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January 18, 2017

Representative Nino Vitale
77 S. High Street
11th Floor
Columbus, Ohio 43215

Re: Support for the Ohio Pastor Protection Act

Dear Representative Vitale:

I am writing today in support of the Ohio Pastor Protection Act. This bill is not only timely, it is much needed. Today, perhaps more than any other time in our nation's history, religious liberty is under attack. And it is under attack by those who seek to impose their political agenda upon people of faith.

Our Founders understood the importance of religious liberty by enshrining its protection in the First Amendment. Unfortunately, that protection was severely eroded by the U.S. Supreme Court in the 1990 decision of *Employment Division v. Smith*, 494 U.S. 872 (1990). In *Smith*, the Supreme Court held that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Id.* at 879 (quotations and citation omitted). This was viewed as a departure from the standard set forth in cases such as *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In response, in 1993 Congress enacted *statutory* protection, the Religious Freedom Restoration Act (RFRA), in an effort to restore the strict scrutiny test for claims arising under the Free Exercise Clause of the First Amendment.

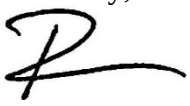
As a result of the *Smith* decision, a person cannot bring a First Amendment free exercise challenge to a "neutral law of general applicability" even if that law imposes a substantial burden on the person's religious exercise. As a consequence, *Smith* eviscerated the protections of the Free Exercise Clause. That is why, for example, Hobby Lobby's successful challenge to the HHS mandate was decided under RFRA and not the First Amendment. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). However, RFRA only protects against burdens on religious liberty imposed by the federal government.

Presently, the Ohio Constitution still provides religious freedom protection against laws that burden religious exercise, regardless of whether these laws are neutral and generally applicable. In *Humphrey v. Lane*, 89 Ohio St. 3d 62; 728 N.E.2d 1039 (2000), the Ohio Supreme Court rejected the *Smith* approach to interpreting the Ohio Constitution's protection of religious freedom. However, even under *Humphrey*, the religious adherent would lose if the challenger can show that the restriction on religious exercise furthers a compelling state interest and is the least restrictive means available of furthering that state interest. *Id*. at 69; 728 N.E.2d at 1045. In other words, there is no guarantee that the Ohio Constitution will provide the immunity from legal action that the Ohio Pastor Protection Act provides as a matter of statutory law.

Unfortunately, today, judicial activism in this area of the law is the norm and not the exception. *See Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (striking down, *inter alia*, Ohio's law which provided that "[a] marriage may only be entered into by one man and one woman"); *see id.* 2612 (Roberts, C.J., dissenting) ("The majority's decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court's precedent."); *see also id*. at 2625 (Roberts, C.J., dissenting) ("Today's decision . . . creates serious questions about religious liberty."). A way to blunt this judicial supremacy and its potentially adverse effects on religious adherents is for a legislature to provide statutory protection, as Congress did in 1993 by passing RFRA in response to *Smith*, and as the Ohio legislature is seeking to do here through the Ohio Pastor Protection Act.

In summary, there are only *good* reasons for passing this important legislation and no legitimate basis for opposing it.

Sincerely,



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