

Joyce: Welcome back to #SistersInLaw with Jill Wine-Banks, Barb McQuade, Kimberly Atkins Stohr, and me Joyce Vance. We have got such exciting news to share today. We're ready to take the #SistersInLaw podcast back on the road, and I can't wait. Our live audiences last year were so much fun. This year we get to see y'all if you live in Jill's hometown, Chicago on May 2nd. Barb and Kim both claim Detroit and will be there on May 9th, and we'll finish up in Boston on May 30th.

Now, here's the important part for tickets and more information, sign up now at [politicon.com/tour](http://politicon.com/tour). You'll get an alert when it's time to get tickets, but here's the skinny in advance. We'll have a special pre-sale for our listeners starting this Wednesday, March 6th at 12 noon Eastern. So mark your calendars, go to [politicon.com/tour](http://politicon.com/tour) to make sure you don't miss out on limited VIP tickets and more. We can't wait to see y'all. And really, you guys, I can't wait to see the audiences, but I can't wait to see each of y'all and for all of us to be together again. What are you most looking forward to doing once we're back together, Barb?

Barb: The great hot dog debate, of course. We've been talking about this for I don't know how many years.

Kim: Bring it.

Barb: I want to go head to head, the Chicago dog versus the Detroit Coney dog. I'm looking forward to it.

Joyce: Do they do dogs in Massachusetts?

Kim: No chowder. But that's good too. But we can all enjoy Boston will be the Kumbaya where we all come together over Chowder. But...

Jill: Kim, you had dogs in D.C, so...

Kim: Yes, vegetable dogs.

Jill: You have two cities to claim.

Barb: Well, they like smoky dogs or something.

Kim: They were half smokes.

Barb: Half smokes

Kim: At Ben's Chili Bowl. But I'm going to say you will never be the same after you have your Lafayette Coney, I'm telling you.

Joyce: You guys are so serious about this.

Jill: I'm looking forward to it. Although I have to say that one of our fans wrote to me saying we should not be promoting pork because of how badly they're treated. And I pointed out to him that Chicago dogs do not have any pork. It doesn't mean that we treat beef any

better, but anyway, I can't wait to see all of you and to have our eat off and make sure that Chicago wins. But I'm also looking forward to seeing the audience. I cannot believe that I am lucky enough to be on stage in Chicago, my hometown. I mean, this is amazing to me. I'm really, really looking forward to that and to seeing Barb's hometown and Kim's adopted hometown. So I'm looking forward to this trip a lot and to debating all of the hot issues of the day.

Kim: And my real hometown too, Detroit, yes, and my adopted one of Boston. But you know what I'm looking forward to? I'm looking forward to see how fabulous Jill Wine-Banks looks. So when we were on tour, the first time I remember, I think we were in New York and we had to get up really early to take a train to Washington, D.C. And so you're in a hotel and they have the little place where you get your coffee and your little buffet breakfast. So it's like, I don't know, 6:30, 7 o'clock in the morning, so I roll down. I got my glasses on, my hair's all piled up in my head. I'm wearing sweats. I'm just looking for caffeine. And there is Jill Wine-Banks pitch picture perfect, head to toe, not a hair out of place, hair, makeup on point, got her pumps on. She looked like she was ready to go on camera. And I'm like, how the in world, did you sleep like that? How in the world does that happen? We're about to get on a train.

So Jill Wine-Banks always looks fabulous. I look forward to always seeing her outfit. So that's one of the many things I'm looking forward to.

Joyce: Well, you too, Kim. I always love it when you wear clothing that you've designed and sewn yourself. I'm not exactly a fashion plate, so I look forward to living vicariously through you and Jill.

Barb: I'm just looking forward to eating.

Joyce: You guys. It's going to be so much fun. Y'all go to [politicon.com/tour](http://politicon.com/tour) and make sure you're signed up so you'll be first to know when our tickets are available.

Jill: I just have to say, Chicago just won for the best pizza in the country, a place called Pequod's, which is known for its caramelized crust pan pizza, deep dish pizza. So I can't wait to try that and maybe that's what we'll have for dinner in Chicago.

Kim: Nice. Pizza populace in Detroit.

Joyce: We have got a great way to make your life easier, help the planet and transform the way you do laundry forever. Just switch to Earth Breeze. Nobody likes those huge plastic jugs that can spill and make a goeey mess. Thankfully, Earth Breeze is changing the game with Eco Sheets.

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Jill: We all have higher blood pressure than I can ever remember. Our text messages were frantic on Thursday after SCOTUS granted cert and a stay. And I want this discussion to be a free flow of emotion and analysis as we struggle to understand what the court did and why. So I'm going to look first as soon as the order was released, we all had strong reactions. And before we dive in for analysis, let's talk about our emotions. Kim, what was your visceral reaction to this?

Kim: This is a family podcast, I don't think I could say it, but I was really shocked. Listen, I was one of those pundits on TV and elsewhere, saying, the longer it takes the Supreme Court to issue its order on this immunity order, whether Donald Trump is immune partially or fully from prosecution, the more likely it is that somebody's just writing a dissent or a statement attached to this order and they're just going to deny hearing it and they're going to let the lower decision of the DC Circuit stand. And lo and behold, after weeks and weeks, they decided to take up the case and issue full briefing and arguments. And the arguments are not until April. I just thought there is no way in heck that this is going to get to trial, that the Jack Smith case is going to get to trial before the election.

Jill: Barb, what was your emotional reaction? We'll talk about the analysis later but just-

Kim: I know, but that was part, I have to explain why I was emotional. That was emotional not just because the Supreme Court did what it did, but what it means. That was the part that was the gut punch.

Barb: Well, I found out about it because I got a text message from Kim with the exploding head emoji.

Kim: True.

Barb: And this is bad. So I thought, this is really bad. I'll say that when I read it, I thought I'm not as bad as exploding head. I think that it's concerning to me because I worry that it is now on a pace that might make it difficult for the case to come to trial before the election, but not impossible. And I actually think this is not a crazy outcome. I think it's kind of a compromise middle ground. It's not a home run for Jack Smith, but it's also not a home run for Donald Trump. So it's fine. I was a little alarmed with the exploding head emoji,

but I actually calmed down a little bit when I read it and we can talk a little bit further about it a minute.

Kim: Are you calling me alarmist?

Joyce: Yeah, I mean I am so.

Barb: No, you just, you've been out on the ledge for so long, Kim, that it's understandable that you're all ramped up. And so I understand I don't share your alarm. I share concern. In the words of Susan Collins, I'm concerned.

Joyce: I am so not calm about this one and I usually don't get pulled off my game by emotion. But I was on a plane when this decision came in, so I was seeing little pieces of it and it slowly dawned upon me the horror that Kim and I were going to need to extend that ledge a little bit further out because I'll tell you what hit me. It was the feeling that the Supreme Court does not feel any urgency about this matter. And look, I'm not suggesting we should be in a rush to convict Donald Trump for political reasons. My point is very simply that the American people are entitled to a speedy trial in this case. Barb, I saw earlier today, is it Ohio Senator J.D Vance, who I am in no way related to took you to task on Twitter for making the point that the American people have a right to a speedy trial just like a defendant does.

Kim: What?

Barb: Yeah,

Joyce: That is what-

Barb: He said, I'm lying.

Joyce: Last Letter law.

Barb: Yeah. He said, I'm lying, engaging in misinformation that it's only the defendant he said has a right to a speedy trial, which is we all know, of course is not true.

Kim: That is incorrect. What law school did he go to?

Joyce: Jack Smith laid out that law.

Barb: He went to the Ohio State University. It's at some point in his career.

Joyce: Well, Jack Smith laid out the law in that regard in one of his briefs, right? And it's very clear that this is an important matter and the kind of thing that the court in the past has handled quickly to resolve a dispute so Americans can move on and they're just not going to do it here. So I am staying out on that ledge. Thank you.

Jill: So I, of course, agree with all of you, and I was devastated when I saw the order. Something you just mentioned, Joyce I'm going to throw in there, which is Dahlia Lithwick and Steve Vladeck apparently just did an article saying, no, the Supreme Court

is doing the right thing, taking its time that they should not bend to political needs. I think that is so completely off the mark. And past history of course shows the complete opposite. But we'll get to that. I think I want to move first to key points in the order so that the rest of our discussion will be framed around the actual language. SCOTUS said it was taking limited to the following question. There were a lot of possibilities, but this is how they phrased it. Whether and if so, to what extent does a former president enjoy presidential immunity from criminal prosecution for conduct alleged to involve official acts during his tenure in office.

And Barb, let's start with you about parsing the language here, which is total immunity while president versus no immunity, except they are in his official role versus who's the alleged official conduct from. It's not from Jack Smith. Jack Smith alleges criminal conduct, not official conduct. So what does it mean when they say for conduct alleged to involve official acts during his tenure?

Barb: Yeah, this is really interesting, isn't it? I think it's caused a little bit of confusion. I know we've talked a little bit about it. What do they mean? Because Jack Smith alleges that everything Donald Trump did was outside of his official duties, that the president has no role to play in administration of elections. That's all for the states. And so that everything he did was outside the scope of his presidential duties. I've actually, again, I think I'm less alarmed and less pessimistic than some of you are about this because I think one possible outcome here is that the court is simply going to say, of course he's not immune from anything that's outside the scope of his presidential duties. There is some room for a president to be immune from criminal prosecution for certain things within the scope of his official duties. And I can't remember where I read it, so this is not an original thought, but I read things like Harry Truman dropping the bomb on Japan. What if his successor had tried to charge him with crimes for murder for that? People could accuse him of that, but he would have, I would argue, and this person argued whoever it was, that he would've immunity for that because he was doing his job as president. Even if people may have strongly disagreed with that decision, he did it as the commander in chief of the United States. Same when President Obama ordered drone strikes on like Anwar al-Awlaki, a US citizen. Could he be charged with-

Kim: Or W. People say W might have broken the law with the war in Iraq and these are things that are official.

Barb: Yeah, these were official acts and although people could disagree about them, are they crimes? What Donald Trump did is very different from that. So I think it could be that the court just wants to make it clear because Donald Trump is saying, well, you can't find immunity because if you do, then every president will simply charge their predecessor. I mean that is so projecting like the way he sees the world, only if you're abusing your power. But maybe they want to just say a president is immune from prosecution for certain official acts, but they're not immune for things that are outside the official acts. So I think that's a possibility.

And then with this timeline, keep in mind that although the court did not act very quickly, which it could have done by summarily affirming the court of appeals and sending it right back to the trial court right now, it also didn't do the awful thing it could have done, which is to treat it like a normal motion for stay, wait for Trump to file his petition for

certiorari, give him all the 90 days the briefing and the arguments would've been passed the election.

Instead, they did set an expedited briefing schedule, expedited briefs, oral argument in April, and then a decision one hopes this term which could allow for the trial to go in before the election. I know it's going to be tight and that's why it's frustrating, but the only worry I have about all of the things that I just said is that if they have to decide that the case needs to go back for fact finding about whether all of the things, and I think the word "alleged" here is not what Jack Smith is saying, it's what Donald Trump is saying. It's Trump who alleges that these acts were within the scope of his official duties. I worry, and I know Jill you raised this too, that what the court could say is, well, we need to send this back to Judge Chutkan for some fact finding on what is and isn't official acts and then that could be appealed again and again.

And I just want to add one more thing, which is all of it I think Donald Trump or Jack Smith says is outside the scope of the official duties. I think the one smidge of all the alleged conduct that could be within the scope of official duties is what he did within the Justice Department. Even though the Justice Department was abusing its authority when he tells someone in the Justice Department to write a letter to Georgia to do X, Y and Z, is that possibly part of the scope of his duties? So I just worry that maybe there's room for some splitting of hairs here about what is and isn't and that could take some time.

Kim: That was all brilliant analysis Barb, the only thing I would disagree with you with is that this is not a very expedited, it was slower, set aside how quickly the court decided *Bush v. Gore* for example, or the Watergate case, even the Colorado case, from the point that they granted and consideration got arguments done and the case was submitted was shorter than this. So it feels like a slow walk to me, it feels like a slow walk.

Joyce: It does to me too because the Supreme Court has the total ability to set the timeline in any way they want to. And the parties, they've already fully briefed these issues twice in the district court, in the court of appeals. They could have been ready to file their briefs really in just a few days or a week. And so I go back to that first point that I made. This court does not feel any urgency to get these issues decided.

Jill: And that's where I'm at, is that the real issue is the delay they're causing unnecessarily. And for exactly the reasons you said Joyce, this was fully briefed at the Court of appeals for the District of Columbia. And so there's no time that they need for new briefing. And I'm used to looking at the history, which is how fast they handled *Bush v. Gore*, how fast they handled the 14th amendment case, how fast they handled the Watergate case. We applied for cert on May 24th. It was granted a week later. It was argued and a week after the argument, it was decided in a unanimous vote, not a week after, I'm sorry, it was actually two weeks after. And then we had the president resigning right after that because of the result of that case. So I think speed is really important in the same way, Barb, that you are right, that a speedy trial is the right of the American people. So is the right to have this resolved in a speedy way.

But okay, let's go back to another basic choice. Where does the concept of presidential immunity come from? Is there something in the Constitution?

Joyce: Yeah, I mean it's not from the Constitution. It's Judge made law and that's really why we're here. And maybe I should say this, I always thought that there was a good chance that the Supreme Court would want to hear this case because it's an important issue. They've never decided it before. And immunity, whether it's, we've talked a lot about qualified immunity for law enforcement, whether it's speech or debate clause immunity for members of Congress, that one's a little bit different because it really does have more of a basis in law, but this is a doctrine that's really just something that comes from the court. So I think it's fair for them to hear it. Of course, my quibble is still with their timeline.

Jill: So Kim, let me ask you a sort of follow-up question to something Barb said, which is her fear, which was one that I have always had that it might get remanded for a fact finding hearing to the district court. Couldn't the court take judicial notice that the alleged crimes can never be within the scope and that the allegations in the indictment are clearly not official conduct acts?

Kim: Well, yes, they can rule out right those two things and still either apply it to the case at hand or I guess distinguish it from the case at hand while still holding that criminal activity is not something that can ever fall within the bounds of presidential immunity. They certainly could. So point 1, at this point, I don't know what the Supreme Court will do anymore. I am out of the Supreme Court prediction game. I've been embarrassed too many times and I'm just not doing it anymore. I can tell you what I'm afraid they might do and that in addition to this whole alleged word in the question presented that you all pointed out doesn't make any sense. I also am worried, and I think one reason that they called for all this briefing, even though this has been briefed ad nauseum, is the question says, whether and if so to what extent there is presidential immunity.

And to me that's like, oh, so it is on the table. It is on the table that the Supreme Court could rule what Donald Trump is asking, which is total immunity, total immunity for presidential acts. Because the question is whether and if so to what extent. That terrifies me and I think that we need to brace for that. I mean, I really don't know what this court will do. It clearly took a long time for them to come to this question presented. There is clearly some back and forth going between the justices. So I think that, and just to show that my viscera is not always over the top. Some people will think, well, no, nobody on the Supreme Court could actually think that the president is immune. Judge Michael Luttig, a conservative, a Federalist society lifelong card carrier, a believer in democracy said literally minutes after on MSNBC. I think that there is at least and possibly more justices that believe that Donald Trump is immune. So it's not just me. I'm worried about what this court is doing and this question presented makes me more worried.

Jill: It is worrisome and I think we've all focused though on the delay and how that is. So Joyce, I want to ask you why did it take so long to issue the order? It was more than two weeks and even longer. If you go back to Jack Smith's original request, which was December of 2023, December 11th, so it's like two and a half months. He asked for this to happen back then. And so it's really a long time and now we're looking at arguments in April 22nd of '24.

Kim: The week of April 22nd.

Jill: Yeah, it could be later in the week. That's true. It's true. So why do you think it took so long?

Joyce: I really wish I could answer that question, but I mean I just can't, to Kim's point, perhaps there are justices who believe that Donald Trump is immune, although it's really hard for me to imagine that world and think we're still living in a democracy because if it was okay for Donald Trump to try to steal an election, then it's okay for Joe Biden to steal an election.

Kim: Yes.

Joyce: So anything that the Supreme Court signs off on in this case and says it's not criminal, then Joe Biden who of course won't do it because he's a good decent human being who believes in the rule of law and democracy, but theoretically, he or any other president could come along and do the same sort of stuff to hold onto power except be more successful about it than Donald Trump was. I mean, Donald Trump is in many ways a failure at committing this crime, but conspiracy and attempt of crimes and that's why he's charged.

If the Supreme Court says he's immune, then they're saying even the president who does it better than Donald Trump did, still can't be prosecuted. I just can't imagine that we live in that world. But this was a long time. It was close to two and a half weeks that it took the court to grant in this case. I assume that means that there was back and forth, maybe there was an effort to find a majority position that they could get to before this even kicked off. I suspect we'll have a much better sense of that when we hear the oral argument, and I'm all ears.

Kim: Joyce, to your point about if the president is immune, then so is Joe Biden, this isn't going to happen. This wouldn't happen. But wouldn't it be great if the Justice Department filed an amicus brief? Basically say it all. We can't wait. We can't wait y'all for this ruling comes down, you wait. We are just going to go to students' houses and just give them money for their student loans. We are going to just, we're going to... You just wait. I wish that would be so brilliant, the justice if Elizabeth Prelogar could just roll up to this podium and rub our hands together.

Joyce: Every year at election time, I tend to do election protection work and sometimes that looks like an effort to suppress votes at our historically Black colleges and universities in Alabama. That's a persistent theme. Well, if presidents have immunity, there's no longer any worry. You can just manufacture 3000 ballots that weren't cast at Alabama A&M and cast them for the candidate of your choice, right?

Kim: And cast Joe Biden could roll up to your house and take your guns.

Jill: That ought to cause some concern I would say. But is there any reassuring reason for a case of this public significance and time sensitivity, with the primaries well along already, to take as long as it is? Is there anything you can think of that would make people feel like maybe it's better, and maybe this goes to why grant cert, and Joyce, you referred to thinking that maybe this was a case where the Supreme Court should be the

final say on such an important issue and so they're taking it so that they can be the final say.

Joyce: This is an issue in more than just the DC case. It's an issue in Mar-a-Lago. It's an issue in Georgia. Maybe the Supreme Court does want to have the final say in the matter. I don't quibble with that. I mean, I think that they're entitled to vote however they want to. I just don't think that they're entitled to take so much time.

Barb: Yeah, I don't know. Again, I think Steve Loddick had a piece where he talked about, if you look at the dates that are open on the calendar, there just aren't open dates ahead of time. And I don't think they feel the need to have a fire sale about this. I think that they feel the need to have a prompt disposition because of the public interest in a speedy trial, but I don't think they feel beholden to the election as their deadline. And so that's why I think they feel like April's quick, it's expedited. And if other things happen beyond their control, like appeals of other issues that take this case beyond election, that's not their problem. That's not their matter. Their job is to decide cases that come before them. They're doing this as reasonably quickly, and I think they probably see that that's their job.

Jill: So let me take us in a totally different direction. And that is a law 28 U.S.C. Section 455, which makes it clear about the obligation to recuse in certain circumstances. And it is to me very clear that under that law, unlike under the wishy-washy nonexistent ethics, that the Supreme Court passed that Justice Thomas must recuse himself from the January 6th case. Anyone want to dispute me on that?

Joyce: No, I mean you are dead on the money girl.

Kim: Yeah, listen-

Barb: Good here.

Kim: The justices have not even abided by their own guidelines, non-binding guidelines that they issued a while back in response to all of the stories about the apparent ethical lapses by the justices, like the fact that they're supposed to give a reason why they recuse. I think the Chief Justice Alito and Thomas actually has recused a time or two in some cases and gave no reason. The only people giving reasons for why they recuse were Jackson, Kagan, and I believe Barrett did too. But even Roberts is not given reasons. They're not even abiding by their own rules, let alone to the law. They really do think they are above the law. So why wouldn't they think that the President, or at least the President that put some of them are too.

Jill: So I want to give credit to someone calling this statute to my attention, and it is someone that Barb is going to get to meet at her book event, which will have now been last night. So by the time this is broadcast, Barb, you will have met Linda Harris, Linda Chaplik Harris, who gave me this heads up on this.

Barb: Well, very good.

Kim: You guys, I don't have a ton of things in common with Jennifer Aniston. So when I saw her talking about how fabulous LolaVie is, I was a little skeptical that could work for her hair, but her hair is not like my hair. But you know what? I tried it and it is fabulous, especially the Leave-in product. It leaves my hair bouncy and healthy and fluffy. It's really fantastic. And this episode is proudly brought to you by LolaVie, the award-winning hair care line founded by hair icon Jennifer Aniston. She got sick of choosing between hair products that work and ones that are actually good for us. And LolaVie solves that dilemma.

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Barb: The Supreme Court heard two cases this week that relate to the topic of disinformation online and that is Moody versus NetChoice and NetChoice versus Paxton. These cases involve statutes enacted in Florida and Texas that prohibit large social media companies from removing content on their platforms unless the content violates the law. Sponsors of the laws allege that social media engage in censorship by disfavoring conservative voices. Now, industry groups representing large tech companies like Twitter and Google and YouTube filed lawsuits challenging these laws, arguing that the First Amendment prohibits states from forcing them to publish content that violates their community standards regarding threats or harassment, obscenity and other violations of public safety. The 11th Circuit struck down the Florida statute, but the fifth Circuit upheld the Texas law resulting in a circuit split. And now even the law in Texas has been on hold until the Supreme Court can decide the case. So first Joyce, can you explain this idea of a circuit split and why the Supreme Court might take up these kinds of cases and hear them together?

Joyce: So this is a circuit split. One of the classic reasons that the Supreme Court agrees to hear cases when two circuit courts of appeals reach different decisions about the same issue. The Supreme Court steps in to make one unifying decision that will apply across the whole country. And this one is sort of interesting because the split here is between the fifth Circuit and the 11th Circuit. They used to be one circuit until 1978, the former Fifth Circuit. So here that when they're oppositional and the fifth and the 11th combined, they

stretch from Texas all the way to Florida. They run in a line all the way through the deep south. They don't agree, the court has to make the decision for all of us.

Barb: Hey, so Joyce, when you're living in the 11th Circuit, does that mean you have to research 11th and fifth Circuit case law in case there's something older that is binding?

Joyce: Yeah, what we did was we adopted in the 11th Circuit the day it was created, all of the prior case law from the fifth Circuit is binding in our circuit. Fifth Circuit law after the split is, I mean it's not binding, but people use it like it is. It's certainly given a lot of preference.

Barb: It's double the research time.

Joyce: It really is.

Barb: You bill your clients twice as much for all that work. Well, Kim, I want to ask you about the oral argument because my perception was the court seemed pretty skeptical that these laws in Texas and Florida are legal. Any tea leaf reading here? I know you said you're out of the business of predicting what the Supreme Court might do, but sometimes you can tell based on their questions what direction they're leading. What was your impression from the oral argument?

Kim: Yeah, I wasn't sure it was quite that clear. I sort of saw from justices across the ideological spectrum, some justices expressing skepticism that a state can regulate social media in that way, but also expressing some concern about the way that social media was operating and how it was failing to tamp down the sort of misinformation and other things. Not so much leaning into the whole purpose of these laws, which was to claim, oh, there's a conservative bent on these. They didn't seem to be buying that wholly, but somewhere you say sometimes they don't do a good job in tamping down misinformation or hate or other things. So I think that there was some concern. Now it seemed to me that Clarence Thomas was totally fine with these things.

Barb: He's the one who kept using the word censorship. So you mean though you can engage in... It's another word for censorship, isn't it?

Kim: He was. He was. But on the opposite, well, maybe not entirely the opposite end, but on the other hand, it was John Roberts that was pointing out, okay, we're talking about the First Amendment, but these are private actors. This isn't quite the public square, so that's not quite how it works. So I'm not actually sure. I think that they were struggling with it a little bit.

Barb: Yeah, I think it's going to be really interesting to see how these cases come out. And Jill, one of the things that I'm curious about is what's at stake in these cases? So if one or two states can prohibit social media platforms from moderating content, I mean, what would that look like?

Jill: Well, obviously it would lead to a patchwork that would be untenable and would be the kind of thing where the lowest common denominator would control. A company cannot operate where you can broadcast certain things or publish certain things in five states but

not in five others. That would be an impossible burden for them. And I think the very concept of applying this to a private actor would be really threatening to way more than just social media platforms. It's bad enough when we look at it in terms of whether social media platforms or a newspaper, does a newspaper have to publish every letter that's sent to them? Does it have to say things that are totally false? Because if they cut it out, they're censoring? I think not. When it's the government, that's a different thing. The government has a different First Amendment obligation. So without going into more depth, I think it's a very scary concept that they might possibly agree with these arguments.

Barb: And if there is no content moderation and you think social media is a toxic hellscape now. Imagine what it would look like if there is no removal of claims that Covid vaccines make you magnetic or other-

Jill: Or that magnets survive water or don't survive water.

Joyce: I mean it's really just all part of the culture wars. I think the reason we hear Alito react the way he does in oral argument is because this is about these allegations that content from conservatives is moderated in ways that content from progressives or liberals or what have you, isn't. And so again, they're just results oriented. They're just trying to bootstrap the law around the conclusion that they want to reach.

Barb: Well, I think the first amendment issue here is so interesting. Jill, you mentioned we should treat them more like publishers, and this was an argument that came up. Section two 30 of the Communications Decency Act says that they're not liable like publishers, they're just platforms, they're more like utilities. And so they're trying to sort of have it both ways. I'm immune from legal liability under Section 230, but I want to be treated like a publisher when it comes to editorial discretion. And that's why the First Amendment issue here is so interesting. The states are accusing the tech companies of engaging in censorship and the tech companies, which are private actors are accusing the states of violating their first amendment rights by requiring them to publish content that violate their community standards. It's interesting because what if Elon Musk is the guy over there at X. What if he decided to post only content he agreed with on X, doesn't that create problems too?

Jill: Sure it is. I mean, it's obviously a big issue when you have a major platform of national stature. If one person can decide, it's all my view. On the other hand, if he was a publisher, even if it was a national newspaper like the New York Times, the publisher does have that discretion. And I think that this is where you get onto a sort of balancing the equities kind of approach to protecting the First Amendment rights of a newspaper or analogizing a social media platform to a newspaper for them to control their content and not be violative. On the other hand, if they totally take off all negative points of view or points of view they don't agree with, that's really a bad situation.

Kim: And listen, this isn't the only case on the docket this term that the Supreme Court is wrestling with these social media First Amendment issues. And it sort of gets to the point that Jill was making. There is one involving public officials who make comments on their private accounts or Black people on their private accounts or do other things, is that official conduct. And one point I remember Elena Kagan making in those arguments where, these weren't about Donald Trump, they were about local officials, but she was

making the point that you can't fully understand who Donald Trump is unless you see his private social media account.

So to say that that isn't any official act, this is just the guy, he's not posting about his grandkids, he's posting about stuff that's vital to understanding who he was as a president and who he might be if elected again. So the lines are not super clean and I think one reason you haven't seen, I think that already two cases in this realm have been argued at the court before this third one. The reason we haven't seen any decisions on any of them yet is that these lines are hard to draw.

Barb: As Elena Kagan, I think said at one of the social media cases from last term, the last people you want deciding these social media policy issues are nine people in black robes. The idea that we don't get it, we don't really know how this works, so.

Kim: We're not hip. It's this tech stuff.

Barb: Yeah. So I think it is problematic. And there's one more case coming this term, Kim, you mentioned other cases on tech, which is this one, Missouri versus Murphy about the Biden administration talking with social media companies and asking them to remove content that is violating public safety, things like false information about Covid vaccines and others, and they have been accused of censorship in that case too. I mean, Joyce, do you think that that is a different situation when it's the government telling social media companies to take down content or can social media companies resist that? Can the government not say that ever like, hey, Joe at Google, you might want to take down this information, we know that it's false. Isn't that a public service? Isn't that what the government's supposed to do?

Joyce: Well, and this is a lot of the debate, right? I mean, what the government can't do is enact prior restraints on speech. They can't prohibit speech. There has been some argument, and it's been mostly political, that the government, for instance, shouldn't hold conferences with social media companies where it says, hey, there's a problem with this person who's posting on your site. It seems to me that that's fair game, that's good government. We want the government to communicate with people when they determine that there's something that's problematic on their site. We want the government to share as much as it can of the details, but then it's ultimately up to that site what they intend to do about it. That's not the government's call because we have a First Amendment in this country.

Jill: Barb, can I take a slightly different position than Joyce? Not a different outcome, but I think that the word, can the government force or tell a social media platform is not what's happening. I think it's perfectly fine for the government to send emails or call up any social media or newspaper and say, I saw an article in your paper. I heard a thing on your broadcast station. I read a tweet, an X, a thread, whatever. And I want you to know what the actual facts are. Here's the scientific evidence that vaccines work, and we're just informing you so that you can take whatever action you think is necessary. I think that's what I perceive is happening, that it's not the government calling and saying, you know what? We're the government and we're going to make you take this down. I don't think that's what happening. So I think we should talk about it in the framework of a government service to help make the record clear so that people are not getting the kind of misinformation and disinformation that your book is all about, Barbara.

Kim: Can I take the middle road? Because I think that you're both right, but I think sometimes even what Jill is saying, when the government comes in and says, hey, we think that you are posting misinformation, knowing that they have the power through whatever agencies they have, the FTC, the FCC or whatever, it could feel like, uh-oh-

Barb: Yeah, it could feel coercive.

Kim: I can better change. And I think that's where the Supreme Court needs to draw that line. And I think, again, it's a tough line to draw. I do think that the government ought to be able to do that. But the question then is what is Coercive and what is just suggestive?

Joyce: Yeah, that's a fair question. I just don't think Elon Musk feels really like he's forced to act, when DOJ says, oh, Elon.

Barb: Are you worried about your children being online with all the dangers lurking in the digital shadows? Well, securing your family's online experience is not just essential, but urgent. It's why we teamed up with Aura. An all-in-one online safety solution committed to shielding your family from digital threats. Aura's parental controls are the protective shield Every parent needs to ensure your family's online safety.

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Kim: I worry so much about the young people in my life, my nieces and nephews, and the children of my friends, especially those who are avid gamers. But with Aura, there is a new game-changing feature for gaming enthusiasts in your household. You get real-time cyber bullying alerts and 24x7 in-game voice and text monitoring for over 200 of the most popular PC games. More than 19 million kids face bullying in the gaming world, Aura fights back instantly notifying you if it detects any cyber bullying. It feels so much better knowing that Aura is protecting the digital spaces that my loved ones use online. And we know you'll feel that way too.

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Kim: Okay, sisters, let's talk about supremacy in Texas, but it's the good kind. It's the supremacy clause, and that's what caused the federal judge to put on hold a state deportation law that the governor of Texas said, it's aimed at stopping unauthorized border crossings, but that the federal government seems to think is an encroachment on federal power. So Joyce, tell us about this Texas law and who sued to stop it.

Joyce: Yeah, so this is fascinating. It's got a real feeling of deja vu from the cases in Arizona and Alabama 10 or 15 years ago, Texas passes a law that lets Texas police, Texas local law enforcement arrest people who they suspect of crossing the Texas Mexico border illegally and the United States sues. And to your point about the supremacy clause, it says, hey, Texas immigration law is a federal prerogative and we get to decide how this works and we are entitled to enforce it. You can't sort of freelance on this because if you did, we would have a patchwork quilt of 50 states with 50 different sets of laws and it would just be something that wouldn't be navigable by foreign countries trying to protect their citizens by federal law enforcement. You just can't do it. And Judge David Ezra agreed. He imposed a preliminary injunction that keeps the law from being enforced at least until the Fifth Circuit says otherwise.

Kim: So Jill, Judge Ezra stopped this law from going into effect as Joyce said, but talked about the supremacy clause. What does that mean in this case?

Jill: In this case, it means that the federal government is supreme over any state in this particular area. It has long been recognized that immigration law must be not a patchwork as we were talking about in the last discussion, but must be a uniform law from the federal government and it must also comply with international treaties, which the laws that were passed here did not comply with. And so I think it's very clear here that by our historical precedent, the federal government controls immigration and that a state cannot pass. Arizona tried this and it was killed, and now Texas is trying it and every state could try it and we would have this horrible mismatch and it would really violate not just federal supremacy, but also international treaties.

Kim: So I will say this lest our listeners believe that Texas officials have never seen the Constitution or are mistaken as to how the law works. They know perfectly well that this was tried in Alabama and Arizona and elsewhere for decades and never, ever, ever, not one time. Has it worked, they are well aware of the ongoing battle over that border of what do you call, razor wire situation that they're still fighting with the government about and they're very likely to lose. They don't feel well that they're violating the constitution. Our listeners should know they don't care. They know they're actually going to lose this case on the merits. They just want to gin this stuff up because they think that immigration fear is something that pays political dividends. That's gross. And to the good listeners that we have who live in Texas, let your views be heard with your votes.

But with that said, Barb, Governor Abbott promised to quickly appeal this ruling, keeping this law from going into effect. So it's going to go up the chain of the appeals process regardless of what happens at the next level, whether or not at the trial level or beyond this law is found to be viable. You never know in Texas. It's sort of similar to the social media argument in that, it's a case of states stepping in, which is usually the purview of the federal government. How do you think this decision goes as it makes it up that appeals chain all the way maybe to the SCOTUS?

Barb: Yeah. Well, you, I no longer have confidence in my ability to protect the outcome in the Supreme Court because they've surprised me so many times. Like the abortion decisions that they made have still rocked my world and have made it very difficult for me to predict the outcome. But if they follow the law, and I think we should still presume that they do, I think that this is an absolute no-brainer loser. I know Joyce dealt with this when she was the US attorney in Alabama and we saw a similar activity on immigration

in Arizona. This is not for the states, this is for the federal government. This is an area that is exclusively within the domain of the federal government. And so the idea that states are engaging in their own brand of immigration law, deportation is completely lawless. And I agree with you, Kim.

They absolutely know better. Perhaps they're genuinely frustrated, but they cannot take the law into their own hands. They are violating the rule of law. And even if this is just a flex for voters and they know that ultimately this will fail, that is a violation of the rule of law and a violation of the Constitution. These people all take oaths to uphold the Constitution and instead they're engaging in all this activity that's illegal, at best, it's a waste of time. At worse, it creates real havoc on the border and makes it difficult for the federal government to do its job. And as Jill said earlier, with regard to the social media patchwork, you just can't have different states with different rules on these things. One rule in Texas and a different rule in Arizona and a different rule in California about how the border is going to be enforced. So I think the Supreme Court, I'm going to give them the credit and the benefit of the doubt, this is such a clear case that they will get this one right.

Joyce: So can I tell y'all the argument that scares me? I agree with you about 105%, Barb, and this is what frightens me, given the fact-free universe that Sam Alito lives in. The argument that they will make, I don't think this is just for political show. I think that they're serious about this. This is a core state rights sort of thing. They're going to go in and they're going to say the federal government folks is not doing its job. They've abdicated their responsibility on the border. And so the states can now step in. That doesn't work in our constitutional universe. The federal government gets to do whatever it wants to do and the states can intervene. But I can see Alito cobbling together a majority that will say, yes, this is a clear major question sort of an issue. And when the federal government fails to uphold its responsibilities, we rule that the states are entitled to step in. I mean, that would be about the Dobbs equivalent of work of reversing Roe versus Wade in the area of Supremacy Clause. And unfortunately, I have all too easy of a time envisioning that happening.

Jill: So that is exactly of course, what Governor Abbott said in his statement, both after the barbed wire issue and here is that we have an invasion. But, an invasion in the Constitution means a military invasion, and you cannot by any stretch of them, no matter how conservative the justices are, cannot envision the application of someone coming here for asylum as an invasion.

Joyce: But I disagree because this is the same argument that Arizona made in US versus Arizona. Alabama made this argument and the argument really is postured differently. They just say, if the government doesn't do its job, then the supremacy clause concerns don't apply. And I mean, it's such a bogus argument. Even Justice Scalia had no trouble. It's a bogus argument. Well, I fear that with this six three conservative uber majority that might change.

Kim: You guys, I'm so hungry. But luckily, this episode of #SistersInLaw is brought to you by Wildgrain and I love Wildgrain, and there's nothing quite like the smell of fresh baked bread coming out of the oven. If you want everyone in your household to love you, bake some nice fresh, delicious bread and see if you are not the MVP. So what if I told you

that you could get the delicious experience of home baked bread with none of the time and work involved? Well, you can with Wildgrain.

Joyce: Wildgrain is amazing because it's baked from frozen. That means I can walk in the door at night, preheat the oven and pop bread in and have it out just in time for dinner, and the smell is really great. Wildgrain is the first ever baked from frozen subscription box for sourdough breads, fresh pastas. They're really wonderful and artisanal pastries. Every item bakes from frozen in 25 minutes or less, and there's no thawing required. I know I've said that already, but it's my favorite part of the whole thing. The team at Wildgrain just sent us a new box, and there's so much delicious stuff inside. Let us tell you all about it. First off, the pastries. They taste amazing and there's a great variety. The only problem is once you pull them out of the oven, it's a free for all as to who gets them first. Luckily, that's usually me because I love watching the color and flavor come alive when they heat up in the oven. Wildgrain is so easy and so delicious. It's the perfect combination. You'll want to try everything they offer.

Barb: You can now fully customize your Wildgrain box. So you can choose any combination of breads, pastas, and pastries. You can even build a box of only breads, only pastas, or only pastries if you'd like. Plus, for a limited time, you can get \$30 off the first box plus free croissants in every box. Those are delicious, by the way. When you go to [wildgrain.com/sisters](http://wildgrain.com/sisters) to start your subscription, you heard me Free croissants in every box and \$30 off your first box when you go to [wildgrain.com/sisters](http://wildgrain.com/sisters), look for the link in the show notes.

Joyce: So y'all, our listeners have a lot of questions for us this week. It has been one of those crazy upside down weeks, and I think the weeks ahead, we'll continue to produce a lot of questions, and that's good because we're here for it. We love answering your questions. If you have one for us, please email us at [sistersinlaw@politicon.com](mailto:sistersinlaw@politicon.com) or tag us at SistersInLaw Podcast on Threads or tweet using #SistersInLaw. If we don't get to your questions during the show, keep an eye on our threads feed throughout the week where we'll answer as many of your questions as we can. This week our first question is for Barb. It comes from, I'm not sure if it's Anaitte or an Anate, A-N-A-I-T-T-E. Here's the question though, Barb, the Anti-abortion movement is an unapologetically religious one with no basis on facts or science. So why do you think it has not been challenged as one that violates the First Amendment? Ooh, it's a good question.

Barb: It's such a good question. And we just saw this in Alabama where one of the justices wrote in his opinion about how these fertilized embryos are children in God's image created. And it was all Christian, which of course is a violation of our first amendment. Our first amendment says that there can be no establishment of religion and that there must be free exercise of religion. So if someone is of a particular Christian faith and they believe that life begins at conception, then by all means you are free to not have an abortion. But for people of other faiths we've talked before about they're all, are all kinds of different viewpoints. I know I've said in the Jewish faith, life begins at birth and I have been corrected that that is one part of the Jewish faith believes that. And there are lots of different opinions even within the Jewish faith.

There is part of the Muslim faith that life begins at something called ensoulment, which is usually viability sometime during pregnancy. And then there are atheists, agnostics, all kinds of different religions. And so the idea that all of us are stuck with these rules set by

people because of a Christian tradition, I believe does violate the First Amendment. And I think there have been some efforts brought by Jewish women on this issue. And I would love to see those cases brought because I think they've got a lot of merit. Now, whether this court which released the Dobbs opinion will share that view, I don't know. But it is certainly, I think a very valid argument.

Joyce: Something that I think is really a helpful lens for questions like this is, imagine that the Supreme Court is not using evangelical Christian principles. Imagine that they're imposing Sharia law. And if you don't like that, it's probably a violation of the First Amendment, right? If the Alabama Supreme Court had said, well, we're going to use ensoulment from the Muslim tradition as the standard for whether IVF can be achieved in Alabama, I don't anybody would've had a real hard time saying it violated the First Amendment and this one doesn't either. But what do I know? So Jill, I have a question for you from Flavia. Flavia asks, is there any legal hurdle for Biden that prevents the seizure of Russian assets in the high billions, I believe, and using them for Ukrainian aid? That's a great question for your expertise, your former work as Secretary of the Army and all?

Jill: Well, it's actually more a expertise of one of my Watergate colleagues who served in the Treasury department during the Iranian hostage crisis of 1980. And so I actually asked Rich Davis to help me with this question because I thought it was a fascinating one. And the answer is unfortunately, it's sort of undecided. Back during the Iranian hostage crisis under 50 USC section 1702, it was determined that they could freeze the assets, but they couldn't take ownership. And so there is some argument now being made that the statute does allow taking ownership. And I'm hoping that someone from the Biden administration will take on that challenge and try to utilize the frozen assets to take the place of the destruction that's happening in Ukraine because of Russian actions. I can't think of a better use of the money that was from Russia to fix what Russia has wrought on Ukraine. So I'm hoping that that will get decided in favor of being able to take ownership.

Joyce: That's fascinating. Thanks for going the extra mile on that one. That's a great answer. Hey Kim, I've got one for you from Nina in Newport News. Nina asks, can you explain how a judge can hold a journalist in contempt for refusing to reveal her sources? Doesn't the First Amendment protect that? And I know that there's a situation behind this, so tell us all about it.

Kim: Yeah, so I believe this is referring to Catherine Herridge who is a former reporter at both CBS and Fox News. But this involves a lawsuit that was filed by a scientist here in the United States, who Herridge reported was under investigation due to some statements that she made about Chinese-American immigration. And so she was never charged with anything. I'm not sure, this is one fact that I'm not sure about, but I don't think she alleges that there was not an investigation, which is what the report said. But she was never charged, but she sued the government for defamation, claiming that the government violated the Privacy Act by leaking information to Herridge about this probe. So that's the lawsuit. It's between the scientists and the government. Well, a judge ordered that Herridge come in for questioning, which she did. And then during that questioning ordered her to divulge who her source was, which she refused to do, and ended up holding her in contempt.

Her attorneys asked for a small fine saying that she still wasn't going to give the source up, but the judge said, nope, 800 bucks a day, but I'll put it on hold while the case is appealed. Now, I think this is outrageous, not just as a journalist, but as somebody who believes in not just the letter, but also the principle of the First Amendment, which is the government cannot take action. That essentially bullies members of the press to do things like give up their sources. If they do that, you cannot expect that the press can effectively do what they need to do to report stories that the public needs to know about what's going on with their public officials, with the government in other ways. And so even if the judge is not technically violating any law on this, it's shameful because it should be a law against this. But it's really going to have a terrible chilling effect.

Especially I think it's even worse that it's coming out of a civil suit between an individual and the government to threaten to, I couldn't pay \$800 a day that, there but for the grace this could be me. So I just really think that this is troubling. I know a lot of media organizations agree, and this case is being very closely watched. What do y'all think? I know you guys are prosecutors. I want to hear your thoughts.

Barb: Yeah, maybe I come at this from a government perspective, but remember it's the government here who's the alleged wrongdoer. And so the plaintiff actually wants to know who the government source was, who leaked information about her so she can sue the government. So she's trying to fight back in an effort by the government to bully her.

Kim: Yeah, the lawsuit is fine. I think the lawsuit is fine. I think this order to Herridge is BS.

Barb: So again, you said what the law should be versus what the law is. There is no federal reporter's privilege. And so if she wants to know who in the government told this reporter all of this bad stuff about her, she has a right to ask for that. Merrick Garland has actually issued a policy at DOJ that goes much further than what the law requires. He has said that prosecutors in the US Attorney's offices and the DOJ around the country are forbidden from using a court process to get information from reporters regarding the news gathering process. So this would not happen in a governmental case, which is why it's happening in a civil case. And maybe the law should be different to protect reporter's privilege, but it's not the case now. And so I think the judge got it right, whether we like it or not. That's the law. And so write your congressman. Oh, sorry, you live in Washington DC. That's another story.

Kim: I've read James Madison and I think he would like a word if he were here.

Joyce: Thank you for listening to #SistersInLaw with Jill Wine-Banks, Barb McQuade, Kimberly Atkins Stohr, and me, Joyce Vance. We can't wait for our live shows to begin. Remember, that's May 2nd in Chicago, May 9th in Detroit, and May 30th in Boston. Go to [politicon.com/tour](https://politicon.com/tour) now and sign up so we can let you know the instant tickets go on sale. And please show some love to this week's sponsors, Earth Breeze, LolaVie, Aura and Wildgrain. You can find their links in the show notes. You'll be happy if you do because we love all of them. Please support them because they really do make this podcast possible. Please follow #SistersInLaw and Apple Podcasts or wherever you listen. And please give us a five-star review. It really helps others find the show. See you next week with another episode, #SistersInLaw,

Kim: We're going to have to fight over who host in Detroit.

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Barb: Yeah, you can't have three hometowns. You've got Washington. You've got Boston. Come on, give me Detroit.

Kim: Where my mama is.

Barb: Where's my mama? Where's my mama? My mama. My mama's in Detroit.

Kim: Got to fight.