

Gaggle on AZ Abortion Ban

Ron Hansen [00:00:02] Arizona's Supreme Court thrusts the state into the center of the national debate over abortion rights, with a ruling that upheld a 19th century law barring abortions except to save the life of the mother. The legal bombshell Tuesday drew reactions from the white House on down, and could motivate even more people to vote in November. It also led some Arizona Republicans in tight races to distance themselves from the ruling, such as Senate candidate Kari Lake and Congressman Juan Cisco Armani and David Schweikert.

Mary Jo Pitzl [00:00:44] Democrats, meanwhile, leaned in on the decision. Governor Katie Hobbs expressed her views in a press conference shortly after the announcement.

Gov. Katie Hobbs [00:00:53] It is a dark day in Arizona. The Arizona Supreme Court issued its opinion in *Plant parenthood females*, upholding one of the most extreme abortion bans in the country.

Mary Jo Pitzl [00:01:06] Some Republican lawmakers are getting on board with Hobbs call for a repeal of the law. This likely reflects public sentiment on the issue and the political potency of the matter in one of America's premier swing states.

Ron Hansen [00:01:26] Welcome to The Gaggle, a politics podcast by The Arizona Republic and azcentral.com. I'm Ron Hansen. I cover national politics for the Republic.

Mary Jo Pitzl [00:01:37] And I'm Mary Jo Pitzl. I cover state politics and policy. Today, we're examining Arizona's newly revived and ancient abortion ban, what it means politically and legally. But before we talk to the Arizona Republic, Stacey Barchenger and law professor Carl Tobias, here's some of the reaction after the ruling came down Tuesday. Outside the state Capitol, Democrats and pro-choice supporters gathered. Yolanda Bejarano, the chair of the Arizona Democratic Party, had this to say.

Yolanda Bajarano [00:02:19] This ruling is a result of Republicans decades long fight to end abortion rights. Less than two years ago, Donald Trump overturned Roe and continues to brag about it. We remember when Doug Ducey and the Republican legislature pushed through a 15 week ban, and we remember when congressional Republicans sponsored legislation that would enact a national ban. We also remember Sonny Borrelli humiliating Arizona and saying to hold an aspirin between their knees to prevent pregnancy. It is hard to believe that a law from 1864 is now taking away the rights of millions in 2024.

Mary Jo Pitzl [00:03:01] Attorney General Kris Mayes promised to support and defend women's reproductive choices.

Kris Mayes [00:03:08] Good morning and thank you for being here. Fighting for reproductive freedom, a cornerstone of my administration, because the people of this state deserve to make their own private medical decisions without interference from the government or anti-abortion activists. The decision by the Arizona Supreme Court today is unconscionable and an affront to freedom.

Ron Hansen [00:03:38] On the other side of the spectrum, those against abortion rights have been celebrating. Here's reaction from one such person supporter, Lucy Smith.

Luc Smith [00:03:48] Well, we're celebrating because it really it's going back to where abortion is not legal and not going to be happening in our state, because women really never need an abortion for health reasons. You would deliver baby early, treat mom and baby, so it's going to save lives. And so that's why we're so excited.

Eric Hazelrigg [00:04:08] My name is Doctor Eric Hazelrigg, and I'm honored to serve as a representative for unborn children in Arizona and its important case before the Arizona Supreme Court. We pray that unborn children will be protected under Arizona law, and that women and families receive real support and real health care. We all deserve the dignity and respect that is upheld by laws that affirm that life is a human right.

Ron Hansen [00:04:31] In Washington, DC. Arizona Senator Mark Kelly expressed his dismay over the ruling.

Mark Kelly [00:04:37] From a law that was passed in 1864, before Arizona was a state, actually 48 years before Arizona became a state. Senator Stabenow mentioned one out of three women live in a state that have an extreme abortion ban. Well, about 30 minutes ago, that number went up. This is going to criminalize doctors for doing their jobs, and it's going to have a devastating effect on the health and freedom of women in Arizona.

Ron Hansen [00:05:13] Senate candidates Ruben Gallego, a Democrat, and Kari Lake, a Republican, have also shared their views.

Ruben Gallego [00:05:21] For many, many people, especially women all across the country, of all across the state, Democrat, independent or Republican. They want to know that they will still be able to control their bodies and have a right to me.

Ron Hansen [00:05:35] Here's a portion of lake's statement on the state Supreme Court's ruling on Tuesday. She said, "In addition to covering the state of Arizona as a fair and honest journalist, for 27 years, I have traveled to every corner of this state on the campaign trail. I speak to more Arizonans than anyone, and it is abundantly clear that the pre statehood law is out of step with Arizonans." But in 2022, Lake, who was then running for governor, had a very different view on the subject.

Kari Lake [00:06:08] I'm incredibly thrilled that we are going to have a great law that's already on the books. So it will prohibit abortion in Arizona, and I think we're going to be paving the way and setting course for other states to follow.

Mary Jo Pitzl [00:06:28] With all that setting the table. Here's what our experts had to say. Joining us from our Capitol bureau is Stacey Barchenger, a state politics reporter for the Republic. Stacey, thanks for stepping away from your keyboard to join us.

Stacey Barchenger [00:06:47] It's been a busy day in the Capitol bureau. As you know, Mary Jo.

Mary Jo Pitzl [00:06:50] Well, give us a recap of the court's ruling, what it means for abortion care in Arizona, both immediately and maybe a little bit down the road.

Stacey Barchenger [00:07:00] Yeah. So at the most basic level, this frankly shocking decision from the Arizona Supreme Court says that a pre statehood ban on abortions is enforceable. That means county prosecutors that want to pursue doctors who provide abortions at any stage in a pregnancy, unless it's to save the life of a mother. They can

pursue those criminal cases, potentially exposing doctors to time in prison. Now, there's a caveat. We have this court ruling and the justices stayed there ruling for 14 days. So you won't see any enforcement of this ban for at least 14 days. Several other involved parties on both sides of the case have also pointed to this separate court order. That means abortions up to 15 weeks could continue through about May. So you won't see an abrupt stop in abortion care because of this ruling, but that could come by this summer.

Mary Jo Pitzl [00:07:59] You say it's a shocking ruling. Perhaps that has something to do with the fact that this law was created 160 years ago, but what were the justices reasoning in why they allowed the law to stand?

Stacey Barchenger [00:08:12] The job before them was to figure out how these two conflicting laws go together, or don't. This is the 1864 almost total ban, and a 2022 law that prevented most abortions after 15 weeks of pregnancy. So they took this task of trying to figure out how those two laws go together. If they don't, and what the four justices in the majority said was that the 2022 law explicitly said it did not repeal any existing laws to include this 1864 ban. So that was really pivotal to their decision. And they also pointed to numerous other laws over the years when the legislature has restricted elective abortions. They say that the legislature had a clear intent over all these years to restrict abortions. And when Roe versus Wade was overturned in 2022, that allowed those more restrictive policies to be enforced to go into effect.

Mary Jo Pitzl [00:09:18] So there were two justices who voted against this ruling. What was their reasoning?

Stacey Barchenger [00:09:25] Yeah. So the vice chief justice and Timmer and Chief Justice Robert Brudenell joined in a dissent. They basically said, and in sometimes quite fierce terms, that the majority got it wrong. Justice Timmer wrote that how the majority interpreted the legislature's intent was something she did not agree with because she would not, quote, engage in the guesswork that they did. She said it was implausible to conclude the legislature planted within the language of the 2022 bill. Her words a bombshell of reverting to a near-total ban on abortion. In her view, the 15 week law created basically an exemption to the all out ban.

Mary Jo Pitzl [00:10:12] So given the furor that we've seen immediately to this ruling, Governor Hobbs seemed to have a pretty quick fix. She said repeal the law. Will that make the controversy go away? And what are the chances of the Republican legislature heeding Hobbs call to do away with the 1864 ban?

Stacey Barchenger [00:10:31] This is something that we've heard from the governor before. You know, multiple times this year, we've heard from her and other abortion and reproductive health care advocates that the state legislature needs to act to get this law off the books. Previously, they said they needed to do it so that this ruling could not happen. Whether it changes anything for Republican lawmakers to be determined. I don't believe we've seen any, you know, calls for that right now. But of course, we're still processing. People are still, you know, dealing with kind of the emotion of this whole situation.

Mary Jo Pitzl [00:11:07] Again, recognizing that this is early. I'm wondering who benefits from the ruling, politically speaking.

Stacey Barchenger [00:11:12] Yeah. Well, of course, you know, there's fallout for this decision as it relates to health care, but you can't talk about this issue without talking about

politics this election year, right? We have all 90 lawmakers on the ballot shortly after this decision came down. The vice president announced she would be coming to Tucson on a continued tour to talk about the importance of protecting reproductive health. Care. This is absolutely an issue in its broader context that Democrats are trying to use to distinguish themselves in their appeals to voters this year. They are the party, they say, that will protect these rights, and that is their sort of pitch to voters that really could play into the legislative races. You know, as we were sitting here, we got a text message from the state party fundraising off of this ruling to help flip the legislature. They're certainly going to try and use this to their benefit. Well, they also oppose what it means in practice. The other way this could have a political impact is groups like Planned Parenthood and the ACLU are well on their way to make the ballot in November with an initiative that would put abortion access into the state constitution. They announced last week 500,000 signatures. That's, you know, well over what they need, but they're still going to continue this effort. They say that ballot measure is necessary no matter what the court rules. But you have to think that a voter, given this sort of drastic black and white option of a ban and protections through viability, maybe that voter tips in favor of the ballot measure.

Mary Jo Pitzl [00:12:54] Is there any way in which Republicans might benefit from today's decision?

Stacey Barchenger [00:12:59] Well, that's pretty hard to see from this vantage point. Maybe this spurs them to action. Maybe they do come up with some sort of stopgap measure. Maybe they do decide to repeal the 1864 law and reaffirm the 15 week law. But that remains to be seen.

Mary Jo Pitzl [00:13:20] Another question that's come up in the midst of all this today is the ruling talks about abortions. What does it mean for medication abortions?

Stacey Barchenger [00:13:29] Yeah. So as far as we know, abortions, no matter the manner in which they are performed, are banned under this ruling unless to save the life of a mother. Most abortions in Arizona and elsewhere happen through a procedure done by pills, not surgical abortions. But as we understand it, either type cannot proceed under this ruling.

Mary Jo Pitzl [00:13:53] Stacy, are there any other immediate takeaways you have from this pretty momentous decision?

Stacey Barchenger [00:13:58] You know, only that it seems like Arizona is always at the national forefront as a swing state, and I think this solidifies us there. The vice president is coming. They're going to try to turn out the vote on this issue. And it could be a really close reelection for the president here. And maybe this tips the scales to be determined.

Mary Jo Pitzl [00:14:21] Well, thanks again so much for taking time to talk with us today. If our listeners want to follow your work, where can they find you on social media?

Stacey Barchenger [00:14:29] Yeah, you can find me on social @sbarchenger. That's s-b-a-r-c-h-e-n-g-e-r.

Ron Hansen [00:14:42] Turning now to the legal fallout of all this. We're connecting with University of Richmond law professor Carl Tobias. There, he holds the law school's prestigious Williams chair and writes in a number of areas with a particular emphasis on federal judicial selection. Carl, thanks for joining us, especially on short notice.

Carl Tobias [00:15:02] Thank you for having me.

Ron Hansen [00:15:03] So what is happening now with this case legally? What is the status? What are the unanswered matters that will be ironed out as this thing continues to wend its way through the courts, if there are additional hearings?

Carl Tobias [00:15:18] Well, it came up from the trial court to the intermediate appellate court in Arizona and was favorable, I think, to people who were opposed to abortion restrictions and then was appealed to the Supreme Court and Supreme Court reversed, basically the lower courts and said, no, this very old law from the 19th century was now back in force. That's where we are, though the judges on the Supreme Court, the majority did say that they would give some time for appeals and also the possibility of sending it back to the trial court to then thrash out certain constitutional arguments if the pro-choice litigants wanted to do that. So I think that's where it is procedurally.

Mary Jo Pitzl [00:16:16] Let's talk a little bit about, as we've mentioned, you know, what the law does. And it does go back to a standard that was established in 1864, and it would require jail time for any doctor or medical professional who would provide abortion care. How do you see this being enforced and is it enforceable in the 21st century?

Carl Tobias [00:16:39] That's a good question. As I read what has been said since it issued the attorney general of the state saying she will not enforce it, which also raises very interesting questions about whether they can have a public official who's elected, not enforce the law. But I think that's her position. And so it may be that she is then sued to try to force her to do that, but I don't know exactly how that would happen. So it's just not clear exactly where this is going to end. Up next, though, it may well start back at the trial court and then go back up at some point.

Mary Jo Pitzl [00:17:23] As long as we're talking about the legal process. I am unclear, but is this decision potentially appealable to the U.S. Supreme Court? This has all been running through the Arizona courts up until now.

Carl Tobias [00:17:36] It could be, but I think not immediately because as I read the opinion, the justices were saying it should go back. If the pro-choice forces want to make the arguments on a constitutional basis in the trial court, and then it would come back up, would be their contemplation. Now, someone could probably try to appeal this if they wanted to, to the US Supreme Court, but I think the US Supreme Court would say, wait a minute. The Arizona Supreme Court wants you to go back to the lower court. And so the justices might well deny any kind of attempt to do that. And so it looks like to me, the next thing would be something going on in the lower court there.

Ron Hansen [00:18:24] Carl, can you clarify what issues will be examined back in the trial court?

Carl Tobias [00:18:31] The opinion from the Supreme Court said that all of the constitutional issues involving the statute and its interpretation, or the section of the code in Arizona, if the pro-choice people wanted to make the arguments about the Constitution and where where the abortion law stands now, they could make those because the Supreme Court, I think, just said the majority said, we are really finally deciding all of those issues. We're just looking at the statutes that existed as far back as the 19th century and trying to reconcile them. But did it in a way that then meant, that it was very harsh in its

operation. Unless challenged. So there is that opportunity that the Supreme Court mentioned in its opinion, and I assuming that the litigants would take up the lower courts on that invitation.

Ron Hansen [00:19:35] Is there any alternative litigation that could grow out of. This, with different litigants involved in trying to get any kind of clarity on this from the U.S. Supreme Court more quickly. Does this case have to run its course fully, or would the courts just prefer to see it that way? For judicial economy to just keep it with one matter, even if a second were an option?

Carl Tobias [00:20:02] I think that the justices would just use the excuse, if you will, to allow it to finish in Arizona. That's the way they typically proceed. And I don't think the way it's been teed up is likely to appeal to the justices in a way that they want to take up now because they think it ought to finish in Arizona. You know, one thing that could happen, though, it seems to me, is that someone could sue the attorney general and say, you're not doing your duty. Invoke something like mandamus to say, you public official, you must do your duty in this context and enforce the law as interpreted by the state Supreme Court. Which is another interesting question, but a difficult one.

Mary Jo Pitzl [00:20:52] Do you see, even though you seem to contend that this will probably run its course first within the state courts? Is there anything in this ruling that is at odds with the national law now, as set by the Dobbs decision?

Carl Tobias [00:21:09] I don't think so, because I think what Planned Parenthood and others have been contending is that you have to look at Arizona law and see what it says. You know, I think that's where we are.

Ron Hansen [00:21:23] Carl, obviously, all of this is happening against the backdrop of a very consequential election. We presume where Arizona figures to be among the more important states in determining who wins the white House, who will control the U.S. Senate, who will control the U.S. House. There's a lot on the table with all of this. Can you give us a sense of where Arizona's law, especially in light of this ruling, is? Where we stack up relative to other swing states in America on the matter of abortion rights?

Carl Tobias [00:21:57] Well, I think after today, if this stands, it would be among the most restrictive. As I understand it. If this decision were to stand and you go back to the 1860s for the law, that applies, but it's not likely to be resolved right before November. It seems to me either this could go back down and come back up through the appeals courts and into the state Supreme Court, and then maybe on to the US Supreme Court. So all of that is not going to happen. I think before November.

Mary Jo Pitzl [00:22:35] Arizona's governor, Katie Hobbs, this morning called on the legislature to go ahead and repeal the 1864 law. And already we've heard from at least two potentially moderate Republicans saying this has got to go. If the legislature were to follow the governor's advice, does that cut short then any other litigation regarding this measure, this 1864 law?

Carl Tobias [00:23:03] It seems to me worth asking. And I think it's creative whether the votes are there. I don't know, but I assume the governor would sign it if that were to happen. And that's fascinating to me. I think that that could be a result if the votes are there. And so that would sort of take it off the table, I think potentially.

Mary Jo Pitzl [00:23:27] Would there be any circumstance that you can think of where it might keep it on the table?

Carl Tobias [00:23:32] Well, if it's a very close vote, yes. It could be that there would be a compromise struck. That would be not as harsh as this one moving back to the 1864 law, but might modify some of that or make some some trade offs or, you know, even agree on, I don't know, 15 weeks or something like that. Possibly.

Ron Hansen [00:23:58] Very good. Well, Carl, we appreciate your time and we will let you go, sir.

Carl Tobias [00:24:03] I enjoyed it. Thank you.

Mary Jo Pitzl [00:24:12] That is it for this week. Gaggle listeners have questions about today's episode or topics you'd like us to cover on the show. Send us a message at (602) 444-0804, or send a voice memo to thegaggle@ArizonaRepublic.com. That's all one word, all spelled out. This episode was edited and produced by Kaely Monahan with production assistance from Amanda Luberto. Episode oversight is by Kara Edgerson and our news direction is from Kathy Tulumello.

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Mary Jo Pitzl [00:25:32] And I'm @maryjpitzl. That's p i t z l. The Gaggle is an Arizona Republic and azcentral.com production. Thanks for listening and we'll talk to you next week.