

Stenberg: High court justices split on ban

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"The issue here today is whether the state can ban a little-used form of abortion that borders on infanticide when safe abortion procedures remain available to women," Stenberg said.

"The state's interest here is to draw a bright line between abortion and infanticide."

Justices Ruth Bader Ginsburg and John Paul Stevens said such a "bright line" would be a departure from precedents set by the court in *Roe vs. Wade* in 1973 and *Planned Parenthood of Southeastern Pennsylvania vs. Casey* in 1992.

In those cases, they said, the crucial criterion was the fetus' viability, not its location at the time of an abortion. The ruling allowed states to prohibit or regulate abortions after the fetus became viable. But in this case, the court is considering the constitutionality of an abortion procedure performed before viability.

Stenberg said the *Planned Parenthood* decision recognized legitimate state interests that included, but were not limited to, preserving the health of the mother and discouraging abortion.

In this case, Stenberg said, the state has an interest in banning a procedure that most Americans believe is barbaric.

Justice Sandra Day O'Connor, who along with Justice Anthony Kennedy is considered by many legal experts to be a critical swing vote, drew Stenberg into an extended dialogue on the law's scope.

"Do you take the position," she asked, "that the state of Nebraska could also prohibit D&E for pre-viability?"

Stenberg said the state could not do so and has not attempted it.

"It is difficult to read the statute and be sure that is so," O'Connor replied. "They're both gruesome procedures, but one of them may not be different from the other."

"I'm not sure why the statute might not prohibit the D&E procedure."

The law prohibits a doctor from "deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child."

Stenberg said he was not aware of a single state attorney general who has interpreted that

language, or similar language, to prohibit D&E or any procedure besides D&X.

Although the law contains an exception for those cases when the procedure is necessary to save a woman's life, it includes no exception to preserve a woman's health, O'Connor noted.

Stenberg replied that both the American Medical Association and the American College of Obstetricians and Gynecologists have said the D&X procedure is never necessary to preserve the life or health of a woman.

Chief Justice William Rehnquist suggested that an exception to preserve a woman's health could be used to justify almost any partial-birth abortion.

But Justice Stephen Breyer said some doctors have testified that the D&X procedure is sometimes the safest

procedure available.

Stenberg answered that courts should defer to the will of legislators "when medical opinion is divided."

Justice John Paul Stevens asked Stenberg whether the court, in order to agree with Stenberg's position, would have to find that the D&X procedure is never the most appropriate abortion method for a woman.

Stenberg said the court would not have to make such a finding, given that "the overall weight of judgment" of the medical profession is that the procedure is never medically necessary. Women still would be able to undergo other procedures, he said.

Stenberg also urged the court to follow precedent by favoring a constitutional interpretation of a state statute when possible.

Heller, Carhart's lawyer, disputed Stenberg on two primary fronts.

First, he said, the law prohibits many abortion procedures besides D&X. Second, even if the law banned only D&X, it still would be unconstitutional because it would violate a woman's privacy and possibly force her to forgo the least risky procedure, he said.

The law would impermissibly elevate the interests of the fetus above the woman's health, Heller said.

If this elevation were made permanent, it would authorize states to prohibit all abortions, he said.

By "all indications," Heller said, "The

Nebraska statute is much broader than just a ban on D&X."

In many abortion procedures, Heller said, the doctor dismembers the fetus and pulls parts of its body into the birth canal before the fetus is clinically dead. The law's prohibition on delivering a "substantial portion" of the fetus into the womb during an abortion is vague and could prohibit such abortions, Heller said.

Stenberg said the Nebraska Legislature actually added the phrase "a substantial portion" to make clear the law would not ban D&E, thus gaining the American Medical Association's support.

Justice Antonin Scalia said he doubted procedures other than D&X would be prohibited. Dismembering a fetus is different from "intentionally delivering" it into the womb for the purpose of killing it, he said.

Heller replied that the law's intent was "shifting the abortion procedure into the womb at the expense of the mother's health."

Carhart has said the D&X procedure is sometimes less risky because it reduces the amount of surgery that must be done inside a woman's cervix. This reduces the risk of infection or perforation, he said.

Scalia asked Heller whether, if the term partial-birth abortion was interpreted to cover only D&X, the law would still be unconstitutional.

Heller said it would. He said the state still would have no compelling interest that would supersede considerations about the woman's health.

Scalia continued to press Heller, saying the D&X procedure could lead to a "coarsening" of society.

"Is there no state interest at all," Scalia asked, in prohibiting "the destruction of a live human creature outside the womb?"

Heller said the most important interest is promoting the woman's health.

"Any time the state prohibits a safe procedure, it is prohibiting a technique that could be safe for some women," he said. "Here we are talking about the right to have an abortion by the safest possible means."

A relatively new procedure like D&X may be controversial at first, but it may prove to be an important medical advance, Heller said.

"So we can look forward to this being wide-

spread in the years to come?" Scalia replied.

Heller said *Roe vs. Wade's* nationwide legalization of abortion led to medical advances that have improved safety for women undergoing abortion. Women's reproductive freedom and health should continue to be paramount concerns, he said.

After the hearing, at a rainy press conference on the steps of the Supreme Court, Stenberg and Carhart stood nearly side by side to answer reporters' questions.

If the court does not uphold Nebraska's law, Stenberg said, then no abortion procedure would be "too horrific, too barbaric," for the government to prohibit.

During a phone conference with Nebraska media, Stenberg said he was pleased with the arguments he presented and that the two key justices in this case, O'Connor and Kennedy, seemed interested in the arguments.

Stenberg said it was difficult to determine which way the decision would go.

"The court is clearly divided on this issue," Stenberg said.

If the court does rule against Stenberg, he said, it would mean the court was saying 20 other state attorneys general - who interpret their states' law on banning partial-birth abortions as limited to the D&X procedure - had interpreted their states' laws incorrectly.

Stenberg also said Carhart testified that 90 to 95 percent of the D&X procedures he performs fail.

"I don't think Dr. Carhart's testimony holds water considering his previous experience," Stenberg said.

At a press conference later, Carhart said he had performed "an act of citizenship and patriotism," by challenging the law and seeking to ensure "we don't make criminals out of doctors for doing what they feel is safest for their patients."

The Nebraska law originally was found unconstitutional by a district court and by the U.S. Court of Appeals for the 8th Circuit. The U.S. Court of Appeals for the 7th Circuit handed down a conflicting ruling, upholding similar laws in Illinois and Wisconsin.

The Supreme Court is expected to resolve those conflicting rulings.

Staff writer Michelle Starr contributed to this report.

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Don Stenberg
Nebraska attorney general

"The Nebraska statute is much broader than just a ban on D&X."

Simon Heller
lawyer for Dr. LeRoy Carhart

School of Music director named as interim dean

By Kimberly Sweet

Staff writer

The director of UNL's School of Music will take on the position of interim dean of the College of Fine and Performing Arts.

Lawrence Mallet will begin duties as interim dean of the college on July 1, provided the Board of Regents approves his appointment, said Richard Edwards, senior vice chancellor for academic affairs at the University of Nebraska-Lincoln.

Mallet will hold the position until a permanent replacement is found. He takes over for Richard Durst, who resigned last February to accept the position as the dean of the College of Arts and Architecture and executive director of University Arts Services at Pennsylvania State University.

Mallet said he wanted to help the college continue on its successful track.

"I look forward to the opportunities and challenges afforded in the

interim dean position," he said. "I think the college has made great strides.

"We must continue that growth in quality and in quantity."

Mallet said he wasn't sure how long his tenure would be but knew a search committee had been formed and was advertising for candidates.

The process of reviewing applications will begin May 31, Mallet said. The search committee hoped to have a new dean ready to start by Jan. 1, 2001.

Mallet became director of the school of music in 1993. He is a clarinetist and a conductor.

He earned his bachelor's and doctoral degrees from the University of Iowa.

He earned his master's from Ohio State University.

He earned Iowa's first-ever doctorate in conducting and has received teaching awards. He is also the conductor for the Lincoln Community Concert Band.

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12:00 - 5:00 p.m.
George W. Seadle Center
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Program of Events

- 12:00 p.m. The Local Food Scene: Snacks of Nebraska Products
- 12:30 p.m. Welcoming Remarks (Myron Brakke)
- 12:40 p.m. From Seed to Bread (Brief Introduction by Anne Vidaver)
- 12:45 p.m. Biotechnology: The Human Need in Plant Agriculture (Steve Baenziger)
- 1:30 p.m. Genetically Enhanced Plants (Tom Clemente)
- 2:15 p.m. Break
Taste Nebraska Foods and See the Posters of Biotech Research at UNL
- 3:15 p.m. Challenges to Biotechnology in Food Products from Animal Agriculture (Brief Introduction by Ruben Donis)
- 3:20 p.m. Cutting-edge Technologies to Refine the Old Art of Animal Breeding (Daniel Pomp)
- 4:00 p.m. Protecting Animal Health and the Consumer through Vaccines and Surveillance (Tim Miller)
- 4:45 p.m. Closing Remarks (Anne Vidaver)

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