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The “Freedom of Choice Act”: Most Radical Abortion Legislation in U.S. History

Myth: The Freedom of Choice Act (FOCA) basically codifies the Supreme Court’s 1973 decision in *Roe v. Wade*.

Fact: In allowing and promoting abortion, FOCA goes far beyond even *Roe*.

Some say FOCA (S. 1173, H.R. 1964) would simply codify *Roe v. Wade*, 410 U.S. 113 (1973), the U.S. Supreme Court decision that declared a constitutional “right” to abortion and invalidated anti-abortion laws in all 50 states. But FOCA is even worse.

FOCA states that every woman has a “fundamental right” to have an abortion, and no government (federal, state, or local) may “deny” or “interfere with” this right. Moreover, no government may “discriminate” against the exercise of this right when regulating or providing “benefits, facilities, services, or information” to the public. In other words, abortion may not be treated differently from live birth -- if a public program supports motherhood it must equally support abortion. FOCA endangers a wide range of laws enacted by the people and their elected representatives over 35 years -- laws upheld under *Roe* and cases applying it. These include laws on informed consent, parental involvement, physician licensure, clinic safety, and taxpayer funding. FOCA’s far-reaching rule on abortion is more radical than anything wrought by *Roe*.¹ For example:

1. FOCA will invalidate laws to protect a woman from unsafe abortion clinics and to ensure that she is informed about abortion.

Roe permitted regulation of the “facility in which the [abortion] procedure is to be performed” to protect women’s health, and permitted other regulation after the first trimester (first three months) of pregnancy when “reasonably related to maternal health.” 410 U.S., at 163, 164. Later Supreme Court cases clarified that laws protecting maternal health are permissible throughout pregnancy,² and that nothing in *Roe* prevents a law requiring that a woman’s consent to an abortion be informed.³ The current version of FOCA actually removes language found in previous versions of the bill to permit regulations that are “medically necessary to protect the life or health of women.” Because informing women about abortion and alternatives involves some delay, and may lead some women to change their decision, laws ensuring informed consent would likely be seen as “interfering” with the abortion right.

2. FOCA will require taxpayers to pay for abortions.

Roe said nothing about abortion funding. Later Supreme Court cases held that *Roe* “implies no limitation on the authority of a State to make a value judgment favoring

¹ For a more detailed analysis, see www.usccb.org/prolife/FOCAanalysis.pdf.

² *Planned Parenthood v. Casey*, 505 U.S. 833, 872, 878 (1992).

³ *E.g.*, *Casey*, *supra* note 2, 505 U.S., at 881-87.

childbirth over abortion, and to implement that judgment by the allocation of public funds.”⁴ The current version of FOCA removes language found in previous versions of the bill ensuring that taxpayers will not be forced to pay for abortions, declaring instead that government may *not* “discriminate” against abortion in publicly funded programs.

3. FOCA will require states to allow “partial-birth” and other late-term abortions.

Roe allowed states to ban abortions after viability (when a child can survive outside the womb) if they included an exception for the mother’s “health.” Later decisions have upheld laws placing various limits on late-term abortions, and upheld a federal law banning “partial-birth” abortions even before viability and without a health exception.⁵ FOCA’s insistence on a “fundamental” right to abortion throughout pregnancy would set the clock back on these gains, and its sponsors say it is specifically intended to invalidate the partial-birth abortion ban that was upheld this year within the bounds of *Roe*.

4. FOCA will require states to allow abortions by non-physicians.

Roe permitted a state to “proscribe any abortion by a person who is not a physician.” 410 U.S., at 165. FOCA does not authorize such laws and would likely result in their invalidation.

5. FOCA will bar laws protecting a right of conscientious objection to abortion.

Roe cited with approval an AMA resolution that no “physician, hospital, nor hospital personnel” shall be required to violate “personally-held moral principles.” 410 U.S., at 143 & n.38. The current version of FOCA removes language found in previous versions of the bill to permit regulations to protect conscience.

6. FOCA will deny parents an opportunity to be involved in their minor daughter’s abortion decision.

Roe expressly declined to rule on laws ensuring that parents may be involved (410 U.S., at 165 n.67), and later Supreme Court cases held that nothing in *Roe* prevents such laws.⁶ The current version of FOCA removes language found in previous versions of the bill permitting such laws; instead it states absolutely that any law which would “interfere” with the individual’s decision making is invalid.

A vote *for* FOCA is a vote *against* modest, reasonable, widely supported laws that promote and protect women’s health, ensure informed consent, protect minors and ensure parental involvement, safeguard rights of conscience, and respect the desire of most citizens not to pay for abortions with their tax dollars. It is the most radical and extreme abortion legislation ever considered in the United States.

9/30/08

⁴ *Maier v. Roe*, 432 U.S. 464, 474 (1977). See also *Harris v. McRae*, 448 U.S. 297, 314-318 (1980).

⁵ *Webster v. Reproductive Health Services*, 492 U.S. 490, 513-20 (1989); *Casey*, *supra* note 2, 505 U.S., at 879-80; *Gonzales v. Carhart*, 550 U.S. 124 (2007).

⁶ *E.g.*, *H.L. v. Matheson*, 450 U.S. 398 (1981).