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Jill: Welcome back to #SistersInLaw with Kimberly Atkins-Stor, Joyce Vance, Barb McQuade, and me, Jill Winebanks. Let's get to the show right away, because we have some really good topics. We're going to of course be discussing, "Immunity, immunity, immunity, a five alarm fire," to quote two of our justices. We are also going to talk about the social media cases and the first amendment, and we'll talk about some of the consequences that have already happened since the Supreme Court ended the Chevron deference.

But before we get to that, we just celebrated the 4th of July and...

Kim: Frisbee's still celebrating.

Jill: He apparently is. He's not afraid, obviously, of fireworks.

Anyway, we are now celebrating the 4th of July, and I want to talk to you all about what you did and how you grill. That's important. My husband's looking for new ways; and maybe some special recipes if you have any for the holiday.

Joyce: Well, as far as grilling goes, we have a new local butcher store, so we got really great Wagyu burgers. Usually we're a little bit more upscale and prone to do ribs, but this year we did burgers, they were great. I'll tell you what the best 4th of July recipe in our house is. It is an angel food cake made with strawberry whipped cream. It's my mom's recipe, her mom made it before her, and it's just not 4th of July without it.

Jill: Mm. I'm coming to your house.

Joyce: Good stuff.

Jill: Sounds good.

Also, it's similar to my favorite recipe, which comes from a law school classmate of mine when we were still in law school. I've had that recipe probably longer than you've had yours from your mom. It's for a trifle. And the trifle I have moderated because I don't like making my own fresh whipped cream. I use frozen strawberries, I use store-bought angel food cake. But for 4th of July, I use, instead of just strawberries; on the top, I put a flag made out of blueberries and strawberries.

Joyce: Yeah, that's fun.

Jill: Plus the whipped cream. So it's really a fun recipe. Everybody loves it, and it serves a crowd.

Joyce: This is now the SisterInLaw's Bake Cakes Podcast.

Jill: New season.

Kim, what about you?

Kim: I don't bake on the 4th of July. But one thing that I think people sleep on when it comes to grilling are vegetables. Actually vegetables are my very favorite thing to grill, and they're so easy to do. Even if you don't have the special little containers that you can put the vegetables in so that they don't fall out. All you have to do is a little bit of foil. I put everything on there, from potatoes and onions and green peppers and all kinds of stuff, but my favorite thing is zucchini. I saw somebody post some nonsense on socials about nobody really likes zucchini, and it's just filler food. Incorrect. Zucchini, especially grilled with a nice balsamic on it, a little bit of olive oil, that is divine summer food right there.

Barb: The defense of the zucchini.

Kim: Delicious.

Barb: Interesting.

Well, we grilled burgers and dogs and chicken. We had a houseful yesterday, which was really fun. Some of our kids were home and mother-in-law, father-in-law, sister, brother-in-law, all kinds of people. It was really fun. I'm not a big baker. We had berries and watermelon that I thought would be healthy dessert options, but everyone else opted for ice cream, which I did as well. My Achilles heel is ice cream. I also though, got a great dessert. I ran in the Ann Arbor Firecracker 5K. Not only does every finisher get a medal, every finisher gets a Bomb Pop. So that was probably the highlight of my eating day.

Jill: Sounds good.

Barb: Bomb Pop at 9AM. It's not too early to eat a Bomb Pop, is it?

Jill: You have to tell me what a Bomb Pop is.

Barb: Oh, come on.

Joyce: Jill.

Barb: Where were you during the Bicentennial? It's a Popsicle that's red, white and blue, but it's shaped like a little rocket.

Jill: Okay. I do know that. I do know that.

My husband actually burnt his eyebrows off with our gas grill, so he has converted it into a charcoal grill. He has now started marinating the steak in a salad dressing and some seasoning before he cooks it. It's really good that way. He's really come a long way in terms of his grilling.

Kim: Well, I'm glad he's okay now, but I have to say the taste of charcoal grills is much better than the taste of gas grills. I said it.

Jill: I agree on that.

Kim: And we have a gas grill too.

Jill: I agree on that about charcoal, but not on zucchini. Sorry.

Kim: Identity theft is no joke. I always make it a point to ensure that my most personal data is protected. I shred things that are paper copies that have sensitive information. I'm very careful where I give it, and I'm also making sure that I use Aura. I'm absolutely thrilled, as all the sisters are, to partner with Aura. Aura is an all-in-one online safety solution that protects you by controlling what information about you and your family gets sold online without your consent. Data brokers are legally required to remove your personal information if you ask them to, but they make it extremely difficult to do so. Aura automatically and regularly submits opt-out and take-down requests on your behalf, reducing robocalls, telemarketing, phishing text messages, and junk mail.

Barb: They offer a suite of tools to protect you and your loved ones, including real-time alerts on suspicious activity, computer virus protection, a VPN, a password manager, and even parental controls. It's a comprehensive online safety solution that provides every tool you'll need in one place.

Jill: That's not all. Aura also monitors identity theft, financial fraud, and other online threats before they happen. With Aura, you can rest easy knowing that someone is looking out for you. Aura even scans the dark web to look for your email addresses, passwords, social security numbers, and other sensitive information. If anything is found, you'll receive a real-time alert. When you're a victim of ID theft, their experienced white-glove fraud resolution team helps you navigate credit bureaus, initiate credit freezes and locks and works with you around the clock to resolve it.

Joyce: We feel so much better knowing our families are protected, and you will too. Just listening to all of Aura's services reinforces for me how important this is. And for a limited time, Aura is offering our listeners a fourteen-day trial plus a check of your data to see if your personal information has been leaked online, all for free when you visit [aura.com/sisters](https://aura.com/sisters). That's [aura.com/sisters](https://aura.com/sisters) to sign up for a fourteen-day free trial and start protecting you and your loved ones. That's [aura.com/sisters](https://aura.com/sisters).

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Well, by now, everyone knows that the Supreme Court decided the immunity appeal bought by Donald Trump on Monday. The decision was far worse than I thought possible. This is my first chance to talk about it with Jill and Barb and Kim, and I'm really eager to hear what they think about it. So let's start there. We've had the week to read the opinion and assess it. What did each of you think about the court's decision.

Kim?

Kim: On the one hand, it was exactly what I had been predicting it would be, which is some immunity, not total, but effectively ensuring that there would be no trial. And that's exactly what happened. But the devil is in the details, and the details were so much worse. I thought that they would be, not just in the ruling, just painting out these broad brushes of categories of immunity, but also in the way that the Chief Justice sort of... I mean the job of the Supreme Court in whatever case it's deciding is to decide the case before it. The way that he took a cue from Neil Gorsuch, who at the argument said, "Oh, we're writing a decision for the ages," and pretended like he was not writing the immunity rules for Donald Trump, but just writing some general immunity rules for all other presidents for the rest of time. No, the case before you has to do with Donald Trump.

Maybe he just didn't want to say, "Hey, I'm going to give Donald Trump, this person who has proven to be extremely dangerous, this really broad immunity, and make it really hard for him to be held accountable for his danger," by saying, "Oh, it's for the ages." We have a constitution and we need all these broad protections. So I think I don't even comprehend how bad it is just yet, but it's bad.

Joyce: Yeah.

Jill, what do you think?

Jill: I agree with you and Kim. I think it was way, way worse than I ever expected it to be. It didn't officially grant total immunity, but effectively it did. The way they described that middle category and the way they don't describe the final category of personal, to me leaves it open to the subjective judgment of any future court at the lower level, at the intermediate appellate level, and again at the Supreme Court level. So I really am concerned about what this means for any future president who wants to abuse his powers. We've seen it with Richard Nixon, we've seen it with Donald Trump, and it is frightening beyond belief to think that a president can commit a crime that anyone else would be charged with. No, it's okay because he can claim that it is an official act, even though to the average human being and to [inaudible 00:11:17], it's clear that it is definitely not any way near a presidentially authorized act. You can't even look at the evidence of it, and you can't look at the motive. Those are terribly damaging to our democracy.

Joyce: Yeah, I mean, it's just a hall pass for climbing if you're Donald Trump. It's alarming to me that the Supreme Court really left it so amorphous. You can't pin down, as you say, Jill, that second category where you're distinguishing official acts from unofficial acts. It's much whatever the Supreme Court says when this case comes back up on appeal to them. I hope I'm not being a cynic here, maybe Kim, I'm too far out on our ledge right now; but it seems to me that they gave this broad read right now that's very beneficial to Donald Trump, but they won't really have to own it until after they know the outcome of the election. Right?

Jill: Right.

Joyce: Judge Chutkan will make her decisions, it will go back on appeal. They won't have to say for sure if Donald Trump gets immunity or not until after they know if he wins.

Jill: Yep.

Joyce: I don't know.

Barb, have I gone too far with that?

Barb: No, and I think what's so disheartening, it doesn't surprise me that there's some part of the president's powers that are immune from criminal prosecution. And they divided it into those three categories. One, they talk about core constitutional functions. When the president is acting in his capacity as Commander in Chief of the Armed Services and orders of drone strike, that's the kind of thing. Maybe there's room for some immunity there.

But it's the abuse of powers that concerns me. Even a police officer who uses his badge under color of law and abuses it by violating someone's civil rights, deliberately attacking them, beating them in jail or something like that, they don't get any protection. It's a really high standard though. You have to show there was a willful violation of a known legal right. So I really was expecting something there, because this absolute immunity means we've been thinking about the Constitution all wrong for well over 200 years. I mean, Jill, I'd like to ask you about, you charged the President, right? In Watergate, we all assumed that the President could be charged, right? I mean, Ford thought he needed to pardon Nixon, right? Nixon thought he needed to resign. So was everybody just so wrong, and all this time Roberts has been waiting all his life to tell us what it really says.

Jill, back in the seventies, were you thinking that there was any immunity at all for a president?

Jill: Never occurred to us. Well, clearly there was a privilege in terms of executive privilege, but that there was a immunity for crimes was never, ever not, especially for a former president. There was a question of whether you could indict while someone was sitting in office, but not once they got out of office for anything they did in office, before office, or after office. And Richard Nixon, I'm sure, is celebrating wherever he is now because had this been the law, or had this been the Supreme Court when he was in office, he would have served his full term. He wouldn't have needed a pardon. Gerald Ford probably would've been reelected or elected for the first time since he was only serving when he substituted for Nixon. When he resigned, he became president from being vice president. But he would've been re-elected. He wasn't in part because he granted the pardon to someone who was a recognized criminal. This is just devastating.

Joyce, you mentioned that middle category. The court puts into that middle category when he talks to his people at the Department of Justice, even if it is to plot a conspiracy to overturn the election. You can't look at the reason for the conversation because they say having conversations with your cabinet officers, that's a presidential responsibility. No, it's not if it's to commit a crime. So it is terrifying and Nixon would have been thrilled. I wrote a piece for MSNBC about the immunity decision and the impact it is going to have going forward and what it would've meant to Richard Nixon.

Joyce: Yeah, Richard Nixon would've never resigned, right?

Jill: Right.

Joyce: God, if he had known this was the law, man, stay in office.

Jill: Although he at least had some sense of shame, something that doesn't seem to exist now. He did take the advice that he would be convicted by the Senate after impeachment by the House. He resigned in shame and tucked his tail between his legs and flew home to San Clemente.

Kim: But he also told Frost afterwards, if the President does it, it's not a crime. So he was right.

Joyce: We were all appalled right at the time. Oh yeah, don't say that. That's so horrible.

Jill: Yeah.

Joyce: But Donald Trump came out and said, "Well, I was completely exonerated by this decision," which is not true, by the way. All the decision says is you can commit crimes, you just can't be prosecuted. It's no exoneration.

Kim, something that we talked about, and I know our listeners have questions about are concurring opinions, and we had concurrences here. So the first one I want to talk about is justice Thomas' concurring opinion. I don't know why the hell he was participating in this case. He had a clear conflict and should have recused. But leaving that aside, were you surprised by the issue that he decided to focus on in his concurrence?

Kim: Well, no, I wasn't actually, once I read it, and maybe that gives a clue why he was so eager to participate in this. Because what he focused on was an issue that wasn't even raised in this case, which was the propriety of the appointment of Jack Smith as special counsel. Now, we have said on this podcast not once, not twice, but many, many times, that the constitutionality of a special counsel is an issue that has been litigated, it has been decided, it has been asked and answered. There is no outstanding legal or constitutional issue here.

But Clarence Thomas seems to insist that there is, that unless the special counsel himself goes before the Senate and is confirmed, that he cannot do this job. Of course, we've had many of them going back to Watergate, but I think I know why he's doing this. One of the other cases that Donald Trump is facing down in Florida, someone raised an issue that someone, would be Donald Trump, about the constitutionality of Jack Smith's appointment. And that's one of the many motions that Judge Aline Cannon has yet to rule on. So what I think is going on here is Clarence Thomas is like, "Hey Aline, we are happy to take up this issue. If you want to rule against Jack Smith and kick this thing either way down the road or kick it off your docket completely, we are here for it. Give us a holla." So I think that's why he sat and, well, he also sat because he doesn't believe the rules apply to him; but I think that's what this concurrence is all about and it's a hot mess.

Joyce: Okay, so we've got Justice Thomas' love letter to Aline Cannon. We've also got another concurrence, maybe a slightly less inside baseball one from Justice Barrett. Jill. She did

not join Section 3C of the opinion. What is that about? Can you talk about what happens when justices join part, but not all of a majority opinion?

Jill: Sure. Of course this one is still a majority opinion even without her on this. She is showing some independence, that's, I think, true. And I just want to, before I go on to your question, just say we've had this discussion about whether the Supreme Court has gotten too political, and you all have said to me, "Absolutely not. The order of opinions isn't political." Don't tell me that this isn't political. Kim, you've just made my argument that they did this signal.

Kim: Well, I don't say they never act politically. I just said they're such a hot mess. And it was probably the dissents that made that case take so long, and I think that was right.

Jill: Exactly.

Anyway, Justice Barrett has shown some independence from the other members of the conservative caucus. She said they went too far in terms of saying about the evidence. That is of course, as I said, the thing that bothers me the most, is them predetermining what Rule 403 is intended to do. So let in context a decision be made about whether something is overly prejudicial and can't be introduced. So I think they went too far and that's what she said.

What it means is that she gets to express her opinion and deviate from what the full court majority said, and hers has some bearing on the future can be cited. Sometimes dissents are more cited even than the majority opinion.

Joyce: So those are the concurrences.

Barb, there is also a series of two dissents in this case that are very powerful. What was your takeaway from the dissents, either or both of them?

Barb: I thought that the most powerful thing in all of these dissents, well, actually I thought there are two very powerful things. One is, I'll start with this. Justice Sotomayor writes this dissent and really to me points out the hypocrisy of the majority. When it cites Dobbs, the case that overturns Roe versus Wade, and points out how just as recently as last term majority, what you said was there must be a firm grounding in constitutional text, history, or precedent to recognize some right or doctrine. And she says there is no official acts immunity in the Constitution. It's not written in there. So they accused the Roe court of just making this up by looking at lots of different provisions in the Constitution, and then using logic to conclude that that right exists there. Well, that's what the court is doing in this case. So right at the get-go, she cites Dobbs, which I think is quite devastating for the hypocrisy.

But I think she really focuses on why this opinion is so problematic. Remember all those hypotheticals during oral argument that everybody said, "Well, that's ridiculous. Why are they even talking about that, SEAL Team Six?" The only reason that issue was ever raised in the first place of course, was because the thought that, of course these things can't be permissible. But she points out going forward, "If a president orders Navy SEAL Team Six to assassinate a political rival, immune; organize a military coup to hold on to



power, immune; takes a bribe in exchange for a pardon, immune. Immune, immune, immune." That's a direct quote. She says that. And then the majority responds to this and they say, "Oh, the dissenters use extreme hypotheticals to say there is no such thing." But they never refute them. They never say those hypotheticals aren't true. They get into this whole idea of it's got to be in the text and it doesn't have to be in the text. We can presume this from privileges and other things. So they do not refute them because they're true.

Now, a president still could be impeached if he did any of those bad things, like ordering SEAL Team Six to assassinate his rivals or accept a bribe or whatever it is. But imagine a president who does this on the last days of office. There's not going to be time to impeach him. So if he orders a military coup on January 18th or assassinates his rivals or accepts bribes, "Go ahead and impeach me."

Also, I think realistically, is impeachment really a meaningful check anymore when our politics have become so polarized? I think Chief Justice Roberts just kind of ignores reality when he says that. So that to me is why this opinion is really awful and I hope someday will be overturned.

Joyce: Well, it's just shocking to think that Chief Justice Roberts would ever ignore reality, like he did in Shelby County versus Holder, the voting rights case.

Barb, I want to even push further on your hypo, because it seems to me now that presidents can assassinate their political rivals at will, you don't even have to wait until the end of the term. You just go ahead and do it right up front, because who in the Senate is coming after you on impeachment knowing that you can just assassinate them too. It's a lawless paradigm, with the president as the most lawless guy in the room. And it's really scary.

Jill, how did you react in that sense?

Jill: Well, there's a couple of things I want to say about the dissent. One was its condescending nature. I mean, at the dissent, the majority opinion, sorry, toward the dissenters. The language was terrible. They used language like hysterical, and I found it to be extremely sexist. I think Dahlia Lithwick wrote a very good piece that we can put on our show notes to let people read a very detailed exposition of that.

But also Barbara mentioned bribery. Well, remember what the court did on bribery. It's just a gratuity, it's not a bribe. So what bribes are going to survive? Donald Trump has already said, "Give me a billion dollars and I'll make sure all your problems go away," to the oil executives. Well, if they pay him, is that a bribe or is that a gratuity because he is going to do a good thing for them, or has done a good thing? I think it's really, really terrible.

I thought that the dissents made a lot of sense. The extreme hypotheticals were things that were posed in Supreme Court arguments. I believe the court has gone beyond what even Donald Trump's lawyers asked for in that. They went beyond what could have ever been expected to be considered as partly within the constitutional responsibilities of the



President. So I agree with Barb's analysis completely, and it's terrible. The dissents were brilliant and accurate.

Joyce: Hey Kim, I'd love to hear you chime in on the dissents; but I also wanted to ask what your sense of what Jack Smith does next is? Does he even have a case left to prosecute after this?

Kim: I mean, he does. I associate myself with the comments of my sisters with respect to the dissents. Yeah, so the cases, as I read it, I've read and reread the Chief Justice's ruling; I think certainly with respect to the phony elector scheme and perhaps, perhaps his actions on January 6th itself with that rally and sticking people on there, although I can see there seemed to be some indication that that might be considered, "A president needs broad authority to speak to the public." I'm like, that was a campaign rally at best. But anyway, after Judge Chutkan goes through and makes a clear record of that and rules, I think those might be okay.

The one that I think is just crazy though, and that probably doesn't make it, is the claims with respect to his pressuring Mike Pence to try to not count the electoral votes. I mean, it sounds like, okay, no, that is not necessarily official conduct, but it's a real strong presumption that that's official conduct. And if that's official conduct, pressuring your own vice president to do crimes, then that's a roadmap to the next despot wants to get to the White House and use all the levers to say, Hey, DOJ... We already know for sure, without question, that Trump's weaponization of the DOJ, totally immune. And he can also pressure people within his own White House to do crimes? That's crazy. And it sounds like that's what this opinion says.

So if I were Jack Smith, I'd probably at least proceed, maybe just proceed unfortunately, on those with respect to those, the electors and the actions on January 6th. But my goodness, this is crazy that this is where we are.

Joyce: Barb, what would you do if you were Jack Smith? Do you agree with Kim? Do you think he's got a narrow path forward?

Barb: He does. It's an okay path. I think that he probably should just dump the DOJ allegations, which really gnaws at me because that to me was the most offensive. Jeffrey Clark writing those letters falsely claiming that the Justice Department had found irregularities in the election, and urging state legislatures to reconvene to select new slates of electors. That's just appalling that you would use the Justice Department for that. But I think it's clear under this opinion that that's going to be immune. I think even the Mike Pence stuff, there's room, it's an uphill battle to litigate it, but maybe you just dump it. Because there's still some okay stuff left. Organizing false slates of electors and pressuring state officials to flip the outcome of the election, like Brad Raffensperger. Also, there's the theory that they exploited the chaos at the Capitol to continue to pressure legislators to refuse to certify the election. So I think those go forward. And that's like 60% of the case, right? There were five schemes, it sounds like. One, it's for sure immune. The second one is probably immune, but that's 60% of the case.

So I think he goes forward. But I do think that Judge Chutkan has to rule. I think there will be an appeal. It will go back to the Supreme Court as you said before we get clarity. But I think there is a good bit of this case that is still alive, and we should go forward.

If I may just say one more thing about the underlings. So the president is immune. But I don't think the underlings are. So Jeffrey Clark who is under indictment in Georgia may still face criminal charges there. But here's the game plan, we'll called it the roadmap or the blueprint for going forward; when the president assassinates his rivals, he doesn't do it himself. Of course he has underlings do it. He pardons the underlings.

Joyce: Yeah.

Barb: So that's how they get away with this abuse of power.

Joyce: It's just an utterly disturbing path forward.

Jill, how did you take what was left for Jack Smith?

Jill: I agree with Barb. There is definitely enough to go forward with, and the delay that would be involved and the likely outcome with this Supreme Court of challenging the definition of what falls within, even though I think it's clearly not within the presumptive immunity category. I think that you just have to go ahead with the ones that are clearly personal and political, and acts of candidate Trump not President Trump. Even though they happened while he was president, there has to be recognition that some conduct as president; you know that certain phone calls can't be made from his office because they are political. So I think that Jack Smith proceeds with the counts that are clearly political and personal, and not in any way shape or form subject to presidential authority.

I agree with Barb that it is concerning that the people who carry out these orders can be held accountable and have been held accountable and will continue to be held accountable, and if he is still in the office, he can pardon them. Now, he can pardon them while he's president as long as he's doing these acts while he's president. I have always questioned whether the preemptive pardon that was issued by Gerald Ford was a legal thing to say, "Any future conduct I'm pardoning you for, or any conduct that you haven't been indicted for." These weren't pardons for things that he's been tried or convicted or shown any remorse. Normally pardons are reserved for people who show some remorse, have served their full sentence; but it happened and it was allowed to happen and probably would be again, certainly this Supreme Court would allow it to happen as long as the person issuing the pardon was Donald Trump or some other MAGA person.

If Joe Biden tried doing any of these things, including getting rid of an existential threat to democracy, like possibly Donald Trump, I'm sure the court would find that it was in that category of totally personal and that they would not give him immunity for that. That's what I think.

Joyce: I'm going to play devil's advocate just briefly here and say that if I was Jack Smith, I would actually go forward with as much of my indictment as I could credibly believe I would be able to obtain a conviction and sustain it on. And I might really push for inclusion of some of this conduct in that second category, and then make the argument the Supreme Court says you have to make to bust out of that category, which is essentially that prosecuting wouldn't impact the power of the presidency. I would do that because I think it's a colorable argument. For instance, maybe the conversations with the leadership at DOJ were okay in official function, but when you got the head of

environment and natural resources division on the phone, and a congressman is introducing him to you and you're talking about that stuff, I think I'd be willing to make that argument if only to get the Supreme Court to force them to go on record a second time as saying it or to see if you might get a more favorable reading.

This is a bad decision. This is a Supreme Court decision that will live in infamy. It will be reversed one day, the only question is how soon and how much damage gets done first.

Speaking of damage, Jill, sentencing has been delayed in the Manhattan DA's case. There are a lot of people who believe that that case is now in question. Not because of the charges, but because of the use of evidence. Part of the Supreme Court's decision in Trump versus United States was you can't use evidence of official acts to convict someone. So now that's the argument that Trump is making in Manhattan.

What's going on there and what do you make of all that?

Jill: So just to give some background, there is a concept of harmless error, and that's what he's going to have to argue, is that yes, some official acts were put into evidence, but he would've been convicted even without that evidence, and so it didn't affect the outcome. Otherwise, there's going to have to be a retrial without that evidence, and that would be terrible. The sentencing delay is to allow some analysis of what the evidence was, whether any of it was within this very broad category of presidential conduct that the Supreme Court has laid out; and if it has, whether it was something that affected the outcome or whether it was harmless error. So again, it's a mess that we're seeing right away, what has happened from this broad decision.

Joyce: Yeah. I'm worried about the harmless error argument because some of this evidence, like the Hope Hicks conversations. In closing the prosecution was like, "This is our linchpin piece of evidence." And it's hard to say it wasn't harmless error. I know they've got a procedural default argument. You have to raise immunity at a certain stage in the case, and if you don't, you can't make it later on. And that argument's floating around. But I got to say, I am worried about that case.

Barb that leaves us with the other cases, right? They're still pending the federal case in Florida and Georgia. How does this decision impact them?

Barb: Well, Florida I think is actually in pretty good shape. Because Florida mostly relates to post-White House activity. He's charged there with unlawfully retaining sensitive documents and obstructing an investigation. Now, I suppose it's possible that they had planned to use some evidence from while Donald Trump was in office, and that could get tricky. Remember those examples where he was very reckless with the use of classified documents and things; but I think they can very much try the case without using any of that evidence. So I think that case is on firm ground.

The Georgia case, however, I think is in very equal footing with the federal election interference case because it alleges much of the same conduct. So I think they're going to have to go through the same litigation there to say what's official and what's unofficial, maybe they look to what happens in the federal case, but they're going to have to make the same determination. So I don't know if you just stay it and let the feds sort it all out or

if you address it separately and they go up to the court together. The Georgia case of course, is more comprehensive than the federal case. I think in an effort to really streamline it, Jack Smith charged only Donald Trump. The Georgia case brings in 19 defendants in a RICO case, but many of the same acts, it's all based on the same conduct. So I think we're going to have to go through the same exercise in Georgia, which means delay of well over a year or more before this case ever goes to trial.

Joyce: Well, this has been such an upbeat first half.

Jill: Even though I don't get to go to a beach with palm trees, I do get to go to the beach in Chicago, surprisingly enough. And you know that feeling when you first step out on the beach, OSEA has captured it all in their all-natural Undaria Algae Body Oil. It's uplifting notes of mango, mandarin, grapefruit, lime, and cypress smell just like summer. It's so much more than a scent. The body oil is clinically proven to instantly improve skin elasticity and deeply moisturize, leaving skin silky and soft for that coveted post-vacation glow. Right now, you could be transported to the tropics with 10% off your first order with our code Sisters at [oseamalibu.com](https://oseamalibu.com).

Joyce: OSEA is women founded and led, and we love that OSEA has been making clinically proven seaweed infused products that are safe for your skin and the planet for over 28 years. Everything is clean, vegan, cruelty-free, and climate neutral certified. With OSEA, you never have to choose between your values and your best skin.

Kim: I love the indulgent rich, never greasy texture of their Undaria Algae Body Butter. It's their best-selling product for a reason. The creamy goodness is next level, and after putting it on, my skin always feels so soft and silky and it smells amazing. It's like being surrounded by this unbelievable glow that lights up a room. If you're anything like me when it arrives, you won't be able to wait to open it up and put it on. Not only does it visibly firm your skin for a perfect sculpted tone, but it also is clinically proven to increase skin elasticity instantly. Now my skin looks and feels softer than it ever has, and you'll feel like you've escaped to an island as soon as you put it on.

Barb: Boy, that sounds good. I want to go roll around in it right now. You can get healthy glowing skin for summer with clean vegan skin and body care from OSEA. Get 10% off your first order site-wide with code sisters at [oseamalibu.com](https://oseamalibu.com). You'll get free samples with every order and free shipping on orders over \$60. Head to [oseamalibu.com](https://oseamalibu.com) and use code sisters for 10% off. Look for the link in our show notes.

The court decided another pair of significant cases on Monday. You may have missed it in light of all of the hullabaloo, but these cases were called NetChoice versus Paxton and Moody versus NetChoice. So in both of these cases, industry groups for tech companies had challenged statutes that were enacted in Texas and Florida, making it illegal for social media platforms to moderate content in compliance with their own community standards, or to take down someone's account altogether to de-platform them, like Donald Trump. In both cases, the plaintiffs argued that platforms like Facebook and YouTube had removed some content following the January 6th attack on the U.S. Capitol in a way that was discriminating against conservative viewpoints.

Joyce, the court decided 9-0, that these cases needed to go back to lower courts without addressing the merits. Kind of anticlimactic after that long wait. Why was that their decision?

Joyce: Yeah, it was anticlimactic. The judgments get vacated and the cases get remanded for further proceedings because according to the Supreme Court, neither the 11th nor the Fifth Circuit applied the proper standard for a facial First Amendment challenge.

Here's what that means. There are two types of key constitutional challenges. A facial challenge is a challenge to the face of the statute as written that says, "This statute is unconstitutional as written." Then there are as applied challenges. Once a law goes into effect, sometimes there will be a challenge that says, "As this law is applied to me, it's unconstitutional."

Well, these cases were a facial challenge saying, that this law for all purposes, for all time, both Texas and Florida, their unconstitutional as written. They impact my free speech in an unconstitutional way. A facial challenge is a lot more difficult to make out than an as applied challenge. A plaintiff essentially has to show that there's no set of circumstances under which the law would be valid.

So here's what the majority says they say, and we heard some of this at Oral Argument, to be frank, this wasn't out of the blue; but the court says all that they really looked at were feeds on social media. And there's so much else. There's direct messaging. Justice Kagan writes, "The technology is changing all the time. There are new apps and new things." So they tell the courts of appeals, "Go back and do it again and then tell us what you think." So that's where we ended up.

Barb: Kim, one interesting thing about this case though is, even though the court did not decide the case on the merits, Justice Kagan went ahead and wrote a lengthy opinion anyway for the majority saying, "But if we did decide this on my mind." And she's gotten a majority of the justice to agree. She lays out the legal standard.

Kim: She does.

Barb: Based on her opinion, do you think these challenges are likely to succeed in the long run?

Kim: So too long didn't read for Justice Kagan's opinion, is basically like, "Yeah, I know this is not how you do a facial challenge, but if you did do an as applied challenge, you're going to lose. And let me tell you why." Basically what she is saying is Texas would have to show that there is a substantial state interest at stake that they're advancing, even in an as applied challenge. What she writes is Texas has never been shy and always been consistent about its interest. The objective is to correct the mix of viewpoints that major platforms present. But a state may not interfere with private actor's speech to advance its own vision of ideological balance. So it's like y'all got nothing out the gate. So if you want to save some of your taxpayers time, Texans are very hardworking, maybe you just let this go. But you know they won't. But she's just saying, "Yeah, you're not going to win."

Barb: Yeah, really interesting.

Jill, there are other justices who took her to task and took the majority to task and saying, "You can't do that. It's a mistake to address the merits at all. If the court's not deciding the merits, then it's a mistake to actually issue this advisory opinion." Do you agree with those concurring justices?

Jill: I do. And it takes me back to law school where, I mean, I haven't thought about Dicta in a long time. Except a TV show that's called Dicta.

Kim: I used to have a blog, that's how long it was, a blog called DC Dicta back in the day.

Jill: Okay, so there you go. Right.

Kim: I found out that Ruth Bader Ginsburg read it, but I'll talk about that later.

Jill: Whoa, I want to hear about that.

Kim: I noticed that.

Jill: To answer Barb's question, yeah, I mean advisory opinions; we've talked about it on several episodes where we've talked about how you have to have parties that have something at stake. You can't have people that don't have standing. You don't issue advisory opinions. You decide cases or controversies. So saying that this is not relevant to the decision is like saying, "Yeah, you shouldn't be saying it." It was interesting and might give some pause to whether they're going to refile, keep it at a facial level or an as applied level. Although I think that even Barrett in her concurring opinion says the Florida Court just wasn't right about the First Amendment. So she's signaling again, "they're going to lose, so why bother?" But they will, because it's a political issue, so they're going to stay on it.

Barb: Yeah. I have to say that if you look at the merits of what Justice Kagan writes, I think she's right. States can't tell private actors, "You must print everything that everybody puts out there." But I think this case really does demonstrate just how difficult it is going to be going forward to regulate social media in a meaningful way to address disinformation, especially as artificial intelligence grows in its prevalence. So this one will be back, I'm sure. We'll keep an eye on this one.

Joyce: Y'all, it is that time of the year when I'm always looking for a fresh manicure, and it's great to be able to give yourself the perfect home manicure with all of Injun's salon-grade tools. I haven't used anything else for years now. Their mani system has everything you need for a DIY salon quality manicure, and it's all in one box. You can customize it with your choice of six polishes, and we love how their polish doesn't chip. You can expect it to last for seven days or more. I'm definitely in the more category. I get about 10 days out of a manicure, and I just love it. You get fantastic savings too, because it breaks down to just \$2 a manicure.

Jill: Joyce, you didn't mention how good the colors are. I love the variety of colors. Everything from pale pink, bright pink, blue. They're great. You can count on the mani system for salon worthy nails. It's so convenient and relaxing to do it at home, you definitely won't miss scheduling appointments or traveling to a pricey salon. It's great



knowing you'll be looking your best while saving time and money. My friends, family and sisters are always so impressed. Once you try it on, you'll never go back to using anything else. I just wish my sisters were all in the same city so we could have an Olive and June night all the time.

Kim: Their quick dry polishes only take about a minute to dry, and you can feel confident knowing your mani will last with only one or two coats. The colors really are beautiful, Jill is right. And we love having 40 plus cruelty-free and vegan polishes to choose from. They even have amazing cool looking press-ons that go on quickly, look real, and last a really long time. I've used those, especially when I found myself in need of a very, very quick manicure. The press-ons come in every size you can imagine, so you know you're going to get a perfect fit, and you can get a non-damaging manicure in less than 10 minutes for only \$10 a set. It's no surprise that they are an Allure best of beauty winner.

Barb: Olive and June has so many amazing products, you need to try them out for yourself. Visit [oliveandjune.com/SIL](http://oliveandjune.com/SIL) for 20% off your first system. That's O-L-I-V-E-A-N-D-J-U-N-E.com/sil for 20% off your first system. You can also find the link in our show notes.

Kim: We are living in a post-Chevron world, but I am not a post-Chevron girl. You know that we are living... That's right. Chevron is gone. Chevron is gone, y'all. And already we are seeing the impacts of it. Sometimes it's hard to explain complex legal doctrines and their effect on actual people, but courts are already giving us a real life taste of what our new post-Chevron world looks like. We talked about the Supreme Court's decision overturning Chevron last week. It essentially held that experts in federal agencies who were tasked with implementing rules and regulations affecting nearly every aspect of our American lives can be overruled by federal judges with no such expertise, if the federal law is found to be ambiguous. And of course, federal law is always ambiguous, right? Sometimes by design. But now we have two fresh rulings giving us a glimpse at what our future is.

Jill, tell us about the ruling out of Gulfport, Mississippi that brought to a halt of federal rule meant to protect transgender healthcare. How did the end of Chevron play into that?

Jill: Well, when we talked about the Chevron decision last episode, we talked about what we thought might happen in terms of the courts making these decisions instead of experts making the decisions about the demise of administrative agency's power to do what their expertise really should empower them to do. Here's another example, where the president has his cabinet and tells one department or tells all departments, "You should look at making sure that when the word sex appears, the discrimination on the basis of sex is barred, that that also includes gender identity." So there was a ruling that when there was any kind of insurance that the federal government paid for, Medicare/Medicaid, that when it said you can't discriminate on the basis of sex, sex includes gender identity. And the court said, "No, we're not going to go along with that. That agency doesn't have the power to make that regulation to include gender identity."

So I'm sure this will be appealed. I have no doubt that the Biden administration will pursue this, that right now healthcare can be denied on the basis of your gender identity. That really is something that all of the supporters of this regulation are going, "We have the same rights to our healthcare as anyone else." And I agree.



Kim: Barb, a few episodes back, we talked about the FTC ruling, the Federal Trade Commission ruling, that barred non-compete agreements for workers. That is a big deal. But another federal court, this time in Texas, had other ideas about that. It's in the same vein as what we're talking about; we get these agency rules and we get these judges slapping them down. What happened there?

Barb: So a judge granted a temporary restraining order to block this rule from taking effect. It's only a temporary rule, but the judge said, "I think there's a likelihood of success on the merits that the FTC, the Federal Trade Commission, lacks the authority, the rulemaking authority, regarding unfair methods of competition." And courts are better situated to do that. So we'll hear all of this, and ultimately, I'm confident that the plaintiffs will prevail. This was a tax preparation company in Texas that filed a lawsuit saying that the FTC lacks the rulemaking power to do this. And after this overruling of Chevron, what the FTC says is no longer going to get any deference. But what the FTC said, "We based on our findings, that non-compete agreements reduce innovation. They inhibit economic growth, and they keep wages low. It prevents people from leaving one company and working at another." In rural communities this is especially problematic with hospitals where doctors can't move from one place to another because there's a geographic ban on their ability to go work for some other hospital.

So it's a very pro-business thing that wants to keep its employees close and not allow them to work for some higher bidder. But after Chevron, I think this judge is probably right in terms of no need to defer to the FTC. Judges have appointed themselves in the words of dissenting Justice Elena Kagan, the nation's administrative czar. So courts will decide for themselves whether these non-competes can survive.

Kim: Wow, that data that you were talking about, Barb, that sounds like expertise in the area, but judges of course, they know better. And I hadn't even thought about that. I think about that; you live someplace that's not Boston, that's not LA, this isn't teeming with doctors. You live in a place that has good healthcare, but it's given by a certain number of people. And they can't work and they can't provide healthcare to the people who need it because of non-compete. That's crazy, right? Anyway, I'll stop.

Joyce, be our voice of reason here. These decisions will likely be appealed. What does that look like after Chevron? We talk about doom and gloom, and it's not that these agencies can't be heard at all, but the standard is surely different. What do you think it means as these agencies fight to say, "No, these rules that we are implementing are important. This is our job. Let us do it."

Joyce: I'm sorry, but if you're looking for the voice of reason, after watching the Supreme Court this term, it ain't going to be me, girl. I am looking forward to flying on airplanes where engines are attached by two bolts instead of 12 because the Supreme Court thinks they know better than experts. In the post-Chevron world, all that really matters is what the Supreme Court thinks, right? If they think that a law passed by Congress is ambiguous, then they believe it's up to the Imperial Courts to decide what the rule is going to be. They don't have to take into account any agency expertise. And given the texture of the court's recent decisions, I think we all know that the culture wars are just as likely to be fought in the Supreme Court as they are in the halls of Congress.

We live in a very troubling time. The only way to right-size what's going on in the judiciary is to vote for a president who will make sure that judges who are appointed are more moderate in their views; not politically, but moderate in their views about their own power and their accumulation of power. Undoing the administrative state has been a long-term conservative goal. They now have all the tools that they need in place to do it, and I think we would be foolish to not anticipate that they will. So we can look forward to decisions like this going up on appeal, and for the most part, getting a nod of support from the appellate courts.

Kim: I'll just leave us all with one last thought on this, which is this why it's so concerning to me that the Mifepristone decision was done on a procedural basis, which means it'll come back. They'll get somebody else, maybe somebody who took mifepristone who will pass the standard of standing to come back. The Emtala case is coming back. We have even more cases on transgender healthcare. We'll have even more cases on immigration and other things that we need to fix our economy to keep our access to healthcare, to keep the planes in the air. Gosh, now you terrified me, Joyce.

Joyce: Sorry.

Kim: But they're going to be coming. And do you want judges making those decisions, not the experts?

Jill: Not when they can't tell the difference between nitrous oxide and nitrogen oxide.

Kim: Listen, listen.

Barb: That's the laughing gas talking.

Jill: And that was from the son of the woman who headed the EPA and fought for Chevron after he helped to delete Chevron.

Kim: Who has Neil Gorsuch's heart.

Joyce: Find your perfect mattress for the best sleep of your life when you take Helix's two-minute quiz and match with a mattress customized for your body type and preferences. When I first took the Helix quiz, I matched with the Helix Midnight Mattress. I liked it so much I ended up getting Helix mattresses for everyone in my family, and they all love them too. Your sleep will be better than ever with Helix. So upgrade to a mattress tailored just for the way you sleep. Like us, you'll never go back.

Barb: The Helix lineup offers 20 unique mattresses, including the award-winning Luxe collection, the newly released Helix Elite collection, mattresses designed for big and tall sleepers, and even a mattress made just for kids. There's something for everyone. Helix Designs cradle your body for essential support in any sleeping position with enhanced cooling features to keep you from overheating. And if your spine needs some extra TLC, they've got you. Every Helix mattress has a hybrid design, combining individually wrapped steel coils in the base with premium foam layers on top. It's the perfect combination of comfort and support.

Jill: Helix knows there's no better way to test out a new mattress than by sleeping on it in your own home. That's why they come with a ten-year to fifteen-year warranty, and offer a one-hundred-night trial to try out your new Helix mattress. The setup is fast and easy, and Helix mattresses get delivered in a box straight to your door for free, and easy to set up.

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Jill: Well, that was a great episode. Now we're going to go to our favorite part of the show, which is listener questions. I want you to remember that if you have a question for us, you can email us at [sistersinlaw@politicon.com](mailto:sistersinlaw@politicon.com), or tag us at [@sistersinlaw](https://twitter.com/sistersinlaw) on Threads, or Tweet using [#SistersinLaw](https://twitter.com/SistersinLaw). If we don't get to your questions during the show, keep an eye on our Thread or Tweet feeds throughout the week where we'll answer as many of your questions as we can.

This week, let me go straight to a question from Terry for Joyce. Can President Biden transfer the title of Chief Justice from John Roberts to another Justice? If so, would that action need to be confirmed by the Senate?

Joyce: This is a great question, Terry, and unfortunately the answer is no. No, he cannot. Just like Associate Justices are appointed by the President and confirmed by the Senate before they take office, the Chief Justice is in a special category. You're actually nominated to be the Chief Justice, and your confirmation in the Senate is as the chief justice. You don't have to have been an associate justice before you can be the chief, although in many cases that's true. The reality is that we are stuck with Chief Justice John Roberts until he resigns or leaves office in some other fashion. He's it.

Jill: Kim, I want to ask you a question that comes in from Ellen. How do Supreme Court concurrences work? If the court reaches a decision through slightly different paths or arguments, is only the majority opinion held as precedent or can concurrent opinions be used as well?

Kim: So yes, and. So the way that concurrences work generally, we know the way it normally work; if you have five or more justices on one side, but you have someone who believes that the court could have gotten to that outcome in a different way or using different legal reasoning, then that is what a concurrence is. But for the record, when it comes to who wins and who loses that case, that concurrence still counts with the majority when we say it's 6-3, 7-2, or whatever. But for presidential reasons, which is what you're talking about, it's just who was in the majority with that reasoning. So if it was five in the majority and one concurrence, that's five people.

Now this is important because there are decisions that have plurality holdings, which means less than five people made the "opinion". And in that case, that still allows a win, if maybe you have a plurality of four people who find under one reasoning, three people who also find for one side, but under a different reasoning, and then everyone else dissents. The only thing that that means is that the party in that case wins. Without five

justices there's no binding precedent. So that means that the courts below don't have to follow it. They can use it as guidance as to what the high court might do. But unless five justices bless a certain kind of reasoning, it's not precedent. It takes five to make a precedent.

It's a great question.

Jill: Great answer, Kim.

Barb. Here's a question from Jody. What happens if either Trump or President Biden dies before their nomination at the convention or after the nomination, but before the inauguration?

Barb: Great question, Jody. I had to look this up. There is an answer to your question. So the 20th Amendment addresses this to some extent. Section Three of the 20th Amendment says if at the time, fixed for the beginning of the term of the president, the President-elect shall have died, the Vice President-elect shall become president. So that's only after the person becomes the President-elect. But of course, a person does not become a President-elect until after the electoral college casts its votes in December. So if a candidate for president dies before that and, the timing of matters, say it's before the convention or before the election in November or before those electoral votes are cast in December, then the parties choose.

So at this moment, we have two candidates who are referred to as the presumptive nominees, but they're really not until the convention. So if one were to die even before the convention, then those delegates get released, they're no longer bound to that candidate, and the delegates would vote to see who is going to be the candidate. If it's after the convention or after the election, then it's the Democratic National Committee or the Republican National Committee who chooses, and none of them are required to choose the vice president to fill the shoes of the president until after the electoral votes are cast in December.

Jill: Thank you for listening to #Sisters-in-Law with Kimberly Atkins-Stor, Joyce Fance, Barb McQuade, and me Jill Winebanks. And please show some love to this week's sponsors: Factor, Aura, OSEA Malibu, Olive and June, and Helix. Their links are in the show notes. Please support them because they make this podcast possible.

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Joyce: There's a famous 11th Circuit opinion about Blackie the talking cat. I'm sure I've told this story before.

Jill: No.

Joyce: Yeah. Blackie's owner gets sued for vagrancy. And the owner, one of the things he pleads is Blackie's First Amendment rights. The court finds against the owner and the 11th Circuit says, "As for Blackie, he can speak for himself."

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Jill: That's great. It's a great opinion. That is fantastic.