FHIP. In the very unlikely event HUD would not pull its contract with the agency, undeniably, FHIPs would opt to file their charges with HUD under the federal FHA where damage awards are not so restricted and specifically where there is no limitation on a FHIP's right to remedies as SB 349 would create. Under the contract, HUD pays the Commission up to \$2,600 per case investigation. The monetary loss of those 638 cases over a five-year span would theoretically amount to **\$1,658,800** (\$2,600 x 638 cases).¹²

The State also stands to lose revenue in the form of recoupment of attorney fees¹³ and more detrimentally the Commission could actually be required to pay fees when a landlord prevails. While the Commission typically waives fees at the pre-trial stage, the Revised Code mandates respondents to pay actual damages and attorney fees when the Commission prevails at the post-investigative formal hearing phase. SB 349 would change the law to allow prevailing respondents to recover attorney fees, which seems logical. However, the legislation is silent as to

¹⁰ 39 in FY 10; 44 in FY 11 and 46 in FY 12.

¹¹ The median amount over this 3-year period is 43 cases. HUD pays the Commission up to \$2,600 per case investigation. (\$2,600 x 43 cases = \$111,800).

¹² This amount would actually be higher because HUD recently increased its FHAP case payment to \$4,000.

¹³ When the state is awarded attorney fees, the recovered amounts are reinvested back into Ohio's revenue funds. For example, in eight cases tried over a five-year span, the Commission awarded \$40,646 in fees or an average of \$5,080.75 per case. Compare this figure to the average amount of punitive damages awarded to a FHIP.

the standard by which fees are permitted. Additionally, the legislation allows respondents to recover attorney fees (assumingly from a charging party) upon a finding of “no probable cause” or upon a dismissal order (assumingly from the Commission) after a hearing/trial where the respondent prevails. However, it is unclear who would be required to pay, if not both.

As a final point, the enactment of SB 349 would bring about several negative implications for Ohio landlords and property owners as well. Assume the law is passed and the Commission loses its status as a HUD FHAP partner, SB 349 would become an unfunded mandate. The Commission would still investigate housing discrimination charges over which it has jurisdiction. The agency, however, would not receive federal funds for the work. The same charging party could simultaneously file a charge with HUD asserting federal violations. Currently, OCRC investigates one “dual filed” charge. If passed, HUD would investigate and possibly prosecute federal housing violations, and the Commission would investigate and possibly prosecute state housing violations, subjecting respondents to duplicative costs in time, resources and legal fees.

Along these lines, Ohio landlords and property owners would see less litigation. FHIP agencies will still file charges, but with HUD. Consequently, landlords would be required to defend themselves against testing evidence before a HUD Administrative Law Judge (ALJ) or in federal court. Pushing litigation to the federal arena would actually increase transactions costs for the respondents, where case resolution is not nearly as efficient or inexpensive than in the state forum. For example, in eight cases where the Ohio Attorney General, representing the Commission, tried and won the case before the Commission, the ALJ awarded a total of **\$222,282.70** in monetary remedies (109,090.85 in actual damages; \$71,300 in punitive damages; \$1,245 in miscellaneous fees and \$40,646.85 in attorney fees) for a median case resolution of \$27,785.34. A comparison of cases tried before HUD Administrative Law Judges yields a much different result. In nine cases tried before a HUD ALJ, the remedies awarded nearly doubled state awards - **\$409,137.00** for a median case resolution of \$45,460.00.¹⁴

In fact, a fiscal analysis of the cost of SB 349 to the State of Ohio versus the savings it purports for homeowners and landlords is telling. Compare the loss of \$1 million annually in federal funds to the assessment of remedies awarded against a very small (12%) percentage of housing cases where the Commission finds probable cause. Over the past six years, the Commission resolved 947 housing cases where a FHIP was a party to the charge. Of those cases, the Commission secured a total **\$994,258** in monetary remedies. The median case resolution was therefore a minimal **\$1,049.90** per FHIP.¹⁵ Consequently, the amount of damages assessed to respondents over a six-year period is still less than the revenues paid by HUD for one annual contract. Is this a cost to the State the General Assembly is willing to impose? The Commission strongly hopes not.

¹⁴ See fn 2, supra.

¹⁵ Of the 947 total cases, 638 were settled prior to issuance of a formal complaint for a total of **\$275,133** in remedies (median settlement of **\$431.24**) and 301 were settled post-complaint issuance for a total of **\$558,900** in monetary remedies (median of **\$1,856.81**).

IV. The isolated Grybosky case should not be the impetus for unnecessary changes.

The impetus behind SB 349 is the Commission's prosecution of a case against Gary and Helen Grybosky. Mrs. Grybosky has been publicized by certain advocates as the innocent victim of governmental bureaucracy. However, what is widely overlooked is the fact the Gryboskys maintained clearly illegal housing policies. First, the Gryboskys did not rent to disabled applicants with assistant animals. Second, the Gryboskys exercised a policy of not renting to families with children.¹⁶

Also overlooked is the point that the Gryboskys' attorney ran up unnecessary legal fees through unconventional defense methods. Rather than deny or challenge the existence of unlawful policies or discriminatory conduct, the Gryboskys engaged in protracted litigation – on two legal fronts – one to contest the *manner* in which their policies were uncovered¹⁷ and the other by filing a civil action in common pleas court prior to the administrative hearing.¹⁸

Compounding the attorney fees, after finding probable cause, the Commission attempted to conciliate the matter by seeking the Gryboskys to change their policies and pay damages to the FHIP that uncovered the discrimination in an amount less than \$5,000.¹⁹ Because the Gryboskys refused to conciliate, the Commission was statutorily obligated to issue an administrative complaint. At the hearing stage, the Gryboskys gambled on an untested legal theory and lost. The Commission's Administrative Law Judge recommended an award of \$12,000 in actual damages (i.e., pre-litigation expenses, diversion of resources, and frustration of mission), \$10,000 in punitive damages, and \$39,848 in attorney fees to the FHIP. The ALJ subsequently awarded \$47,375 in attorney's fees to the State.

“[W]here Congress enacts statutory provisions for federal agencies to administer, courts should give agencies' interpretations of those statutes some level of deference.” See, Thomas Merrill & Kristin Hickman, Chevron's Domain, 89 GEO. L.J.833 (2001). Respecting this axiomatic tenet

¹⁶ At the administrative hearing, several eyewitnesses testified about their exposure to the Gryboskys' unlawful policies. For example, one tester testified that Mrs. Grybosky told her that she “doesn't allow kids.” Other witnesses testified that, on different occasions, Mrs. Grybosky either outright refused to rent because of an assistant animal, or else tried to charge an extra \$100 for the assistant animal. What should have been a simple hearing was stretched to three days, increasing attorney fees primarily due to questionable legal challenges of the Gryboskys' counsel.

¹⁷ For example, the Commission became aware of the Gryboskys' unlawful policies through FHIP testing. The use of testing evidence in state and federal courts was well established over thirty years ago by the U.S. Supreme Court in *Havens Realty v. Coleman*, *supra*. Yet, the Gryboskys argued *testers not in the protected class* (i.e., testers that did not actually have children or disabilities) discovered their policies, rather than actual applicants for housing and therefore, the case should be dismissed.

¹⁸ Prior to the Commission's evidentiary hearing, the Gryboskys filed a civil action against the Commission in Ashtabula County. The Gryboskys allege the Commission, its employees, and the Assistant Attorneys General, who prosecuted the case, were “extorting” them through the conciliation process. They argued that their policies are not “actual discrimination” because they were not uncovered by “actual applicants” with real children or disabilities. The Gryboskys also argued that asking them to pay the cost of the testing program violated their constitutional rights. The common pleas judge dismissed all five claims for declaratory judgment, intentional infliction of emotional distress, 42 USC §1985 and §1983, and extortion. On appeal, the Eleventh District affirmed all aspects of the decision except for the portion declaring absolute immunity for the OCRC employees. The court remanded the case, where it is currently stayed pending the outcome of the Gryboskys' appeal.

¹⁹ This amount – greatly objected to by the Gryboskys – included damages for “frustration of mission,” also recognized by the Supreme Court in *Havens Realty*.

of administrative law, the Commission has a statutory measure of checks and balances. The Administrative Law Judge operates as a magistrate, and the five gubernatorial appointed commissioners operate as the court with the final authority to adopt, reject or modify an ALJ's Report and Recommendations.

Consequently, in the cases of *Fair Housing Resource Ctr. v. Gary & Helen Grybosky*, Complaint Nos. 09-HOU-CLE-39116 and 39125, after the ALJ issued her Report and Recommendation, the parties filed objections. Based on various factors, including the landlords' small size, no prior history of discrimination, and no bona fide victim of discrimination, the five appointed Commissioners collectively voted to reduce the award to \$100 in actual damages, \$0 in punitive damages and \$3,985 in attorney fees to the FHIP and \$4,588 in attorney's fees to State. Speaking for the Commission, Chairman Leonard Hubert noted: "Respondents' attorney filed a separate lawsuit against the Ohio Civil Rights Commission's (OCRC) employees and the Attorney General's office and aggressively defended his clients, thereby increasing attorney fees higher than normal for all the parties; but Respondents' counsel's conduct shouldn't be blamed on his clients. The question before us is what amount is 'reasonable' to award in attorney fees."²⁰

Ultimately, this Order was set aside. After submission of position statements by the parties, the Commission increased the damage award to \$2,513.05 to account for requested pre-litigation expenses and diversion of resources. The remainder of the award was unchanged. The Gryboskys exercised their right to judicial review of the Commission's Order (R.C. 4112.06), and the appeal is pending in Ashtabula Common Pleas Court.

V. The single home and Mrs. Murphy exemptions are products of political concessions in the 1960's and should not be supported by a 21st Century zero tolerance society.

An examination of the reasons underlying the single family home exemption reveals the exemption was borne out of a political concession to appeal to the Caucasian majority:

In passing Title VIII, Congress ventured from the position taken by the Supreme Court in Shelley v. Kraemer [334 U.S. 1 (1948)], and recognized that there was room for government to legislate in the area of private discriminatory actions. Yet, in many respects, the Act did not go far enough, exempting from its coverage single family dwellings and owner occupied buildings of no more than four units. Despite these exemptions, the Act was highly controversial. The fact that it was passed only one week after Dr. King's assassination is no coincidence. Some commentators believe that the exemption for single-family dwellings was a necessary concession and that the Act probably would not have passed without it.

Damon J. Keith, What Happens to A Dream Deferred: An Assessment of Civil Rights Law Twenty Years After the 1963 March on Washington, 19 Harv. C.R.-C.L. L. Rev. 469, 471-72 (1984).

The history of the Mrs. Murphy exemption is no less revealing:

²⁰ OCRC Minutes (September 26, 2013), p.30.

*The Mrs. Murphy exemption (Adopted from Title II) was included in the FHA to protect Mrs. Murphy's First Amendment freedom of association. Senator Mondale, who co-sponsored the FHA, declared: 'The sole intent of [the Mrs. Murphy exemption] is to exempt those who, by the direct personal nature of their activities, have a close personal relationship with their tenants.' Yet implicit was an understanding that the First Amendment right at stake was specifically Mrs. Murphy's right **not** to associate with African Americans.* * **

*In 1963, during the debates over Title II, "Mrs. Murphy" became a slogan by which opponents of Title II appealed to the public *** Circumstantial evidence also points to the influence of racial politics in the inclusion of the Mrs. Murphy exemption in the FHA. In the same breath in which Senator Mondale extolled the exemption as protecting Mrs. Murphy's privacy, he said, "I want it clearly understood as well that I do not agree with the need for granting this exemption." *** Despite disagreeing with the basis of the exemption and recognizing the questionable motivations of its adherents, Mondale was willing to make a concession in order to save his bill.*

*Senator Mondale's comments do not make clear why he thought the exemption was "politically necessary," but it seems clear that Mrs. Murphy's First Amendment rights were not the underlying concern of most of those supporting the exemption. *** Accordingly, the exemption is more accurately understood as a political concession, born more out of racist prejudice***.*

James D. Walsh, Reaching Mrs. Murphy: A Call for Repeal of the Mrs. Murphy Exemption to the Fair Housing Act, 34 Harv. C.R.-C.L. L. Rev. 605, 607-10 (1999). (Emphasis added).

To pass an exemption in 2014 that was based on political concessions in the climate of the 1960's can only be considered as a major setback to those seeking to eliminate invidious discrimination. The changes SB 349 would produce are neither necessary, nor practical in the 21st Century where the majority of Ohioans have zero tolerance for hatred and bias. Indirectly, SB 349 supports obsolete discrimination and therefore should be withdrawn.

V. Conclusion

To conclude Senator Seitz, the Commission is a neutral investigative agency that serves the needs of Ohioans from housing advocates to private landlords. Ohio law, unlike federal law, requires the agency to act upon housing charges within a year's time. R.C. §4112.05(B)(7). The Commission's process – though not perfect – is an efficient and effective way to resolve housing cases. If enacted, SB 349 would cause a devastating blow to the Commission's ability to fairly investigate and act upon housing cases. This legislation would not prevent private landlords from being sued. It would simply push them into the federal arena, where courts can languish on decisions for years and where damage awards are much higher than at the state level. We therefore urge you Senator to retract this legislative initiative, which threatens to harm Ohio.

Att. A – Senate Bill No. 349 as Introduced – A Comparative Analysis

Present State Law	Federal Law	Senate Bill No. 349
<p align="center">Statutory Liability Exemption R.C. 4112.02(k)</p>	<p align="center">Statutory Liability Exemption 42 U.S.C. §3603(b)(1) & (2)</p>	<p align="center">Statutory Liability Exemption Lines 393-424</p>
<p>No single family house\ residential dwelling owner exemption from liability.</p>	<p>Nothing in section 804 of this title (other than subsection (c)) shall apply to-- (1) any single-family house sold or rented by an owner if the owner:</p> <ol style="list-style-type: none"> 1.) Owns no more than 3 single family houses at any one time. 2.) Does not own any interest in, title to or any right to the proceeds from the sale or rental of more than 3 such single family houses at any one time, 3.) Sells or rents the single family home without the use of: <ol style="list-style-type: none"> a.) a real estate broker, agent, or salesperson or their agent, or b.) Through publication, posting or mailing, after notice, of any advertisement or written notice in violation of §804 [discriminatory advertising]. <p>The exemption applies to one sale during any 24 month period of the single family house by an individual owner who is not residing in the house at the time of sale or who was not the most recent resident of the house prior to the sale if the owner.</p>	<p>Except as otherwise provided in division (K)(6) of this section, division (H) of this section does not apply to the <u>owner</u> of any single-family residential dwelling sold or rented by that owner if all of the following apply:</p> <ol style="list-style-type: none"> 1.) Owns no more than 3 single family dwelling units at any time, 2.) Does not own any interest in or title to or any right to all or a portion of the proceeds from the sale or rental of more than 3 single family dwelling units, and 3.) Sells or rents the single family dwelling without the use of: <ol style="list-style-type: none"> a) A real estate broker, agent, or salesperson or their agent or b.) Through printing, publishing, or circulating any statement or ad in violation R.C. 4112.02(H)(7) [discriminatory advertising]. <p>The exemption would also apply to one sale during any 24 month period of the single family house by an individual owner who is not residing in the house at the time of sale or who was not the most recent resident of the house prior to the sale if the owner:</p>
<p>No “Mrs. Murphy” statutory exemption from liability.</p>	<p>Currently provides “Mrs. Murphy” liability exemption defined as an owner of a residential dwelling being rented containing 4 or fewer units if the owner actually maintains and lives in one of the four units as her residence.</p>	<p>Does not provide for “Mrs. Murphy” exemption from liability.</p>

<p style="text-align: center;">Actual Damages & Fees R.C. 4112.05(G)(1)</p> <p>The commission additionally shall require the respondent to pay actual damages and reasonable attorney's fees...</p> <p>OCRC shall order Respondent to pay "reasonable attorney's fees."</p> <p>Prior law did not define "aggrieved person." HB1 amended 4112.01(A)(23), "aggrieved person" includes both of the following: (1) Any person who claims to have been injured by any unlawful discriminatory practice. (2) Any person who believes that the person will be injured by any unlawful discriminatory practice.</p>	<p style="text-align: center;">Actual Damages & Fees 42 U.S.C. §3612(g)(3)(p)</p> <p>If the (HUD) administrative law judge finds that a respondent has engaged or is about to engage in a discriminatory housing practice, such administrative law judge shall promptly issue an order for such relief as may be appropriate, which may include actual damages suffered by the aggrieved person and injunctive or other equitable relief.</p> <p>***the administrative law judge or the court..., may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs. The United States shall be liable for such fees and costs to the extent provided by section 504 of title 5, United States Code, or by section 2412 of title 28, United States Code.</p> <p>Actual damages and injunctive or equitable relief may be issued to aggrieved persons including private fair housing organizations. See <i>Havens Realty Corp. v. Coleman</i>, 455 U.S. 363, 374-375 (1982).</p>	<p style="text-align: center;">Actual Damages & Fees Lines 800-806, 826-828, 833-841</p> <p>The commission... may order Respondent to pay actual damages and reasonable attorney fees.</p> <p>If the commission finds that no probable cause exists or if upon all the evidence presented at a hearing, the commission finds that a respondent has not engaged in any unlawful discriminatory practice... the respondent may recover reasonable attorney's fees.</p> <p>No actual or punitive damages... shall be awarded to a state or local fair housing agency.</p>
<p style="text-align: center;">Punitive Damages R.C.4112.05(G)(1)</p> <p>The commission...may award to the complainant punitive damages as follows: A. Cap of \$10,000 for 1st violation. B. Cap of \$25,000 if 1 prior violation within previous 5 years C. Cap of \$50,000 if 2 or more violations during the previous 7 years</p> <p>No requirement of actual malice.</p>	<p style="text-align: center;">Civil Penalty 42 U.S.C. §3612(g)(3)</p> <p>Such order may, to vindicate the public interest, assess a civil penalty against the respondent. A. Cap of \$11,000 for 1st violation. B. Cap of \$27,500 for 1 prior violation within previous 5 years C. Cap of \$55,000 for 2 or more violations during previous 7 years.</p> <p>No requirement of actual malice.</p>	<p style="text-align: center;">Punitive Damages Lines 826-828, 804-810, 811-825</p> <p>A. Two times the actual damages with a cap of \$5,000 B. Two times actual damages if 1 or more prior violations in previous 5 years.</p> <p>Requirement of actual malice.</p>

<p>No limitation on isolated class of persons.</p>	<p>No limitation on isolated class of persons.</p>	<p>No punitive damages shall be paid to a "state or local fair housing agency."</p>
<p>Other Provisions of R.C. 4112.02(H)</p>	<p>Fair Housing Act</p>	<p>Post SB 349</p>
<p>(H)(3) Discriminate against any person in the making or purchasing of loans or the provision of other financial assistance for the acquisition, construction, rehabilitation, repair, or maintenance of housing accommodations, or any person in the making or purchasing of loans or the provision of other financial assistance that is secured by residential real estate, because of race, color, religion, sex, military status, familial status, ancestry, disability, or national origin or because of the racial composition of the neighborhood in which the housing accommodations are located, provided that the person, whether an individual, corporation, or association of any type, lends money as one of the principal aspects or incident to the person's principal business and not only as a part of the purchase price of an owner-occupied residence the person is selling nor merely casually or occasionally to a relative or friend;</p> <p>(H)(5) Discriminate against any person in the terms or conditions of any loan of money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of housing accommodations because of (protected class) or because of the racial composition of the neighborhood in which the housing accommodations are located;</p>	<p>42 U.S.C. §3605(a) In general It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.</p> <p>(b) "Residential real estate-related transaction" defined As used in this section, the term "residential real estate-related transaction" means any of the following:</p> <p>(1) The making or purchasing of loans or providing other financial assistance— (A) for purchasing, constructing, improving, repairing, or maintaining a dwelling; or (B) secured by residential real estate. (2) The selling, brokering, or appraising of residential real property.</p>	<p>None of the existing provisions would extend to any:</p> <p>owner of any single-family residential dwelling sold or rented by that owner if all of the following apply:</p> <p>(a) The owner does not own more than three such single-family residential dwellings at any one time. (b) The owner does not own any interest in, nor is there owned or reserved on the owner's behalf, under any express or voluntary agreement, title to or any right to all or a portion of the proceeds from the sale or rental of more than three such single-family residential dwellings at any one time. (c) The owner sells or rents the single-family residential dwelling without both of the following:</p> <p>(i) The use, in any manner, of the sales or rental facilities or services of any real estate broker, agent, or salesperson; the facilities or services of any person in the business of selling or renting dwellings; or any employee or agent of any such broker, agent, salesperson, or person; (ii) Printing, publishing, or circulating any statement or advertisement, or making or causing to be made any statement or advertisement in violation of division (H)(7) of this section.</p> <p>In the case of the sale of any such single-family residential dwelling by an owner not residing in the dwelling at the time of the sale or who was not the most recent resident of the dwelling prior to the sale, the exemption granted by this division applies only with respect to one such sale within any twenty-four month</p>

		<p>period. Nothing in this division prohibits the use of attorneys, escrow agents, abstractors, title companies, and other such professional assistance as necessary to perfect or transfer the title of a dwelling. As used in this section, "person in the business of selling or renting dwellings" has the same meaning as in 42 U.S.C. 3603.</p>
<p>(H)(6) Refuse to consider without prejudice the combined income of both husband and wife for the purpose of extending mortgage credit to a married couple or either member of a married couple;</p>	<p>No comparable federal provision</p>	
<p>(H)(12) Coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of that person's having exercised or enjoyed or having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by division (H) of this section;</p>	<p>42 U.S.C. §3617 It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section <u>3603</u>, <u>3604</u>, <u>3605</u>, or <u>3606</u> ...</p>	
<p>(H)(13) Discourage or attempt to discourage the purchase by a prospective purchaser of housing accommodations, by representing that any block, neighborhood, or other area has undergone or might undergo a change with respect to its religious, racial, sexual, military status, familial status, or ethnic composition;</p>	<p>No comparable federal provision</p>	
<p>(H) (14) Refuse to sell, transfer, assign, rent, lease, sublease, or finance, or otherwise deny or withhold, a burial lot from any person because of the race, color, sex, military status, familial status, age, ancestry, disability, or national origin of any prospective owner or user of the lot;</p>	<p>No comparable federal provision</p>	

<p>(H)(17) Except as otherwise provided in division (H)(17) of this section, make an inquiry to determine whether an applicant for the sale or rental of housing accommodations, a person residing in or intending to reside in the housing accommodations after they are sold, rented, or made available, or any individual associated with that person has a disability, or make an inquiry to determine the nature or severity of a disability of the applicant or such a person or individual. The following inquiries may be made of all applicants for the sale or rental of housing accommodations, regardless of whether they have disabilities:</p> <ul style="list-style-type: none"> (a) An inquiry into an applicant's ability to meet the requirements of ownership or tenancy; (b) An inquiry to determine whether an applicant is qualified for housing accommodations available only to persons with disabilities or persons with a particular type of disability; (c) An inquiry to determine whether an applicant is qualified for a priority available to persons with disabilities or persons with a particular type of disability; (d) An inquiry to determine whether an applicant currently uses a controlled substance in violation of section 2925.11 of the Revised Code or a substantively comparable municipal ordinance; (e) An inquiry to determine whether an applicant at any time has been convicted of or pleaded guilty to any offense, an element of which is the illegal sale, offer to sell, cultivation, manufacture, other production, shipment, transportation, delivery, or other distribution of a controlled substance. 	<p>No comparable federal provision</p>	
<p>(H) (21) Discriminate against any person in the selling, brokering, or appraising of real property because of</p>	<p>42 U.S.C. §3606 After December 31, 1968, it shall be unlawful to deny any person access to</p>	

<p>race, color, religion, sex, military status, familial status, ancestry, disability, or national origin;</p>	<p>or membership or participation in any multiple-listing service, real estate brokers' organization or other service, organization, or facility relating to the business of selling or renting dwellings, or to discriminate against him in the terms or conditions of such access, membership, or participation, on account of race, color, religion, sex, handicap, familial status, or national origin.</p>	
	<p>42 U.S.C. §3605(c) Appraisal exemption Nothing in this subchapter prohibits a person engaged in the business of furnishing appraisals of real property to take into consideration factors other than race, color, religion, national origin, sex, handicap, or familial status.</p>	