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READ: Supreme Court justices trade barbs in contentious non-decision in abortion case

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Iowa's Supreme Court may not have set any precedents Friday in a hotly contested abortion case, but that doesn't mean the justices didn't have a lot to say.

The court deadlocked 3-3, leaving in place a lower court ruling blocking a 2018 state law that would prohibit most abortions after the sixth week of pregnancy.

Nonetheless, three justices took up their pens to explain their thinking, showing unusually sharp divisions between members of a court — all appointed by Republican governors — that often rules unanimously even on contentious issues. Justice Thomas Waterman wrote in favor of keeping the law blocked, while Justices Christopher McDonald and Matthew McDermott both wrote in favor of lifting the injunction.

Here are some of the most notable comments from each side in Friday's ruling.

'Untrue statement' on Iowa's legal standard

Waterman wrote that the standard for judging abortion laws remains the "undue burden" test formerly used in federal court, and that the state has failed to take advantage of the opportunity to change it to one more favorable to abortion restrictions.

That opportunity came in the wake of a 2022 Iowa Supreme Court ruling that struck down an even stricter standard that held abortion to be a fundamental right. The standard Waterman said now applies focuses on whether a law places an undue burden on a woman's ability

to obtain an abortion. Abortion opponents want to see that ratcheted down to what is called "rational basis review." To pass this test, laws need only be “rationally related to a legitimate governmental interest.”

"The state should not complain now: we granted (in 2022) all the relief on the governing constitutional standard that it sought in that case," Waterman wrote.

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McDonald, though, accused Waterman of misreading a key 2015 precedent.

"My colleagues repeatedly state that (the 2015 case) adopted the undue burden standard for claims arising under the Iowa Constitution. That is an untrue statement, and repetition of the statement does not make it true," he wrote, asking later, "How can a case that specifically declined to find a right to terminate a pregnancy under the Iowa Constitution now serve as the legal basis for finding a law unconstitutional? Planned Parenthood and my colleagues have no legitimate answer."

And McDermott criticized the court for once again punting, in his view, on what the legal standard ought to be.

"We fail the parties, the public and the rule of law in our refusal today to apply the law and decide this case," he wrote.

To Dobbs or not to Dobbs?

McDonald accuses Waterman (and Justice Edward Mansfield, who wrote a key abortion decision last year and joined Waterman's opinion Friday) of flip-flopping on whether Iowa should follow the lead of the U.S. Supreme Court ruling known as Dobbs. That was the ruling last year that overturned Roe v. Wade, the case that made abortion legal nationwide.

"One of the reasons the plurality in (the 2022 decision) refused to announce a controlling legal standard was that it wanted to wait and see the opinions in Dobbs because those opinions would 'impart a great deal of wisdom [the court did] not have [on that day].' Now that Dobbs has been released, my colleagues reject the wisdom of Dobbs. But why?" McDonald wrote. "Until today my colleagues believed strongly that this court should presumptively follow federal precedents."

Waterman, for his part, pointed out that no other state courts have cited Dobbs to overrule their pre-existing state protections for abortion. He wrote that several have instead strengthened state-law protections, and that "we need not only look to Dobbs" for guidance on Iowa's legal standard.

"Today's case presents the state's second attempt at a shortcut to adopting Dobbs," he wrote. "Nothing has changed since last summer to warrant adopting Dobbs in this extraordinary proceeding."

More rights for garbage than women?

Waterman also took a shot at McDonald, who authored a recent opinion (opposed by Waterman) finding police cannot search trash left on the curb without a warrant.

"It would be ironic and troubling for our court to become the first state supreme court in the nation to hold that trash set out in a garbage can for collection is entitled to more constitutional protection than a woman's interest in autonomy and dominion over her own body," Waterman wrote. "That would be untenable."

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McDonald responded that his position in that case and Friday's abortion decision is the same: that Iowa has the right to interpret its own constitution separately from the federal constitution.

"The only thing my colleagues' discussion of (the garbage search case) proves is that I adhere to my own personal precedents," he wrote. "All judges should strive to do the same."

Does it matter why the 2018 law passed?

One reason not to reinstate the 2018 law, Waterman suggested, is the Iowa Legislature may not have even intended to apply it. At the time, Roe v. Wade was still the law of the land.

"When the statute was enacted in 2018, it had no chance of taking effect," Waterman wrote. "To put it politely, the legislature was enacting a hypothetical law. ... Uncertainty exists about whether a fetal heartbeat bill would be passed today."

McDonald wrote that the law was passed by lawmakers and signed by the governor in accord with the state constitution, and "contrary to my colleagues' assertion, it is not a 'hypothetical law.' It is an actual law."

McDermott reacted to Waterman's comment even more strongly.

"I've never seen this characterization of lawmaking in a judicial opinion," McDermott wrote. "They coin a new term, or create a new doctrine, as a means to undermine this statute. ... The legislature, we're supposed to conclude, didn't really mean it when they enacted the statute. It was all performative politics, all gesture and signaling, because the statute 'had no chance of taking effect.' So instead of analyzing the law as a law, they offer conjecture about the intentions of the elected representatives that passed the law."

'Not logical, legal or legitimate'

Furthering his point that the 2018 law might no longer have the support of legislators, Waterman also noted that the number of cosigners on an amicus brief filed by Republican legislators in favor of allowing the law to take effect would not have been sufficient to actually pass legislation.

McDonald described Waterman's reasoning as "not logical, legal, or legitimate."

"The public can review their reasons and decide, for example, whether it is logical, legal or legitimate to decide this case on the grounds that not enough nonparties to this case joined an amicus brief," he wrote.

Why didn't the Legislature pass a new law?

Waterman pointed out that the Legislature has had ample opportunity since last year to pass a new law with similar abortion restrictions, and argued again that it's not even clear the Legislature would support passing such a bill today.

"When the general assembly convened for the 2023 session, the legislators already knew that the district court had denied the state's motion to dissolve the 2019 injunction. That denial occurred in December 2022. Yet the state chose to hold out for the possibility of an expedited, discretionary review and reversal by this court rather than proposing that the legislature reenact the law," he wrote.

McDermott said he was 'embarrassed' by this line of reasoning.

"At the risk of further spitballing about legislators' motivations in a case already too long on such misadventures, I'll simply say that I'm embarrassed to think that we might actually fault the legislature for believing that the judiciary could correctly and more efficiently resolve the issue in this appeal," he wrote.

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