
JOINT RESOLUTION OPPOSING THE FEDERAL “FREEDOM OF CHOICE ACT” (FOCA)

Model Resolution & Policy Guide

For the 2009 Legislative Year



Changing Law to Protect Human Life, State by State

TABLE OF CONTENTS

I.	Introduction	3
II.	“The Freedom of Choice Act”: A Radical Attempt to Prematurely End the Debate Over Abortion	5
III.	Joint Resolution Opposing the Federal “Freedom of Choice Act”	12

INTRODUCTION

As we prepare for and begin the 2009 state legislative sessions, the United States Congress is set to debate a radical piece of legislation that poses an ominous and undeniable threat to the right of States to exercise their general legislative authority – specifically, to enact protective, abortion-related legislation – and to the right of all Americans to debate and, ultimately, determine abortion policy in their home states. That threat is the “Freedom of Choice Act” (FOCA).

In essence, FOCA is a cynical attempt to prematurely end the debate over abortion and declare “victory” in the face of mounting evidence that (a) the American public does not support the vast majority of abortions being performed in the U.S. each year and (b) that abortion has a substantial negative impact on women. The enclosed article, “*The Freedom of Choice Act: A Radical Attempt to Prematurely End the Debate Over Abortion,*” provides more detailed information on the history, legal implications, and practical impact of FOCA.

Thirty-five years after *Roe v. Wade* when abortion on demand was foisted by judicial fiat on the American people, abortion supporters are dismayed that abortion remains a divisive issue and that their radical agenda has not been submissively accepted by the American public. Their weapon to impose their will on the unwilling American public is FOCA.

In light of the results of the fall election, it is critical that the States and their citizens voice their opposition to FOCA and strongly urge Congress to reject this radical attempt to enshrine abortion-on-demand into American law and to force an unwilling American public to accept this destructive usurpation of states’ rights. One effective tool for communicating opposition to FOCA is a resolution condemning FOCA and enacted by one or both chambers of a state legislature.

To assist state legislators, AUL has drafted the enclosed model (joint) resolution opposing the federal “Freedom of Choice Act.” AUL experts are available to tailor the language to the needs of a particular state.

By design, the model resolution envisions the 111th Congress introducing a version of FOCA that is substantially similar to the one introduced in April 2007. However, as a result of efforts by AUL and others to publicize the radical impact of FOCA and to begin mobilizing the public and legislative support needed to defeat FOCA, public statements by some pro-abortion groups after the November 2008 elections suggest that these groups might, in a purely tactical response to significant and increasing opposition to the current version of FOCA, seek to “water down” FOCA or to enact its provisions incrementally. For example, they might start by seeking to eliminate long-standing limitations on the use of public funding for elective abortions, to aggressively enact measures making abortions readily available (at taxpayer expense) in military healthcare facilities, or to reduce legal protections for healthcare providers who conscientiously object to participating in abortions.

AUL will be carefully monitoring abortion-related legislation introduced in the 111th Congress (which convenes in early January 2009), including any subsequent versions of FOCA, and will make any necessary updates or modifications to the language of the enclosed resolution. Please check our website, www.AUL.org, for periodic updates on FOCA and the 111th Congress.

For more information or assistance, please contact AUL's Legislative Coordinator at (312) 568-4717 or Legislation@AUL.org.

DENISE M. BURKE, ESQ.
Vice President of Legal Affairs
Americans United for Life

The “Freedom of Choice Act”: Radical Attempt to Prematurely End the Debate Over Abortion

Nearly two years ago, the public debate over abortion was irrevocably altered. In the landmark *Gonzales v. Carhart* decision, the U.S. Supreme Court upheld the federal ban on partial-birth abortion and, more importantly, abdicated, at least in part, its role as the “National Abortion Control Board.”

In its decision, the Court signaled an increasing willingness to blunt attempts by abortion extremists to use the federal courts to unilaterally impose their radical agenda. The immediate reaction of activists and some members of Congress confirmed this critical shift.

Abortion advocates, including some members of Congress, hastily recycled the hyperbolic rhetoric of the 1970s. In one public statement after another, they condemned the decision and the Court, predicting--like modern-day Chicken Littles--that the outlawing of abortion was at hand and that women were about to be relegated to “second-class” status. For example, then-Presidential candidate Barack Obama stated, “I am extremely concerned that this ruling will embolden state legislatures to enact further measures to restrict a woman’s right to choose, and that the conservative Supreme Court justices will look for other opportunities to erode *Roe v. Wade*, which is established federal law and a matter of equal rights for women.”

Recognizing that the federal courts would no longer be a reliable and viable tool for actualizing their demands for unlimited and unregulated abortion, abortion supporters began to look elsewhere for the means to advance their radical agenda.

In late April 2007, Barack Obama along with Senator Hillary Clinton and others, immediately re-introduced the federal *Freedom of Choice Act* (FOCA), a radical attempt to enshrine abortion-on-demand into American law, to sweep aside existing laws that the majority of Americans support-- such as requirements that licensed physicians perform abortions, fully-informed consent, and parental involvement-- and to prevent states from enacting similar protective measures in the future.

History of FOCA

Even before *Roe v. Wade* was decided in 1973, there were attempts by Congress to legalize abortion. For example in 1970, Senator Robert Packwood introduced the *National Abortion Act*, which sought to legalize abortion nationwide and preempt state laws restricting or regulating abortion.¹ Although the *National Abortion Act* was unsuccessful, Senator Packwood later joined

¹ Johnsen, Dawn E., *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?* Law and Contemporary Problems, *Supra* note 152, available at: [http://www.law.duke.edu/shell/cite.pl?67+Law+&+Contemp.+Probs.+105+\(summer+2004\)](http://www.law.duke.edu/shell/cite.pl?67+Law+&+Contemp.+Probs.+105+(summer+2004)) (last visited November 4, 2008).

with Senator Alan Cranston to introduce the inaugural version of the *Freedom of Choice Act* (FOCA) in 1989.²

FOCA was introduced at a time when some in Congress feared that *Roe v. Wade* might imminently be overturned, and were seeking a means to prevent states from enacting laws prohibiting or regulating abortion. FOCA's main goals were to create a "fundamental right to abortion" and to eliminate any federal, state, or local government action (including the enactment of abortion-related legislation) that limited or "impeded" access to abortion.

Relying on specific portions of the Supreme Court's decision in *Roe*, abortion supporters argued that FOCA would protect a woman's right to an abortion prior to "fetal viability or at any time...to protect the life or health of the woman" and that states could, within enumerated limits, enact protective laws that did not "interfere" with a woman's right to abortion.

Over the next several years, substantially-similar versions of FOCA were repeatedly re-introduced in Congress until 1993, when the provision allowing states to enact protective legislation was removed. The 1993 version of FOCA instead included criticism of the Supreme Court for abandoning the "strict scrutiny standard" (of reviewing abortion-related laws) for the "undue burden" standard that had recently been announced in *Planned Parenthood v. Casey*.³ Notably, under the new "undue burden" standard, requirements such as informed consent, reflection periods, and parental involvement for abortion were deemed constitutional.

After its subsequent re-introduction in 1995, FOCA was not again introduced until 2004 when it was offered by Representative Jerrold Nadler in the House of Representatives and Senator Barbara Boxer in the Senate. In her accompanying press release, Senator Boxer explained that FOCA would "supersede all other abortion related laws, regulations or local ordinances"⁴, which included informed consent laws and any health and safety regulations imposed on abortion clinics.

The most recent version of FOCA was introduced in April 2007, following the Supreme Court's decision in *Gonzales v. Carhart*, upholding the federal ban on partial-birth abortion. This most-recent version was substantially similar to the 2004 version, but also included a section deriding the Supreme Court's decision in *Gonzalez*. Specifically, FOCA mischaracterized the prohibition of partial-birth abortion as a "legal and practical" barrier that hindered "the ability of women to participate in the economic and social life of the Nation."⁵ Further, drawing upon "abortion mythology," this version of FOCA exaggerated the numbers of Americans who availed

² See S. 1912, 101st Cong. (1989); H.R. 3700, 101st Cong. (1989).

³ See *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) and S. 25, 103^d Cong. (1993); H.R. 1068, 103^d Cong. (1993).

⁴ National Right to Life, Senator Barbara Boxer 2004 Press release, available at:

<http://www.nrlc.org/FOCA/FOCA%20Boxer%20press%20release.pdf>, (last visited November 4, 2008).

⁵ See S. 1173, 110th Cong. (2007); H. R. 1964, 110th Cong. (2007).

themselves of illegal abortions in the late 1800's and early 1900's, inflating the actual figure of less than one-hundred thousand to "over one-million."⁶

Although expressing as its goal the simple codification of *Roe*, FOCA also expressly provided that it would apply "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."⁷ As Senator Boxer eloquently explained in 2004, "FOCA [will] supersede all other laws," especially those that the Supreme Court has held to be constitutional under *Roe* and its progeny.⁸

What Does FOCA Say?

FOCA provides that "[i]t 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."

Further, FOCA would specifically invalidate 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."

Clearly, its reach is very broad. This single piece of legislation would apply to any federal or state law "enacted, adopted, or implemented before, on, or after the date of [its] enactment."

What is the Legal Impact of FOCA?

FOCA creates a new and dangerously radical "right." It establishes the right to abortion as a "fundamental right," elevating it to the same status as the right to vote and the right to free speech (which, unlike the abortion license, are specifically mentioned in the U.S. Constitution). Critically, in *Roe v. Wade*, the Supreme Court did not define abortion as a "fundamental right." And with the exception of a couple of minor attempts to distort the Court's jurisprudence and classify abortion as a "fundamental right" in later opinions, the Court has not subsequently

⁶ Nathanson, Bernard. (PHD), *Confessions of an Ex-Abortinist*, available at: <http://www.aboutabortions.com/Confess.html> (last visited November 4, 2008).

⁷ See S. 1173, 110th Cong. (2007); H. R. 1964, 110th Cong. (2007).

⁸ <http://www.nrlc.org/FOCA/FOCA%20Boxer%20press%20release.pdf> (last visited November 4, 2008).

defined abortion as a “fundamental right.”⁹ Thus, FOCA goes beyond any Supreme Court decision in enshrining unlimited abortion-on-demand into American law.

FOCA would also subject laws regulating or even touching on abortion to judicial review using a “strict scrutiny” framework of analysis. This is the highest standard American courts can apply and is typically reserved for laws impacting such fundamental rights as the right to free speech and the right to vote. Prior to the Supreme Court’s 1992 decision in *Planned Parenthood v. Casey* (which substituted the “undue burden” standard for the more stringent “strict scrutiny” analysis), abortion-related laws (such parental involvement for minors and minimum health and safety standards for abortion clinics) were almost uniformly struck down under “strict scrutiny” analysis. If enacted, FOCA would retroactively be applied to all federal and state abortion-related laws and would result in their invalidation.

What is the Practical Impact of FOCA?

In elevating abortion to a fundamental right, FOCA poses an undeniable and irreparable danger to common-sense laws supported by a majority of Americans. Among the more than 550 federal and state laws that FOCA would nullify are:

- *Partial Birth Abortion Ban Act of 2003*
- *Hyde Amendment* (restricting taxpayer funding of abortions)
- Restrictions on abortions performed at military hospitals
- Restrictions on insurance coverage for abortion for federal employees
- Informed consent laws
- Waiting periods
- Parental consent and notification laws
- Health and safety regulations for abortion clinics
- Requirements that licensed physicians perform abortions
- “Delayed enforcement” laws (banning abortion when *Roe v. Wade* is overturned and/or the authority to restrict abortion is returned to the states)
- Bans on partial-birth abortion
- Bans on abortion after viability. FOCA’s apparent attempt to limit post-viability abortions is illusory. Under FOCA, post-viability abortions are expressly permitted to protect the woman’s “health.” Within the context of abortion, “health” has been interpreted so broadly that FOCA would not actually proscribe any abortion before or after viability.

⁹ See *City of Akron v. Akron Ctr for Reproductive Health*, 462 U.S. 416, 420 n.1 (1983) and *Thornburgh v. ACOG*, 476 U.S. 747, 772 (1986) (“A woman's right to make that choice freely is fundamental”).

- Limits on public funding for elective abortions (thus, making American taxpayers fund a procedure that many find morally objectionable)
- Limits on the use of public facilities (such as public hospitals and medical schools at state universities) for abortions
- State and federal legal protections for individual healthcare providers who decline to participate in abortions
- Legal protections for Catholic and other religiously-affiliated hospitals who, while providing care to millions of poor and uninsured Americans, refuse to allow abortions within their facilities

Notably, pro-abortion groups do not deny FOCA's draconian impact. For example, Planned Parenthood has explained, "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."

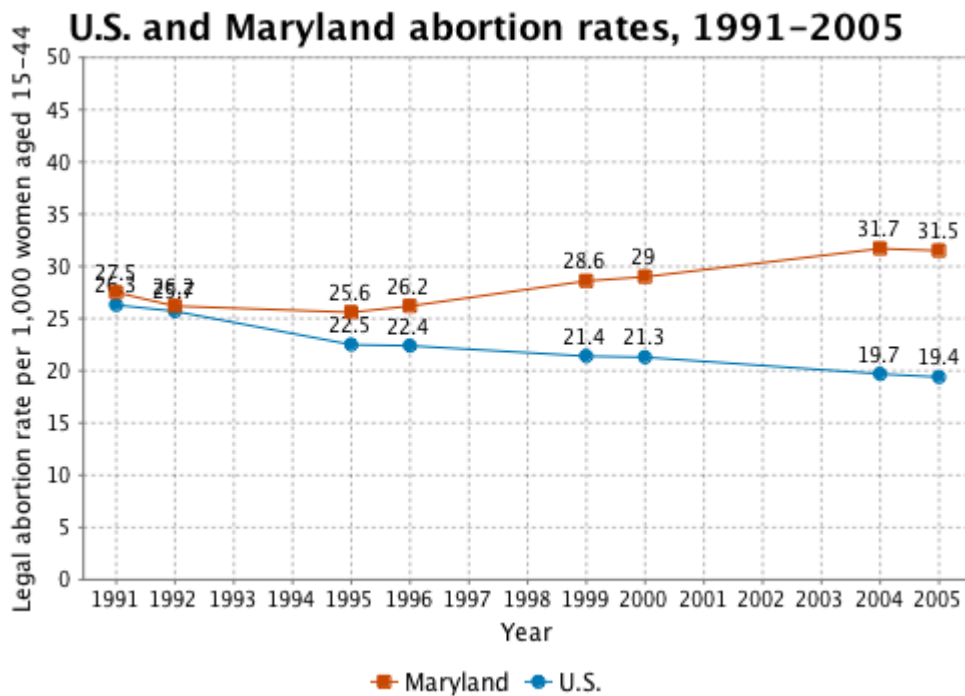
State FOCA's

Seven states have enacted versions of FOCA, further entrenching and protecting the "right to abortion" in those states: California, Connecticut, Hawaii, Maine, Maryland, Nevada, and Washington.

Notably, states that have enacted FOCA's have experienced increases in abortion rates despite the steady decrease in the national abortion rate over the past 15 years and/or have maintain abortion rates that are often significantly higher than the national rate. Supporting evidence for this conclusion is aptly provided by the experiences of Maryland and Nevada – both of which enacted state FOCA's in the early 1990's.

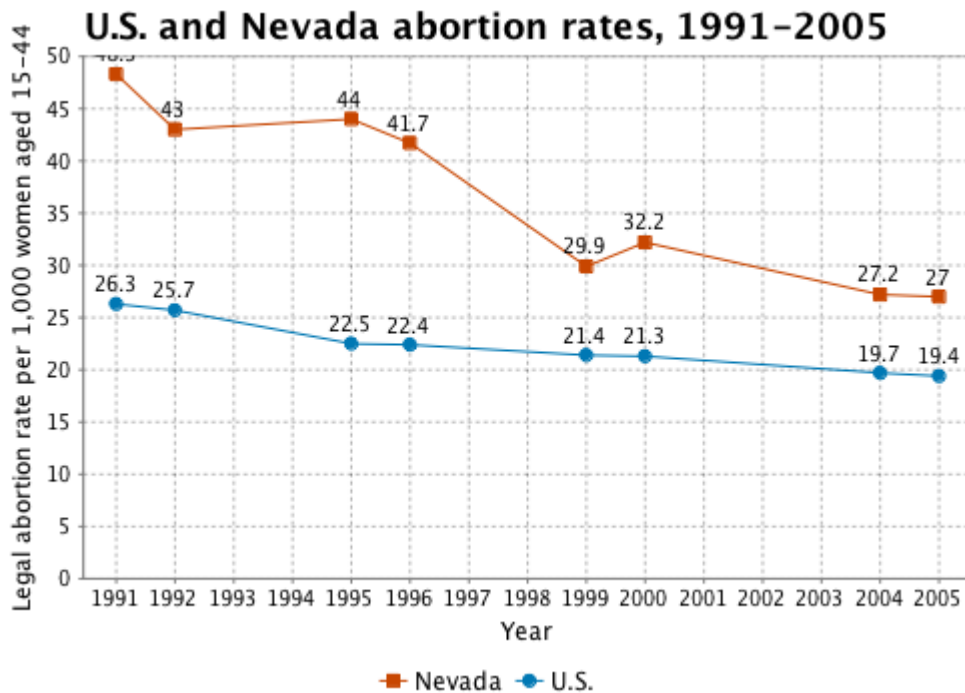
Maryland enacted FOCA in 1991. According the Alan Guttmacher Institute (the "research arm" of Planned Parenthood), Maryland's abortion rate¹⁰ in 1991 was approximately 4.6 percent higher than the national rate. However, from 1991 through 2005, Maryland's abortion rate increased each year while the national rate declined each year. Notably, in 2005 (14 years after enacting a FOCA), Maryland's abortion rate was **62 percent higher** than the national rate.

¹⁰ The "abortion rate" is defined as the number of women per 1,000 in the state who underwent an abortion in any given year.



Source: Guttmacher Institute

Further, Nevada enacted a FOCA by ballot initiative in 1990. From 1991 through 2000, the Nevada abortion rate remained consistently higher (and, at times, significantly higher) than the national abortion rate.



Source: Guttmacher Institute

The experience of these states clearly demonstrates that the enactment of a federal FOCA will not reduce abortion rates, but rather will likely result in an increase in abortions nationwide, reversing the trend of the last 15 years when we have experienced a notable decrease in the abortion rate – a decrease directly attributable to the enactment of protective state laws like informed consent and parental involvement. However, it is these protective and effective laws and others that FOCA targets for elimination.

Conclusion

Clearly FOCA will not make abortion safe or rare – on the contrary, it will actively promote abortion and do nothing to ensure its safety – so, abortion advocates’ unrelenting campaign to enact FOCA is a “wake-up call” to all Americans. If implemented, FOCA would invalidate common-sense, protective laws that the majority of Americans support. It will not protect or empower women. Instead, it would protect and promote the abortion industry, sacrifice women and their health to a radical political ideology, and silence the voices of everyday Americans who want to engage in a meaningful public discussion over the availability, safety, and even desirability of abortion.

JOINT RESOLUTION OPPOSING THE FEDERAL “FREEDOM OF CHOICE ACT”

(UPDATED)

JOINT RESOLUTION No. _____
BY REPRESENTATIVES/SENATORS _____

WHEREAS, the 111th United States Congress has introduced the “Freedom of Choice Act”, [H.R. ____ /S. ____] which purports to classify abortion as a “fundamental right,” equal in stature to the right to free speech and the right to vote – rights that, unlike abortion, are specifically enumerated in the United States Constitution;

(OR if not yet introduced)

WHEREAS, Barack Obama, President of the United States, has promised that one of the top priorities of his new Administration is to sign into law the “Freedom of Choice Act” which purports to classify abortion as a “fundamental right,” equal in stature to the right to free speech and the right to vote – rights that, unlike abortion, are specifically enumerated in the United States Constitution;

WHEREAS, the federal “Freedom of Choice Act” would invalidate 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";

WHEREAS, the federal “Freedom of Choice Act” would nullify any federal or state law “enacted, adopted, or implemented before, on, or after the date of [its] enactment” and would effectively prevent the State of [Insert Name of State] from enacting similar protective measures in the future;

WHEREAS, the federal “Freedom of Choice Act” could be passed as a whole by Congress or, alternatively, implemented piecemeal through legislation, Executive Orders, and/or other policy determinations made by the new Administration;

WHEREAS, the 10th Amendment to the Constitution of the United States provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people”;

WHEREAS, the power to determine an individual state’s abortion policy including the delineation of appropriate medical requirements and standards for its provision has not been delegated in any manner to the federal government;

WHEREAS, beginning with *Roe v. Wade* in 1973, the Supreme Court of the United States has expressly and repeatedly recognized the right and authority of the states to regulate the provision of abortion;

WHEREAS, the Supreme Court of the United States has long recognized that an individual state, such as the State of *[insert name of State]*, “has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient. This interest obviously extends *at least* to the performing physician and his staff, to the facilities involved, to the availability of after-care, and to adequate provision for any complication or emergency that might arise.” *Roe v. Wade*, 410 U.S. 113, 150 (1973) (emphasis added).

WHEREAS, the State of *[insert name of State]* and the other states thus retain the authority to regulate the provision of abortion and, in the interest of protecting both women and the unborn, have acted accordingly and appropriately;

WHEREAS, the federal “Freedom of Choice Act” would invalidate more than 550 federal and state abortion-related laws, laws supported by the majority of the American public;

WHEREAS, the federal “Freedom of Choice Act” would specifically invalidate the following common-sense, protective laws properly enacted by the State of *[Insert name of State]*:

[Drafter’s Note: Insert bulleted list of state laws that would be invalidated by the federal Freedom of Choice Act. AUL is available for assistance in compiling a complete list of affected state statutes.]

WHEREAS, the federal “Freedom of Choice Act” will not make abortion safe or rare, but will instead actively promote and subsidize abortion with State and Federal tax dollars and do nothing to ensure its safety; and

WHEREAS, the federal “Freedom of Choice Act” will protect and promote the abortion industry, sacrifice women and their health to a radical political ideology of unregulated abortion-on-demand, and silence the voices of everyday Americans who want to engage in a meaningful public discussion and debate over the availability, safety, and even desirability of abortion;

NOW, THEREFORE, BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF *[Insert name of State]*:

Section 1. That the legislature strongly opposes *[if yet available, insert: H.R. ____ /S.____]*, the federal “Freedom of Choice Act” and urges United States Congress to summarily reject it.

Section 2. That the legislature strongly opposes the federal “Freedom of Choice Act” because it seeks to circumvent the States’ general legislative authority as guaranteed by the 10th Amendment to the U.S. Constitution.

Section 3. That the legislature strongly opposes the federal “Freedom of Choice Act” because it seeks to undermine the right and responsibility of the States and the people to debate, vote on, and determine abortion policy.

Section 4. That the legislature strongly opposes the federal “Freedom of Choice Act” because the protection of women's health through state regulations on abortion is a compelling State interest that should not be nullified by Congress.

Section 5. That the legislature strongly opposes the federal “Freedom of Choice Act” because its enactment would nullify *[Insert appropriate number]* laws in the State of *[Insert name of State]*, laws that the legislature and the people of *[Insert name of State]* strongly support.

Section 6. That the Secretary of State of *[Insert name of State]* transmit a copy of this resolution to the Governor, to the President of the United States, and to the President of the Senate and the Speaker of the House of Representatives of the United States Congress.

More detailed information about the federal *Freedom of Choice Act* and the protective laws that it seeks to invalidate can be found in AUL's annual publication *Defending Life: A State by State Legal Guide to Abortion, Bioethics, and the End of Life*.

Defending Life 2009 will soon be available online at AUL.org or for purchase at Amazon.com.

For further information regarding this or other AUL policy guides, please contact:

AMERICANS UNITED FOR LIFE

310 S. Peoria St., Suite 500

Chicago, IL 60607

312.568.4700 | Fax 312.568.4747 | Legislation@AUL.org

www.AUL.org

©2008 Americans United for Life

This policy guide may be copied and distributed freely as long as the content remains unchanged and Americans United for Life is referenced as the creator and owner this content.