



*Office of the General Counsel*

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**MEMORANDUM**

We have been asked for an analysis of the Freedom of Choice Act (“FOCA” or “the Act”), with particular attention to its effect on existing state laws.<sup>1</sup>

FOCA’s key provision states as follows:

**Sec. 4. INTERFERENCE WITH REPRODUCTIVE HEALTH PROHIBITED.**

**(a) STATEMENT OF POLICY.—It is the policy of the United States that every woman has the *fundamental* right to choose to bear a child, to terminate a pregnancy prior to fetal viability, or to terminate a pregnancy after fetal viability when necessary to protect the life or health of the woman. [Emphasis added.]**

**(b) PROHIBITION OF INTERFERENCE.—A government may not—**

**(1) *deny or interfere* with a woman’s right to choose—**

**(A) to bear a child;**

**(B) to terminate a pregnancy prior to viability; or**

**(C) to terminate a pregnancy after viability where termination is necessary to protect the life or health of the woman; or**

**(2) *discriminate* against the exercise of the rights set forth in paragraph (1) *in the regulation or provision of benefits, facilities, services, or information.* [Emphasis added.]**

**(c) CIVIL ACTION.—An individual aggrieved by a violation of this section may obtain appropriate relief (including relief against a government) in a civil action.**

Section 6 provides that the Act “applies to every Federal, State, and local statute, ordinance, regulation, administrative order, decision, policy, practice, or other action enacted, adopted, or implemented before, on, or after the date of enactment of this Act.”

The bill provides few definitions. It defines “government” as any “branch, department, agency, instrumentality, or official (or other individual acting under color of law) of the United States, a State,<sup>2</sup> or a subdivision of a State.” FOCA, § 3. FOCA defines “viability” to

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<sup>1</sup>S. 1173; H.R. 1964. The two bills are identical except for slight differences in their findings. The differences are irrelevant for purposes of this memo.

<sup>2</sup>“State,” in turn, is defined to include the States, the District of Columbia, Puerto Rico, and all U.S. territories and possessions. FOCA § 3.

mean “that stage of pregnancy when, in the best medical judgment of the attending physician based on the particular medical facts of the case before the physician, there is a reasonable likelihood of the sustained survival of the fetus outside of the woman,” *id.*, thereby leaving the determination of viability in the hands of the physician who proposes to perform the abortion. FOCA does not define or qualify other key terms, such as “health,” “interfere,” or “discriminate.”<sup>3</sup>

As a general matter, if FOCA were enacted, it would wipe out a very large number of existing state laws on abortion, substantially impede the ability of states to regulate abortion, and override nearly 40 years of jurisprudential experience on the subject of abortion. FOCA does this for several reasons.

First, FOCA states that the decision whether to have an abortion is a “fundamental” right. Under existing case law, a decision to have an abortion is *not* a fundamental right as it was under *Roe*. In 1992, seven justices rejected that view and concluded that the Court’s earlier decisions under *Roe* had too severely and improperly restricted the states’ power to regulate abortion. *Planned Parenthood v. Casey*, 505 U.S. 833, 873-87 (1992) (O’Connor, Kennedy, Souter, JJ.) (concluding that the Court’s earlier decisions had gone “too far” and that “[n]ot all governmental intrusion [into abortion] is of necessity unwarranted”); *id.* at 944 (Rehnquist, C.J., joined by White, Scalia, and Thomas, JJ.) (concurring in part, dissenting in part) (agreeing that earlier decisions had gone too far, and urging that *Roe* be overruled altogether). In judging the constitutionality of abortion laws, the *Casey* plurality abandoned the use of strict scrutiny, a rigorous test traditionally reserved for the protection of fundamental rights and usually fatal to the challenged law, and substituted for it an undue burden test. The latter test prevents government from imposing a “*substantial* obstacle” in the path of a woman seeking an abortion before viability. *Id.* at 878 (emphasis added).

In characterizing *Casey*’s plurality opinion, Chief Justice Rehnquist wrote:

*Roe* decided that a woman had a fundamental right to an abortion. The joint opinion rejects that view. *Roe* decided that abortion regulations were to be subjected to “strict scrutiny” and could be justified only in the light of “compelling state interests.” The joint opinion rejects that view.

*Id.* at 954.

*Casey* therefore restored to states a power to regulate abortion that the Court had not previously allowed in the two decades following *Roe*. FOCA would nullify *Casey* or, more accurately, render it superfluous, not in the sense of creating new constitutional law (which

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<sup>3</sup>There is no reason to think that “health,” as used in FOCA, will not be given the same broad reading as the term was given in *Doe v. Bolton*, 410 U.S. 179, 192 (1973) (defining “health” to include “all factors – physical, emotional, psychological, familial, and the woman’s age – relevant to the well-being of the patient”). In its findings, the bill cites *Doe* with approval. FOCA, § 2(3) and (4).

Congress, of course, cannot do), but by creating a statutory abortion right that goes beyond what *Casey* and even *Roe* require.<sup>4</sup>

Second, FOCA provides that the government may not “deny or interfere” with the abortion decision. The word “interfere” is unqualified. Thus, FOCA does not bar “substantial,” “undue,” or “unwarranted” interference, as *Casey* does, but *any* interference, however slight, with the decision whether to have an abortion. As Justices O’Connor, Kennedy, and Souter pointed out in adopting the undue burden standard: “*All* abortion regulations interfere to some degree with a woman’s ability to decide whether to terminate her pregnancy.” *Casey*, 505 U.S., at 875 (emphasis added). What the Constitution preserves, the *Casey* plurality concluded, is a right to be free of “unwarranted” or “undue” government intrusion into the abortion decision. *Id.*, at 875-77. By outlawing *any* interference with the abortion decision, FOCA would bar a broad range of abortion regulations, however slight or *de minimis* their impact on the woman’s decision whether to have an abortion.

Third, FOCA provides that government may not “discriminate” against the abortion right in the “regulation or provision of benefits, facilities, services, or information.” Although “discriminate” usually has a pejorative connotation in common parlance, at law it simply means to treat differently. Thus, legislation that funds childbirth or other health services but not abortion, public hospitals that provide services related to childbirth but not abortion, and public benefits that pay for childbirth but not abortion – all of these treat abortion differently and therefore could be said to “discriminate.”

Finally, FOCA creates a cause of action for anyone aggrieved by a violation of the Act, therefore resolving any question as to standing in favor of anyone aggrieved by a violation.

The combined impact of these various provisions is the likely invalidation of a broad range of state laws if challenged under FOCA, including –

- informed consent laws
- parental notification laws
- laws promoting maternal health, if they result in an increased cost for abortions
- abortion clinic regulations, even those designed to make abortion safer for women
- government programs and facilities that pay for, provide, or insure childbirth or health care services generally, but not abortion

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<sup>4</sup>Even *Roe*, for example, balanced the abortion right against the legitimate government interests in protecting unborn life and maternal health and regulating the medical profession. 410 U.S., at 150, 162-165. Under FOCA, no such balancing would take place.

- laws protecting the conscience rights of doctors, nurses and hospitals, if those laws create even minimal delay or inconvenience in obtaining an abortion or treat abortion differently than other medical procedures
- laws prohibiting a particular abortion procedure, such as partial birth abortion
- laws requiring that abortions only be performed by a licensed physician
- laws prohibiting abortion after viability except when necessary to prevent significant, physical harm to the woman
- laws requiring a brief waiting period before an abortion is performed
- laws preventing post-viability sex-selection abortions where a mental health reason is asserted for the abortion
- laws requiring that abortion providers maintain certain records with respect to performed abortions
- laws preventing the carrying to term of a cloned human embryo, and quite possibly laws preventing the implantation of an existing cloned embryo for purposes of bearing the child (sometimes known as bans on “reproductive cloning”).<sup>5</sup>

FOCA’s wide sweep is evident not only from its plain language, but from comparison of the current iteration of the bill with versions introduced in previous Congresses. For example, the 1989 version of FOCA (H.R. 3700 & S. 1912, 101<sup>st</sup> Cong., 1<sup>st</sup> Sess.) provided that a state “may impose requirements medically necessary to protect the life or health of women.” The 1992 version (S. 25, 102<sup>nd</sup> Cong., 2d Sess.) included a similar health exception and further provided that nothing in the Act would be construed to “prevent a State from protecting unwilling individuals from having to participate in the performance of abortions to which they are conscientiously opposed,” “prevent a State from declining to pay for the performance of abortions,” or “prevent a State from requiring a minor to involve a parent, guardian, or other responsible adult before terminating a pregnancy.” Qualifications such as these are entirely absent from the current FOCA. The omission suggests that the current version of FOCA is intended to preclude laws that protect maternal health or rights of conscience, permit or require parental involvement, or forbid or limit abortion funding.

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<sup>5</sup>For example, the “Human Cloning Ban and Stem Cell Research Protection Act of 2007” (S. 812) prohibits “human cloning” defined as “implanting or attempting to implant the product of nuclear transplantation into a uterus or the functional equivalent of a uterus.” Such laws are not supported by pro-life organizations because they allow unlimited cloning of embryos for research purposes; they are supported by many “pro-choice” members of Congress, including some who have also supported FOCA. Yet it is difficult to see how such a law could survive or be enforced if government may not “deny or interfere with” any woman’s right to choose to bear a child. Rather, under FOCA it would seem that once a human embryo has been produced, by cloning or any procedure, a woman has the right to decide, free of any government interference, whether to bear that child. That is, it would seem that even “reproductive cloning” would have to be permitted.

This broad reading of FOCA finds support in its legislative history. When Senator Barbara Boxer introduced the bill in 2004, for example, she said that FOCA would supersede “any law, regulation or local ordinance that impinges on a woman’s right to choose” and would “prohibit[] federal and state governments from discriminating against women, who exercise their right to choose.” 150 Cong. Rec. S187 (Jan. 22, 2004) (emphasis added). She elaborated:

That means a poor woman cannot be denied the use of Medicaid if she chooses to have an abortion. That means that abortions cannot be prohibited at public hospitals, thus giving women more options. That means that we respect a woman’s ability to make her own decision and don’t force women to attend anti-choice propaganda lectures, which submit women to misleading information, the purpose of which is to discourage abortion. That means that women serving our country in the military overseas would be able to afford safe abortions that can be performed in a military hospital.

*Id.* These intended results, of course, go beyond what *Roe*, *Casey*, or subsequent court opinions require.<sup>6</sup> Recently, for example, the Supreme Court applied *Roe* and *Casey* to uphold the federal partial birth abortion ban, which had been passed by wide margins in both houses of Congress. *Gonzales v. Carhart*, 127 S.Ct. 1610 (2007). Yet, Senator Boxer and Congressman Jerrold Nadler responded to the *Carhart* decision just hours after it was issued by reintroducing FOCA. See Congressman Nadler’s Dear Colleague Letter (April 18, 2007) (stating that “[t]oday, the Supreme Court declared open season on women’s lives and their right to control their own bodies, their health and their destinies,” and urging colleagues to co-sponsor the bill). The reintroduced bill (the current Senate version) includes a finding that criticizes *Carhart* as “threatening *Roe*” and “fail[ing] to protect a woman’s health,” and that speaks approvingly of the views of the dissenting justices in *Carhart*. FOCA, § 2(9).


Finally, though FOCA would not bind the hands of future Congresses, there is little doubt that, if enacted, it will inspire a virtual cottage industry to challenge existing federal statutes and regulations touching upon the subject of abortion. These laws, enacted over the course of the last 35 years and much more specific and measured in their treatment of issues presented in previous Congresses, would be placed at risk by passage of FOCA.

On balance, then, FOCA is a radical measure. It would, by its terms, go well beyond *Roe*. It would have an immediate effect on a wide range of state legislation regulating abortion. It would create a federal policy that at the very least would invite a challenge to existing federal laws on abortion. It would impose upon the entire country an abortion regime far worse than anything wrought by *Roe* or cases decided under it. It would jeopardize many laws enacted by the people and their elected representatives, at the federal and state level, over the last several

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<sup>6</sup>Applying *Roe*, for example, the Supreme Court has upheld laws requiring that abortion be performed by physicians, state and federal funding restrictions, informed and parental consent laws, and many other provisions that would be jeopardized by FOCA. *E.g.*, *Connecticut v. Menillo*, 423 U.S. 9 (1975) (physicians only); *Maher v. Roe*, 432 U.S. 464 (1977) (funding); *Beal v. Doe*, 432 U.S. 438 (1977) (funding); *Harris v. McRae*, 448 U.S. 297 (1980) (funding); *H.L. v. Matheson*, 450 U.S. 398 (1981) (parental involvement); *Bellotti v. Baird*, 443 U.S. 622 (1979) (parental involvement).

decades. It is difficult to recall any other single piece of legislation that, in a single stroke, would have such a comparable destructive impact on the government's ability to regulate abortion.

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