

Barb:

HelloFresh can help you have a delicious start to the new year with meals like chicken marsala, which I recently enjoyed. Use code SISTERSFREE for free breakfast for life at [hellofresh.com/sistersfree](https://hellofresh.com/sistersfree). That's one breakfast item per box while the subscription is active. You can, of course, find the link in our show notes.

Jill:

Welcome back to #SistersInLaw with Barb McQuade, Joyce Vance, Kimberly Atkins Stohr, and me, Jill Wine-Banks. With the new year kicking off, and Christmas already having gone, and you didn't get everything you wanted from our merch, there's no better time to get your #SistersInLaw merch. We have hoodies perfect for this cold, cold weather, T-shirts for the gym or warmer, climbs, and our new mug. Just click the link in the show notes, or go to [politicon.com/merch](https://politicon.com/merch) today.

Now, onto the show, and this is a big week. We're going to be discussing Trump world, the Fani Willis allegations by one of the defendants, and the transgender ban in Alabama. But before we get to that, I mentioned the cold, cold weather. Chicago is expecting way below zero, plus at least five to eight inches of snow. So, I'm planning on staying cuddly and warm, and indoors. What are you all planning to do? I know, Joyce, you have some really bad weather coming. What precautions are you taking and what plans do you have?

Joyce:

Well, look, we've got the chickens all snug in their coop. I've put an extra layer of hemp up there for them to snuggle up in. We'll be doing the same in here, binge-watching TV for as long as our power holds out for it. We lost power earlier this week, which is always a to-do down here. But, fingers crossed. Barb, what's going on in Michigan?

Barb:

Yeah, it's like I'm in a snow globe right now. Snow is coming down. It's fast-paced. We're expected to get seven inches tonight, on Friday. Then, Jill, the same stuff that you're expecting, some bitterly cold weather. So, I'm actually quite excited because it's a big football weekend. Lions are in the playoffs, and I am going to watch wall-to-wall football all weekend, curled up on my couch with a little catching up on reading as I watch and sip a hot drink of something. What about you, Kim? What's going on in your neck of the woods?

Kim:

I'm just looking at the fact that, on Saturday, when many of our listeners are hearing this, it's going to be getting almost to 60 degrees here in Washington, DC.

Barb:

Oh no.

Kim:

But by Wednesday, it's going to be back to get down to about 15. So I think by that time, when the weather gets cold, one of my favorite things to do is to fire up the fireplace. I love the smell of a fireplace. I love the feel of it. It makes it feel so cozy. Greg is great at keeping the fire going for a long time, so I'm going to enjoy that.

Barb:

What's that Scandinavian word for cozy? You know what I'm talking about?

Joyce:

Hygge or hygge.

Barb:

Yeah, you know about that?

Kim:

I don't know, but I'm going to be hygge.

Barb:

In Scandinavia, they embrace the idea that it's cold and dark outside, so they seek out things that are cozy. Joyce just said the word, that means cozy. So you have blankets, and a fire, and hot chocolate, and you just embrace all of that.

Kim:

I love it.

Barb:

It's going to be a huge hygge weekend, however you say it.

Joyce:

I have a big German shepherd. When I snuggle up when it's hygge, it's me and Bella on the couch.

Jill:

And that's what I'm going to be doing to celebrate my anniversary tonight because it's too cold, we had to cancel our plans. So we're staying in with a fireplace, maybe hot chocolate with marshmallows, we'll see. I guess I'm going to order in dinner instead of going out for a fancy meal. But we're hoping that all of you are going to find a way around bad weather, and enjoy yourselves, and hopefully you're listening to this nice and cozy. Or say it again, Joyce?

Joyce:

Hygge.

Jill:

Hygge.

Joyce:

Somebody's going to correct me. I think it might be like hygge. I see it's spelled H-Y-G-G-E. So, I'm not clear on the pronunciation.

This transcript was exported on Jan 13, 2024 - view latest version [here](#).

Kim:

Hygge sounds nice though.

Barb:

Yeah, hygge does sound nice.

Kim:

And happy anniversary, Jill.

Jill:

Thank you.

Barb:

Yeah, happy anniversary. Jill. You won't be going to... What was it where you had your honeymoon? The remote island with the-

Jill:

Oh, Borneo?

Barb:

Borneo.

Jill:

Borneo. Yes. Borneo and New Guinea. Our honeymoon was actually Hong Kong and China.

Kim:

Oh, my God.

Joyce:

Of course it was.

Jill:

As you can tell, our anniversary is January 12th, but the weather was nice in Hong Kong and China, warm places.

Kim:

Joyce, you always look fresh as a daisy. How do you always stay so refreshed?

Joyce:

You know, a big part of it is finding the right mattress. As you can guess, for people who sleep with lots of dogs and cats, and the occasional child, a good mattress matters a lot in the Vance household. But, our listeners can now do what I do. You can find your perfect mattress to get the best sleep of your life if you'll just take Helix's two-minute sleep quiz, and match with a customized mattress for your body type

and preferences. Here's what happened when I took the Helix quiz, I matched with the Helix Midnight Mattress and it has been perfect for me. I've had great sleep ever since I got it. Every mattress in our house is now a Helix mattress, and my husband loves it too. So, with Helix, you can upgrade to a mattress tailored just for the way you sleep. It is giving us the best sleep of our lives.

Kim:

Well, what's the best mattress for your chickens, Joyce?

Joyce:

Thank God the chickens have not made it into our bed yet, because it's enough with the dogs and the cats, Kim.

Barb:

Too much information.

Kim:

Fair enough. Fair enough. The Helix lineup offers 20 unique mattresses, including the award-winning Luxe collection, and the newly released Helix Elite collection, a mattress designed for big and tall sleepers, and even a mattress made just for kids. I'm sure one just for chickens is on the way. They cradle your body for essential support in any sleeping position, from back to stomach, with enhanced cooling features to keep you from overheating. If your spine needs some extra TLC, they 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.

Barb:

Helix knows there's no better way to test out a new mattress than by sleeping on it yourself in your own home. That's why they come with a 10 to 15-year warranty and offer a 100 night trial to try out your new Helix mattress. Plus, the setup is fast and easy, and Helix mattresses are delivered in a box straight to your door for free.

Jill:

Helix has been awarded the number one mattress by GQ and Wired Magazine. Leading chiropractors and doctors of sleep medicine use Helix as a go-to solution for improved sleep. Now, Helix is offering 20% off all mattress orders and two free pillows for our listeners. Go to [helixsleep.com/sisters](https://helixsleep.com/sisters) and use code HelixPartner20. This is their best offer yet and it won't last long. With Helix, better sleep starts now. Find the link in our show notes.

Barb:

There's quite a bit of news in Trump world this week. First, the DC Circuit Court of Appeals held oral argument in the federal election interference case over Trump's immunity defense. Jill, can you remind us of the issue that Donald Trump has raised here? It was rejected in the trial court. What does it mean to be immune from criminal prosecution?

Jill:

Well, that's such a good question. Listening to the argument was really fascinating. I really loved how it was handled. So let's start with, what is immunity? There's, of course, immunity from disease, like you get from a vaccine for COVID. But immunity in this case is total freedom from accountability and prosecution. There's also transactional immunity and there's also use immunity, if you testify, it can't be used against you.

But, in this case, what he's arguing is that he is totally and absolutely immune from any prosecution because the actions took place during his presidency. Now of course, he doesn't address whether or not those actions were part of his job, or whether they were actually done as an office-seeker rather than as an office-holder. He was a candidate in taking actions that helped his candidacy. So, they raised a lot of issues about whether he could be tried if he hadn't been impeached and convicted first in the Senate and the House. He also raised issues about double jeopardy because, if he was already acquitted in the Senate, then he couldn't be tried for the same crime.

Now of course, that omits, one is a political action to remove him from office, and that is the limitation of impeachment, as opposed to one is holding him responsible for violating the criminal laws of the United States. He raised separation of powers issues, and many, many others. But basically, the bottom line is whether or not he can be prosecuted for his actions surrounding January 6th.

Barb:

Then Kim, how did the oral argument go? This is a three-judge panel. There is one judge who was appointed by a Republican president, two appointed by a Democratic president. I don't think that much matters when it comes to oral argument. Did you get a sense that the judges had tougher questions for one side or the other, or displayed any skepticism for some of the arguments Trump was raising?

Kim:

Yeah. I will start by saying, as usual, it's always... You have to be careful in trying to predict what might happen from an oral argument because the job of a judge is to ask tough questions, and often judges ask tougher questions to the side that they're more inclined to rule in favor of during oral argument, because it helps them flesh out their own position. In this case, this was not one of those cases. I wrote that the arguments were met by a collective eye roll that I could hear, by all three.

Particularly, the judges on this panel, one I had not heard during oral arguments before, and that is Judge Florence Pan, who was confirmed to her seat after the vacancy on the court was made by Ketanji Brown Jackson, when she was confirmed to the Supreme Court. So, she hasn't been on that bench very long, and this is the first argument I heard from her. But, she had no time for anybody's nonsense. She was the one who dug right into the arguments that Jill said. First of all, she made Trump's lawyer concede that his total immunity argument is actually blown up by his argument that you can only be charged for a crime if you are impeached and convicted in the Senate, that it's contradictory. He didn't want to say it, but she finally got him to.

Also, that there is no legal constitutional, historic, any precedent to say that impeachment is a prerequisite to criminal case. That's just made up. He twisted another piece of precedent and tried to come to that conclusion that it doesn't reach. So, it was brutal for Trump's legal team. It really would have been comical if not for how dangerous and appalling the argument that Trump can assassinate his political enemies and not be held accountable, which is the gist of the argument. That is what Judge Pan really honed in on. That's terrifying for another Trump presidency. But legally, it was just a pure dud.

Barb:

Yeah, I think Judge Pan was the one who really exposed the weakness of this argument. Law professors like to do this, and judges like to do this to try to demonstrate the flaw in the logic. Because sometimes the logic might sound okay in one argument, but if you take that logic to its ultimate conclusion in the extreme, then sometimes it becomes apparent of the fallacy of the argument. So hers was, as you said, "What if the president were to ask SEAL Team Six to assassinate a political rival? Are you telling this court that, as long as the president resigned before he could be impeached or convicted, then he can't be charged with a crime after that?"

The lawyers really backpedaled for a long time like, "Well, [inaudible 00:13:56]." Answer the question, it's a yes or no question. It wasn't until about the third or fourth try that they said, "Well, sort of." So, I think that was really the moment that everyone realized this is a loser. Joyce, let me ask you about the timeline. I agree with Kim and Jill, that I think that this decision is going to go the way of the special prosecutor. But of course, time is of the essence in all of these cases. When do you think we should expect a decision from the DC Circuit, which is on an expedited basis in this case, they heard oral argument very quickly. Then how long before we're back in the district court and on track for trial?

Joyce:

Such a good question. Probably the only question that matters for the future of the country right now, or maybe the most important question for the future of the country. I'm going to back up just for a second, if you don't mind, and glom on to yours and Kim's comments, 'cause I think you guys are dead on the money. What struck me during that oral argument was, there was a credible road that Trump's lawyer John Sauer could have taken. He could have said, "Oh, your Honor, I hear your hypothetical about SEAL Team Six. That would be beyond the outer perimeter of a president's duties to order an assassination. So, under no circumstances would we approve of that."

Instead, he embraced the hypothetical. To your point, she went back to him several times and wouldn't let him waffle out of it. So, his final answer to the question of whether someone could be prosecuted for ordering the assassination was a qualified yes, "Yes. If you've been impeached and convicted first." That was not a position that they had to take, and I thought the fact that they did was very telling. It suggests that Donald Trump is very much in control of the lawyers and the arguments that they make. And, boy, is it discouraging. If you want to know what Donald Trump 2.0 looks like, it looks like Judge Florence Pan's hypotheticals, the assassination of political rivals.

But to your question about timeline, I think right now we're in that timeframe where we can expect to see a ruling from the Court of Appeals. They just filed the transcript from the oral argument this afternoon. Maybe they'll wait until after the caucuses, just to avoid having any influence on a political event. But, I think we'll see it pretty shortly. The question of how quickly things move after that is entirely up to the courts. They can move as quickly or as slowly as they want to. Jack Smith asked the court of Appeals to issue its mandate five days after they issued the opinion.

What that means, assuming the government does win and that they lift the stay as part of issuing the mandate, which is how that normally works, is that Judge Chutkan could go back to work and get her case ready. Of course, Trump has some time to appeal. We've talked about that before. He's got 40 days to ask the Court of Appeals to rehear the case en banc, something like 90 days before he has to apply to the Supreme Court for certiorari. So, he could eat up a big chunk of time here. But the courts have the ability to limit that, whether by letting Judge Chutkan go back to work, which would put pressure on him to go ahead and appeal to the Supreme Court to try to stop the clock, or just by saying, "We're going to expedite the schedule here. You've only got a couple of weeks." If the courts don't do that on their own, look for Jack Smith to go ahead and ask them to do that pretty quickly.

Jill:

Can I just follow up on what Joyce said, because she's motivated me to say, the within his duties was not only not jumped on as a way out of this extreme hypotheticals of Judge Pan, but he never even addressed whether this could be passively within the outer penumbra of his duties. It's in the same way that the E. Jean Carroll case went ahead when he was arguing, it was his duty to answer questions, and the court said, "No, not to defame someone, isn't part of your duties." He also didn't address the separation of powers because when he's saying, "Only can this proceed if Congress does something first."

Well, that certainly divides the separation of powers if you're requiring Congress to do something before the executive can do something. He also ignored the language of the impeachment clause that says, "Yeah, you only are limited in impeachment to removal from office." It doesn't say that you have to have the impeachment and conviction before you can be tried, but it says, "After you're removed from office, you can be tried for a criminal case." So, they really undercut their own arguments by that.

Barb:

Yeah, I agree with you. I just think that the other argument to argue that this is somehow within the scope of his duties is also a loser, because administering elections is the duty of the states. There's no role for the president there. So no matter which path you take, I think it's a loser. I think, ultimately, the [inaudible 00:19:02].

Jill:

He doesn't have a winner. I think that's right. But the question is-

Barb:

That's why he made the arguments he did.

Jill:

How do you want to lose?

Barb:

Right. Which way? Well, let's move on. I want to talk about also the New York civil fraud case. Closing arguments were heard this week. Of course, that's the case where New York Attorney General Letitia James is seeking \$370 million in Disgorgement for allegations that Trump inflated the value of assets for the purpose of obtaining loans. Jill, the day of closing arguments on Thursday of this week began with a bomb threat at the home of the judge presiding over this case, Judge Arthur Engoron. Do you think that the bomb threat will, in any way, affect his decision in this case? Of course, after hearing oral argument, he now has to issue written findings of fact and conclusions of law, which we're waiting for sometime in the next couple of weeks. What do you think is the effect of that bomb threat on all of this?

Jill:

I think he's used to having been threatened by the followers of Donald Trump, and by Donald Trump himself. In court this week, as well as on his social media platform, as well as in his press conferences in the hallway and other places. Yet, I have to say, of course he's a human being, and getting a bomb threat has to be a scary thing. But, I have a feeling that Judge Engoron is up to the threat, and that he will make

his decision based on the law and the facts, including the evidence now of an increased request for damages.

I think the prosecution has laid out a very good case, and it's laid out why they're now asking for the \$370 million, based on some saved interest on four properties and on a profit of a sale of the old post office, which became the Trump Hotel in DC, and on the sale of a New York golf course. I think he's going to make his decision based on all of those facts and the law, and that he will go about... He may need some extra security, but I think he's not going to be swayed by that.

Barb:

Yeah, I agree with you that Judge Engoron is an experienced judge. He's probably experienced this kind of thing before. He's certainly experienced it throughout this trial, and I imagine he will want to achieve the just results here. But I do worry about this new trend of... I guess it's not new, it's just so pervasive now. We're getting bomb threats and swatting incidents. I'm sure the people who are in these jobs will work hard to make the right decision, but I do worry that we don't know what we don't know. Are there people who will not seek office for fear of these things, for fear of exposing their families to these things?

And sometimes these things are not just pranks or threats. Sometimes people follow through on these things. So, I do worry about the political violence that we're seeing. I don't know that Trump intends to create political violence, but he's very reckless in his rhetoric, and I think it stirs it up, and I worry about that. Well, speaking of Donald Trump, Kim, Donald Trump himself participated in his closing argument. How rare is that, that the client gets up and argues his own case? Why did Trump get to do this? What was that all about?

Kim:

Can I just start by saying, I thought that was crazy. I didn't think that there was any way on earth-

Barb:

I know, same.

Kim:

That was going to happen. Closing arguments are for an attorney to summarize the arguments that were made during the course of the trial, in order to bring home the case to, in this case, the judge. In other cases, a jury. I've never seen a situation, personally, where a defendant, or anybody else but the lawyer, spoke during closing arguments. I know their team requested that of Judge Engoron. There was this very spicy email back and forth where Trump's attorneys didn't actually respond by the deadline to the conditions that Judge Engoron laid down. It was basically, Donald Trump can only talk about the case, not make a campaign speech, essentially, or talk about all things that weren't at issue.

But in court, the judge gave Trump an opportunity to speak. The only thing I can think is, it's a bench trial. So, it's just the judge who was making the determination. There's not a jury that can be prejudiced by anything that he said. So, maybe that was one reason. Two, he wanted to take away any potential claim that somehow there was unfairness by not letting him speak, and Donald Trump claiming that he'd been muzzled, or something else nonsensical. So, it's like, "Okay, you know what? I'll let you speak. But if you go out of bounds, I'm going to cut it off," and that's exactly what happened. So, it was a piece of drama.



Barb:

You know that Trump was hoping and expecting the judge to say no so he can say, "I've been silenced. I've been muzzled."

Kim:

Exactly. Right.

Barb:

The judge was like, "Yeah, go ahead. Go ahead. Here are the rules. Let's see if you can comply with them." Then when he starts going off the rails and says to the lawyer, "Can you please control your client?" Trump said, "I'm done," and he storms out of there. But Trump talks about how he's held to a different standard from everybody else. You bet he is. He gets better treatment than anybody else. Can you imagine anybody else being allowed to stand up there and make all of these... And all he did was accuse the attorney general of misconduct, and the judge himself of misconduct.

Kim:

A bit crazy. He was insulting the person who makes the decision. I wish that I could.

Joyce:

Then he'll argue that he's biased against him.

Kim:

Right [inaudible 00:24:49].

Joyce:

He insulted him, got a threat called into his house, and he will argue shamelessly on appeal that the judge has it in for him.

Jill:

Just insane.

Kim:

Oh, man.

Barb:

Well, Joyce, do you think Trump's team... Some of his lawyers did argue, Chris Kise argued and Alina Habba argued, do you think any of them made any good points or do you think the Attorney General's team had the stronger arguments based on the evidence in this case?

Joyce:

Some of the later arguments, particularly the last one, involves some additional charges. We've been mostly focused on the first cause of action that the New York Attorney General brought, which involves the persistent pattern of fraud in the corporation. Some of these later charges involve allegations that Donald Trump Jr. and Eric Trump were involved in intentionally submitting false statements. I think the

evidence there is a little bit more tenuous. The lawyer did a good job of pointing out that there was only tangential evidence of their intent.

I don't think the judge will necessarily buy those charges, and he may decline to act on that basis. That won't really affect the outcome of this case though. He's already made his decision on that first charge, which would cause the certificates that permit Trump to do business in the state of New York to be pulled. He's ruled on that pattern of corporate fraud, and I didn't hear anything in these arguments or in the evidence that suggests that the judge won't require the Trump organization to disgorge its ill-gotten profits.

There was a very telling breakdown by the Attorney General's Office of where those ill-gotten profits were made by the organization. More than \$168 million in saved interest on four commercial loans, more than \$139 million in profit from the sale of the old post office in Washington DC, that's that Trump hotel on Pennsylvania Avenue, \$60 million from the Ferry Point property, and the Attorney General even isolated \$2.5 million dollars in bonuses that were paid to key executives at the Trump organization, including convicted felon Allen Weisselberg.

This New York statute requires organizations that engage in a persistent pattern of fraud, not to pay a fine, not to pay a penalty, but to disgorge their ill-gotten gains. That part of the case is pretty compelling. The real issue, Barb, and we always end up here, will this hold up on appeal? Trump will lose in the trial court. The question is, what did the Court of Appeals in New York say?

Barb:

With regard to this first count, where the judge found summary judgment, that doesn't even require a finding of criminal intent of mens rea. It's just a sheer numbers game. I don't see how Trump gets a reversal on appeal on that one. But I think with regard to individual liability on the counts for which intent is required, those are closer calls. Well, let's move on finally to the E. Jean Carroll case part two. Jill, this is the second trial before Judge Lewis Kaplan for defamation claims by writer E. Jean Carroll. Last year, we will recall, a jury awarded Carroll \$5 million in damages after finding that Trump falsely denied sexually assaulting her many years ago in a department store dressing room. So, why are we back having another trial?

Jill:

It's really interesting. This is actually trial number one. This was the first time he defamed her.

Barb:

And, we did second?

Jill:

Yeah, we did two first because number one was on appeal for the issue that we mentioned in our first discussion, which is whether it was within the scope of his duties to defame her, and the court eventually ruled, no, it wasn't. Yes, it was his job to have press conferences, but not to discuss and defame E. Jean Carroll. But while that was still on appeal, he re-defamed her, because he can't control himself. So the second time he defamed her is what went to trial first. So even though this is the second trial, it's the first defamation. But because there's already been one trial between the same parties, and there was a decision on his liability, there's no trial for liability. That's already decided. So, it's only a question of damages.

This time, E. Jean Carroll is asking for what I think is not enough. She's only asking for \$12 million in damages. Damages in this case have to include punitive to prevent him from defaming her a third time, and I don't think \$12 million is enough to stop him. I'm not sure there is any amount that will stop him 'cause he doesn't seem to have the self-control that a two-year-old does. So, I'm just thinking that the damages could go well beyond the \$12 that's requested. I think that would be not an illogical thing. So, that's why we're having a second trial, is because he defamed her first. We went to trial on the second defamation, and now we're getting to the first because the court said it's within the power not to consider this part of his official duties.

Barb:

So as we get ready for trial, last week, Kim, we saw the judge issue an order narrowing the issues for trial, and part of that order was directing Trump to refrain from discussing certain topics. Why is that?

Kim:

This case, of course, is separate from the case that already completed, where there was a verdict against him for the sexual assault and defamation of E. Jean Carroll. So the judge essentially said, "You cannot use any of the findings in that case," specifically the findings that the jury did not find Trump liable for rape, only found him liable for sexual assault, "To try to claim somehow that E. Jean Carroll is lying or anything else in this case," that those are two separate things. I think the judge made it because he has seen Donald Trump in action. Donald Trump will throw anything at a defendant. He's still defaming her, as Jill said. So, obviously, these are the sorts of things that he's very liable to say, that he's very likely to push his side to argue, and it has nothing to do with this case, and the judge is trying to keep tight reins on it.

Barb:

Yeah, the judge came up with a whole list of things he's not supposed to talk about. But, you can just imagine Trump finding something not on the list that's still inappropriate. He's not supposed to question his choice of a lawyer, or her past sexual history. This is all long list.

Jill:

Can I just add to this that, when I first became a lawyer, rape laws were really bad and they allowed blaming the victim, "Oh, she was dressed in revealing clothes," "Oh, she isn't a virgin." Those things are no longer permitted under our laws, but they were then. So, a lot of what Judge Kaplan said you cannot use were her past sexual behavior, etc. That seems so obvious that that cannot be used as part of any argument, and should not be subject of any questions in this court.

Barb:

They're really basic common sense, aren't they? And, the kind of thing no lawyer would even attempt to address. But again, we've got Donald Trump there who, anything goes.

Joyce:

Suggests that Judge Kaplan is coming to trial loaded for bear. He's entered the order. If Trump violates it, will he hold him in contempt, and will it be civil or criminal? I can't wait.

Barb:

Well, Joyce, I want to circle back to something that Jill said. What can Carroll's team do if Trump keeps defaming her? Do they just keep suing him? Just last week, Trump made more defamatory remarks about her on his truth social platform, 31 times in a single day. Is there any point at which the defamation becomes free, essentially? That, as a jury says, E. Jean Carroll has already recovered \$5 million, and another \$12 million, and enough to compensate her for the damage to her reputation. Or does she keep going for more, and more, and more punitive damages every time he does it? How does this battle of wills end?

Joyce:

This is a question of legal strategy. Rudy Giuliani, the lawyers who are representing the two Georgia women who he defamed, their approach was to seek an injunction in the courts. But, that takes a long time. Those cases can take years before they come to a conclusion. In the meantime, the bad guy is free to continue with defamation. E. Jean Carroll has a very smart lawyer in Robbie Kaplan. She makes very strategic choices. I don't think she would be willing to do something that would take years to resolve, if it ever did.

Here's what I think we'll see her do. Jill talked about the amount of damages that were originally asked for in this case. Well, I think that's off the table. We're going to see Robbie Kaplan put in all of these instances where Trump continued to defame Carol, the CNN Town Hall where he defamed her on live national television, the night after the original verdict against him, the ongoing defamation, the total meltdown he had on social media about a week ago where he spent a whole night just going after her again, and again, and again. This is great evidence that Kaplan can use to ask the jury to give damages in an amount that they believe is sufficient to keep Trump from continuing to harm E. Jean Carroll.

You can make an very good argument here that that would be an extraordinarily high amount of damages, maybe an unprecedented amount. But the evidence is very good, especially because all of this is happening in a climate where people who Trump identifies as his enemies often are subjected to violence. On Friday, Carroll actually filed a letter brief with the judge, where she seemed to contemplate that he might, in the course of the trial itself, defame Carol, that he would go off the rails, that he would talk about stuff he had been prohibited from talking about.

She told the judge, "It's important that you make clear to Trump from the outset that you won't tolerate any of these stunts." She suggested some curative instructions that could be given to the jury, but she said to the judge, "There are some bells that can't be unring," suggesting that if Trump misbehaves, then perhaps there could be a mistrial. That could mean stopping this case, turning around in a few days, picking a new jury, and starting all over again, which would draw out the agony for Trump. So, I think it'll be very interesting to watch how Kaplan handles this. But I think everyone who has suggested Trump can't behave himself in the courtroom is absolutely correct.

Barb:

Well, trial starts Tuesday, so we will have to see what happens and we can report back next week. Jill, after this week, I'm looking for everything maize and I'm looking for everything blue. Tell me about Blueland.

Jill:

Oh, I'd love to tell you about Blueland, which is actually green. That's the important part about Blueland, they really do help you to be a better contributor to our environment. I'm a big believer in self-reflection and thinking about how I can make an impact. This year, Blueland's products are not just about tidying

up things, but also about a cleaner, greener lifestyle that reduces plastic use. This year, let's turn our new year resolution into actions. They will make a big difference if you switch to Blueland.

Kim:

We have really been trying to eliminate single use plastics. You usually think about foods in that, but it's also in other products you use, like hand soap. So that's why I really love the way Blueland is reinventing cleaning essentials to be better for you and the planet. You still get things very, very clean. The idea is simple. They offer refillable cleaning products with a beautiful cohesive design that looks great on your counter, it really does.

Just fill your reusable bottles with water, drop in one of the tablets. I like to then watch the tablets 'cause it does this cool little fizzy thing, and they spin around and they dissolve, and there you go. You have your powerful cleaning product, whether it's hand soap or other cleaning products for your kitchen, bathroom, or any place in your house. You'll never have to get bulky cleaning supplies. I often walk to the grocery store, and I was carrying a bunch of bottles of cleaners. It's heavy. Blueland is easy, it's not heavy, you're not having awful shipping costs. You're really doing great by the planet.

Joyce:

Earlier this week, it was time to refill all of my bottles. I confess, I really did enjoy putting the tablets in and watching everything settle. But the great thing about the refill pack is that the one that I got had lots of different scents for me to try across the different products, and that was even better. Those refills start at just \$2.25, and you can set up a subscription like the one I have so that they show up whenever you need them, or you can buy in bulk for additional savings.

From cleaning sprays to hand soap, toilet bowl cleaner and laundry tablets, all Blueland products are made with clean ingredients you can feel good about. They work great and they smell great. They're so refreshing that it's really difficult to decide between all of the wonderful scents. I love using them and, most importantly, I can't believe how much plastic waste we've cut from our lives. As soon as you try Blueland, you'll know why they're trusted in over 1 million homes, including ours. It's good to be green.

Barb:

And blue. BlueLand has a special offer for our listeners.

Joyce:

I set you up. You know that.

Barb:

Thank you, Joyce. Right now, get 15% off your first order by going to [blueland.com/sisters](https://blueland.com/sisters). You won't want to miss this. [Blueland.com/sisters](https://blueland.com/sisters) for 15% off. That's [blueland.com/sisters](https://blueland.com/sisters) to get 15% off. Look for the link in our show notes.

Kim:

This week, there were new allegations in the Fulton County Georgia election interference case against Donald Trump, but they were not directed at Trump or his co-defendants. Instead, they were directed at District Attorney Fani Willis and Lead Prosecutor Nathan Wade. One of Trump's alleged co-conspirators is seeking to get Wade kicked off the case, alleging that he is having an affair with Willis that constitutes a conflict of interest, and that they are both improperly profiting from the case. Barb, let me ask you this

to start. As a former prosecutor, tell us how lead prosecutors in cases like this are chosen. Are there particular rules? Does a DA have broad discretion to pick who the prosecutor is, and therefore who might get paid? What are the limits there?

Barb:

First, I think we should make it clear that these allegations have not been confirmed. They're allegations at this point, so it might be totally made up. The second point that's really important is, nothing about these allegations go to the guilt or innocence of Donald Trump, or any of the co-defendants. So, there's that. Then the question is, did Fani Willis engage in something that is unethical? The answer is, maybe. But depending on the rules in her jurisdiction, in Fulton County, in Georgia, she has authority to hire out additional attorneys when she doesn't have sufficient resources on her staff.

We saw this in the prosecution of Derek Chauvin, you may recall, in Minneapolis, when the Minnesota Attorney General's Office brought in a private attorney to help with the team who had a lot of trial experience to help handle the case, and it was very successful there. No one questioned the hiring of outside counsel in that case. Here, if they're involved in a romantic relationship, that alone does not make it a problem. But, I think we would have to look to the specific rules here.

If he's a skilled lawyer, if he's being compensated at what is deemed an appropriate rate, and he is providing appropriate services, I don't know that there's a problem here. Now, if there is a conflict of interest in that she is using some of the very same money that she's paying him to go on lavish vacations, maybe there is an ethics issue there. But I think the most important thing is that it's unrelated to the guilt or innocence of any of the defendants in this case.

Kim:

Jill, Trump's co-defendant didn't cite any evidence whatsoever in this motion, but he claims that taxpayer money that Wade is earning on this job is being spent on Fani Willis through lavish trips and stuff. Again, there's no confirmation as of yet that any of this is true. But if there is evidence of this, how concerning is this motion to you?

Jill:

First, let's stress that there is absolutely no factual allegation other than, sources say that they were seen together in the Atlanta area, and sources say that they traveled to the Caribbean, and Florida, and somewhere else. Even if that's true, as Barbara said, it has nothing to do with whether or not Donald Trump and all the other co-defendants did something that is illegal. While it is politically bad, while it could create some doubt among people who are already doubting the legitimacy of the case, so it's therefore bad, it really shouldn't make a difference legally as to whether the case proceeds.

There have been other allegations. Actually, not an allegation, it was actually correct, that Mr. Wade did not file his oath of office, and that he was required to do so and didn't do so until it was raised by one of the defendants in the case. But the court has already said, "It has nothing to do with anything. It didn't prejudice them, so it doesn't matter that it didn't happen in a timely way." So, these are all minor little nitpicking things that you wish wouldn't happen.

But the grand jury thought that he did a great job, he and Mr. Wade, of presenting the evidence in the grand jury, and that they are convinced that the facts are true and that the indictment alleges what they heard. So, I don't think it will ultimately lead to the end of the case, no matter what is found. But it certainly isn't going to help either of their careers that this is happening. Fani Wallace has now been

subpoenaed for a deposition in his divorce case by his wife. All of this does not look good. I have to admit, I wish it hadn't happened.

Kim:

To that point, I really have to say, I agree with everything that you said, legally and procedurally, so far. But, this is one of the most important cases when it comes to holding responsible the people who tried to upend our democracy in 2020. For something like this, if it has the impact of harming the public's trust in this process, that would be gutting. Right or wrong, it very much could have the ability to do that, and that is what I am most worried about.

Joyce, to that point. in looking at these allegations, one thing that struck me that I didn't know is that Wade, although he's a seasoned attorney, he's been an attorney, he was a former municipal level judge, he is a partner in a law firm, has a lot of experience, but not very much of that is as a prosecutor. This is one of the biggest prosecutions in our nation's history. Does that really make it seem like there's actually fire to this potential smoke?

Joyce:

It's a really good question. We have not heard Fani Willis's response yet. It sounds like we will hear that sometime early next month. But I'm totally on board with you, Kim. When you're doing a case like this, your behavior has to be above and beyond reproach. We don't know the facts here yet. Anyone who has ever been involved in a divorce, which is supposedly where these allegations come from, a sealed divorce filing, which in and of itself makes you wonder, how did Michael Roman's lawyer get access to what's contained in a sealed divorce proceeding? But, things are said in divorces that aren't always true. I think we have to withhold judgment because of that. But that said, it will be very disappointing if there's any meat at all here.

State DA's offices are perennially understaffed. It's not uncommon for a prosecutor in a big case like this to go out to the private bar to try to flesh out her team. Fani Willis hired John Floyd, who's an expert on Georgia RICO law, brought him on board. There's another lawyer who's an expert in Georgia evidence law. I think the perception here is that Mr. Wade really did do a lot to give this team all of the strengths it needed. The lawyers who come in from private practice in a situation like this, there's maybe a little bit of snark in this. It's sometimes referred to as being a low bono lawyer.

Lawyers have an obligation to provide service to their community, and many of us do it through being a pro bono lawyer, acting as a lawyer for free for somebody who couldn't otherwise afford counsel. Well, here, these lawyers, Mr. Floyd and Mr. Wade, have come in from private practice. They're receiving far less than what they're able to command from their private clients, and it's seen as a form of public service. So, where does Wade fit in in this? You asked, "Is he qualified? I've been told by lawyers who practice in Atlanta that he has a reputation for being an excellent trial lawyer, and he knows the judges, he knows their practice.

There are rules of court. Individual judges can do things in very different ways. It's important, when you're doing a big case like this, to understand that. I'm told that people in the Atlanta area pretty much view this as a smart heads-up decision by Willis to bring Mr. Wade in. We'll have to wait and see what she has to say about it. It could be that there's an ethics issue here, something that she would have to answer to the Georgia State Bar for. But I think Jill is absolutely right, under Georgia law, everyone whose looked at it, who's an expert in Georgia ethics law says, "There's nothing here that could force Willis to be disqualified from this prosecution, and there's certainly nothing that will have any bearing on whether or not any of these defendants are guilty."

Kim:

Well, Jill, there's also this claim that somehow Fani Willis is profiting off of this because the money that he's earning, he's using on her, on both of them. He's making healthy six figures. But isn't it the case that people get paid for the job that they do, and how they spend their money is really up to them. If somebody wants to spend it, even if she is his girlfriend, who cares if he buys her a gift? Is there any there there?

Jill:

Yes and no. You're right in everything you say. But it's also true, as we've all said, the appearance of impropriety and theft of services. If she's benefiting and getting a kickback from the money that he's receiving in the form of being taken on vacation, it wouldn't look good. Again, I don't think ultimately it has any impact on the outcome or the continuation of the case. Does it have an outcome on her career and whether she stays in office? Possibly. But, I don't think it will affect the important case that's going forward.

Yes, he's highly paid, he's well compensated. But I was in the Illinois Attorney General's Office, and a lot of our consultants and extra lawyers who were brought in receive a lot more money than the staff or the judges, and that's just the way it is. That's how you get good lawyers to handle things. No one has said that he has not done a good job. So, I think that's where we have to leave it, there's no evidence yet, and maybe there never will be, of any of this being true. So, I want to make sure we end saying there's no evidence that this is true. It's all just allegations.

Kim:

We're not ending yet, I still have more questions for you all. But it's an important point, you have to get people to step away from their very lucrative law firm jobs in order to take this job, and they won't do it if they're not paid well. But now I want to ask everybody... Fani Willis has been subpoenaed in his divorce case, his estranged wife has subpoenaed Fani Willis. In what way, if any, will that affect the prosecution? That's question one. Question two is, if Nathan Wade says, "You know what? I want to take the emphasis off me. This case is too important," and walks away, does that doom the prosecution? Would they have to start over again? Anybody, have at it.

Barb:

Well, I'll speak to the first one about the subpoena that Fani Willis has to appear in the divorce case. She's got to go. She's got to answer questions. They may be relevant to the divorce case. She has to answer them under oath. I imagine she will show up and she will answer them truthfully. I think that there is potential risk to her reputation. I think there's also, even if there's not a clear cut ethical violation, one of the things we always tried to avoid was even the appearance of a conflict of interest.

So, to the extent that there is some belief that she benefited financially because she was going on trips based on money that was being paid out of her office, I think that there's some reputational harm. I don't think that goes to any harm to the criminal prosecution, but I think it could affect her reputation and public confidence in the way she's running her office. Now, I also want to say this, there's no basis and evidence for this to be true. This might be a greatest gift, that she gets to go answer questions under oath and deny this relationship. Because if we've seen anything in this world of Trump, it is that women, especially women of color, are targeted as people engaging in misconduct. He's called people animals, he's called people racist, and other things. So, until I see evidence of this thing, I am very skeptical as to its truth.



Kim:

What about you, Joyce? Do you think that, even if, just hypothetical, Wade steps down just to take the attention off of him and refocus it on the trial, how big of a setback would that be?

Joyce:

I don't think that Wade will step down unless there's really a big problem here. Even if, for instance, they have a relationship and they've been vacationing together, I'm just not sure that that's really a problem. To Barb's point, folks in the MAGA camp have been quick to cast aspersions on Black women where there really was maybe a nugget of the truth in it, but it didn't add up to what they've tried to make it up to. But I'll play, Kim, I won't fight the hypothetical. Let's say that Wade does resign from the team. I think that there are a lot of other very capable lawyers involved in this. You never like to lose your lead trial counsel, but it looks like there's plenty of time here. John Floyd, the Florida RICO prosecutor is there. Willis's office is deep with very experienced, very accomplished trial lawyers, and I think that they will execute the mission.

Kim:

All right. Thanks for keeping me off the ledge on this one.

Joyce:

I'm here for you, sis.

Jill:

Hey, Kim, our listeners can't see you, but you're getting ready for an MSNBC appearance. So, you're putting on makeup while we're recording this, and I can't help but notice the mascara you're using is Thrive Causemetics. Isn't that right?

Kim:

Yes, it is. You know it. I often am, all of us are often, off to a TV hit right after we record this podcast today. Me and my lashes, if you watch me, will be care of Thrive, because it's really a great formula. It goes on easily. It looks great. I don't use false eyelashes, but I look like I have them on, and it comes off so easily. It's really one of my favorite cosmetics. Whether your style is fresh face, or full TV-level glam, or somewhere in between, you've probably seen Thrive Causemetics viral Tubing Mascara. It's good stuff. It's the one in the turquoise tube all over your socials. Thrive Causemetics beauty products are certified 100% vegan and cruelty-free. They're made with clean, skin loving ingredients, high performance trademark formulas, and uncompromising standards, so it's easy to see why their bestsellers have gone viral and have thousands of five-star reviews.

Jill:

As if that weren't enough, we love that cause is in the name for a reason. Every purchase supports organizations that help communities thrive, from education, cancer research, or working to end homelessness. You'll feel great and look great with Thrive.

Joyce:

You've got to try their new Impact-FULL Semi-Permanent Smoothing Lipstick. It's infused with moisturizing botanical oils and vitamin E. This morning, I ordered two new tubes because I found a color

I'm in love with. It's a soft pink called Ilene, and it's my new favorite lipstick. You'll see visibly fuller, smoother, nourished lips with a creamy satin finish, and it's fade-free for up to eight hours without bleeding, drying, or settling into your fine lines. Pick your favorites from 12 shades that go from natural, to professional, to vibrant statement-making colors. With Thrive, I know that when people are watching me on TV, everything looks great.

Kim:

That color has your name all over it, Joyce.

Joyce:

Well, it's close. It's an I not an A, but it's a great color.

Barb:

Thrive Causemetics is luxury beauty that gives back. Right now, you can get an exclusive 20% off your first order at [thrivecausemetics.com/sisters](https://thrivecausemetics.com/sisters). That's thrivecausemetics, C-A-U-S-E-M-E-T-I-C-S, .com/sisters for 20% off your first order. You can also find the link to your perfect look in our show notes.

Joyce:

Alabama's Governor Kay Ivey signed the so-called Vulnerable Child Compassion and Protection Act into law in 2022. It was neither compassionate nor protective. The law made it a felony punishable by up to 10 years in prison for a doctor to give anyone who's under 19 gender-affirming care, including puberty blockers or hormones, even if they had their parents' consent. That law was challenged in court. It's been the subject of lots of back and forth. Earlier this week, the 11th Circuit made a decision that will impact care for transgender kids in Alabama, and also in surrounding states where care is illegal, many of those kids had been coming to Birmingham. The challenge is over the law's constitutionality. Kim, can you explain what the 11th Circuit did this week, and how it's a new step in the barbarous nature of this proceeding?

Kim:

The 11th Circuit, they didn't make a ruling, they issued an order. We've talked before about the differences between the two. They didn't decide this case, but what they did was allow the ban to take effect as the challenges to this make their way through the appeals process. But that's very telling because, just like with Dobbs, we sort of knew what was coming from the Supreme Court when they allowed that really restrictive Texas abortion ban to go into effect, they gave the game away. In this case, I think it's quite likely that the appeals court, since they see no problem with this going into effect, we know where they're headed. Of course, that's really problematic, especially when it comes to people who really urgently need this care. You don't always have a lot of time, and being denied this care can really be harmful to the quality of life. So it is something, and it's a big tell.

Joyce:

Yeah, it's really disturbing for young people who are currently receiving care and who are now, with virtually no warning, cut off from receiving it. Great if your parents can pack you up and take you to New York, bad if you just don't have the financial resources to obtain the care that you're used to receiving. As you've said, there's this decision in the district court and the trial court that said, "You know? This law

looks like it might be unconstitutional. We're going to stay it from going to effect while these proceedings are underway."

There's an appeal to the 11th Circuit, and the 11th Circuit says, "Absolutely not." We're going to stay the district court's order. I love that this conversation about stays, and rulings, and orders, which used to be the picky business of lawyers, has now come into common parlance. But the Court of Appeals has stayed the district court's order. Jill, the district court judge who blocked the law originally is a Trump appointee. Folks may find that surprising, maybe a little bit charming. What was the basis for the order preventing the law from going into effect?

Jill:

Let's talk about a couple things here. He was a Trump appointee, and he had an interesting background. He has done a lot of work in domestic violence and juvenile law, so maybe that made him a little more sympathetic. But he had a hearing, and he heard from witnesses, and he made his decision based on testimony from parents, doctors, medical experts, about how devastating the impact of this ban would be, and the fact that there was no medical justification for doing this, this is going to hurt people.

I don't know how many people have friends who have children who are trans, or who know someone who's trans, but I think it does help if you do, in the same way that gay marriage became acceptable because so many people knew gay couples and liked them. I think it would really help for people to understand how easy it is to understand the motivation behind giving this treatment. It's also strange, don't you think, Joyce, that Alabama picked... You have to be over 19? 18, you can vote, you can enlist, you can serve your country overseas, but you can't get medical treatment even at 18. You have to wait until you're over 19. It's just a bad law. Personally, I think it is legally going to be held unconstitutional so that banning the ban, or staying the ban is the right thing to do because it's likely that the state will lose ultimately.

Kim:

Think about that. That's like saying, "Oh, we'll allow abortion after the baby is born." No, but really. When it comes to-

Jill:

You're right.

Kim:

Gender-affirming care, you reach a point that hormone blockers and other care no longer work if you're too old. So, that's what makes this so... There's a reason. There's a method to the madness of that 19 number.

Joyce:

To be clear about it, using puberty blockers gives that individual a little bit more time to decide where they stand, to receive counseling, to receive care. Nobody walks in the door to these clinics and receives puberty blockers right away. It's sometimes a years-long process to access this care. So, what is going on in Alabama is another form of what happened with jobs and abortion. It's a way of telling people, "You don't have the right to determine the course of your own medical care." Barb, what happens next in this case, what claims are the plaintiffs raising, and what's the procedure from here on out?

Barb:

Well, as Kim said, this order that we're talking about was just an order that allowed the law to go into effect while the case works its way through the court system. So this decision that reversed the judge's order, allowing this law to go into effect, there's now a request for the full court to review this. This is what's referred to as an en banc review. That would be, all the judges on the 11th Circuit would look at this and decide whether they agree with the decision of the three-judge panel. There is a consideration to take the case there next.

Of course, the next thing that would happen is, the case goes to trial. It's currently scheduled for trial in August of 2024. That would be the place where we would get the ultimate decision as to whether this law is permissible, whether it violates the constitution. But in the meantime, all of these kids who want to have this kind of medical care are not going to be able to get it in the state of Alabama.

Joyce:

Kim, you're our Supreme Court expert. Do you think this case or this issue ends up in front of the court anytime soon?

Kim:

Well, it's highly likely that it ends up at the court at some point, because one justification for the court taking up an issue is if there is a circuit split and, lo and behold, on this issue there is. The 6th Circuit has reached a similar conclusion as the 11th Circuit when it comes to transgender affirming care bans in Tennessee and Kentucky. They looked at the injunctions that were put in place in those cases, said, "Nah, we think it's fine," and lifted those injunctions, allowing those bans to go into effect. Whereas over in the 8th Circuit, they paused Arkansas's law banning procedures and drugs for transgender people. So, that looks like a circuit split in the making to me.

Right now, the Supreme Court is already poised to decide the case when it comes to bathroom use by transgender people. They may not want to load up on all the transgender issues all at one time. So, I think they may do things like, if a petition for cert is made, they'll probably ask the DOJ to chime in, knowing full well what the DOJ's going to say, and try to push this off to next term, at least, in order to handle one transgender case at a time. That would be my prediction. But in the end, like I said, the circuits are split. We can't have different rules for different people in different states, not something like this. So, they will have to decide eventually.

Joyce:

Well, I think that's a fair analysis, and the issue is headed there sooner or later. Jill, how serious do you think Alabama is about its case? Alabama's Attorney General, Steve Marshall seems very focused on this one. He had a fast press release here. Is this a legitimate legal position, or is it politics?

Jill:

Well, it can be both. The Attorney General, of course, his job is to defend the laws of the state, and this is a law that was passed, and therefore he must defend it. On the other hand, there are plenty of attorney generals who have said, "I will not." Sometimes district attorneys do that and then they get fired, for example in Florida. Clearly, it's a political issue for him too. He must see this as something that is attractive to the voters in Alabama, and that's why he is personally making a big deal out of this, and is really pushing it. But it is his job to defend the laws of the state of Alabama. So, I'm not sure that he really has a choice.

Joyce:

That's a fair point. I can recall, on more occasions than I can really shake a stick at, sitting down with his predecessor. Because when you're at DOJ, before you sue a state over the constitutionality of one of its statutes, you're required to consult with state officials. So with his predecessor, Luther Strange, I'd call him up and say, "Luther, we're getting ready to sue you over your immigration law. Can we sit down and talk about it first?" We would explain our case, and he would explain exactly what you've just said, "As the state's Attorney General, I'm obligated to defend this statute." We would say, "Really? Because you're just going to waste the state's money." Then we would go into court and we would beat the state like a drum. It happened a couple of times. It does, it wastes a lot of the state's money.

But to your point, the attorney does, at least in that sense, represent the Attorney General. So, I appreciate the comment that you make there. But Barb, Alabama's law doesn't just ban the care, it criminalizes the provision of it. The 11th Circuit decision last August said that that was okay because there's no tradition in history of this sort of care being available. That language rang a bell with me. Where did I hear that before? It sounds a lot like the language the Supreme Court has used in other culture wars cases, including the abortion case. Given your background as a prosecutor, I'm curious about how this hits you, and whether you think moves like this by conservative state legislatures to ban conduct that they disapprove of is appropriate and whether it will withstand constitutional scrutiny.

Barb:

Well, it shouldn't. The question is, but will it anyway? The claims that the families of transgender children have brought in these cases say that the law violates the Constitution. So, lawmakers can pass any law that the people want to enact to protect public safety or other interests, but only to the extent it complies with the Constitution. The Constitution is a backstop that says you can't pass any law that violates the Constitution. Lawmakers swear on oath to uphold the Constitution.

Sometimes, nonetheless, unbeknownst to them or maybe beknownst to them, they pass the law that does violate the Constitution. That's where courts come in to say, "We're striking down this law because it violates the Constitution." Here, the challenge by these families is that this law violates the equal protection laws of the 14th Amendment that says that laws cannot discriminate on the basis of sex, is one of them. So, if this law is discriminating against people who are getting healthcare denied to them on the basis of sex, that would be a violation. They have also alleged that this violates their free speech rights, the right to express their gender the way they choose under the First Amendment.

Finally, they say this violates substantive due process rights because it intrudes into the medical decisions of a family. This goes much further than some that say you have to have family permission to allow this. This says, even with family permission, these kinds of gender-affirming medical procedures are not permitted. So, that's the one that I think really is violated here. So if I think there were a fair reading of the law, I think that this law would be struck down.

Now you point out this language about history and tradition, which is all about the conservative legal movement. It is all about trying to cling to conservative values by introducing into the law the idea that we have to view the world the way it was viewed at the time of the founding of the country. Clarence Thomas has used this language about history and tradition when it comes to gun cases. We have to look to whether there was a history and tradition of certain gun laws at the time of the Second Amendment.

Kim:

Can I just remind everyone that Clarence Thomas is the last one who should be wanting to rely on history and tradition at the time of the founding for anybody's right?

Barb:

Yeah, no kidding. Think about our evolution from that, between slavery, and interracial marriage, and things. Yet, that is the language that they use to be able to get rid of all of these things. But, I personally take a much more pragmatic view of the Constitution. I don't think we're stuck with the way the world was viewed at the time of the framing. If you did, then women would have no rights, minorities would have no rights.

I also find conservatives pick and choose when it comes to things like... Well, if we look to the language of the Constitution at the time it was written, then a gun means a musket with a single shot, and they just dismiss that with the wave of the hand and say, "Well, that would be ridiculous." Or the idea that the Fourth Amendment extends to telephone calls and wiretapping. "Well, that would be ridiculous to say that there's no protection there." Well, which is it?

The lack of consistency, is what rankles me the most. So my personal interpretation of the Constitution, I think we take the values that are expressed there, and then we have to look at them in the context of today's world with our evolving standards of social justice. So here, I don't have a lot of confidence in our courts, in either the 11th Circuit or the Supreme Court, when it comes to these kinds of culture war issues.

Kim:

Jill, you've had a lot of jobs. Have you ever considered working with Calm? Because, your voice is very soothing.

Jill:

Oh, I'm so glad to hear that. I would love to do that because I love Calm. It is one of the best things for turning off your mind. That and Wordle do it for me. If you are someone like me, who gets into bed and then starts checking all of my social media apps, my emails, and all of a sudden 45 minutes have passed. If you're a nighttime doom scroller, let Calm help you form new and healthy bedtime habits. Calm is the number one app for sleep and meditation, giving you the power to calm your mind and change your life.

Kim:

Calm recognizes that everyone faces unique challenges in their daily lives, that mental health needs differ from person to person, and that time for meditation may vary since self practices are so deeply personal. That's why Calm strives to provide content that caters to your preferences and needs.

Barb:

Yeah, I really don't love the ones that focus on breathing. I think I've told you before, if I focus on my breathing, I start worrying that something's wrong, so it adds to my anxiety and stress. But I love the ones that are guided meditations where you're very mindful, just walking, nature walks, just walks through the neighborhood. There are all kinds of guided meditations, including some that reduce anxiety and stress, relaxation and focus, building healthy habits, and taking care of your physical well-being. They even have sleep stories with hundreds of titles to choose from, including sleep meditations and calming music that will have you drifting off to dreamland quickly and naturally. We also love their expert-led talks on topics like tips for overcoming stress and anxiety, handling grief, improving self-esteem, caring for relationships, and more.

Joyce:

I'm trying to care for all of my relationships this year, and Calm is really helpful for that. The Calm app puts the tools you need to feel better in your back pocket. If you go to [calm.com/sisters](https://calm.com/sisters), you'll get a special offer of 40% off a Calm premium subscription. New content gets added every week. Stress less, sleep more, and live better with Calm. Best of all, Calm is offering our listeners an exclusive deal, 40% off a Calm premium subscription at [calm.com/sisters](https://calm.com/sisters). Go to [C-A-L-M .com/sisters](https://C-A-L-M.com/sisters) for 40% off unlimited access to Calm's entire library. That's [calm.com/sisters](https://calm.com/sisters). Look for the link in the show notes and find some inner bliss.

Jill:

Well, after all that heavy duty discussion, we are now at the point of our favorite part of the podcast, and that's answering your questions. We look forward to this every single week. If you have a question for us, please email us at [sistersinlaw@politicon.com](mailto:sistersinlaw@politicon.com) or tag us @sistersinlawpodcast on Threads or Twitter, or X, or whatever you call it, using #SistersInLaw. If we don't get to your question during the show, keep an eye on our Threads feeds throughout the week because we try to answer other questions than we get to on the podcast. I want to start with you, Kim. We have a question from Harriet in Richmond, Virginia. She asked, "The Supreme Court decided to decide the Trump ballot ban case, and will take it up on February 8th. What do the justices have to do between now and then that is going to take them so long that they can't have the argument until February 8th?"

Kim:

That's a good question. The justices actually do have a full plate. This is a really, really consequential term at the US Supreme Court, and they have been holding oral arguments in all manner of cases so far this term, some of which we've discussed. What happens after each? I'll explain what happens with each case, and then you can multiply that by about 65, or however many cases that are on the docket. They hear a case for argument. First, the parties have to brief the case, actually. They submit their briefs making their arguments.

We've talked about amicus briefs. These are people who have interests, who submit their briefs. The justices can consider amicus briefs or they can ignore them, it's up to them. But, they often read those too. They often cite them in the opinions. Then they have an oral argument. The parties have to prepare for that argument. They argue before the judges, then they go, they vote amongst themselves how they think, and then they have to write opinions. They have been doing this consistently through October, and it usually is a rush at the end of the term in June to finish it all, because it is a lot for them to do.

There are consequential cases about abortion on the docket. They are deciding cases about gun rights. They are deciding all these Trump cases that are coming up, not just this one. It is a busy docket. We've talked about the interest in fully briefing a case, and not ruling on what we call the shadow docket, which is done without that full briefing. So I honestly think February 8th, and a decision that I probably would expect sometime in late winter or early spring, is a rocket docket for the Supreme Court. That's actually moving pretty quickly to decide a fully briefed case. So I know it seems like it's taking a long time, but I actually think this is pretty quick, and it's basically what I anticipated when they granted this case.

Jill:

Great answer, Kim. Our next question comes from Sally, and I'm going to ask you to answer it, Barb, "Could you elaborate on the concept of mens rea, and why it's so important in Trump's cases?"

Barb:

Oh, this is a great question. This is what we discuss in criminal law. We spend endless hours discussing this concept. Mens rea is the idea that you have to have a particular mindset, a particular intent in order to be guilty of a crime. Each crime has a specific type of intent that is specified in the statute. Some require that you do something knowingly. Sometimes it's that you do something willfully. It might be that you do it recklessly. Each of those things means different things.

For example, doing the same act might be an innocent act without the required mens rea, and it might be a crime with a different mens rea. For example, if you pulled a fire alarm believing that there was a fire, then that's not a crime. You were alerting people and being a good citizen. If you pull a fire alarm knowing that there's no fire, but you're doing it because you want to disrupt activity in a building, then you might be guilty of a crime. So the act is the same, but your intent was different in each of those cases.

In the cases that Trump is charged with, many of the crimes he's charged with requires the highest level of mens rea, which is called willfulness. That means that you know not only what you're doing, but that you know what you're doing is wrong. Most of the time, we follow the adage that ignorance of the law is no excuse. So if you do something, even if in good faith and you didn't know it was a crime, just the mere fact that you're doing it is bad enough, like being a felon in possession of a firearm. It's enough that you knew you were possessing a firearm, and that you knew that you were convicted of a felony, even if you didn't know that it was a crime to possess a firearm after being convicted of a felony.

But in Trump's case, we have that highest level where he has to know what he was doing was wrong, and that can be very difficult to prove. You have to prove it through circumstantial evidence because, most of the time, a person doesn't confess and say, "Look, I know this is wrong," so that's why we're hearing about all of this evidence that he knew that he had actually lost the election. Now some of the crimes, like his obstruction, just requires that he knows that he's violating the proper method for doing things, like the proper way to challenge an election. So this is a very specific type of element that has to be proved depending on the crime in the case. I think it's where we're going to see prosecutors spend the most time when these cases come to fruition. But the fact that they've charged it means that they believe they have sufficient evidence to prove all of these crimes at trial, including the required mens rea in each of these crimes.

Jill:

My favorite question comes from Ryan, and I'm going to ask you to answer, Joyce, "Doesn't Gerald Ford's pardon of Richard Nixon set a clear precedent against presidential immunity?"

Joyce:

Oh, if only it were this easy. Look, I think Trump loses on the immunity argument in the criminal case. So, ultimately, this ends up just being an interesting side note. It was actually raised by one of the judges during the argument earlier this week on Trump's immunity, where she sort of interjected, "Well, other presidents have believed that they were at risk of criminal prosecution, that's why Richard Nixon wanted a pardon so much." So, this is not legal precedent in the sense that a judge has made the determination, and that's why we're involved in the current litigation. It will be decided pretty shortly, and I think that this is a fabulous historical footnote to the controversy.

Jill:

Thank you all for listening to #SistersInLaw with Joyce Vance, Kimberly Atkins Stor, Barb McQuade, and me, Jill Wine-Banks. Remember, you can send in your questions for next week by email to sistersinlaw@



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Barb:

Joyce, you probably didn't listen, but this week I do Note From Preet, as does Joyce for Cafe. It was the day after the game, and I sound so raspy. I asked, "Should we record later?" "No, we got to do it right now." He said, "Maybe say something about why your voice is gone." "I'm recording the day after the game." It's terrible.

Kim:

You sound like Bart Simpson's sister.

Barb:

Yes.

Joyce:

We have all been in mourning. It was a grim week in Tuscaloosa.

Jill:

Sorry.

Barb:

Yeah, Nick Saban out. That's a big deal.