Joyce:

Welcome back to #SistersInLaw with Kimberly Atkins Stohr, Jill Wine-Banks, Barb McQuade, and me Joyce Vance. This week was the last week of the Supreme Court's term. Barb, Kim, Jill and I are going all Supreme Court for the entire show because there's so much to discuss.

We'll start with the affirmative action decisions and student loan forgiveness. We'll turn to 303 Creative, this term so-called religious freedom case. And then we'll end with what we'd hope is the demise of the independent state legislature theory. We may have different opinions on just how firm that is. And as always, we look forward to answering your questions at the end of the show.

Don't forget, go to politicon.com/merch to buy our shirts, totes, and other goodies, just in time for summer. We'd love to see you wearing it out and about. Please take pictures of yourself and tag us on Twitter so we can see.

It has been a very serious week. No one is super happy about what we've seen out of the Supreme Court, so it's sort of hard to get into the mood for chitchat this week. Instead, I'm just going to ask everybody, what do you do when you're feeling down? Barb, I'll start with you.

Barb:

Yeah. That's a good question, Joyce. I think that I sometimes, I have a tendency to want to snap out of it and get happy again and be happy as I can be. But I've learned that I kind of need to spend a little time being sad, to lean into the sadness for a little bit. And so I'm going to be sad over some of these Supreme Court decisions for a while.

So one way of just sort of living with the sadness is through music. Music, listening to sad songs or maybe even empowering songs. One artist I really like when I'm feeling down is to listen to Tracy Chapman. I find that her music is often somber. It addresses some serious things, but there's also some empowerment in that. So I got to go through a little sad phase first, but then when I want to start feeling better, I have found the best medicine for that, is doing something positive.

Doing something really meaningful is one thing, but if I even just do something as simple as a favor for a friend or helping somebody, it just makes me feel like I'm contributing to some positivity in the world. So I got to go through that little phase, I think before I can get over my sadness at the moment.

Joyce:

That sounds very sensible and very level-headed, Barb, which I would expect coming from you. I think it's important not to walk past the moment too quickly without giving yourself the chance to sort of grieve for what it feels like we've lost as a country this week.

Kim, what about you? Are you any more upbeat than we are?

Kim:

I mean, it's been a tough week, right? It's hard to be optimistic when the weak is tough, and I think it's important that we do find things to keep that balance in our lives. I find that when I do something with my hands that that's a good way to take my mind off of things that are bothering me, because I have a tendency to ruminate on negative things if I don't do that.

So whether it's working on making a sewing a garment, or I really love repairing things, just things that I'm doing with my hands in a tactile way, when I'm done doing it, I feel very satisfied in doing that. Even cooking can really help lift my spirits.

Joyce:

Jill, what about you?

Jill:

Well, first I have to try to absorb the bad news, and there's plenty this week, that's for sure. Although there was some good news on the Trump front maybe, and once I absorb it, I make a plan for how I can work to change whatever it is. And then I listen to Gloria Gaynor's, I Will Survive, and that cheers me right up. And sometimes Helen Reddy's, I Am Woman, hear me strong. So those are the ways I cheer myself up.

Joyce:

I love Cake's version of I Will Survive. It's one of my favorite covers ever done of a song, and it runs around in my head a lot in weeks like this. I think I'm like you.

Look, this is a tough week to stomach, in a lot of different ways. But something that I'm increasingly coming to accept is that the Supreme Court and institution that I have borderline cherished for my professional career, that it is damaged, that it is possibly broken and like you say, Jill, to me that's a challenge to do something about it.

So I think moving forward, we may all have to be willing to explore solutions that before would've seemed unfathomable, like term limits for Supreme Court justices or expanding the court. But what's clear to me is that we can't do nothing. We can't just stay walking in place.

Jill:

Did you know your personal information is out there for anyone to find? Data brokers, scrape public tax records and sell that information legally, making it accessible to anyone. We all need to fight back. Kim and Barb, have you ever been hacked or do you understand how important this is to protect yourself?

Kim:

Yeah. I really do. I mean, I have had my identity fully stolen, new credit cards opened up and tens of thousands of dollars worth of credit limit used, and it was such a hassle to try to work out. And I didn't realize before then about the dark web and how information, your address, your name, your date of birth, the stuff that you open credit cards with is so readily available before that. What about you, Barb?

Barb:

Yeah. In my work as a prosecutor, we had a lot of cases involving identity theft, these massive organized crime rings where people would steal identity from tax returns and bank records, hospital records, all kinds of things. And it's just a nightmare for the people who lose access and control of that information.

Jill:

That is so important to know because when privacy is paramount, we're thrilled to partner with Aura. Aura is an all-in-one online safety solution that helps protect you and your family from identity theft, financial fraud, and online threats before they happen.

Kim:

And with Aura, you can rest easy knowing that someone is looking out for you. The app scans the dark web to look for your email addresses, passwords, social security numbers, and other sensitive information, malicious actors might have. And if anything is found, you'll receive an alert in real time.

If you're a victim of ID theft, their experienced White Glove Fraud Resolution team will help you navigate credit bureaus and help you initiate credit freezes or locks, and work with you around the clock to resolve it.

Barb:

The security is such a great feeling, and Aura offers a suite of tools to protect you and your loved ones, including realtime alerts on suspicious credit activity, computer virus protection, parental controls, a VPN and a password manager. It's a comprehensive safety solution that provides almost every tool you'll ever need. All in one place. Aura also helps reduce annoying robocalls, telemarketers and junk mail by sending takedown requests for you regularly.

Joyce:

For a limited time, Aura is offering our listeners a 14-day trial, plus a check of your data to see if your personal information has been leaked online.

It's all for free when you visit aura.com/sisters. That's aura.com/sisters to sign up for a 14-day free trial and start protecting you and your loved ones. Again, that's aura.com/sisters. Certain terms apply, so be sure to check the site for details, and of course, you can find the link in our show notes.

Kim:

All right, well, it has been quite a week at the US Supreme Court. Joyce, we know what the court did with respect to affirmative action, it is essentially no more. But I want you to help us understand how we got here.

When the affirmative action decision came down, I tweeted, urging people to read Justice Ketanji Brown Jackson's dissent first, in part because the majority very conveniently forgot the originalism in its analysis of affirmative action. And didn't even mention.

Joyce:

I'm sorry, originalism. What's that?

Kim:

Oh, yes.

Joyce:

What are you talking about Kim?

Kim:

Originalism was a part of this, but it only came from Justice Jackson on the court who very deftly explained the 14th Amendment, which includes the Equal Protection Clause, this was an Equal Protection Case. And what went into its adoption, its Reconstruction-era amendment. Joyce, explain to us why that's so important here in order to understand how we got here.

Joyce:

Yeah. So I'm a fan of your approach too. I almost always start with the dissent, and this one was a barn burner. It was a good one to start with. Because what happens in the majority opinion is that they somehow transmute this notion that affirmative action is there to level the playing field. That's its purpose, given our nation's undeniable history and its generational effects.

And somehow the majority concludes that affirmative action violates the 14th Amendment by discriminating against white people and notably against Asians. And I think it's worth noting that one of the big arguments the majority makes, is this pitch to try to divide communities of color by setting Blacks and Hispanics on one side and Asians on the other side. I think we're fortunate. The student groups that I've seen have refused to take the bait, but this is for sure one of the fallacies of that opinion.

And to your point, Kim, the majority's opinion just flies in the face of the reason the 14th Amendment was enacted in the first place, which was that some of the southern states had become actively passing laws that restricted the rights of former slaves, after the Civil War, Congress responded with the 14th Amendment. It was designed to place limits on those states' ability, on their powers and also to protect civil rights.

So what does the majority do here? They ignore that. They reverse decades of precedent. They do that like the precedent means nothing. And that's really a huge issue. They, in essence, turn the 14th Amendment on its head. They forget that it's meant to protect Black people. They ignore the precedent. I think it's a very normal thing for lawyers and folks in the community to dislike the results, when a judge makes a decision in a case, because in every case there are winners and there are losers, right? I mean, that's how the system works.

And there are decisions that I don't like, that I disagree with. The problem here, and that's why this is such a good question to start off with, is that what the court does is fundamentally wrong. It's intellectually dishonest.

One of my former US attorney bosses texted me this morning and she said, "Oh, look, the court was intellectually dishonest three times in two days." And this case, I think is the worst of them, simply because they ignore what the 14th Amendment is and what it's meant to do to reach a result that they want to. It's about politics, not about legal principle.

Kim:

Yeah. It's totally outcome driven. I mean, the one reason I was, one of the few things that shocked me about this opinion was after Justice Ketanji Brown Jackson, after joining the court, has given now in a number of cases, both the affirmative action cases and in some of the voting rights cases.

Given this absolutely splendid originalist lesson about the 14th Amendment and other Reconstruction-era amendments, 13th, 14th, and 15th Amendments, which were passed after abolition for the purpose of bringing former enslaved people and their descendants, Black people into society in a fully operating way. Not just saying that slavery is over, but saying, "How can they be educated?" "How can they hold office?" "How can they vote?" "How can they have all the rights that everyone else has?" And that's what the Reconstruction-era was all about, and that's what these amendments came out of.

Now, the folks on the Supreme Court who claimed to love originalism, I was waiting to see, I want to see how Chief Justice John Roberts, who I figured would probably write this opinion, because ending affirmative action seems to be a B that has been in his bonnet for a while. How he would answer that, how he would address that very clear case that Jackson put forward. And he just didn't! He just ignored

it! He didn't say anything, which I just found just like, "Wow. He memory hold a whole part of constitutional law in order to get to this result." Which I think tells you something.

And another thing that I thought was really interesting about this opinion, is Chief Justice John Roberts also does another little slide of hand by saying, "After the government with Solicitor General Elizabeth Prelogar did a great job in arguing about this the importance of affirmative action to our military academies. And why that's so important. John Roberts somehow just said, "Oh, but this doesn't apply to them." I still don't understand how, but he just said, "Mo, no, don't worry."

Joyce:

Or it might be important there, Kim.

Kim:

He's, "Okay. You can still do it there."

Joyce:

You want to mention that?

Kim:

Oh my God. So Jill, you are the first woman to serve as US general counsel of the army. And knowing the wonderful case that Elizabeth Prelogar made about the importance of affirmative action to military academies. Make it make sense, Jill. What happened here?

Jill:

When you talk about being shocked at something, I can't even remotely begin to think about how this got pulled out as an exception to which the rule doesn't apply. Yes, recruiting people for the military is important, but recruiting people to every aspect of life is important. Having a diverse community in business, in any job, in any profession requires diversity in the classroom.

And when I was general counsel, it was right after the draft had been abolished and the military was becoming heavily populated by people of color, particularly men, because women had restrictions at the time, which have since been mostly eliminated. And there was an argument about what we would be doing to people of color in this country by putting them at more risk in the military than white people.

And so it was something that we took seriously, and the Secretary of the Army Cliff Alexander, had been head of the EEOC. So he takes equality quite literally, and he is also African American. So he takes it from a very personal standpoint. And we did our best to deal with that, but honestly, as importance as it is in the military to have people who look like you be the leaders, it's equally important in every other profession. So the rule should be the same for everywhere. The military decision is really the right decision. Let's pay attention to that.

Kim:

Yeah, and one-

Joyce:

Because argument proves... I'm sorry to jump in, but I mean, I felt like Roberts, the way he postures this, it proves too much, right? That's what Jill's saying. He's in essence conceding that it should be the majority opinion.

Kim:

Yeah. It's totally outcome driven. It's like he doesn't, "Oh, I don't want to mess with that. So I'm just going to carve it out."

Joyce:

Yeah. Exactly.

Kim:

"I'm not going to explain why, but I'm just going to carve it out." It's crazy. So Barb, one point that Elizabeth Prelogar made when talking about the military and the importance of diversity there, is national security. Now, I think I have long said, I think the problem with affirmative action jurisprudence from the beginning is that they use the wrong compelling interests.

So for our listeners, when there's a constitutional issue involving race, the test is whether there is a compelling state interest and whether whatever action that is taken is narrowly tailored to fit that compelling state interest. The only compelling state interest that the Supreme Court has sanctioned for affirmative action is diversity, not rectifying past racism, not basically what the 14th Amendment was meant to do, which was guard against racism and protect the rights of people of color.

It's classroom diversity, which is really meant to benefit white students. It's having, the rationale is having people from different backgrounds in a classroom. Helps everyone, including the white students, which that's the wrong compelling interest, but that's a different thing. I think one of the biggest problems is they don't cite national security as a compelling interest. So you are our national security expert Barb, what do you think about that?

Barb:

Well, the argument that the solicitor general made, was that this could have an adverse effect in the military because military leaders themselves believe it's important to have a diverse officer corps, because they're going to go forth and lead soldiers who are themselves diverse. And so they need admissions to the military academies to be able to admit a diverse officer corps. But it goes far deeper than just that.

If you look back in our history, the United States has tried to hold itself out on the world stage as this leader of democracy. And we use a lot of soft power to try to mold the world to make it safe for democracy. We are much better served when we have allies around the world who are also democracies. It stabilizes military conflict, it makes for better trade partners, it makes the United States safer. But you go back to Khrushchev during in the Soviet Union, and when we would call out human rights violations by the Soviets, his response would be, "Fiat." And, "You lynch Negroes."

And so it would take all the wind out of our sails to try to hold ourselves out. It was with some moral authority when we couldn't achieve equality in our own country. And so over the decades we've worked toward a more perfect union.

But when things like this happen, you can just imagine that all of these authoritarian regimes around the world and other democracies that have been backsliding toward authoritarianism like in Hungary, in Turkey, or the regime in China, they're going to say things like, "Huh! Look, they call themselves a

democracy and they can't achieve equality there either. Democracy's not all it's cracked up to be. You might as well have a strong leader who makes you better off economically, and so you should be more satisfied with me." And that's just not good for the national security of the United States.

Kim:

Oh, wow. So I want to leave open any other thoughts on this decision, but I also want to talk about a decision that's very much related to higher education, which is the decision striking down President Biden's student loan forgiveness plan. They found in the most tangential of ways that there was standing for the people challenging this.

So it was challenged both by some students who, it wasn't even that they didn't get relief. I believe one did get some relief, but not as much as they wanted. And another student that didn't get relief, they found that they did not have standing. They were not affected, directly impacted by this decision in a way that gave them grounds to bring the challenge.

But they found that one state did have standing, the state of Missouri because a student loan servicer called Mohela is based there. Now, keep in mind, Mohela did not challenge this. Mohela was not in it. I know there's a meme with Nene Leakes that says, "Why am I in it? That's Mohela." They're like, "Why are we even in it?" But that was enough for Missouri to make a claim that, "Oh, because it harms them and they're based in Missouri, it harms us." And the Supreme Court bought that. That's first of all, that's a first bit of crazy.

But the fact that this loan forgiveness was struck down, I want anybody who wants to talk about it because to me it goes hand in hand with access to education. Because I wrote an entire series about the racial wealth gap, and the first piece of it was about student loans and the disparate impact that student loan debt has, in perpetuating the racial wealth gap, that makes education a bad deal for a lot of Black and brown people. And that plus the end of affirmative action to me just feels devastating. What do you guys think?

Joyce:

Yeah. I think seeing them both happen on the same day is tough. And the standing issue is nothing to sneeze at here, Kim. I mean, they really manufacture standing almost as though they're using the standing doctrine as a way to deal with issues that are not properly before them when they want to. This isn't the only time we've seen this happen this term, but it's maybe the most egregious one.

I'll just say on a personal note, I was raised by a single mom who taught preschool. So I went to college and law school on a lot of loans. I paid off my last payment, the year before the first of our four children went to college. It is very important to me that they're able to get the best educations they can and not feel constrained like I did. And I'm hugely supportive of finding a way to pay off student loan debt.

The court has ruled that this one is not legal. I'm glad to see that Joe Biden quickly announced that he had a new plan, and I hope he will be successful because I just don't think your background, your family's financial well-being should limit your opportunity in life.

Jill:

And Joyce, I had a really visceral, horrible reaction to this because it seemed to me the court was going out of its way to stop executive action by this particular president, and you know that if the president who had proposed it had been named T-R-U-M-P, that they would've seen it differently.

And I think this is part of, I suppose we'll talk about the slippery slope that many of the cases that we're talking about today have put us on. But this is part of the slippery slope of are they going to eliminate all

executive action? Are they going to eliminate the administrative state and the ability of agencies to make rules, under which they will live? That to me is what this case really is about, and that's scary to me.

Kim:

The point that you make is important, Jill. Are they going to eliminate the executive branch's authority altogether or are they going to pick and choose? Because Elena Kagan and her dissent was like, "This is the court basically stepping and putting itself in the shoes of the executive in a way that I think exceeds is power." That's not okay. This is the same court that it took a couple tries, but they found a way to let Trump's Muslim ban stand. But they did not find a way to say, "Under this rule that allows the executive to act in emergencies." And if the pandemic wasn't an emergency, I don't know what it was, they can't do it here. So I think it's an important question to ask.

Look, the underlying statute, it came after the war in Afghanistan. So I think there could be an argument that's like, "All right, they did not. Did Congress really envision expanding student loans during a pandemic based on this?" But if we lived in a normal world where Congress would act when needed, then we wouldn't be here, but we don't. So what else is a president supposed to do to lead other than use the tools that he or she has? She one day God willing, has. So I think there's something to Kagan's argument.

Barb:

Yeah. And this is just another example I think of the court achieving the result they want to get. I am a process freak because we can't allow the ends to justify the means because then whoever has the majority just wins all the cases. And that's not how we're supposed to decide disputes in this country. And I understand that case law is more art than science, and people, judges bring their own worldview when they're deciding cases. So sometimes they'll interpret things differently depending on that worldview. But here I find their reasoning so disingenuous.

The Congress has delegated to the Secretary of Education, the power to hear the words modify or waive student loans in times of a national emergency. And so the Secretary of Education here said, "I am going to waive loans up to this $10,000 cap for families earning below a certain amount of money in light of COVID-19." And what the court reasoned is, "Well, what they meant when they said modify, they meant only a modest modification. And this would undo something like $400 billion worth of debt. So they couldn't possibly have meant it be this much."

Are you originalist or are you not originalist? Right? You're textualists or not textualists? The language of the statute says modify or wave. And they say, "What do you mean modest? I can wave it all together. Why does the modification have to be modest?" So I find the reasoning, the procedure here to be incredibly disingenuous. And if I make him, I just wanted to add one more thing on the affirmative action case while I have the microphone and that's on this issue-

Kim:

Take it away, Barb.

Barb:

... it's on this issue of colorblindness. I think it's really important to think about this concept because clearly, Chief Judge Justice Roberts think that we must aspire toward a colorblind society. And this is the thing that Justice Jackson calls it, the let them eat cake obliviousness. And I think to say, we live in a

colorblind world is to undermine the reality of the world that we live in. And in fact, the law does not require that we be colorblind.

As you pointed out, Kim, no right is absolute under the Constitution. And he says something like, "We must end discrimination, and the only way to end discrimination is to end all discrimination." No, we do discriminate. It is lawful to discriminate. As long as the government has a compelling governmental interest and the law is narrowly tailored to achieve that governmental interest, then courts have consistently held it is permissible, it's skeptical. That's why it's subject to what we call strict scrutiny. But if there is that compelling reason and narrowly tailored, it is permissible under the Constitution.

And I think this idea of colorblindness is just wrong. It sounds good, I think to people who say, "Yeah. My parents taught me to treat everybody alike, whether they're Black or white or brown or purple." Well, there are no purple people. Get over it. That is not the way the world works. And affirmative action is about recognizing that reality and taking affirmative steps so that we can move toward a more perfect union.

And so I think this is something he has been steadfastly working toward his whole career, and that also latched onto this language in Grutter that, "There must be a time limit. There has to be an end for affirmative action. And since you can't tell me when it's going to end, it must be unconstitutional. And 20 years ago we said, we expect it will end in 25 years." So I don't know why we feel the need to end it after 20 years and not 25 years. But that was always an expectation and not a requirement. And so to latch onto that I thought was also intellectually dishonest. So I'll get off my soapbox now. Go listen to my Tracy Chapman.

Jill:

No. Those were really inspiring words and I agree with you. I want to just emphasize one thing you said about the wave or modify, which is the language. And I don't see how wave doesn't include the word cancel. I mean, tell me what definition of wave doesn't mean you can cancel it. And modification, well, you can certainly eliminate the interest on it, can't you? I mean, that would be a modification.

Kim:

Barb, you know something I found that my dog Snickers and I have in common? We love bacon. Bacon is an amazing thing and we love it when it's high quality. What's your recommendation for us?

Barb:

Oh, bacon is good stuff. And you know where you can get the best bacon in the world, Kim? Is from Moink. Have you had their Bacon? Man, it's good.

Kim:

Wow. It's so good.

Barb:

Yeah. Not only do we love their bacon, but we love how you can support small family farmers with Moink, and reduce your environmental imprint all while enjoying the highest quality meat on earth. That's why we're so excited to tell you about Moink. That's moo + oink.

Moink is a meat subscription box company on a mission to fight for the family farm. They're located in rural America, run by an 8th generation female farmer. Their animals are raised humanely, their employees are paid a living wage, and the product quality is better than anything you'll find in a store.

Jill:

Moink delivers grass fed and grass finished beef and lamb, pastured pork and chicken and sustainable wild caught Alaskan salmon straight to your door. Moink farmers farm like our grandparents' generation did. And as a result, Moink meat tastes like it should because the family farm does it better.

The Moink difference is a difference you can taste. And unlike the supermarket, Moink gives you total control over the quality and source of your food. You choose the meat delivered in every box like rib eye, chicken breasts, pork chops, salmon fillets, and much more. Plus, you can cancel any time.

Joyce:

Shark Tank host Kevin O'Leary called Moink's bacon, the best bacon he's ever tasted. And Ring Doorbell founder Jamie Siminoff, jumped at the chance to invest in Moink.

Those guys may be important and have some gravitas, but the opinion that matters the most to me is Ollie Vance, my youngest son. He's super happy that our refrigerator is full of Moink's bacon. Ollie loves it too. And best of all, Moink guarantees that if you get their bacon, you'll say "Oink. Oink. I'm just so happy I got Moink." You'll love Moink just like we do. It's the perfect option for a family meal or dinner party.

Kim:

So keep American farming going by signing up at moinkbox.com/sisters right now. And listeners of this show will get free bacon in your first box. It's the best bacon you'll ever taste. Trust me, and trust my hound dog. It is true, but for a limited time.

So it's spelled moinkbox.com/sisters. That's moinkbox.com/sisters. So start bringing better food to your table when you visit the site. We know you're hungry now. So guess where you can find that link, in our show notes.

Joyce:

Okay, I just got happy thinking about free bacon.

Kim:

If Snickers knew English, she would be right here. Like, "What? Bacon? Where?"

Barb:

Well, this week also brought us a very significant case that included a face-off between 1st Amendment free speech rights and anti-discrimination laws protecting the LGBTQ community case called 303 Creative vs. Elenis. Each case gets worse than the last or hard to compare, which is worse than the last.

Jill, can you tell us just a little bit about the background of this case and the court's holding that came out on Friday?

Jill:

Sure. This is a case that should have ended withstanding, but I'll skip that part because no work was done and no request, at least as far as I can tell, was made to have a website designed. This is a case where a person was found who creates websites who didn't have a wedding website business, but was convinced that she wanted to expand her business to include wedding websites, but to make sure she excluded from ever doing a wedding website for any same-sex marriage.

And so she hadn't done that yet, but said, "I want to make sure in advance. I want to preempt the possibility that under the Colorado law, the accommodation law that would require me to do this, that I don't have to do it because of my religious beliefs." And that's really what it was. So the question that was decided was, "Does requiring an artist to speak violate her free speech rights?" And the court said, "The anti-discrimination law of Colorado couldn't be used to make her speak and to say something that she didn't agree with, which was it would be requiring her to support gay marriage that she did not support."

Barb:

All right. Well, thanks for the summary, Jill. Kim, how does this case square with that old case Masterpiece Cakeshop from a few terms ago? You remember that one?

Kim:

Yes. I do.

Barb:

Did that sort of leave the door open to this one, you think?

Kim:

Well, it didn't, but I think I understand. I understand what happened. So for our listeners, you recall the Masterpiece Cakeshop case involved a baker of wedding cakes who had a religious objection to making wedding cakes for same-sex couples, and tried to claim that a law that would require a non-discrimination law would mean that that would violate their religious exercise, right?

So that this case went to the Supreme Court actually a couple of times, and in the end, the court, a different court, a differently constituted court clearly uneasy with trying to expand the religious right to allow people to discriminate against gay people. Said, all right, they ruled on it, on very narrow grounds and said, "We are not sure that this cake maker got a fair shake at the state board that went before them and said some things that seemed kind of disparaging about his religious rights. So we're going to send it back down and let them try that again and without that disparaging comment and let them work it out." So they punted essentially on making this decision.

Well, after that, you had conservative groups such as Alliance Defending Freedom, which backed the plaintiff in the most recent case with the website. That took a different tack then and said, "Okay, we're not going to do this on the grounds of religious expression that it's violating religious expression rights because that may not work in the face of these anti-discrimination laws. We're going to say it's speech, we're going to say it's free speech." And this is a wedding website maker who is not making any wedding websites at all, but who wants to, and who wants to say, ahead of time. "Same-sex couples, unite and come to me for that service." And she has a free speech right to do so.

To me, this is litigation activism, trying to use new theories to break holes into these anti-discrimination laws. And lo and behold, on Friday it worked.

Barb:

Yeah, right. It sort of like the old throwing the spaghetti to the wall to see what sticks, right? "Well, religion in it, not so much. How about free speech for speech? What about that? Let's try that one. She's close enough. She doesn't really have a real case for controversy. Let's try this." And then-

Joyce:

"Oh, it's all in the 1st Amendment. Why not?"

Barb:

And then of course, as Jill says, they come down on the side of the web designer. Joyce, you and Kim have both spoken about the value of dissents and Justice Sotomayor has a real killer dissent here. In fact, you had a Twitter thread about this today that I thought was great. Can you share with us some of the thoughts of Justice Sotomayor here?

Joyce:

Yes. Apparently this is the week where I have read all of the dissents so that are listeners don't have to.

Barb:

But do you remember what Justice Ginsburg said about dissents, don't you?

Joyce:

We write dissents-

Barb:

You're writing for the future.

Joyce:

... for the future. Absolutely. And I mean, if there's a hopeful outcome this week, it's reading the power of some of these dissents. So in 303 Creative, the majority says that it's speech and Justice Sotomayor says, "Not so fast. It's conduct, not speech." And she makes a good case for that legally. But she says, "Even if it is speech, the 1st Amendment has never been intended to protect discrimination."

And she talks about public accommodations cases, public accommodations sort of sounds like it's hotels, but it's much broader than that. It's things, goods that are available commonly in commerce. And so she talks about public accommodations' law, that prohibit discrimination against protected classes of people, Black people, now LGBTQ people and other groups. And she makes the point that they're intended to serve two purposes to make sure that there's public access, but also to protect public dignity.

And there's a great piece in this dissent that I'm going to read. It's not very long, but her explanation is so good. She says, "When a young Jewish girl and her parents come across a business with a sign out front that says, 'No dogs or Jews allowed,' the fact that another business might serve her family does not redress the stigmatizing injury. Or put another way. The hardship, Jackie Robinson suffered the famous baseball player, when on the road with his baseball team, was not an inability to find some hotel that would have him. It was the indignity of not being allowed to stay in the same hotel as his white teammates."

And so she essentially concludes that the internet is sort of the modern version of the Woolworth's counter. It's a place where everyone is entitled to sit, and she traces the history of the court's failure to enforce public accommodation laws after the Civil War, which sort of leads to this whole history of Jim Crow laws and becomes the civil rights movement, and the infliction sometimes of violence upon people who are protesting, the failure of the courts, the failure of civil society. Ultimately, that leads to a good path where equal rights become de jure. They become a part of the law. And the course that this Supreme Court has said on, I think is very much to reverse that.

Here's where Justice Sotomayor ends up that I think is powerful. She says, "You know what this designer is doing here? She's not looking to protect her religious freedom. She's actually asking for a license to discriminate. And that's wrong. That's not something that this court should be in the business of granting, but that's what it did today." I think she nails it, head on.

Kim:

My favorite part too is when she's talking about the hydra, fighting discrimination. It's fighting the hydra.

Joyce:

You keep coming back.

Kim:

You cut one head off and another one pops up. That's exactly, exactly right.

Barb:

Yeah. So Jill, we've got this space off between 1st Amendment rights and anti-discrimination. As we said before, no right is absolute, as long as you can meet strict scrutiny, a compelling governmental interest, a law and narrowly tailored to achieve that interest, the interest should prevail.

And when we've seen, as Joyce just talked about, when it comes to racial minorities and religious minorities, we have said protecting against discrimination is a compelling interest and it prevails, and we're going to let that prevail over free speech rights. But in this case, just the opposite, what does that say to America about the value of the court is placing on free speech vs. freedom from discrimination based on sexual orientation?

Jill:

Well, it seems pretty obvious that we're talking about balancing, competing constitutional rights and that in this case, they weighed or put their thumb on the scale in favor of free speech. In Masterpiece Cake, it was on free expression of religion. And we have another case, the postman who doesn't want to work on Sundays, another example of putting the finger on the scale for religion.

And I think that there are better accommodations than the court has recognized, and that these are not conflicting things. And that of course, I would put much more value on the public accommodation law of Colorado and the equal treatment of all people, which seems to me so fundamental. I mean, I'm all for the 1st Amendment, both speech and religion, but treating people equally seems to me so fundamental and that's being ignored here, and that I don't think is a good thing.

Barb:

Yeah. Let me ask you Kim and Joyce, what do you think might be the practical consequences of this? What's next? If you're a business owner out there and you are opposed to the LGBTQ community, what do you think is going through their mind right now? What are they going to be doing?

Kim:

I mean, I want to hear what you have to say, but I don't see any limiting principle in this opinion. And I think that the consequences aren't just for the LGBTQ community. It can go broader than that. I don't see how, based on this rationale, a photographer can't say, "Oh, you know what? This is my expression and I don't want any Black people in my images." I don't see how somebody who is a dance instructor can't say, "I teach American dance, and so I don't want foreigners in my class." I just-

Barb:

Do you think even beyond the LGBTQ community?

Kim:

Absolutely. If you're basing this on a genuine, sincerely held belief that something is wrong, and this is your artistic expression, you don't want to be forced in your artistic expression to express something you don't believe. If that's the principle, there is no limit to that.

And look, the difference here between the precedent that they cited with the St. Patrick's Day parade and the ability of a civics group to keep a gay group from marching in it or students from being forced to recite the statute, what do you call it?

Joyce:

Pledge.

Kim:

The Pledge of Allegiance.

Barb:

Pledge.

Kim:

That's clearly speech. And that is not in a commercial context. We're talking about businesses, selling goods and products and services. That's what this is getting into. And it's basically giving a big old, putting a big old hole in these laws that can make it saying, "Your kind is not allowed here. We don't serve your kind here." In business establishments, that's what this did. That's where this set us back.

And with no clear, Gorsuch keeps saying that it's limited, but he doesn't say how. I don't see the limit in it. And I think that's exactly the point that Sotomayor was making, that this really is a setback in a way that is damaging to the United States as a society.

Barb:

Yeah. How about you, Joyce?

Joyce:

I think as some of those issues come up to the courts, the court will be forced to find some limiting principles. But here's the problem. All sorts of damage can be done in the meantime. People who are of the mind to not serve Black people at their lunch counters, and obviously there are other legal principles that come into play and that could cause courts to say, "No, you can't do that." But people will try to do it and it will take time for the issues to go to court.

And this case will be responsible for damage that's done to people like the little girl in Justice Sotomayor's... In her dissent, it's not the fact that the courts ultimately vindicate your rights. It's the damage that's done to you when the courts aren't protecting you. And that's what this decision is about.

Kim:

Yeah. And can I just add one more thing that to what I said because, yes, well, I think it's something that imperils all people in protected groups. I think the fact that right now that we are seeing in our society a concerted, an increasing effort to strip away the rights of LGBTQ people, it's that is the current accepted form of bigotry. I want to underscore that they are most at risk right now because-

Joyce:

They are.

Kim:

... this was about and that's what we will continue, it's less palatable for people right now to try to assail the rights of, well, I was going to say it's less powerful than assail the rights of Black people, but then I see the attacks on CRT and book banning, so maybe not. But I think right now that the group de jure to discriminate against is LGBTQ people, and I think they're most imperiled right now.

Jill:

I agree with you, Kim, but I see it as a slippery slope because if they get away with this, then it's, "I don't want to serve an interracial couple. I won't make a wedding cake for them or a wedding website." Or "I don't like Jews. I'm not going to-"

Kim:

Muslim [inaudible 00:46:54]

Jill:

"... do a cake for Jewish wedding." Muslims. Yes, it can be anything.

Kim:

Yep.

Jill:

First Americans, you name it. And so I think that's why this case is so important, is that it is a harbinger of horrible things to come.

Barb:

Well, I have a religious objection to bigots, so I'm going to stop serving you.

Kim:

I am a part of that surge Barb.

Joyce:

Hey Kim. I'm usually slow to adopt new products and new brands, but I am so excited about Kitsch. I'm using a lot of their products now. Have you been trying anything out?

Kim:

I totally have. So my favorite weekend look lately is, my hair is in braids right now, but I put on one of the Kitsch bonnets, which is satin lined, which is so good for your hair, actually helps to tame down the flyaways and make my braids look better, but it's also really cute. I just kind of pop it on my head and go run errands because they come in these beautiful colors and it doesn't look like something that I just only want to sleep in. I kind of want to wear it out because it's so cute.

They say that haircare is the next skincare. The Kitsch has taken it to the next level. With a cult-like following, Kitsch has created game-changing essentials that beauty enthusiasts swear by. From satin pillowcases, which I love, to time saving towels, Kitsch knows haircare doesn't stop in the shower.

Joyce:

Whatever your budget, your skin type, your hair type, Kitsch believes that you deserve little indulgences at affordable prices. Morning, noon and night. They started in 2010 by selling hair ties door to door, literally just hustle and a dream that took off.

We love that Kitsch's self-funded, female founded and now carried in over 20,000 retail locations. Some of Kitsch's bestsellers we can't get enough of are their vegan and cruelty-free satin pillowcase caps and eye masks. They're great for your hair and your skin while you sleep.

But you know, Jill, I have been so influenced by you talking about the heatless satin curlers that I actually picked some of those up and used them for the first time this week. They're every bit as good as you said they were. My hair looks great when I use them.

Jill:

I'm so glad to hear that because I knew that you would think that. They're heatless satin curling rollers are just the best. They mean you can say goodbye to heat damage. I use them. They're easy to roll, comfortable to sleep on, and they really work. They leave your hair just the right amount of curl. These are the original and still the best heatless curlers. Don't settle for knockoffs, get the ones that started the craze.

Kitsch also has rice water shampoo bars that could help with overall hair growth and density. They have a rosemary scalp oil in them that helps support scalp health and hair strength from root to tip, and they have so much more.

Barb:

Right now, Kitsch is offering you 30% off your entire order at mykitsch.com/sisters. That's right. 30% off anything and everything at mykitsch, spelled M-Y-K-I-T-S-C-H .com/sisters. One more time. That's mykitsch.com/sisters for 30% off your order. Everyone can also find the link in our show notes.

Jill:

Okay, let's move to something that might have a little bit more of an upbeat ending. It's a case called Moore v. Harper and it's like Marbury vs. Madison and Brown vs. Board of Education where everyone's going to remember the holding in this case and the relief that we felt except for maybe President Trump and John Eastman who are disappointed.

The court rejected the right wing idea that state legislatures could set federal election rules without any oversight by their own state Supreme Court even when the rules they set violated the state constitution. It was the case I picked as the one to watch as the biggest threat to democracy, when we talked about the upcoming Supreme Court term last fall.

It involves the theory that John Eastman put forth to allow the state legislatures to reject the vote of their citizens and replace it with the winner they wanted. In a 6-3 decision disaster was averted. So Barb, skipping the jurisdictional issue, which although I think it's important, I think we should talk about the rationale and the holding and whether you were surprised by the outcome, that the court actually rejected this theory.

Barb:

Yeah. What I really thought was going to happen kind of midway through the term was that the court would end up dismissing it as moot because the Supreme Court in North Carolina ultimately changed its view on this. So I thought that... That was the only part that surprised me. But then as we got close to this week, it seemed like, "Well, there must be some disagreement. Maybe they're going to issue a merits decision." But ultimately, I think this is good news.

Chief Justice Roberts wrote this opinion and said, rejected the independent state legislature's theory. And I think they got it right. I mean, the first case you learn in constitutional law, back me up on this, sisters, is Marbury vs. Madison, which is the case that says that the role of the judiciary is to interpret the law and that all of these things are subject to judicial review.

And so the independent state legislature theory of course, says that the legislature gets to choose the time, place and manner for selecting election, handling elections. And that means even if they should use some rule that violates their state constitution, their courts are powerless to do anything about it. And then even perhaps federal courts could be powerless to do anything about it. That was ridiculous.

It was pushed by Eastman, somewhat fringe people who see that state houses are controlled by Republicans, see this as a way to override the vote of the people of their state. But it's crazy, it's not only antidemocratic, it just doesn't jive with the way we conduct judicial review in this country. And so Chief Justice Roberts recognized that, wrote about it and rejected this theory.

There were some dissents, which seems alarming, but a 6-3 majority rejecting. And I think it's super important to have not a punt on this case, but a merits decision so that as we go forward in 2024, it is clear that this theory is not viable.

Jill:

So I can see a lot of heads nodding on this right now.

Kim:

Marbury vs. Madison. You're with me on that one.

Jill:

Absolutely, for sure. So let's talk about the concurring opinion and the dissents. So Joyce, let me start with Justice Kavanaugh concurred with the decision, but wrote his own opinion. Is that significant for future cases? What was his point?

Joyce:

Yeah. It potentially is significant if he could attract more votes for his, let's just call it the moderate view for convenience because nothing about it is moderate, but we'll call it that.

If he could attract votes, this could become the law of the land the next time this comes up, say in November of 2024. In essence, he agrees with Robert's review of the case law on independent state legislature. He agrees that federal court review of a state court's interpretation of state law in a federal election case should be deferential. But he says deference is not abdication.

And this means that although the majority, which includes Kavanaugh rejects this sort of extremist version of the independent state legislature theory, this theory that state legislatures can pass any election rules they want even for federal elections and state courts can't do anything about it. He says, "No, that's offbeat." But he does believe that there is some sliver here that I think would be a bad result if it gets implemented in the future.

He picks up on this view that Justice Rehnquist had of a more minimalist independent state legislature. And you need to understand, and it's complicated and tough to do in a couple of minutes, but you have to go back to Bush vs. Gore and the Florida challenge, where all of this comes up and Justice Kavanaugh suggests, "Well, maybe Justice Rehnquist had it right. Maybe there is some area where a state court's interpretation of its own laws can be rejected, if it goes so far afield from the way those state court decisions are, those state court laws are normally interpreted that it's just almost like they're making up their own sorts of things."

In other words, you want to talk about a rule that doesn't have a limiting principle, that's Justice Kavanaugh's concurring opinion here. And the frightening thing about it is down the road, it leads to the prospect that you could have federal courts reviewing the decisions that are made on this sort of aberrant state legislative behavior. And we could have, oh my God, the Supreme Court deciding the outcome of the election in 2024 under the Rehnquist version of the theory.

Kim:

And it's important to note too, that not only does Kavanaugh embrace this. I found video from the time of Bush v. Gore when Kavanaugh was working for Bush at that time.

Joyce:

Yeah. This was all his baby.

Kim:

Yeah. And he was explaining this. And do you know who else are alums of working for Bush? John G. Roberts and-

Jill:

Amy Coney Barrett.

Kim:

... Justice Barrett, the three of them all worked.

Joyce:

They worked on him too.

Kim:

On all of that.

Joyce:

On Bush v. Gore in Florida.

Kim:

So that's really-

Barb:

On Bush v. Gore.

Kim:

... that's really on Bush v Gore. So that is scary.

Joyce:

I think they should always-

Jill:

[inaudible 00:57:08] All right. So Kim, let's talk about, and you haven't held back on how you feel about all of these opinions, and I know you won't disappoint us on this one, but Thomas wrote a two-point dissent. He was joined by Gorsuch on both points and by Alito only on the first point about mootness. So just briefly tell us about the mootness issue and whether the dissent is significant for future cases.

Kim:

All right, so this is rare when this happens, but on one part of that, I believe that Justice Thomas has a point. So what happened in the North Carolina case was that there was an election, there was a change in control of the North Carolina legislature and they adopted the maps that were at the base of this entire challenge.

So normally when something like that happens and there's a Supreme Court case pending, the case becomes moot, which basically means the Supreme Court can only come in, they can't just rule on anything that they want. They can only rule when there is an active case or controversy before them. And essentially what those turn of events meant, even if you did not, as I didn't like what happened in North Carolina. What it meant was that there was really no more case or controversy. And so the case should have been dismissed.

I thought at the time, like Barb said that that was going to be the best case scenario because I didn't know what the court was going to do about the independent Bennett state legislature theory. And I thought, "Just moot it, just moot it. Let's cut it off before something bad happens." So that's part of the argument. I think there's a point there.

But he also writes this part of his dissent, which I have to say is so crazy that even Alito didn't join it. That he doesn't out-and-out come out and say that he thinks that the independent state legislature theory is right, but he chastises the majority for not at least hearing it out or hearing it out in the wrong way or by the wrong stand.

It's so crazy that I don't even fully understand it, but Neil Gorsuch understood it enough to join on to that part. Which means that there are two people on the court who, in its most farfetched radical form, are at the very least willing to give or have a listen at this fringe constitutional theory, which I think is terrifying.

Jill:

So I'm a little worried that that fringe theory could get another hearing in the next term. There's an Ohio case, Huffman v. Neiman, where the court is going to look at this theory a second time. And given this dissent, and given what we've talked about with three of the justices, having argued, been lawyers representing Bush in Bush v. Gore. Does anybody think that the independent state legislature theory is not dead based on this opinion and that it might come back in Huffman v. Neiman?

Kim:

I don't think it'll come back in that. I think it's dead in the Roberts Court, but the Roberts Court can't last forever. So who knows what happens after that.

Barb:

Yeah. I feel like they've moved on with this one, but I mean, I guess you're right. My son said to me the other day after seeing the affirmative action case, "Are we just going to see this forever? One court just reverses everything that the other courts do forever?" I said, "Yes."

Jill:

Well, that's not supposed to work with stare decisis, but maybe it's a whole new world. So that's right.

Kim:

That's a good point. All of the cases we've talked about today. Stare decisis?

Barb:

Yeah.

Kim:

Could have ended most of the affirmative action case, and this case.

Barb:

Yes. Absolutely.

Kim:

It could have ended, but it doesn't because stare decisis doesn't matter anymore. Wait till next term when we get to Chevron deference, it won't matter then either.

Joyce:

But truly when you look at this opinion, there was no standing to decide this case, right? We've mentioned that the Supreme Court can only decide cases based on a final decision in the lower court. And here y'all will recall that we talked about what happened in North Carolina.

Where the North Carolina Supreme Court, after it changed hands and became Republican majority after the midterm elections, it reopened this case. And that divested jurisdiction from the Supreme Court. It should have flat out dismissed it and sent it back, but it wanted to decide the issue. And look, I like the outcome here, don't get me wrong, but you still have to have standing to hear a case.

Here, I think this court wanted to protect the 2024 election from Donald Trump. I'm not so sure that they wouldn't change course once they perceive that threat as being over. Just-

Kim:

That's a good point.

Joyce:

... I'm not confident that they have a lot of integrity on how they're making these decisions when they manufacture standing at will.

Kim:

Are you saying that they're outcome driven, Joyce? Are you saying that that's what the Supreme Court is?

Joyce:

Oh, you know, gee. Yeah. Yeah, that's absolutely what I'm saying.

Jill:

But at least for now, we can take a sigh of relief and say the independent state legislature theory is a far right theory that can rest in peace for now.

Barb:

Kim, your skin is positively radiating. What's your secret?

Kim:

I love the ocean, Barb. Not just as a vacation destination, but also in my skincare products. And that's why I really love Osea. Now, is the perfect time to refresh your skincare routine. And for us, Osea's brand new Undaria Collagen Body Lotion was a great place to start.

It's a high performance body moisturizer that absorbs instantly and delivers lasting hydration without stickiness or residue. Born from Osea's bestselling Undaria Algae body care line and is backed by some impressive clinical results, like an instant increase in skin hydration and visibly firmer skin in just four hours. I bet you didn't know Osea can do all that, but it's amazing stuff.

Joyce:

Osea's Undaria Collagen Body Lotion is my new favorite summer moisturizer. The newest product in their bestselling Undaria Algae body care line, which includes the cult favorite body oil. I love that too. And the body butter. All of their products are incredible for warm weather with a silky weightless finish. It doesn't leave you feeling greasy and you can put it on, wait a couple of seconds, and it's dry.

Their products are packed with vegan collagen, hyaluronic acid, peptides, and Undaria seaweed. It's the perfect thing to put on before your morning jog or after swimming or Pilates. So hydrate and bright and dry summer skin, whether you've spent the day in a chlorinated pool or swimming in the salty ocean.

Jill:

Another thing that's really important to us is that Osea is a one-stop shop for clean, nourishing clinically proven products for both face and body. Even better, they've been making seaweed infused products in California that are safe for your skin and the planet for over 27 years. Never choose between your values and the best skincare possible.

Barb:

All right. I actually do like that body butter. I'm a swimmer in the summer, and so the body butter is great and it smells so good. I've said this before, I feel like I want to eat it. It smells so good. But don't eat it. Just put it on your skin because that's the way to get hydrated healthy skin for summer with clean vegan skincare and body care from Osea.

And right now we have a special discount just for our listeners. Get 10% off your first order site-wide with code SISTERSINLAW at oseamalibu.com. But that's not all. Get an extra 10% off plus free shipping when you have your favorite products delivered on repeat with their subscribe and save program. Head to O-S-E-A malibu.com and use code SISTERSINLAW. You can also find the link in our show notes.

Joyce:

Well, now we've come to the point in the show where we get to answer questions from our listeners. This has been a different sort of a show. We've talked almost exclusively about the Supreme Court and its passel of bad decisions this week. But now we'll move on and we'll take your questions on some different topics.

If you have questions for us, please email them to us at sistersinlaw@politicon.com or tweet using the #SistersInLaw. And if we don't get to your question during the show, keep an eye on our Twitter feeds throughout the week. We try to answer as many of your questions as we can there.

This week, our first question is for Kim. It comes from Kathleen in Virginia and she asks, it's such an interesting question, "Is there a legal strategy for the loser in a case to relitigate a matter or seek redress based on conflict of interest of a judge? If this is allowable at lower judicial levels, how might this be used to drive reconsideration of a case and apply pressure for judicial ethics at the Supreme Court?"

Kim:

Oh, okay. So I see what you're doing there. So there's two answers to this question. When it comes to court below the Supreme Court, yes, there is absolutely a way to appeal a case or a judgment or even an interlocutory appeal, which means a ruling that was made as a case is ongoing that you think was made because of a conflict of interest or a bias of the judge that would violate a litigant's due process rights. And that's either in a criminal or a civil case, because there is a right to an impartial judge and a fair trial in both of those settings.

So there is a way to appeal either a judgment or a ruling on that basis. And then the court above that court would make the determination of whether or not that judge violated a litigants due process rights based on their impartiality.

The problem with the SCOTUS is there is no higher court to bring such a challenge to. And so in that sense, no, it is not the same for the SCOTUS, but I see what you're saying about pushing for reforms. I think that's a great argument because of that, because there is no redress for a litigant whose case is before the Supreme Court to appeal based on impartiality or any sort of ethical problem, that that should be an impetus to Congress to impose stricter ethical guidelines on the Supreme Court. I think the principle is correct, but there's no mechanism to force that to happen.

Joyce:

So we'll go from that first question to a peer process question. I really like this one a lot. This comes from Marie. "Jill, I'm going to ask you, what is Jencks Act material? That's a phrase we've been starting to hear in the context of the Trump prosecution. Can you explain?"

Jill:

Absolutely. And it is a good question. In light of what's happening in discovery in the Trump trial, which is making a lot of process questions come to the fore, and it's not something that most people ever talk about is the Jencks Act. But the Jencks Act requires the government to produce past statements and written statements and oral statements of witnesses they're going to use. It's inculpatory evidence that they plan to use.

So when they're putting a witness on the stand, and it doesn't have to actually be produced technically, until after the witness testifies, but I can't remember the last time it wasn't given as part of pre-trial discovery.

Maybe one of you knows a case where it was withheld till after testimony, but generally anything that relates to something, the witness who's going to testify against the defendant. Says prior to his testimony or her testimony is turned over to the defendant for cross-examination purposes. So it's all of those kinds of documents that relate to the witness.

Joyce:

It's interesting, different courts have different local practices. And this is true across the board in discovery. For instance, in my district, prosecutors are required to be prepared to turn over discovery at the time a defendant is arraigned. In other districts it's much later. And so even though the Jencks Act doesn't require turnover, technically doesn't require turnover of witness statements until after testimony.

Really the principle is that they have to be provided at a point in time that makes them meaningful, right? That gives the defendant that opportunity. But there's also this counterbalancing sort of thing that goes on in some cases, and I know I've had this in doing Dixie Mafia cases where you don't want to jeopardize the witness's safety by turning stuff over too early and outing your cooperators. I think it's going to be interesting to watch how this plays out in the southern district of Florida in the Trump case. So I thought it was a great question to ask.

Hey, Barb, I've got one for you. This is from Tish, and she says, "I'm curious about how the courts handle a trial in which classified information is at the heart. I understand Trump's lawyers need clearance, but what about jurors? How can a jury operate without clearances, but how can the trial wait long enough for them to be cleared?" So this is your wheelhouse. Can you tell us what happens?

Barb:

Yes. Super good question. No. Jurors do not get clearances. So one of the things you've seen that the parties have asked for in the Mar-a-Lago case is for a conference with the judge to work through how they're going to handle all of these classified documents. But usually the parties try to come up with some workaround.

So for example, it may be that they take the documents and they redact them to remove the part that would be damaging to the national security. If the document says something like, "The nuclear silos are located at..." Maybe they can just redact the location. That would be one way. There's also something called a substitution where they make up some brand new or a document, but it includes some of the language of the first one, so that the jury can get the gist of how serious it was, the nature of it.

And then there's also something if that's not good enough, called the silent witness rule, where the jury actually sees the document, the witness has the document, the parties have the document, the judge has the document, but they don't talk about it out loud because there are members of the public in the courtroom. And so they say things like, "Witness, I'm showing you a document. Do you see paragraph two there?" "Yeah. I see paragraph two." Already looks at paragraph two. "Is paragraph two an accurate statement of what you observed?" "Oh, yes. It is." So that's another way. And is that a secret and would it be damaging to the national security if that were to be disclosed? Yes, it would.

So that's a way to, so the jury sees it, and even though it's been disclosed to them, the information does not lose its classified nature just because it was seen by the jury. That's kind of a last resort, the government would prefer to use a redaction or a substitution.

And then there's one other thing that I have seen used in a courtroom, which is similar to the silent witness rule, but rather than giving everyone the document, they've put it up on a screen, but they've positioned the screen so that only the people in front of the bar can see it. So none of the spectators can see it, but only the jury, the parties, the judge, the clerks, the staff can see what's on the screen.

So a lot of different ways for handling it. And sometimes the jury does see classified information, unless the government can find some work around, but the public will not see it.

Joyce:

Lots of interesting times ahead. We're lucky to have a national security expert with us because these issues are going to continue to come up.

Thank you so much for listening to #SistersInLaw with Jill Wine-Banks, Barb McQuade, Kimberly Atkins Stohr, and me, Joyce Vance. Remember, you can send in your questions by email to sistersinlaw@politicon.com or tweet them for next week's show using #SistersInLaw.

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See you next week with another episode, #SistersInLaw.

Barb:

Well, you know what Harry Truman used to say? "If you want a friend in Washington. Get a dog."