



# MEMORANDUM

**TO:** Interested Parties  
**FROM:** American Center for Law and Justice  
**RE:** Executive Summary of the Freedom of Choice Act  
**DATE:** May 1, 2007

While the Supreme Court of the United States upheld the Partial-Birth Abortion Ban Act of 2003 in *Gonzales v. Carhart*,<sup>1</sup> abortion-supporters in Congress have acted quickly to counteract the decision. Senator Boxer and Representative Nadler have introduced a bill, entitled the Freedom of Choice Act,<sup>2</sup> that would dramatically expand federal protection of abortion rights beyond what is required by *Roe v. Wade*<sup>3</sup> and *Planned Parenthood v. Casey*.<sup>4</sup> The bill would invalidate many federal, State, and local abortion laws, including the Partial-Birth Abortion Ban Act of 2003.

The key provision of the Freedom of Choice Act provides:

A government may not . . . *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.<sup>5</sup>

Under *Roe* and *Casey*, the government may regulate abortion so long as it does not impose an “undue burden” on abortion rights by placing a “substantial obstacle in the path of a woman

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<sup>1</sup> Case No. 05-380, 2007 U.S. LEXIS 4338 (Apr. 18, 2007).

<sup>2</sup> Freedom of Choice Act, H.R. 1964, 110th Cong., 1st Sess. (Apr. 19, 2007); Freedom of Choice Act, S.1173, 110th Cong., 1st Sess. (Apr. 19, 2007). Several similar bills have been offered in previous Congresses.

<sup>3</sup> 410 U.S. 113 (1973).

<sup>4</sup> 505 U.S. 833 (1992).

<sup>5</sup> H.R. 1964, § 4(b)(1) (emphasis added). The term “government” includes the federal government as well as State and local governments. *Id.* at § 3(1).

seeking an abortion before the fetus attains viability.”<sup>6</sup> The Supreme Court has noted that the abortion right “is not absolute and is subject to some limitations.”<sup>7</sup> The Court “struck a balance” in *Casey* allowing for a significant level of regulation of abortion rather than recognizing an absolute right to abortion.<sup>8</sup> The *Casey* Court observed that “[a]ll abortion regulations interfere to some degree with a woman’s ability to decide whether to terminate her pregnancy.”<sup>9</sup>

The Freedom of Choice Act would create an absolute right to pre-viability abortion that would override any federal, State, or local law that simply “interfere[d] with” that right, no matter how compelling the justification for the law.<sup>10</sup> For example, the Freedom of Choice Act would likely invalidate the Partial-Birth Abortion Ban Act of 2003 (at least with respect to pre-viability abortions) even though the statute is constitutional. The findings section of the Freedom of Choice Act states that the Court’s decision in *Carhart* “permits the government to interfere with a woman’s right to choose to terminate a pregnancy . . . .”<sup>11</sup> Since the Freedom of Choice Act would invalidate any federal, State, or local law that “interfere[s] with a woman’s right to choose . . . to terminate a pregnancy prior to viability,”<sup>12</sup> federal and State partial-birth abortion bans would likely be invalidated to the extent that they apply to pre-viability abortions.

In addition, the Freedom of Choice Act’s definition of “viability” ensures that a determination of viability will likely be made later into pregnancy rather than sooner. The later into a pregnancy that a fetus is determined to be viable, the longer the government must wait before it may assert its interest in respect for the human life of the fetus. The bill defines “viability” as

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<sup>6</sup> *Carhart*, 2007 U.S. LEXIS 4338 at \*15-16 (quoting *Casey*, 505 U.S. at 878). After viability, the State may restrict abortion so long as the law does not endanger the life or health of the mother. *Id.* at \*15.

<sup>7</sup> *Roe*, 410 U.S. at 154-55.

<sup>8</sup> *Carhart*, 2007 U.S. LEXIS 4338 at \*16.

<sup>9</sup> *Casey*, 505 U.S. at 875 (quoting *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 61 (1976)) (emphasis added).

<sup>10</sup> *See id.* (emphasis added).

<sup>11</sup> H.R. 1964, § 2(9) (emphasis added).

<sup>12</sup> *Id.* at § 4(b)(1) (emphasis added).

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.<sup>13</sup>

This definition is loosely based on language from *Colautti v. Franklin*<sup>14</sup> rather than the broader definitions found in *Roe*, *Casey*, and other cases. For instance, in *Roe*, the Court stated that a fetus is “viable” when it is “*potentially able* to live outside the mother’s womb, albeit with artificial aid.”<sup>15</sup> In *Planned Parenthood v. Danforth*, a statute defined viability as “when the life of the unborn child *may be* continued indefinitely outside the womb by natural or artificial life-supportive systems.”<sup>16</sup> Moreover, in *Casey*, the Court noted that viability “is the time at which there is a *realistic possibility* of maintaining and nourishing a life outside the womb.”<sup>17</sup> These definitions of “viability” are much easier to meet than the definition used in the Freedom of Choice Act. The bill would ensure that women have an unrestricted right to an abortion throughout the period of weeks, or even months, where the fetus is potentially or possibly able to survive with the aid of machines but there is not yet a “reasonable likelihood” of “sustained survival.”

In addition, the Freedom of Choice Act provides that “[a] government may not . . . discriminate against the exercise of [abortion rights] . . . in the regulation or provision of benefits, facilities, services, or information.”<sup>18</sup> This section could have a wide-ranging impact on many federal, State, and local programs that provide funding for health or family planning services but do not fund abortions. For example, Title X of the Public Health Service Act—a major source of federal funding for most family planning organizations—states that “[n]one of the funds

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<sup>13</sup> *Id.* at § 3(3) (emphasis added).

<sup>14</sup> 439 U.S. 379 (1979). The *Colautti* Court explained that “[v]iability is reached when, in the judgment of the attending physician on the particular facts of the case before him, there is a reasonable likelihood of the fetus’ sustained survival outside the womb, with or without artificial support.” *Id.* at 388.

<sup>15</sup> *Roe*, 410 U.S. at 160 (emphasis added).

<sup>16</sup> *Danforth*, 428 U.S. at 63 (emphasis added).

<sup>17</sup> *Casey*, 505 U.S. at 870 (emphasis added).

<sup>18</sup> H.R. 1964, § 4(b)(2).

appropriated under [Title X] shall be used in programs where abortion is a method of family planning.”<sup>19</sup> Under the Freedom of Choice Act, Title X and similar State and local programs that do not fund abortions would likely be invalidated.<sup>20</sup>

### **Conclusion**

The Freedom of Choice Act would expand abortion rights far beyond *Roe* and *Casey* and override many federal, State, and local laws that regulate abortion, including the Partial-Birth Abortion Ban Act of 2003. The bill would eviscerate the government’s interest in preserving the dignity of unborn human life. The Supreme Court has repeatedly emphasized that the government may “show its concern for the life of the unborn”<sup>21</sup> and has an interest in “protecting potential human life.”<sup>22</sup> The State “may use its voice and its regulatory authority to show its profound respect for the life within the woman.”<sup>23</sup> The Freedom of Choice Act must be rejected because it would greatly restrict the ability of the government to promote respect for the life of the unborn.

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<sup>19</sup> Family Planning Services and Population Research Act of 1970, 42 U.S.C. § 300 *et seq.*, Pub. L. No. 91-572.

<sup>20</sup> See H.R. 1964, § at § 4(b)(2).

<sup>21</sup> *Casey*, 505 U.S. at 875.

<sup>22</sup> *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 518-20 (1989).

<sup>23</sup> *Carhart*, 2007 U.S. LEXIS 4338 at \*59.