Dan Eaton, Legal Analyst

During the confirmation hearings, the justices cited the long-standing stare decisis clause that settled law remains settled law, why did they even hear the case? – Bradley Tinnon, Oceanside.

Why would the U.S. Supreme Court agree to review a lower court ruling striking down a Mississippi law that essentially prohibits abortion after 15 weeks of pregnancy – weeks before a fetus may live outside the womb, i.e., viability – when decades of Supreme Court precedent established that (1) a woman has a constitutional right to terminate her pregnancy and (2) a state may not prohibit a woman from exercising that right before fetal viability?

The closest insight into why at least four of the nine justices agreed to hear this case is in the Court's announced statement of the question it agreed to answer in the appeal: "Whether all pre-viability prohibitions on elective abortions are unconstitutional."

As Chief Justice John Roberts pointed out in his concurring opinion in this case, the Court could have overruled the part of *Roe v. Wade* and *Planned Parenthood v. Casey* that barred pre-viability abortion restrictions without overruling the core right announced in *Roe* and *Casey* that a woman has a constitutional right to terminate her pregnancy at some point.

Stare decisis, which a leading law dictionary defines as "to stand by things decided," is a policy of judicial decision-making that a judge generally should apply rules announced in prior decisions, especially constitutional decisions. But *stare decisis* is not a "clause" found in either the U.S. Constitution or in any federal statute and it is "not an inexorable command," as Justice Samuel Alito noted in the majority opinion.

Writing for the majority, Justice Alito explained why he believed the factors judges consider in evaluating whether to overrule prior rulings weighed strongly in favor of overruling *Roe* and *Casey* in their entirety. Dissenting Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan explained why they believed those same factors weighed heavily in favor of reaffirming those precedents and striking down the Mississippi law.

Chief Justice Roberts agreed with the majority that the Mississippi law was not unconstitutional. He wrote that the Court's abortion precedents recognize a woman's right to terminate her pregnancy. "That right should therefore extend far enough to ensure a reasonable opportunity to choose, but need not extend any further – certainly not all the way to viability." Because the Mississippi law allows a woman almost four months to obtain an abortion, it provides her, in his view, an adequate opportunity to get an abortion.

But, he added, that was all he would decide in this case, "out of adherence to a simple yet fundamental principle of judicial restraint: If it is not necessary to decide more to dispose of a case, then it is necessary *not* to decide more." He called the majority's decision to go further and overrule *Roe* and *Casey* "a serious jolt to the legal system – regardless of how you view those cases."

In the majority opinion, Chief Justice Roberts's concurrence, and the dissenting opinion, then, there was general agreement on the factors Supreme Court justices should use to decide whether

to honor prior rulings, but three distinct views of how those factors should be applied in this case.

Since Roe v Wade provided fundamental rights to privacy and body autonomy for people with uteri, its overturn removed those rights. As women can no longer trust how our data will be used against us while we travel outside of "safe-for-now" states, what are the steps politicians in California will take to ensure our data is safe and won't be used against us in hostile states? – Sarina D., La Mesa

A CNN.com article posted in May and updated the day *Dobbs* was announced addressed how digital data could be used in prosecutions of those who seek or aid abortions in those states where abortion is criminalized. According to the article: "Various online behaviors could become part of investigations and court proceedings in states where helping to provide access to abortions is criminalized, including internet searches, location history, call and text logs, emails and financial records, according to Cynthia Conti-Cook, a civil rights attorney and tech fellow at the Ford Foundation. Any part of a person's digital footprint is fair game once a device is in law enforcement's possession, she said."

Action by individual states that protect abortion rights is likely to be less effective than action by federal officials and individuals themselves in guarding digital privacy.

The article describes efforts by Congressional Democrats, such as Senator Elizabeth Warren of Massachusetts, to urge federal regulators to investigate the use of advertising data, collected by Google and other companies, to prosecute abortion-seekers.

The article adds: "The Digital Defense Fund created a guide for women on how to keep digital footprints protected when seeking information on abortions. It includes tips such as opting out of personalized ads on Google and social media sites to minimize tracking, turning off location sharing and using privacy-focused browsers like DuckDuckGo or Firefox Focus that do not save search data, collect personal information or allow third-party trackers."

***What can we do to protect the remaining rights under the privacy umbrella from the same fate and is there any way to restore abortion access to women, particularly to women of limited economic means, in states that have made it illegal*?** – Anonymous, Vista

In his majority opinion in *Dobbs*, Justice Alito wrote that other rights under the federally recognized right to privacy, such as the right to interracial and same-sex marriage, were not directly threatened by the ruling. "Each precedent is subject to its own *stare decisis* analysis and the factors that our doctrine instructs us to consider like reliance and workability are different for those cases than for our abortion jurisprudence."

Justice Kavanaugh, widely considered the swing vote on this Court, wrote in his concurring opinion: "I emphasize what the Court today states: Overruling *Roe* does *not* mean the overruling of those precedents, and does *not* threaten or cast doubt on those precedents." (emphasis in the original.)

The dissenting justices were skeptical of the majority's assurances, writing: "Assume the majority is sincere in saying, for whatever reason, that it will go so far and no further. Scout's honor. Still, the future significance of today's opinion will be decided in the future. And law often has a way of evolving without regard to original intentions – a way of actually following where logic leads, rather than tolerating hard-to-explain lines. . . . [W]hatever the majority might say, one thing really does lead to another."

Reinforced protection of the related privacy rights may come through adding those rights to state constitutions and through a litigation strategy, in the face of state measures to curtail those rights, that focuses on how and why the *stare decisis* analysis is different in these other contexts than in the abortion context.

Restoring abortion rights in those places where they have been rescinded will be harder. State legislatures that are imposing increased restrictions on abortion are getting most of the attention in the aftermath of *Dobbs*, but state laws are only one part of the legal framework. Challenges are being mounted to some of these laws in state and federal courts, with some seeking to overturn all or parts of these restrictive laws based on state constitutions.

There is a dispute in the legal academy about whether Congress could enact right to abortion by way of a federal statute based on its power to regulate interstate commerce, enact legislation ensuring equal protection of the law under the fourteenth amendment, or both. Justice Kavanaugh in his concurrence hinted Congress has this authority, writing: "After today's decision, the nine Members of this Court will no longer decide the basic legality of pre-viability abortion for all 330 million Americans. That issue will be resolved by the people and their representatives in the democratic process in the States *or Congress*." (emphasis added.) For now, an evenly-divided Senate makes this question purely academic.

What are the legal implications for people in states like California to mail the morning after pill or provide other forms of non-surgical contraception to states where it is banned? --
Heather, La Mesa

Mailing a pill that induces abortion – even one approved by the Federal Food & Drug Administration -- to a state that prohibits such drugs is illegal. A July 6, 2022 article in the *Washington Post* headlined "To get banned abortion pills, patients turn to legally risky tactics" said: "The medications — mifepristone and misoprostol — are approved by the Food and Drug Administration and can be taken up to 10 weeks into pregnancy. The Biden administration has said the drugs have been authorized as safe and effective for use in all 50 states. But remote providers could be targeted in criminal probes by local and state prosecutors, get hit with civil lawsuits, and lose their medical licenses if they violate rules by prescribing and shipping pills to people in states where abortion is illegal."

The *Post* article further warns that, laws in California, Massachusetts and other states laws now prohibiting state officials from cooperating in official investigations from other states where abortion is illegal may not be enough to avoid professional harm to the sender of such pills: "Findings against a Massachusetts physician who practiced medicine without an Alabama

medical license, for instance, would still have to be reported to the Massachusetts Board of Registration in Medicine," according to health-care lawyer Dianne Bourque of the Mintz firm.

On June 24, Governor Gavin Newsom signed into law AB 1666 barring the application of any "law of another state that authorizes a person to bring a civil action against a person or entity civil actions in California state court" who receives or seeks an abortion; performs or induces an abortion; knowingly engages in conduct that aids or abets the performance or inducement of an abortion; or attempts or intends to engage in any such conduct.

Article IV, section 1 of the U.S. Constitution generally requires one state to give "full faith and credit" the public acts and judicial proceedings of every other state. The California legislature's legislative analysts have opined that AB 1666 would survive a challenge on this basis.

Can women from other states, such as Texas, be prosecuted for getting an abortion in California?

Perhaps not, partially because the criminal consequences of abortions are usually directed at those who provide or assist them rather than on the women who get abortions. Moreover, in his concurring opinion, Justice Kavanaugh said it was simple, as a constitutional matter, that the constitutional right to interstate travel blocks a state from barring one of its residents from traveling to another state to obtain an abortion.

And yet a recent article in *The New York Times* by its Supreme Court reporter Adam Liptak cautioned against relying on Justice Kavanaugh's aside. "The real-world issue, in any event," wrote Liptak, is not whether women seeking abortions would be stopped at the state's border but rather what would happen afterward — to the women, to those who helped them travel and to out-of-state abortion providers." The article quoted Professor Seth Kreimer of the University of Pennsylvania, who has written two law review articles on the right to interstate travel as it related to abortion, as saying that Justice Kavanaugh's comment " may not even suggest protection against prosecuting the resident upon her return — or seeking to sanction doctors in sanctuary states either by prosecution or damage actions."

Are there any restrictions on abortions in California?

Yes. According to the ACLU of Southern California, "California only prohibits abortions after the point of viability, which is when a physician determines based on a good-faith medical judgment that there is a reasonable likelihood the fetus can survive outside the uterus without extraordinary medical measures. Abortions can only be performed after the point of viability if a physician determines based on a good-faith medical judgment that continuing the pregnancy would pose a risk to the life or health of the pregnant person. These determinations are individual to the person and their situation."

According to an article posted on the website of KPBS sister station CapRadio in Sacramento, the Guttmacher Institute, which supports abortion access, ranks California as the only state that is

"very supportive" of abortion access based on 12 criteria. This November, Californians may go further by adopting a ballot measure sponsored by State Senate President Pro Tem Toni Atkins of San Diego that would explicitly add the right to abortion to the state constitution. The measure reads in part: "The state shall not deny or interfere with an individual's reproductive freedom in their most intimate decisions, which includes their right to choose to have an abortion and their fundamental right to choose or refuse contraceptives."

Which states are banning or severely restricting abortions?

The New York Times has a regularly updated dedicated page on its website giving the status of abortion access in the United States. The following nine states now ban abortion, in most cases with no exceptions for rape or incest: Alabama, Arkansas, Mississippi, Missouri, Oklahoma, South Dakota, Texas, Wisconsin, and West Virginia.

As many as 12 additional states may soon have laws that ban or severely restrict abortion, though some of those laws are now tied up in court: Arizona, Kentucky, Louisiana, Utah, Idaho, North Dakota, Tennessee, Wyoming, Ohio, South Carolina, Florida, and Georgia.

What are ectopic pregnancies and are there any restrictions on getting abortions for them?

WebMD describes ectopic pregnancy as "when a fertilized egg grows outside a woman's uterus, somewhere else in their belly. It can cause life-threatening bleeding and needs medical care right away."

According to Planned Parenthood, "Ectopic pregnancies are rare — it happens in about 2 out of every 100 pregnancies. But they're very dangerous if not treated. Fallopian tubes can break if stretched too much by the growing pregnancy — this is sometimes called a ruptured ectopic pregnancy. This can cause internal bleeding, infection, and in some cases lead to death."

According to a recently posted article on Healthline.com, "Currently, the restrictive abortion laws that have passed in certain states do not outright ban abortions for ectopic pregnancies.

"Though abortion restriction bills contain carve-outs for lifesaving care to the mother — which technically includes ectopic pregnancies — the vague language regarding what is and isn't legal could confuse healthcare professionals and cause them to delay care out of fear of being prosecuted, according to experts."