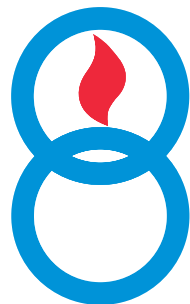

NATIONAL RIGHT TO LIFE NEWS

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Supreme Court Upholds Partial-Birth Abortion Ban Act

By Dave Andrusko

Contrary to what had been said in many quarters, not until Justice Anthony Kennedy actually read from the majority opinion upholding the Partial-Birth Abortion Ban Act could we know for sure that the swing justice on the Supreme Court had, at least in this case, swung in the direction of life.

The composition of the Court had changed since 2000 when the justices handed down their *Stenberg* v. *Carhart* decision overturning Nebraska's law banning partial-birth abortion. Gone was the late Chief Justice William Rehnquist, a dissenter in *Carhart*, as was Justice Sandra Day O'Connor, who was part of the five-member majority. They had been replaced by Chief Justice John Roberts and Justice Samuel Alito.

At a ceremony at the White House, witnessed by many of the congressmen and senators who led the fight, President Bush signed the Partial-Birth Abortion Ban Act into law and vowed to "vigorously defend this law against any who would try to overturn it in the courts."

And even though Kennedy had dissented in *Carhart,* he had also made it abundantly clear, in a previous case, that he still affirms the "core holdings" of *Roe v. Wade*.

Thus it was no sure thing that Kennedy would stay the course in the presence of a newly reconstituted High Court. But he did in a careful reasoned 39-page decision.

There are ten separate stories and

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The "Freedom for Partial-Birth Abortionists Act"

Pro-Abortion Lawmakers Propose "FOCA" to Invalidate All Limits on Abortion

WASHINGTON (April 25, 2007)—In response to the April 18 U.S. Supreme Court decision upholding the Partial-Birth Abortion Ban Act, prominent Democratic members of Congress the next day reintroduced the so-called "Freedom of Choice Act" (FOCA), a proposed federal law to nullify virtually all federal and state limitations on abortion.

NRLC Legislative Director Douglas Johnson commented, "In the interests of truth in advertising, the bill should be renamed the 'Freedom for Partial-Birth Abortionists Act.'"

The House bill, H.R. 1964, was introduced by Congressman Jerrold Nadler (D-NY), who in the new

Rep. Jerrold Nadler (D-NY), chief House sponsor of "Freedom of Choice Act"

Sen. Barbara Boxer (D-Ca.), chief Senate sponsor of "Freedom of Choice Act"

Democratic-majority Congress is the chairman of the House Judiciary subcommittee that has jurisdiction over such legislation. At **NRL News** deadline on April 25, his bill had 71 cosponsors (70 Democrats, one Republican).

The Senate bill, S. 1173, introduced by Senator Barbara Boxer (D-Ca.), had 13 Democratic cosponsors, including presidential candidate Sen. Hillary Clinton (NY), plus independent Joseph Lieberman (Ct.).

The lawmakers proposing the legislation, and groups endorsing it, repeatedly emphasized that the bill would, among other things,

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completely nullify the national ban on partial-birth abortion that the Supreme Court upheld on April 18.

Congressman Nadler issued a statement harshly attacking the Supreme Court ruling.

"Overturning a decision only a few years old, the Court has, for the first time since *Roe v. Wade*, allowed an abortion procedure to be criminalized," Nadler said. The FOCA, he noted, "would bar government—at any level—from interfering with a woman's fundamental right to choose to bear a child, or to terminate a pregnancy."

Kim Gandy, president of the National Organization for Women, also tied the FOCA directly to the Supreme Court ruling, explaining in an e-mailed alert that the bill "would legislatively reverse the Court's damaging decision and will enshrine in federal law our right to safe, legal abortion. . . . Our ultimate success depends on electing a president who will sign the legislation and electing a Congress that can withstand any challenge or filibuster."

"Those promoting this bill intend to use it as a litmus test for those who seek congressional office, or the White House, and as a fundraising tool," NRLC's Douglas Johnson explained. "They know they cannot enact anything like this, so long as a pro-life president is in the White House."

Not Only a "Codification of Roe"

The promoters of the FOCA sometimes claim that its purpose is to "codify *Roe v. Wade*," the 1973 Supreme Court decision that legalized abortion on demand. But the key binding provisions of the bill would go further than *Roe*, invalidating all of the major types of pro-life laws that have been upheld by the Supreme Court in the decades since *Roe*.

"The claim that the bill would 'codify *Roe*' is just a marketing gimmick by the proponents," explained Johnson. "The sponsors hope that journalists and legislators will lazily accept that vague shorthand phrase—but it is very misleading. The references to *Roe* in the bill are in non-binding, discursive clauses. The heart of the bill is a ban that would nullify all of the major types of pro-life laws that the Supreme Court has said are permissible under *Roe v. Wade*, including the ban on partial-birth abortions and bans on government funding of abortion."

The bill flatly invalidates any "statute, ordinance, regulation, administrative order, decision, policy, practice, or other action" of any federal, state, or local government or governmental official (or any person acting under government authority) that would "deny or interfere with a woman's right to choose" abortion, or that would "discriminate against the exercise of the right . . . in the regulation or provision of benefits, facilities, services, or information."

This no-restriction policy would establish, in Senator Boxer's words, "the absolute right to choose" prior to fetal "viability."

The no-restriction policy would also apply *after* "viability" to any abortion sought on grounds of "health." The bill does not define "health," but in some past abortion cases the Supreme Court has sometimes used the term to apply to any physical or emotional consideration whatsoever, including "distress."

The term "viability" is usually understood to refer to the point at which a baby's lungs are developed to the point that he or she can in fact survive independently of the mother—currently, about 23 or 24 weeks. However, the bill contains no objective criteria for "viability," but rather, requires that the judgment regarding "viability" be left entirely in the hands of "the attending physician"—which is to say, the abortionist.

The bill also prohibits any government actions that would "deny or interfere with a woman's right to choose to bear a child," but supporters of the bills have not cited any actual laws that would be invalidated by that provision.

Effects Admitted by Supporters

In a factsheet posted on its website, the Planned Parenthood Federation of America (PPFA) explains, "FOCA will supercede anti-choice laws that restrict the right to choose, including laws that prohibit the public funding of abortions for poor women or counseling and referrals for abortions. Additionally, FOCA will prohibit onerous restrictions on a woman's right to choose, such as mandated delays and targeted and medically unnecessary regulations."

In addition, PPFA explained, "Parental consent or notification statutes have been used as a tool to deny access to abortion services for minors. When such laws deny or interfere with the ability of minors to access abortion services, they would violate FOCA."

(About half of the states have parental notification or consent laws in effect, which the Supreme Court has said are permitted under *Roe v. Wade* as long as they meet certain requirements, including availability of judges to authorize abortions without parental notification or consent.)

In a press release issued when she introduced the FOCA in 2004, Senator Boxer gave a number of examples of current laws that would be invalidated by the bill, including:

- Laws restricting government funding of abortion. (The Hyde Amendment prohibits federal funding of most abortions, and many states have similar laws. The U.S. Supreme Court ruled in 1980 that these laws do not violate *Roe v. Wade*.)
- Laws prohibiting abortions in public hospitals. (The Supreme Court ruled in 1977 that such policies do not violate *Roe v. Wade*.)
- Laws requiring that girls and women seeking abortion receive certain information on matters such as fetal development and alternatives to abortion, and then wait a specified period before the abortion is actually performed, usually 24 or 48 hours. In her press release, Boxer referred to these as "antichoice propaganda lectures." (The Supreme Court said in its 1992 *Casey* ruling that such regulations are constitutional as long as they do not impose an "undue burden" on obtaining an abortion.)

Other Effects

NRLC's Johnson said that a number of other types of laws also would clearly be invalidated by the bill:

- All laws allowing doctors, nurses, or other state-licensed professionals, and hospitals or other health-care providers, to decline to provide or pay for abortions. (Such "conscience rights" with respect to abortion are generally protected by certain federal laws, and by the laws in many states. Supporters of the laws usually call them "conscience laws," but pro-abortion groups refer to them as "refusal clauses.")
- All laws prohibiting medical personnel other than licensed physicians from performing abortions would be invalid because they may "interfere with" access to abortion. (All but a handful of states currently enforce such "doctor-only" laws, which are specifically authorized in *Roe v. Wade* itself.)
- The provision of the FOCA that prohibits any government agency or official from taking any action that would "discriminate against the exercise of" FOCA-created legal rights, with respect to any "benefits, facilities, services, or information," would leave government officials open to lawsuits for anything that anybody thought "discriminate(s)" against abortion. Johnson observed, "This sweeping mandate could cover everything from rural health clinics,

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to health education programs in public schools—and even to pro-life speeches by public officials."

History of the FOCA

An earlier version of the FOCA was pushed by pro-abortion forces beginning in the late 1980s, when they feared that the Supreme Court was preparing to overturn *Roe v. Wade*. When President Clinton, a FOCA supporter, took office in January 1993, Planned Parenthood predicted that the FOCA would be law within six months. But the bill died after an education and lobbying campaign, led by NRLC, persuaded many pro-*Roe* lawmakers that the bill went beyond *Roe* and would strike down many state laws that had broad support.

Johnson noted that during the debates over the FOCA in the early 1990s, many proponents of the bill often tried to deny some of its more radical effects—effects that they have already admitted with respect to the new bill, such as the invalidation of all restrictions on government funding of abortion.

The original FOCA faded from view after Republicans took control of the House of Representatives in the 1994 election.

You can read or download the "Freedom of Choice Act" on the NRLC website at www.nrlc.org, under "Legislation: 'Freedom of Choice Act.'"

You can view an always-current list of cosponsors of the bills (S. 1173, H.R. 1964) on the NRLC website at the "Legislative Action Center," under "Issues and Legislation."

Take Action Now!

- Send an e-mail to your two U.S. senators and to your U.S. House member, urging them to oppose the so-called "Freedom of Choice Act" (S. 1173, H.R. 1964), by going to the NRLC website *Legislative Action Center* and clicking on the prominent alert on the "Freedom of Choice Act." For most congressional offices, the *Legislative Action Center* also provides a fax number that you can use to fax a letter opposing the bill.
- Send a short letter for publication in your local newspaper, explaining the radical nature of the "Freedom of Choice Act," including the fact that its sponsors proclaim that it would nullify the ban on partial-birth abortions, and would require government funding of abortion on demand.

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