How SCOTUS is Shaping How We Do Business
Sam Gandhi, Kwaku Akowuah, and Rob Hochman
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Sam Gandhi:
The Supreme Court made monumental moves last term discarding the Chevron Doctrine and scrambling how regulation to the environment, public health, and consumer protection has worked for 40 years. And it granted the President of the United States vast immunity from criminal prosecution, raising alarm over how that expanded power might take shape.

As our polarized nation emerges from election season, the Court faces potential challenges on many fronts. All this while the media continues to expose ethical lapses by some justices.

Kwaku Akowuah:
Candidate Trump has said he would issue pardons to January 6 defendants The Supreme Court made clear in the immunity case that the pardon power is one of the preclusive powers of the President. So, I think if he followed through and issued those pardons, that would be that for those cases, but much, much more to come.

Sam Gandhi:
That's Kwaku Akowuah, co-leader of Sidley's Supreme Court, Appellate, and Litigation Strategies practice.

Rob Hochman:
There is no doubt that the justices can do things to shore up public confidence in the Supreme Court, and maybe they're not doing it as much as they could. But it's very, very important for people when they approach this issue to be respectful about how difficult and how sensitive that decision is.

Sam Gandhi:
And that's Rob Hochman, also co-leader of the practice. The proposed reforms finally take shape to restore faith in the nation's highest court, and

how will SCOTUS rule on several new cases involving commercial law? We'll explore all of this in today's podcast.

Sam Gandhi:
From the international law firm Sidley Austin, this is *The Sidley Podcast* where we tackle cutting-edge issues in the law and put them in perspective for business people today. I'm Sam Gandhi.

Hello, and welcome to this edition of *The Sidley Podcast*, episode number 44. Kwaku, Rob, great to have you on the podcast today.

Kwaku Akowuah:
Great to be back. Thank you, Sam.

Rob Hochman:
Happy to be here.

Sam Gandhi:
We're recording this podcast on November 5, election day, and while we don't know what the result of the election is going to be, elections do have consequences. The election we're really going to talk about having consequences today is the election of 2016 that radically affected the makeup of the Supreme Court.

According to *The Washington Post*, major businesses have seized on recent Supreme Court decisions that sharply limit the government's regulatory powers. And *The Post* put it this way, the goals to advance dozens of lawsuits that could invalidate a vast array of Federal climate, education, health, and labor rules." And so between June and mid-October the cases have factored into more than 150 legal challenges.

Kwaku, I'm going to start with you, and in the aftermath of the Court's overturning of the Chevron Doctrine, what legal arguments are being made and can businesses now expect less regulation?

Kwaku Akowuah:
I'm not sure about less regulation, Sam. I think what we can see and what we're already seeing is the likelihood of more litigation. Down the road we may see less aggressive decision making, less forward-leaning decision

making from the regulatory agencies, and we may also see less broad-based decision making, fewer rules that are supposed to govern everyone, as opposed to one-off decisions from the agencies.

So, maybe let's take a step back where as loyal listeners of the podcast, we did an episode about the Supreme Court's decisions in *Loper Bright Enterprises v. Raimondo* and *Relentless, Inc. v. Department of Commerce* back in the summer so, you can refer to those for the long form. In brief, what happened? In the *Relentless* and *Loper Bright* cases the Supreme Court overturned the 40-year-old doctrine called the Chevron Doctrine.

And what Chevron did in short was say that there's a systematic thumb on the scale in favor of Federal agencies in litigation between private parties and the agencies. So, it said, we really take these things in two steps. If the statute that Congress enacted is clear, Court just do whatever Congress said. But if it's unclear, if it's ambiguous, then the agencies view of how to read the statute win so long as it's reasonable. And that necessarily left a lot of wiggle room for courts to say and for agencies to argue; this statute that may seem clear is ambiguous, and then left a lot of running for agencies to say, here's what we want to do with the ambiguous space that's been left open, and we are going to in the ordinary courts follow our policy priorities.

And the critiques of that approach are many, but one is that it led to more aggressive decision making from the agencies who could take a look at what was unclear and expand the reach of rules. It led to less consistency because one administration after another could say eh, we're going to read that ambiguous rule our way and chase our policy priorities and would switch back, and it just left the public with less certainty about what the law is going to mean at any particular time.

So, the Supreme Court stepped back from all that and said no, the way we're going to do this is that courts are just going to say what the answer is, and they're not going to defer to the agencies.

And so as your intro suggested, that leaves regulated parties with more room to now go back to courts and push back on forward-leaning or maybe even not forward-leaning rules adopted by agencies and say, courts, the

agencies got it wrong and you have to fix it, and fixing it here means overturning one type of rule after another.

Sam Gandhi:
And Rob, your thoughts on this, and how might this impact the initiatives made by the White House in the last term?

Rob Hochman:
I think one thing to watch, since we're talking about this on election day, is whether Congress and the White House end up politically aligned, because one thing that gets sort of shoved to the side a little bit in these general discussions of *Loper Bright* and the new approach to agencies is that the Supreme Court is quite clearly for all the reasons Kwaku just discussed highly averse to unilateral executive branch policy making.

But it is not, that those decisions are not so obviously averse to legislation that expressly delegates policy making authority to the executive branch. That still remains very much an open question, and what the Supreme Court would do if a Congress and the White House were able to come together and have greater cooperation on big picture policy making by Congress and leaving a lot of discretion to the agencies; that's still an open question how that would go. And whether the Supreme Court is trying to encourage that kind of cooperation, or whether the Supreme Court is really just going to put its foot down and demand legislative policy making exclusively is something that's yet to be tested, and I think we'll see.

And so, none of this is to deny, as Kwaku said, but a lot of businesses are going to be happy to use the opportunity to get out from under the thumb of difficult regulators, but there's no one-size-fits-all preference to regulation in industry across the board. Some industries and some players within industries are perfectly happy with the regulators. They have like to deal with them, they're much less messy and much less complicated to deal with than Congress. And so, to the extent that they can work with Congress and the White House to get authority within specific agencies for specific purposes to have the ability to make policy, we may see that going forward. We'll just have to see. Of course, everything depends on the actual political cooperation between the branches, and that is something that we haven't had much of in quite some time.

Sam Gandhi:
We're not in the business of making predictions here, at least from a political standpoint, but I mean, all the polls basically show that the predilection is that there's going to be a split Congress, a potential and majority Democratic Congress and a Republican Senate. How does that affect where you think this is going, assuming that there's a lack of cooperation?

Rob Hochman:
Yeah. Well, then I think you'll see the Court really sort of working out the implications and along the lines that Kwaku was describing, the implications of its own decision, and it really depends on how aggressive the executive branch agencies continue to want to be. I think they've been prepared for this, I think Kwaku's right, they've been sort of seeing this coming down the pike and they've adjusted the kinds of arguments they've made already in advance.

But there's a fresh set of decisions that are going to start coming out of the courts of appeals, and one of the things that changed as a result of 2016 was not only the Supreme Court, the membership of the Supreme Court became more conservative, but also various courts of appeals became decidedly more conservative as a result of Trump's nominations and appointments to the Federal bench on the courts of appeals, and those courts in certain areas have not been shy in trying to push the Supreme Court's doctrine aggressively and test to the limits of the doctrine.

And so, I think we'll see litigation play out pretty aggressively over time and standards sort of start to emerge and develop.

Kwaku Akowuah:
One aspect of this to watch, and let's just assume, taking a crazy assumption that a divided Congress would not be especially productive, well, so, how do they even seen to respond if they're not getting a lot of new statutes enacted? Are they going to press as far as they might have in a Chevron world? Will they look for more compromised kinds of rules that they suspect are less likely to be challenged? Will they do one-off decision making? So, we'll just take one company at a time as opposed to trying to write a whole rule and use that to send signals. There are a lot of different

tools that the agencies can use in the absence of broad statutes from Congress that really mark the path.

Sam Gandhi:
Kwaku, let me stick with you. Last term the court's rulings actually deferred or even call it ducked some decisions it could have made, for example, the free speech cases involving social media. Are those issues just going to keep coming back to the Court and at some point will the Court try to address them?

Kwaku Akowuah:
I think we're almost certain to keep seeing issues around the First Amendment and social media come back to the Court. In fact, there's a case that the Court has already accepted and will hear argument on in January called *Free Speech Coalition v. Paxton*, and that has to do with age verification requirements adopted by Texas that apply to certain websites. The exact scope of that rule is debated by the parties, but I think everyone is clear that at least one of the significant areas where it applies is to websites that have pornographic content. And so there, the Supreme Court is going to consider both free speech implications again of a state law that works on the Internet and applies state-based rules to Internet content.

So, the cases that you were referring to earlier that the Supreme Court didn't get to the bottom of were two cases out of Texas and Florida, and they had different reaches and different details, but at the core it did the same thing and that was to enact new state-based rules around content moderation. So, what kind of content do websites allow and not allow, what kind of rules do they have on their sites about what you see, what they'll take down, and the like. And Texas and Florida said, we ought to say something about this because we think that what is going on is that they are censoring political speech, and in particular censoring the speech of conservatives. Now, the Fifth Circuit and the Eleventh Circuit went in different direction with the Fifth Circuit upholding the Texas law, and the Eleventh Circuit striking down the Florida law.

And what the Supreme Court ended up saying was well, no one really considered the analysis correctly and they sent it back for further consideration. One thing they did say is we're confident that the First

Amendment applies with some rigor to the question of what rules can a state apply to content moderation. That is a subject of First Amendment analysis. But the particulars, even as to those laws and any range of other laws that might be enacted, those have not been resolved by the Supreme Court. I do think we're going to continue to see more and more litigation around what it is that these platforms can and cannot do, particularly at last there is a Federal law that applies the one-size-fits-all rule to the country.

Sam Gandhi:
Rob, another decision that has only inspired more questions is the Court's ruling on abortion in the previous term. Give us your sense of it and how do you see that getting resolved?

Rob Hochman:
If there was ever any doubt, it's now clear that whenever the Supreme Court touches abortion, you know, you're talking about a radioactive subject that's going to garner just a tremendous amount of attention and focus, and this case, which was ultimately decided without being decided, is no exception.

The case arises out of the Idaho abortion law which is one of the strictest in the nation. At the time the case began in the trial court, it was believed that the law permitted an abortion only when the life of the mother was threatened by continuing the pregnancy. Now, there's a Federal law that's got an acronym called EMTALA, and that governs the obligations of emergency rooms to provide what is referred to as necessary stabilizing treatment to anyone who shows up at the doors of an emergency room, and this is without regard to ability to pay and things like that. The idea is that emergency rooms should be available to stabilize people no matter what.

Now, the Supreme Court, of course, decided *Dobbs v. Jackson Women's Health Organization* overruled *Roe v. Wade*, abortion was no longer a constitutional right, and the Federal government, you know, seeing this coming down the line, published notice that hospitals were subject to EMTALA's stabilizing requirements, even when their state laws would prohibit an abortion. And so, to the extent someone showed up at an ER and required an abortion as stabilizing treatment, that abortion had to be

provided as a matter of Federal law, and the Federal law trumped. That was the theory behind the case.

And what's interesting about what the Supreme Court did in this case is there actually isn't a decision in the case because the Court ultimately dismissed the case without deciding. But what's really interesting about the case is the path the Court took to get there and why and how the Court dropped the case.

First, the Court agreed to hear the case before the Ninth Circuit even decided the case. Idaho had asked to enjoin, to block the EMTALA regulation while the litigation proceeded. The trial court refused so, left it in place. The Ninth Circuit agreed not to block the law during the litigation. And then the Supreme Court both blocked, issued an order that blocked the EMTALA regulation, which left the Idaho abortion law in full effect, and agreed to hear the case on the merits.

And this is the so-called shadow docket in action again. That's where the Supreme Court jumps in, changes the status quo, rushes the case to argument, all on an issue with extreme high political sensitivity, and when the Court does this it's setting itself up for a lot of attention and a lot of criticism, and the Court knows this. It's been receiving a lot of heat in these circumstances, but it went ahead anyway.

And then two things happened. First, another abortion-related leak occurred. While the Court was considering the case there was a story in *The Washington Post* that suggested it had inside sources that revealed that the deliberations, how the case aligned up at the stage when the Court agreed to enter a stay and agreed to take the case, and how there was a shifting coalition. So, a lot of the kind of inside, the highly-confidential, highly-sensitive discussions once again leaking out in an abortion case which just underscores how emotional these issues are and how sensitive these issues are at the Court and stressful for the people working at the Court.

And then second, the Idaho Supreme Court while this case was pending construed its own abortion law, differently from the way the trial court has understood it. And so, essentially when the Court put this all together, the court decided basically, we're going to step back and we're going to allow

this case to run through the normal court. So, they basically put the case back in the posture it was when it arrived on their desk. The stay that the Supreme Court had entered was vacated. So, now while the litigation proceeds, the EMTALA regulation controls.

And so, what's the real takeaway here? You know, the Court continues to see itself as available to intervene in fast-moving hot button matters, but it's taken enough heat for doing so that there are at least fissures that have opened up at the Court, different coalitions on both the conservative side, and not just between conservatives and liberals, but within the conservatives about how cautiously the Court should act and how urgent must a problem be. Recall, we're coming off a term where the Court took the Trump immunity decision, took the Trump ballot access decision through litigation on that kind of accelerated basis.

The Court is still doing this. The Court sees itself very much as a necessary actor in these dramatic events, but at least to some degree it seems to be exercising a greater degree of caution and care as it unfolds on these hot-button cases.

Announcer:
If you're interested in information on the energy industry, tune to the next episode of Sidley's *Accelerating Energy* podcast hosted by our partner, Ken Irvin. Ken will be joined by Pat Wood, former FERC Chairman and CEO of Hunt Energy Network, and they'll discuss battery energy storage systems and how those systems are aiding the national grid in its transition to renewable energy. You can subscribe to Sidley's *Accelerating Energy* podcast wherever you get your podcasts.

You're listening to *The Sidley Podcast* and we're speaking with Kwaku Akowuah and Rob Hochman, both co-leaders of Sidley's Supreme Court, Appellate, and Litigation Strategies practice about the Supreme Court's monumental administrative rulings last term, and the social media and abortion decisions that made waves because of what they failed to settle.

Sam Gandhi:
Someone considered this a business-friendly configuration of the Supreme Court. Rob, would you agree with that, and in looking at the Court's docket this term, what should the business community look out for?

Rob Hochman:
I think as a general matter that's right. If you zoom out far enough I think you get that overall impression, and what I mean by that really is, the Court tends to pay attention to the concerns of industries, major commercial entities in the United States. It's concerned about consistency and reliability which in some significant respects allows for business planning, whether it's in concerns about protections for innovative companies in the United States, or whether it's interest in protecting contractual arrangements that allow for businesses to resolve disputes outside of court in the arbitration area. There's a number of areas where you see that.

It tends to play out in a case-specific way. Sometimes the Court goes the other way. Sometimes the Court's a little bit more friendly to class action litigation, for instance, than the business community would like, but in the main I think that's right.

This term, you know, there's a handful of cases. I'm going to talk about one in particular that I would call sort of the Supreme Court's bread and butter commercial docket. The case that I'm thinking of is *NVIDIA Corp. v. E. Ohman*, and this is a securities fraud case under the Private Securities Litigation Reform Act. Basically what this case is about and what the statute's about is there's very often a big stock drop, you know, volatility in the markets, especially around big companies, and when you see a big stock drop plaintiffs' securities lawyers, typically look for anything they can point to that was made public right before the stock drop that they can say reveal that the company had been misrepresenting its financial condition.

And the Private Securities Litigation Reform Act was designed sort of tighten the screws a little bit around the ease with which plaintiffs could bring those kinds of claims. It was thought that they were too easy to plead. There cases are extremely costly to defend and very, very high risk because the potential awards are massive.

So, the law put a greater burden on the plaintiffs to allege with specificity what was false and how they know it's false. But of course, the law like most laws speaks in generalities, and cases like this come along and the Supreme Court gets to decide how aggressively to interpret that and how loosely to interpret that. In this case concerns specifically how much the

chip maker, NVIDIA, knew about the force of demand for its graphics chip such that when demand dipped and the stock price took a big hit, was it a case of securities fraud and misrepresenting to the public its demand.

And there are two pleading tactics at issue here, and one of the nice things about these cases when they come up is the Supreme Court really does sort of operate, I say in these commercial cases, in the ordinary course. It's nothing like the shadow docket kind of arrangement. They let these cases what they call percolate in the lower court. So, pleading tactics start to develop and take hold and the courts express different views on what kinds of pleading tactics get through, what kinds of pleading tactics don't.

And two of specific interest here are first, when a complaint alleges that internal company documents reveal something to have been known to company insiders, how specific do you have to plead what's in the document and who knew? Courts have taken various views.

And then the second, what role, if any, can expert analysis play in pleading falsity. And as you can see the answers to these questions if they're fairly loose, it's sort of a road map for plaintiffs' securities lawyers to get their foot in the door, get to discovery, and start to exercise leverage to create settlements. And the Supreme Court's historically been very sensitive to that, understands that the statute was designed to prevent exactly that kind of quasi-extortionate kind of litigation tactic. And I think this court is likely to look a little bit unfavorably upon these tactics, but we'll have to see how it plays out.

Sam Gandhi:
And Kwaku, what's your perspective on this and what are you looking at among the cases coming up this term?

Kwaku Akowuah:
Sam, I'm looing at a trend in a group of aces that may tell us something about that trend. So, the trend is then that the Fifth Circuit Court of Appeals has been not shy about taking up cases, in particular cases involving agency decision-making, and you know, changing the law in important risk facts, both at the regulatory rule and at the constitutional level, and here we've got a set of cases that the Solicitor General has taken to the Supreme Court from the Fifth Circuit. You can think about them as

individual, individual choices to take to seek review, but I think you can also see them as an effort by the government, by the Solicitor General to push back and enlist the Supreme Court in trying to check the Fifth Circuit.

So, a couple of the cases are about whether venue was proper in the Fifth Circuit at all, and so, you know, should the case have been subject to review by the Fifth Circuit or somewhere else in the country. There's a case called *R.J. Reynolds Tobacco Co. v. FDA* having to do with the review of e-cigarette applications, very niche in its particulars, but important I think on this theme of is the Solicitor General pushing back on the Fifth Circuit?

There's another case involving the EPA, same kind of theme. This case should have been in the D.C. Circuit, not the Fifth Circuit. Yet another involving the Nuclear Regulatory Commission where the state of Texas was the petitioner and part of the SG's argument — not the whole but also have arguments about the particulars — is that the state of Texas shouldn't have been allowed into the petitioner, but as implications for venue, too, on the path again through the Fifth Circuit.

And then there's another case that I'll talk about a little bit more called *FDA v. Wages and White Lion Investments*. Again, it's in this kind of niche, FDA review of tobacco marketing applications for flavored e-cigarettes. So, of interest to some but not the entire business community by any stretch.

The issues in that case, though, could be broadly thought of as how should courts review fact-specific scientific judgements by the FDA in its process for laying them. I think part of the Fifth Circuit's critique of how the FDA went about its decision-making in this context was to say, you know, the FDA reshuffled the process, pulled the chair on the applicants by first telling them to submit their applications in one way, and then after they submitted them saying oh, you goofed. You should have done it this other way that we didn't tell you about. The Solicitor General says they're wrong on the facts.

Practically every other court of appeals that's weighed in on this has sided with the government. But again, you have the Fifth Circuit reaching a conclusion that's different than how others have looked at it, and you can think about that possibly as having an implication of the Fifth Circuit should trim its sails a bit. It may also turn into a a very important decision, not just

for e-cigarette manufacturers but for the whole body of companies that are regulated by the FDA and have a keen interest in the critical business question for when and how and in what ways will the FDA review marketing applications for drugs, devices, and other products regulated by the FDA.

Sam Gandhi:
Rob, I'm going to come to you on this question which is talking about faith in the Supreme Court given what's been going on over the last couple years, and according to a recent Gallup survey, approval levels for the Supreme Court remain near record lows. Just 41 percent of U.S. adults currently approve of how SCOTUS is handling its job. I mean, that's higher than Congress but that's starting to get to that level.

So, with the media dropping stories about alleged ethical lapses among some of the justices, there's a concern that the Court needs to reform to a greater extent than it can handle internally. We talked about this on our last podcast. The issue still is pretty ripe. How do you see this issue continuing to evolve?

Rob Hochman:
I think the justices are very mindful of it. I mean, I think we're starting to see again fissures in different camps open up, and the first thing and perhaps the most important thing to say is the issue is not going to go away, not necessarily because the justices are going to continue to behave in a way that raises questions about ethical lapses, but there's just no getting around that in this polarized environment when the Supreme Court is issuing decisions on matters of such great significance to so many people, the Supreme Court s going to be the subject of political discussion. And the political branches are going to do what they can to try to influence a quick behavior, or try to gain whatever political advantage they can get from criticizing the court. That's just, I think, part of the ground rules of being the Supreme Court of the United States, and I think the justices are aware of that.

With that said, there is no doubt that the justices can do things to shore up public confidence in the Supreme Court, and maybe they're not doing it as much as they could. Maybe they could be a little bit more aggressively attentive to ethical concerns. But it's very, very important for people when

they approach this issue to be respectful about how difficult and how sensitive that decision is.

There are only nine justices of the Supreme Court. When a justice recuses from a case, you are changing potentially the outcome of a decision at the Supreme Court. The decision to recuse is taken very, very seriously at a court, and the decision not to recuse is in some ways absolutely as important. The obligation to sit is absolutely as important as the obligation to recuse. Now again, how that plays out in particular cases is a matter of some discussion.

The justices I think are very sensitive for each other's reputations about this sort of thing. But you're starting to see Chief Justice Roberts take a more institutional role and speak openly and aggressively about the Court and try to shore up its public confidence. Justice Barrett has taken I think a slightly different tack on the shadow docket, for instance, trying to reduce the heat there; and of course, she wrote a separate opinion in the Trump ballot access case trying to turn down the temperature.

There's a lot of discussion Justices Kagan and Justice Sotomayor are speaking about the propriety of the Supreme Court and the importance of the Supreme Court to hold up its own reputation and to act unimpeachably.

So, when I think it all washes out, in the absence of real political reform…again, that would require political alignment which is unlikely to happen as you said at the outset, Sam. In the absence of that, the Court's going to have to maintain its own reputation. I think there are forces within the Court that are looking to do that. I think the younger generation is probably more sensitive to that at this point than the older generation, which means maybe as people age out we start to see some changes in this regard, regardless of who the replacement is. But maybe not, it's hard to say. But at the end of the day the justices have to own this issue and they have to own their own reputation.

Sam Gandhi:
Kwaku, what are your thoughts on this?

Kwaku Akowuah:

I think one thing the justices just have to get under control are the leaks — and not just the leaks of opinion, that is its own draft opinion that has its own coercive dynamic — but in some ways to my mind, especially as at least as significant a problem that you have leaks of discussions that are going on internally. Who's leaning which way and that away, who had an opinion and then didn't have it. All of those deliberative of steps traditionally have gone on at the Court without them leaving the building, and it's so important to not just to trust within the building, but the working out of what's the best way to write this opinion, what's the right result. If you have those details leaving the Supreme Court and ending up in *The New York Times*, as they did this summer, that can't help the institution repair its image with the country because it just makes the institution look political, makes it look divided, and makes it look less professional, and I think the justices would all say the same thing.

Stop the leaks and that will help, but I think it gets harder and harder each time there's a leak because the tradition seems less like something that's followed each and every day by everyone and starts to feel like something that is followed selectively by some, and with this, as with anything else in life, it's much harder to raise standards once they've been lowered.

Sam Gandhi:
You know, we don't think anything in this podcast that we've talked about is really going to materially change with the result of the election, but there's one area that could materially change with the result of the election and that's in the aftermath. What will we see regarding the cases stemming from January 6, and do they go away if Trump wins, and what happens to those cases if he doesn't?

Rob Hochman:
Yeah. Well, if he loses I think it's pretty straightforward. They will proceed. I mean, obviously under the auspices of the various courts and it's such a wide range of issues, probably too much to go into. But if you're thinking about what happens going forward, the most important thing to take into account and the courts are going to have to figure out how the Trump immunity ruling in the immunity case this past term affects the cases going forward.

The really interesting question is, what happens if he prevails, and you know, I don't know. We'd be facing a really rather extraordinary moment, but it's very hard to imagine the cases simply vanishing, in my mind. But it's also equally hard to imagine the cases proceeding.

So, I suspect the cases just get stayed and everybody just waits out the term, and then they pick up, assuming that's what Trump would want. I mean, I guess Trump could insist on taking the case forward, although I don't even know whether courts would be willing to do that. It's very, very hard and very awkward set of circumstances.

The January 6 suits which are not directly against Trump, of course those would go forward as they have gone. But the cases specifically against Trump would be very hard, at least as a criminal matter to proceed, and of course, you have the *Clinton* ruling on, you know, civil cases can go forward against him, but they have to be exceedingly mindful of the president's duties and there's just a tremendous amount of leeway that's going to be given if he is returned to office to President Trump's obligations as president.

Sam Gandhi:
Kwaku, what are your thoughts on that?

Kwaku Akowuah:
I agree with Rob. I think it would be extraordinarily difficult to imagine just practically how a sitting president could be the defendant in an ongoing criminal proceeding. The mix of separation of powers and national security issues, all involved in that, I think would just be extraordinary.

As to the Federal cases against currently former President Trump, you'd have a set of issues around whether a President can lawfully shut down investigations, prosecutions of himself. That's somewhat different than the immunity question but it's related, and I think the Trump Administration has made clear that they would direct the Justice Department not to proceed with those cases and we'd likely have litigation around that, when then the state cases would proceed on their own path, and then the January 6 cases against everyone else. Candidate Trump has said he would issue pardons to January 6 defendants, but our Supreme Court made clear in the immunity case that the pardon power is one of the preclusive powers of the

President so, I think if you followed through and issued those pardons, that would be that for those cases. But much more to come across those cases and more.

Rob Hochman:
Yeah, and there's also finally the ultimate question of whether the president can pardon himself, which may well get tested.

Sam Gandhi:
So, as we wrap up the podcast, Rob, what are you hearing from clients regarding their concerns about this term, or the reverberations from last term, and what are they focused on?

Rob Hochman:
Obviously the most attention is being paid to the agency decisions, and all aspects, really, of agency law. We didn't talk on this podcast about agency enforcement proceedings which were also significantly constrained last term. And so, how to navigate the new landscape of agency regulation, agency enforcement; how bold do we want to be, how aggressive do we want to be? Do we want to be the tip of the spear, do we want to get an industry group to run interference? These kinds of questions and the strategies around that are a very significant part of people's thinking.

And then there's also one case which we didn't mention but I do want to just bring up, and that's this *United States v. Skrmetti* decision. It's about the Tennessee law restricting access by minors for gender-affirming care and whether that law violates the Equal Protection Clause. It's not strictly speaking a business case, but the insurance industry has been dealing with a lot of different varying rules and policy decisions around what kind of gender-affirming care to cover, what's permissible to exclude from coverage.

Those cases and that issue has been playing out in the courts for some time, and this decision is going to have some sort of reverberations at least in those private litigation cases because the Affordable Care Act has its own anti-discrimination provision, and so, a discrimination ruling from the Supreme Court on whether a law restricting gender-affirming care violates the Equal Protection Clause could have significant impacts on the scope and permissibility of writing restrictions on gender-affirming care into

policies, and we're hearing insurance companies and healthcare administrators and the like want to keep an eye on that as well.

Sam Gandhi:
Kwaku, your thoughts?

Kwaku Akowuah:
Pretty similar. I would say that there's no case in my time in practice that has generated more questions and strategic landscape kinds of inquiries from clients as *Loper Bright*. Everyone is asking, what does it mean? Not just what does it mean in general, people have taken that up pretty quickly, but what does it mean for my industry, what does it mean for my company, what does it mean for my competitors, what does it mean for future product development? What changes is this going to bring about and on what timeline?

Everyone's asking those questions, they'll continue to ask those questions as the Supreme Court continues to reshape the fundamental relationship between Congress and the courts and the president and private industry.

And then I think people are thinking about what's next. They're focused on some of our more novel legislation that's come out of Congress, the Inflation Reduction Act, and the Medicare Drug Price Negotiation provisions of that law. Even that label is contested, but price setting initiatives from Congress in the pharmaceutical regulation space. It's not yet an issue at the Supreme Court, but may very well be an issue that heads in that direction, and I think people are interested in, keenly interested in, how that will develop.

And not only is it a question of pharmaceutical development, but also is price setting in close control from Congress the future of the industry? What does that mean for innovation, what does that mean for investment incentives. And then, you know, kind of echoing *Loper Bright*, one feature of that law is a broad-based preclusion of judicial review of agency decision-making. Is that going to broaden out? Will Congress respond to *Loper Bright* by saying, the court is out all together, and if so, how do the courts respond?

Sam Gandhi:

We've been speaking with Sidley partners Kwaku Akowuah and Rob Hochman about the Supreme Court's monumental decisions last term and the upcoming cases on the docket relating to the business community. Kwaku, Rob, as usual you guys are veterans of this podcast. It's been a great look at the landscape, and thanks for sharing your insights on the podcast.

Kwaku Akowuah:
Our pleasure, Sam. It's always great to be here.

Rob Hochman:
Thank you so much, Sam. Really appreciate the opportunity.

Sam Gandhi:
You've been listening to *The Sidley Podcast*. I'm Sam Gandhi. Our Executive Producer is John Metaxas, and our Managing Editor is Karen Tucker. Listen to more episodes at Sidley.com/sidleypodcast, and subscribe on Apple podcasts or wherever you get your podcasts.