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[00:00:17] **Speaker 1** That was Nathan Benzine reporting. Having both the old and new laws on the books makes the 1849 law unenforceable. That's according to Wisconsin Attorney General Josh Kaul. He's filed a lawsuit seeking to clarify whether the 173 year old ban is still in place. Josh Kaul joins us now from the Capitol. Thanks very much for being here.

[00:00:39] **Speaker 2** Thanks for having me, Fredricka.

[00:00:40] **Speaker 1** So why, according to your lawsuit, would the 1849 abortion ban be unenforceable?

[00:00:47] **Speaker 2** Well, first, I think it's important just to say where we are, which is, you know, we are a week after Roe versus Wade was overruled. And the impact of that is that women in Wisconsin today are less free, less equal and less safe than they were just a week ago. So we are doing what we can to work to restore access to safe and legal abortion in Wisconsin. Now, our suit argues that the 18 mid 1800s ban doesn't come into effect, even though it's still on the books for a couple of reasons. One is there were a series of laws that were passed much more recently that are inconsistent with that 19th century ban. So, for example, the 19th century ban doesn't have an exception even to protect the health of the mother. But the new legislation does have an exception to protect the health of the mother. And it can't be simultaneously legal and illegal for a doctor to perform an abortion that protects the health of the mother. So to to make sure that our statutes continue to have effect, the more recent ones that is, the old one can't be enforced. And now we also argue that old statute has gone into disuse because it was rarely used before and of course, hasn't been used in the last 50 years.

[00:01:51] **Speaker 1** Has this happened before where an earlier law that remains on the books was superseded by a later one?

[00:01:57] **Speaker 2** There is precedent for laws to be imposed in impliedly repealed. It's certainly not common, but this is not a common situation. We're in a situation here where the legislature acted with the understanding that abortion was protected, that we have a right that was taken away from Americans after almost 50 years. So we're we're certainly in uncharted waters here. But, you know, that sorting these issues out so there's clarity as to what the law is is really critical.

[00:02:29] **Speaker 1** Even though there are competing abortion laws on the books. Is it, as of today, illegal? I mean, providers are certainly practicing that way with Planned Parenthood turning away people immediately following last Friday's ruling. But is it immediately illegal?

[00:02:45] **Speaker 2** Well, our argument is that it's not because that old statute is not in effect. But, you know, providers are, of course, have to they don't want to take a chance that what they will be doing could lead to a criminal prosecution. And so this suit will help determine exactly what the state of the law is. But one of the reasons it's so important that we go forward with this suit is that Wisconsin providers need to have clarity about what the state of the law is, that the best way to get that clarity would be for our legislature to come into session and actually consider legislation on this and hopefully protect reproductive freedom. But absent that, you know, having this litigation will hopefully at least begin the process of providing clarity as we try to think about whether and how a 19th century law law that was in place would apply to 21st century medicine.

[00:03:28] **Speaker 1** Still, could a D.A. intent on prosecuting a case under the 1849 law do so now?

[00:03:36] **Speaker 2** Well, my office can't stop them from doing so. They can choose to use their resources however they want. I would discourage them from doing that because I'd much rather see them using their limited resources to prosecute serious offenses like homicides or sexual assaults or drug trafficking. But whether they can or not will ultimately depend on what happens with our suit. Because if if the law can't be enforced, as if we if we receive that ruling in the suit, then there would be no basis for enforcement. But if the Supreme Court finds that it can be enforced, then then it's up to the DA's whether they do, in fact, prosecute cases.

[00:04:09] **Speaker 1** What's your sense as to how fast any kind of ruling might be made on this?

[00:04:14] **Speaker 2** I think it's likely to be a matter of months. You know, this is a legal dispute, fundamentally, not a dispute about underlying facts. And so I think a court can rule relatively quickly. But of course, there will be briefing, there will be arguments before the court and then after the circuit court rules, there's likely going to be appeals as well. So we're not going to have clarity immediately. It's going to take a bit of time. But I do want it to move through the court system as quickly as possible. And in the meantime, you know, I have called and continue to call on the legislature to come into session and help provide some clarity here so that doctors and nurses and women in Wisconsin have a better understanding, a clearer picture of what the law is.

[00:04:53] **Speaker 1** So we should tell our viewers that we did invite Republican legislative leaders to appear tonight. Neither of them responded. But here is what Speaker Vos said about your lawsuit. He said, quote, It's sad that Evers and Call want to break the law instead of work with the legislature. I'm confident our courts will see through their tactics, he says. And. Hold the law. What is your response to Speaker Voss statement?

[00:05:22] **Speaker 2** Well, first part of the issue here is that we have inconsistent laws and which sets of those laws apply as one of the things we want to resolve through the courts. But we are also happy to work with legislative leaders. You know, the governor called the special session and most Republican lawmakers didn't even show up for that special session. They gaveled in and gaveled out. And then just a few days later, we were left in this state of legal uncertainty because Roe was overturned and we still haven't heard from our legislators. This is a huge development in Wisconsin that's impacting many people's lives. And Wisconsinites deserve to have their legislators step up, hear from them on these issues, debate these issues, and I hope ultimately act to protect access to safe and legal abortion.

[00:06:03] **Speaker 1** So just briefly, if you worked with the legislature at this point, even after that special session, what would you seek?

[00:06:12] **Speaker 2** Well, I would want them to restore access to safe and legal abortion in Wisconsin. You know, the situation that we had in Wisconsin prior to Roe being overturned was actually a fairly restrictive set of rules. A lot of the laws that are in place were signed by Governor Walker and returning to that kind of situation where women who who need to obtain abortions are able to get them and they're safe. Doing so is critical to protecting the health and safety of Wisconsin women. We know that when abortion is illegal, it doesn't stop abortion from happening. Where it stops is safe and legal abortion from happening. We've got to get back to protecting people's reproductive freedom.

[00:06:51] **Speaker 1** We leave it there. Josh Kaul, attorney general, thanks very much.

[00:06:54] **Speaker 2** Thanks for having me.

[00:07:01] **Speaker 1** General, can you still hear me? Yes. One of the things that is reported in our little thumbnail mini package about the 1849 law is that I believe Marissa helped me. I don't have the script. I believe it said that there was an exception for the life of the mother.

[00:07:20] **Speaker 2** That's right. There are two exceptions in the law. One is to save the life of the mother, and the other is that the mother can't be prosecuted.

[00:07:27] **Speaker 1** Right. Okay. I may have misheard you at the top of this show.

[00:07:32] **Speaker 2** If I.

[00:07:34] **Speaker 1** Okay. No, Marissa says I misheard you.

[00:07:37] **Speaker 2** Oh, good.

[00:07:37] **Speaker 1** All I could think was what? We got that wrong.

[00:07:41] **Speaker 2** It's certainly. It's certainly possible. I misspoke. I think I said impaled when I meant to say implied. So.

[00:07:46] **Speaker 1** No, I don't think so. No, it was it was very, very good. And I must have misheard it.

[00:07:52] **Speaker 2** I agree. Okay. Well, I appreciate it. You know, I'm happy and I'm sure you this will be subsequent episodes. But you know what? Yes. When that means doctors can intervene or not is a huge question. And, you know, there's also the use of the word conception in the statute, which is a medical term, which is going to raise all sorts of other questions.

[00:08:11] **Speaker 1** But we have an interview that one of our reporters did with an obstetrician with the Wisconsin chapter of the National Obstetricians and Gynecologists or something, who speaks to some of these issues about where this leaves physicians and their patients. So.

[00:08:30] **Speaker 2** Yeah. Okay, good, good. Well, thank.

[00:08:32] **Speaker 1** You. Thank you, sir. Thanks. Have a good holiday weekend.

[00:08:35] **Speaker 2** Yeah, you too.

[00:08:36] **Speaker 1** Thanks.