

(Intro music)

Hillel Aron: Welcome to Sidebar, a podcast from Courthouse News. I'm your host, Hillel Aron. Today on the show, abortion law is back on the Supreme Court menu, and I'm joined by our Supreme Court correspondent, Kelsey Reichmann. Hi, Kelsey.

Kelsey Reichmann: Hello.

HA: So, it's been nearly two years since the Supreme Court overturned *Roe v. Wade*.

KR: Yes. For a refresher, in *Dobbs v. Jackson Women's Health Organization*, the conservative majority said it was overturning the federal right to abortion recognized in *Roe v. Wade*, returning the issue of abortion to the states. The justices said they no longer wanted to be responsible for evaluating the interests of pregnant people, turning that responsibility over to the process of democratic self-governance.

HA: But the Supreme Court is now going to hear another case that could impact abortion access nationwide, isn't that right?

KR: That's correct. In just one of the many blockbuster cases on the court's docket this term, the Supreme Court will review the FDA's approval of mifepristone, one of two drugs used in medication abortions. Mifepristone was approved by the Food and Drug Administration over two decades ago and has been used by over five million people since. Its safety record rivals those of Ibuprofen and Acetaminophen, but doctors opposed to abortion want mifepristone pulled from the market for safety concerns. The justices will be examining the abortion pill on March 26th, but the case also presents the court with an opportunity to comment on federal government authority, another hot topic on the docket this term. From a thousand-foot view, this case provides insight into just one of the ways the anti-abortion movement has continued its efforts to ban abortion since *Dobbs*, with the end goal being a complete and total ban on the procedure nationwide.

HA: What's happened since *Dobbs*? How many states have passed abortion restrictions?

KR: Bans and restrictions on abortion have mostly played out as predicted. According to the Guttmacher Institute, which tracks abortion access nationwide, 14 states currently have total abortion bans and seven states have strictly limited the procedure, outlawing abortions earlier in pregnancy than the standard in *Roe*, but 15 states have made efforts to protect abortion access. None of these outcomes are really all that surprising. You can find dozens of articles predicting what a post-*Roe* world would look like before the *Dobbs* decision. What we know to be true before and after *Roe* is that people will have abortions no matter the legality of the procedure. After *Dobbs*, we've actually seen an increase in abortions. In 2023, the first full year without *Roe*, over one million abortions occurred, a 10% increase since 2020.

HA: What are the anti-abortion groups trying to do to further restrict legal abortion?

KR: The abortion pill fight before the Supreme Court is one option. A group of anti-abortion doctors who do not prescribe the pill challenged mifepristone's FDA approval, attempting to remove the drug from the market. The lower court's ruling would have done that for them, but the 5th Circuit limited U.S. District Judge Matthew Kacsmaryk's ruling, finding that mifepristone's initial approval could stand. The appeals court would still roll back access to the pill, however, and if upheld,

mifepristone would only be prescribed up to seven weeks gestation instead of the current 10 weeks. Abortion seekers would also have to attend multiple in-office doctors' visits, as opposed to telehealth consultations, to receive the pill, and they would have to take the drug under the doctor's supervision instead of receiving it through the mail. But the justices will have the final word here. Any limits on abortion pills will be huge in the post-Roe era. Professor Dale Cecka, director of the Family Violence Litigation Clinic at Albany Law School, represents survivors of domestic violence. She said reproductive control is just another weapon in an abuser's arsenal.

Dale Cecka: It's all about power and control, and laws that give women less control over their own bodies are something that would just play right into the hands of an abuser.

KR: To understand where anti-abortion advocates are focusing next, it's helpful to look back at how *Roe* fell. Many legal experts describe *Roe*'s demise as death by a thousand cuts. Abortion rights were limited time and time again with stipulations like waiting periods and informed consent. The anti-abortion movement would have preferred just to overturn *Roe* right away, but there wasn't an appetite on the court to do so before *Dobbs*. So, when it was not popular to take a big leap, the movement took smaller steps. That is what we're seeing now. One of the flashpoints in the post-Roe era has come from Alabama. The state Supreme Court ruled in February that in vitro fertilization embryos could be considered children under state law. Alabama's ruling grabbed the nation's attention as IVF facilities statewide had to stop the popular procedure.

HA: This ruling seemed like a bit of a shock to state and federal lawmakers and even some anti-abortion conservatives, right?

KR: Yes, I think it was for some people, but for those following the push for fetal personhood, it wasn't so surprising.

HA: Fetal personhood, that's the movement to try to treat fetuses like humans?

KR: Right, it aims at assigning the same rights for people to embryos or fetuses. The most extreme version of this theory starts those rights at conception. Chelsey Youman, the national legislative adviser for Human Coalition Action, said fetal personhood would give embryos or fetuses the same rights as any living child.

Chelsey Youman: Children in the womb are children. They're human and they deserve personhood rights under the 14th Amendment just like any other human. Just like a human outside of the womb could not be intentionally killed or harmed or battered under our laws in the United States or assaulted under our laws in the United States, a child in the womb would also have the same protections as a human being outside the womb from being harmed or battered or assaulted.

KR: It might seem like Alabama's ruling came out of the blue, but Alabama has been recognizing fetal personhood for over a decade. It started with a 2006 chemical endangerment law intended to protect children from exposure to homegrown methamphetamine labs. Hope Ankrom would be charged under this law in 2009, but not because she endangered a child as traditionally recognized. When Ankrom gave birth to her son, he tested positive for cocaine. Ankrom had also tested positive for the substance before she gave birth. Ankrom was arrested and charged with chemical endangerment of a child. A grand jury indicted her with knowingly and recklessly exposing her child to cocaine. Ankrom tried to get the indictment tossed, arguing that the law clearly only applies to

children, not fetuses. A trial court dismissed her motion. She pleaded guilty but appealed to the Alabama Supreme Court, asking the court to revive her previous argument that the law only applies to children. The Alabama Supreme Court upheld Ankrom's conviction. The court relied on a similar case from the South Carolina Supreme Court that was decided in 1997. South Carolina's ruling found that a child under the statute can refer to a viable fetus. Alabama took that one step further, applying the law to any fetus. Just one year later, in 2014, the Alabama Supreme Court reaffirmed Ankrom's ruling in *Hicks v. Alabama*, ruling that prosecuting pregnant people under the 2006 statute was permissible. The Alabama Supreme Court's decision this year, finding that IVF embryos are children, cited *Ankrom v. State* eight times.

HA: Eight times. How are we just hearing about this now?

KR: Grace Howard, an associate professor of justice studies at San Jose State University, had an answer for you.

Grace Howard: People are like what, how did I miss that? Here's how you missed it. You didn't care because the people who were bearing this burden were almost exclusively impoverished drug users. I'm so glad that people are outraged, they should be. It is outrageous. But I also cannot help but wonder like, oh, now that this is impacting a population that mostly has resources, mostly is white, now we are outraged. We should have been outraged a decade ago. I think that if we had been outraged a decade or even two decades ago about what we were doing to these most vulnerable, marginalized, despised people, I don't know if we would be where we are right now.

KR: We're not talking about one or two cases here. Howard analyzed over 700 of these cases for her forthcoming book, "The Pregnancy Police: Conceiving Crime, Arresting Personhood." Pregnancy Justice, a legal organization advocating for pregnant people's rights, reported almost 1,400 criminal arrests of pregnant people between January 1, 2006, and June 23, 2022, the day before the *Dobbs* ruling. Pregnancy Justice's study found cases of pregnancy criminalization in 46 states, but almost 80% of these cases came from just five southern states and, of those five states, almost half of those cases come from Alabama. All the states with the highest percentage of pregnancy criminalization expanded their definitions of child abuse to include fetuses, fertilized eggs and embryos.

HA: Are all these cases related to drug use?

KR: The majority are. The Pregnancy Justice study found that nine in 10 of these cases included substance use while pregnant. The three most common substances in these cases were methamphetamine, cannabis and cocaine. However, the study also found that nearly a quarter of cases involved legal substances like prescription opiates. Laws in some of these states require healthcare or social workers to report pregnant people's use of drugs or alcohol as child abuse, so some of these people go to hospitals seeking help for their addiction and are charged with a crime instead. People who study these cases aren't advocating for drug use during pregnancy. Howard said pregnant people are being treated differently than anyone else, and this treatment has created the idea that fetuses have rights.

GH: People might say, "Oh, you think pregnant women should have special rights to use illegal drugs?" No, when people get in trouble for drugs, they get in trouble for possession, manufacturing,

sales, operating a vehicle under the influence of, maybe public intoxication. Not for use. Right, not for use. Your medical information is supposed to be private. They are not supposed to hand it over to the cops, right? If you test positive for drugs at your like crappy minimum wage food service job, they're not going to call the cops on you unless you're pregnant, in which case they might. They might decide that the fetus or the fertilized egg or embryo is a legal person and I have an obligation to report harm or threat of harm against people, and so I will report this pregnant woman to the cops.

HA: What happens to these women?

KR: A lot of them lose custody of their children, but some, particularly those in Etowah County, Alabama, are arrested and jailed while pregnant. Dana Sussman, deputy executive director at Pregnancy Justice, said Etowah County is ground zero for pregnancy criminalization. Pregnancy Justice is part of a federal civil rights lawsuit filed on behalf of pregnant women who were mistreated while incarcerated.

Dana Sussman: We started to hear stories of women who were forced to endure horrific conditions surrounding their births in the jail or lack of care as they labored by themselves for significant periods of time, and Ashley Caswell was one of those women who shared her story with us, and it was one of the most horrific things we had heard. And yet there is a pattern of this treatment of pregnant women in the Etowah County jail and we document a few other stories in the complaint.

KR: Caswell was arrested in March 2021 for chemical endangerment of a child. She was two months into a high-risk pregnancy at the time. The lawsuit accuses Etowah County Detention Center of denying her medical care during her pregnancy, despite knowing her medical history. It denied Caswell access to her prescribed psychiatric medication and prenatal care. She slept on the floor for her entire pregnancy because the detention center does not allow pregnant women to sleep on top bunks, which is where she was assigned to sleep. After her water broke, Caswell labored alone in a cell in the medical unit for 12 hours after staff refused to take her to an emergency room. Some corrections officers told her to stop screaming and just deal with the pain. She requested an epidural but received a single Tylenol pill. She delivered her baby in the shower room where officers had taken her to wash off the blood from her labor. Caswell handed her baby to one of the officers before fainting. When she gained consciousness, officers took pictures with her baby still connected to the umbilical cord. According to the lawsuit, Caswell is just one of many who have suffered inhumane treatment at the jail. Local reports found that Etowah County has jailed over 200 pregnant women in recent years, more than any other county in the state.

DS: The fact that this is a county that has chosen to prosecute more pregnant and postpartum people than any other in the country and yet provides the most insufficient medical care to those pregnant and postpartum people needs to be called out. And while we can't challenge the underlying premise of their prosecutions because the Alabama Supreme Court has ruled that fertilized eggs are people and so exposing them to some perceived or actual risk of harm in utero is essentially per se child abuse or child endangerment, what we can do is hold them accountable for their responsibilities once they've decided to arrest and detain all of these pregnant and postpartum people.

KR: We'll be right back after a quick break.

Ben Weiss: Hey, this is Ben Weiss. I'm Courthouse News' Congress reporter based in Washington. Covering Capitol Hill for a publication like CNS doesn't just mean writing about the issues of the day. It also means taking a look at topics that don't necessarily make a lot of headlines. Things like fights over federal judgeships, the effects of AI technology on copyright law, even lawmakers pushing to get cannabis plants displayed in the U.S. Botanical Garden. These are the kinds of stories about Congress that you'll find on Courthouse News and nowhere else. You can follow my work in the nation's capital on X @BenjaminSWeiss, or read my stuff daily on courthousenews.com, and listen to Sidebar, a podcast from Courthouse News, for more from our talented journalists all over the country. Thanks for listening. Now back to the episode.

KR: Criminalizing drug use during pregnancy is part of the slow climb towards fetal personhood. Sussman said once fetuses are considered people in some areas of the law, it's difficult to take away that personhood in other areas.

DS: This is another death by a thousand cuts because you're starting to see it sort of become normalized without a lot of outrage. It's hard to get people to be outraged about what some what perceived as innocuous or even beneficial that you could get a tax credit for an embryo, right or that you could get child support for an embryo, but what this ultimately means is we are designating embryos and fertilized eggs with legal status that will serve to diminish and undermine the rights of pregnant people and all people with the capacity for pregnancy.

KS: If Alabama can prosecute pregnant people for drug use, what's to stop the law from applying in other circumstances?

HA: So, Alabama is using a chemical endangerment law to go after pregnant drug users. By that logic, wouldn't any state law regarding child abuse apply to fetuses?

KR: That's the thinking. Pregnant people are already charged under child endangerment laws for things other than drug use. For example, one pregnant woman tried to evade the police and she received a reckless endangerment of a minor charge. There are also more innocuous laws that help build up the idea of fetal personhood. Murdering a pregnant person carries a higher penalty than someone who isn't pregnant. And Sussman said laws recognizing some form of fetal personhood do not only exist in the South.

DS: Fetal homicide laws, what you just described, exist in 38 states and those are laws that have been passed, mostly in the 90s and early 2000s, that designate fetuses as a separate legal entity for the purpose of charging a defendant with a separate crime in connection with the loss of a pregnancy, when you attack a pregnant woman. So, in these horrific cases, a pregnant woman might be killed or very seriously injured, and the pregnancy is also lost. So, instead of charging someone with the murder or assault of one person, you can charge them with the murder or assault of two people. And again, these are, I think, are there in 38 states, so they're not limited to the states that have broader fetal personhood laws, but what they have done is normalize this idea that fetuses are separate legal entities.

KR: California is one of the 38 states with feticide laws. In 2019, Chelsea Becker had a stillbirth and the state charged her with murder. Becker had used methamphetamine while pregnant and California claimed her drug use caused the stillbirth. Becker spent 16 months in a county jail because she was unable to pay her \$5 million bail. Pregnancy Justice represented Becker in the case and successfully argued that there was no scientific evidence that methamphetamine ends pregnancies, and Becker's case was dismissed. It's not clear where the line would be drawn if fetuses receive full personhood rights. Aziza Ahmed, a law professor at Boston University studying the intersection of law, politics and science, compared this question to one the late Justice Antonin Scalia asked during oral arguments over the Affordable Care Act. Scalia opined that if the government could force Americans to buy health insurance, could it also force people to buy other things, such as broccoli?

Aziza Ahmed: Scalia and the conservatives were so amped up about was that, if we allowed the federal government to basically make us participate in health insurance markets, what's next? They're going to force us to eat broccoli? You know, and everyone talked about it all the time like oh, Scalia thinks the government's going to make us eat broccoli. Are they going to make us eat broccoli? It came like a media talking point, but actually this is a much more realistic scenario in the fetal personhood context, where they're going to say like this is how we define, you know, taking care of these children in utero. And if you don't take care of them that way, the way we say you should take care of them, then we're actually going to take custody of your child or, you know, prosecute you for neglect.

KR: While controlling the diet of pregnant people certainly feels like an outlandish idea, some people would say the same thing about Alabama considering frozen IVF embryos children. The Supreme Court has already been asked to take up fetal personhood cases. Not even three months after *Dobbs*, Catholics for Life and two pregnant people asked the court to decide if fetuses have 14th Amendment rights. In the mifepristone case, the justices were asked to allow one lawyer to intervene to represent fetuses terminated by abortion pills. The court rejected both petitions, but more rulings like Alabama's may force the justices to jump into the debate. But the Supreme Court is not the only pathway for fetal personhood.

DS: Fetal personhood is the end game, and there's a bill in Congress with many cosponsors that would codify personhood right now, and the language of fetal personhood has been infused in the *Dobbs* decision and I think we'll see more of it in the Supreme Court cases that are going to be heard this session, and I think everyone needs to truly understand what this means, not only for reproductive health care, but also for the rights and personhood of half of the population that can become pregnant, because it's not just about those moments of pregnancy, right, it is if you are the capacity for pregnancy, your life can be upended by this. So, the implications are vast, they're scary and we need to really grapple with them.

HA: If Alabama has recognized fetal personhood for decades, then why was the IVF ruling such a shock to state lawmakers?

KR: IVF sits in this very complex space in the abortion conversation. Ahmed said there's an IVF carve out in many abortion bans.

AA: Now, IVF has always been exceptionalized in the abortion conversation, I think partly because it's largely upper-middle-class people accessing abortion in the United States and when, for example, in the context of IVF, you do selective reduction, you put an embryo in and you get too many, it's too productive, basically, like maybe you get twins or triplets or quadruplets and your body can't handle it, or you just didn't want to carry quadruplets, they will selectively reduce and we don't really talk about that kind of stuff in the same register that we do abortion politics. You can see IVF was always being treated sort of in its own space politically and I think what happened when Alabama made its decision is that it made these two worlds collide in a very profound way.

KR: IVF doesn't fit into the moral parameters that some might want it to. Sometimes embryos are destroyed, whether for personal or medical reasons. This is where anti-abortion groups take issue. Youman from Human Coalition Action said health care workers should be responsible for every embryo they create.

CY: All health care professionals have a duty to protect the human lives they create. It really is that simple and so when you start to see some of these IVF facility destroying embryos, destroying children and in the Alabama case it was through negligence, but in some cases it's through sex selection, because the baby isn't the right sex or they do scans, retinal scans to determine the eye color of the child and the preferred eye color they get to live and the embryos without the right eye color get destroyed. We believe that that destruction of human life is sad and devastating and that there should be a duty of ethical basic responsibility to not destroy the life you create.

KR: Genetic tests are done on embryos to reveal chromosome abnormalities, but they can also reveal information like the embryo sex. Some countries like Australia have restricted this testing, while India and China have banned the procedure, but the tests are legal in the U.S. despite their murky ethics. Doctors say that foreign nationals have sought out genetic testing in the U.S. because of the legal barriers elsewhere. The American Society for Reproductive Medicine has discouraged sex selection for non-medical reasons. In the Alabama case, someone broke into the IVF facility and purposely destroyed these embryos, but that's not always the case. Accidents happen, equipment malfunctions or sometimes an embryo just does not become viable for another reason. Most medical procedures have complications. The Alabama ruling would force doctors and facilities to potentially be liable for every time an embryo doesn't become viable. After the Alabama Supreme Court ruling, IVF facilities paused their work because of the potential liability risks.

HA: Wow. So, this is what led Alabama lawmakers to pass a bill protecting IVF, right?

KR: Yes, lawmakers quickly responded to the nationwide outrage by passing a bill to protect IVF. But it's certainly not the end of the conversation. It's unclear if the IVF bill will hold up at the state Supreme Court, which recognized fetal rights under the state constitution. The court might not even consider the new law to restrain it from recognizing fetal rights in other cases, and there is another IVF case headed its way.

DS: Don't think the Alabama law does anything. I think, effectively, what it has done is it has allowed providers to start providing IVF treatment and care to patients. I don't want to minimize the importance of that, and yet it doesn't grapple with the constitutional amendment that exists in Alabama. I don't even think it grapples with the judicial decision, and I think that if it were to be challenged before this Alabama Supreme Court, I don't know that this law would survive. I also

don't think that this law very intentionally grapples with the crisis of fetal personhood in the state and it also re-entrenches this concept that, by exempting IVF from civil and criminal liability, it reinforces that everything else can have criminal and civil liability when it comes to reproductive health care, so that in and of itself has laid the groundwork, or laid the foundation, that everything else is open season. We've carved out this tiny little thing, and even that is probably not enough.

KR: But there's another downside to creating an exception for IVF. Ahmed said there is some hypocrisy in creating a loophole and fetal personhood arguments for the benefit of one group and not others.

AA: And maybe it reveals the hypocrisy of some of those folks that would otherwise have supported a position on embryos that would have made it impossible for women to access abortion, but then you were okay with storing your embryos. Maybe it reveals that the lawmakers weren't paying attention to who their constituents were and what they're doing. They just weren't paying attention to women and women's issues in general. I think that's probably fair to say about almost all legislators and that they're not paying attention to women's health or the fact that so many women are accessing IVF. I think it shows the paradoxes and contradictions that the GOP has basically walked itself into, that the conservatives have walked themselves into by declaring, by taking these extreme positions.

HA: The U.S. Supreme Court won't hear any fetal personhood cases this term, at least not as of the recording of this podcast. But what could it do on abortion?

KR: The court could limit mifepristone access by throwing out several FDA approvals. There's also another path. Have you heard of the Comstock Act?

HA: It sounds vaguely familiar, but no.

KR: That's not really surprising, considering Congress passed this law over 150 years ago. Anthony Comstock's chastity laws were passed in 1873. The context of this time in history is important here. Industrialization is changing how people work. There's a huge migration from rural America into rapidly growing cities. There's also massive waves of immigration.

GH: People are expressing fear about degrading family values. They're expressing fear about vice and obscenity and gambling and drugs and alcohol, and they're worried about things like masturbation. Did you know that Kellogg's Corn Flakes were invented to make people stop masturbating? I'm not even kidding. I'm not even kidding.

KR: I wasn't able to find a direct source to attribute this fact to, but what I can tell you is that this tracks with what we do know about John Harvey Kellogg. Kellogg and his brother followed the homegrown American faith, the Seventh Day Adventist Church, which linked spiritual and physical health. The church's followers abstained from meat, tobacco, alcohol, coffee and tea, believing that such evils led to vices like masturbation and excessive intercourse. The invention of corn flakes was a solution to common digestive issues at the time. So, if you consider that Kellogg invented corn flakes to improve one's physical and spiritual health, there's a connection. Like Kellogg, Comstock was very religious. He was appalled by prostitutes and pornography and began an anti-obscenity crusade. Comstock brought a bill to Congress to advance these efforts and the Comstock Act was born. The law prohibits the mailing of any obscene or lewd materials, like

pornography, but following Comstock's personal beliefs, contraceptives fell into this category, too. The law also bans anything that can cause an abortion, like mifepristone.

HA: And this law is still in the books?

KR: That's right. It's mostly forgotten because the government hasn't enforced it in decades. American society rejected the law in the early 20th Century, around the time women gained the right to vote. Judges became more lenient on what the law should ban. Then the Supreme Court recognized the right to use contraception and the right to abortion, and Comstock faded from memory.

HA: But now the law is what? It's being revived?

KR: Without *Roe*, anti-abortion advocates argue for Comstock's enforcement. The Biden administration has said they will not do so, but another administration could. No action from the courts or Congress needed.

HA: All right, Kelsey, let's get down to brass tacks. The court has another abortion-related case. What are the justices going to do? What's your prediction?

KR: The best bet is to not predict what the court will do, but I wouldn't be surprised if some of the liberal justices show some animosity towards the idea of making another big ruling on abortion. Justices Sonia Sotomayor, Elena Kagan and Stephen Breyer, who has since stepped down from the court, were very clear in their dissent in *Dobbs* that they felt the conservative majority overstepped when throwing out *Roe*. They described the decision as catastrophic and said it stripped women of their agency and their liberty guaranteed under the 14th Amendment. The liberal justices predicted that *Dobbs* would not save judges from controversy, but instead forced the court to wade further into hotly contested issues. They said their conservative colleagues revealed how little they know, or care, about women's lives or about the suffering their decision would cause. The dissenting justices wrote: "After today, young women will come of age with fewer rights than their mothers and grandmothers had. The majority accomplishes that result without so much as considering how women have relied on the right to choose or what it means to take that right away. The majority's refusal even to consider the life-altering consequences of reversing *Roe* and *Casey* is a stunning indictment of its decision." That's all to say that if the court were to take more steps to limit the procedure, I'm sure it would ruffle some feathers. The forecast is also stormy for the justices who do not want to decide any more abortion cases. Ahmed said more abortion fights could be on the horizon.

AA: The irony of all this is that, by basically throwing the question onto the states and creating all this legal confusion, every case is going to come back before the court. It's re-empowered the court, ironically, to basically become the arbiter on all things abortion in every single nitty gritty question, including when the FDA, and how the FDA, should be transforming the legal regulations around abortion, which really should be in the domain of FDA. It should not be in the hands of nine justices.

HA: That is going to do it for us. Thanks to Kelsey Reichmann for asking those nitty gritty questions, thanks to our producer, Kirk McDaniel, and thank all of you for listening. On the next episode of Sidebar, it's been said that trying to get something off the internet is like trying to take pee out of a swimming pool. I swear I did not make that up. But that doesn't stop people from trying, and when they do, they send an online takedown request. It determines what stays and what gets forever purged from the series of tubes that is the World Wide Web. But some have used takedown shakedowns to make a quick buck. We'll find out if the courts are ready to step in.

(Outro music)