BIDEN v. NEBRASKA
SUPREME COURT OF THE UNITED STATES
June 30, 2023
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OPINION: ROBERTS/ THOMAS/ GORSUCH/ ALITO/ KAVANAUGH/ BARET...To ensure that Americans could keep up with increasing international competition, Congress authorized the first federal student loans in 1958-up to a total of $1,000 per student each year. Outstanding federal student loans now total $1.6 trillion extended to 43 million borrowers. Last year, the Secretary of Education established the first comprehensive student loan forgiveness program, invoking the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act) for authority to do so. The Secretary's plan canceled roughly $430 billion of federal student loan balances, completely erasing the debts of 20 million borrowers and lowering the median amount owed by the other 23 million from $29,400 to $13,600. Six States sued, arguing that the HEROES Act does not authorize the loan cancellation plan. We agree.

I

A

The Higher Education Act of 1965 (Education Act) was enacted to increase educational opportunities and "assist in making available the benefits of postsecondary education to eligible students . . . in institutions of higher education." To that end, Title IV of the Act restructured federal financial aid mechanisms and established three types of federal student loans. Direct Loans are, as the name suggests, made directly to students and funded by the federal fisc; they constitute the bulk of the Federal Government's student lending efforts. The Government also administers Perkins Loans-government-subsidized, low-interest loans made by schools to students with significant financial need-and Federal Family Education Loans, or FFELs-loans made by private lenders and guaranteed by the Federal Government. While FFELs and Perkins Loans are no longer issued, many remain outstanding.

The terms of federal loans are set by law, not the market, so they often come with benefits not offered by private lenders. Such benefits include deferment of any repayment until after graduation, loan qualification regardless of credit history, relatively low fixed interest rates, income-sensitive repayment plans, and - for undergraduate students with financial need - government payment of interest while the borrower is in school.

The Education Act...authorizes the Secretary to cancel or reduce loans, but **only in certain limited circumstances** and to a particular extent. Specifically, the Secretary can cancel a set amount of loans held by some public servants - including teachers, members of the Armed Forces, Peace Corps volunteers, law enforcement and corrections officers, firefighters, nurses, and librarians - who work in their professions for a minimum number of years. The Secretary can also forgive the loans of borrowers who have died or been "permanently and totally disabled," such that they cannot "engage in any substantial gainful activity." Bankrupt borrowers may have their loans forgiven. And the Secretary is directed to discharge loans for borrowers falsely certified by their schools, borrowers whose schools close down, and borrowers whose schools fail to pay loan proceeds they owe to lenders.

Shortly after the September 11 terrorist attacks, Congress became concerned that borrowers affected by the crisis - particularly those who served in the military - would need additional assistance. As a result, it enacted the Higher Education Relief Opportunities for Students Act of 2001. That law provided the Secretary of Education, for a limited period of time, with "specific waiver authority to respond to conditions in the national emergency" caused by the September 11 attacks. Rather than allow this grant of authority to expire by its terms at the end of September 2003, Congress passed the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act). That Act extended the coverage of the 2001 statute to include any war or national emergency - not just the September 11 attacks. By its terms, the Secretary "**may waive or modify** any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the Education Act as the Secretary deems necessary in connection with a war or other military operation or national emergency."

The Secretary may issue waivers or modifications only "as may be necessary to ensure" that "recipients of student financial assistance under title IV of the Education Act who are affected individuals are not placed in a worse position financially in relation to that financial assistance because of their status as affected individuals." An "affected individual" is defined, in relevant part, as someone who "resides or is employed in an area that is declared a disaster area by any Federal, State, or local official in connection with a national emergency" or who "suffered direct economic hardship as a direct result of a war or other military operation or national emergency, as determined by the Secretary." And a "national emergency" for the purposes of the Act is "a national emergency declared by the President of the United States."

Immediately following the passage of the Act in 2003, the Secretary issued two dozen waivers and modifications addressing a handful of specific issues. Among other changes, the Secretary waived the requirement that "affected

individuals" must "return or repay an overpayment" of certain grant funds erroneously disbursed by the Government and the requirement that public service work must be uninterrupted to qualify an "affected individual" for loan cancellation. Additional adjustments were made in 2012, with similar limited effects.

But the Secretary took more significant action in response to the COVID-19 pandemic. On March 13, 2020, the President declared the pandemic a national emergency. Presidential Proclamation No. 9994 (2020). One week later, then-Secretary of Education Betsy DeVos announced that she was suspending loan repayments and interest accrual for all federally held student loans. The following week, Congress enacted the Coronavirus Aid, Relief, and Economic Security Act, which required the Secretary to extend the suspensions through the end of September 2020. Before that extension expired, the President directed the Secretary, "in light of the national emergency," to "effectuate appropriate waivers of and modifications to" the Education Act to keep the suspensions in effect through the end of the year. And a few months later, the Secretary further extended the suspensions, broadened eligibility for federal financial assistance, and waived certain administrative requirements (to allow, for example, virtual rather than on-site accreditation visits and to extend deadlines for filing reports).

Over a year and a half passed with no further action beyond keeping the repayment and interest suspensions in place. But in August 2022, a few weeks before President Biden stated that "the pandemic is over," the Department of Education announced that it was once again issuing "waivers and modifications" under the Act-this time to reduce and eliminate student debts directly. During the first year of the pandemic, **the Department's Office of General Counsel had issued a memorandum concluding that "the Secretary does not have statutory authority to provide blanket or mass cancellation, compromise, discharge, or forgiveness of student loan principal balances." After a change in Presidential administrations and shortly before adoption of the challenged policy, however, the Office of General Counsel "formally rescinded" its earlier legal memorandum and issued a replacement reaching the opposite conclusion.** The new memorandum determined that the HEROES Act "grants the Secretary authority that could be used to effectuate a program of targeted loan cancellation directed at addressing the financial harms of the COVID-19 pandemic." Upon receiving this new opinion, the Secretary issued his proposal to cancel student debt under the HEROES Act. Two months later, he published the required notice of his "waivers and modifications" in the Federal Register.

The terms of the debt cancellation plan are straightforward: For borrowers with an **adjusted gross income below $125,000** in either 2020 or 2021 who have eligible federal loans, the Department of Education will discharge the balance of those loans in an amount up to $10,000 per borrower. Borrowers who previously received Pell Grants qualify for up to $20,000 in loan cancellation. Eligible loans include "Direct Loans, FFEL loans held by the Department or subject to collection by a guaranty agency, and Perkins Loans held by the Department." The Department of Education estimates that about 43 million borrowers qualify for relief, and the Congressional Budget Office estimates that the plan will cancel about $430 billion in debt principal.

Six States moved for a preliminary injunction, claiming that the plan exceeded the Secretary's statutory authority. The District Court held that none of the States had standing to challenge the plan and dismissed the suit. The States appealed, and the Eighth Circuit issued a nationwide preliminary injunction pending resolution of the appeal. The court concluded that Missouri likely had standing through the Missouri Higher Education Loan Authority (MOHELA or Authority), a public corporation that holds and services student loans. It further concluded that the State's challenge raised "substantial" questions on the merits and that the equities favored maintaining the status quo pending further review.

With the plan on pause, the Secretary asked this Court to vacate the injunction or to grant certiorari before judgment, "to avoid prolonging this uncertainty for the millions of affected borrowers." We granted the petition and set the case for expedited argument.

II

Before addressing the legality of the Secretary's program, we must first ensure that the States have standing to challenge it. Under Article III of the Constitution, a plaintiff needs a "personal stake" in the case... The Secretary's plan harms MOHELA in the performance of its public function and so directly harms the State that created and controls MOHELA. Missouri thus has suffered an injury in fact sufficient to give it standing to challenge the Secretary's plan. With Article III satisfied, we turn to the merits.

III

The Secretary asserts that the HEROES Act grants him the authority to cancel $430 billion of student loan principal. It does not. We hold today that the Act allows the Secretary to "waive or modify" existing statutory or regulatory provisions applicable to

financial assistance programs under the Education Act, not to rewrite that statute from the ground up.

The HEROES Act authorizes the Secretary to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the Education Act as the Secretary deems necessary in connection with a war or other military operation or national emergency." **That power has limits.** To begin with, statutory permission to "modify" does not authorize "basic and fundamental changes in the scheme" designed by Congress. Instead, that term carries "**a connotation of increment or limitation**," and must be read to mean "to change moderately or in minor fashion." That is how the word is ordinarily used. See Webster's Third New International Dictionary 1952 (2002) (defining "modify" as "to make more temperate and less extreme," "to limit or restrict the meaning of," or "to make minor changes in the form or structure of or alter without transforming"). The legal definition is no different. Black's Law Dictionary (giving the first definition of "modify" as "to make somewhat different; to make small changes to," and the second as "to make more moderate or less sweeping"). The authority to "modify" statutes and regulations allows the Secretary to make modest adjustments and additions to existing provisions, not transform them.

The Secretary's previous invocations of the HEROES Act illustrate this point. Prior to the COVID-19 pandemic, "modifications" issued under the Act implemented only minor changes, most of which were procedural. Examples include reducing the number of tax forms borrowers are required to file, extending time periods in which borrowers must take certain actions, and allowing oral rather than written authorizations...

The Secretary's new "modifications" of these provisions were not "moderate" or "minor."...The Department of Education estimates that the program will cover 98.5% of all borrowers. From a few narrowly delineated situations specified by Congress, the Secretary has expanded forgiveness to nearly every borrower in the country.

The Secretary's plan has "modified" the cited provisions only in the same sense that "the French Revolution 'modified' the status of the French nobility"-it has abolished them and supplanted them with a new regime entirely. Congress opted to make debt forgiveness available only in a few particular exigent circumstances; the power to modify does not permit the Secretary to "convert that approach into its opposite" by creating a new program affecting 43 million Americans and $430 billion in federal debt. Labeling the Secretary's plan a mere "modification" does not lessen its effect, which is in essence to allow the Secretary unfettered discretion to cancel student loans. **It is "highly unlikely that Congress" authorized such a**

sweeping loan cancellation program "through such a subtle device as permission to 'modify.'"

The Secretary responds that the Act authorizes him to "waive" legal provisions as well as modify them-and that this additional term "grants broader authority" than would "modify" alone. But the Secretary's invocation of the waiver power here does not remotely resemble how it has been used on prior occasions. Previously, waiver under the HEROES Act was straightforward: the Secretary identified a particular legal requirement and waived it, making compliance no longer necessary. For instance, on one occasion the Secretary waived the requirement that a student provide a written request for a leave of absence. On another, he waived the regulatory provisions requiring schools and guaranty agencies to attempt collection of defaulted loans for the time period in which students were affected individuals.

Here, the Secretary does not identify any provision that he is actually waiving. No specific provision of the Education Act establishes an obligation on the part of student borrowers to pay back the Government. So as the Government concedes, "waiver"-as used in the HEROES Act-cannot refer to "waiving loan balances" or "waiving the obligation to repay" on the part of a borrower. Because the Secretary cannot waive a particular provision or provisions to achieve the desired result, he is forced to take a more circuitous approach, one that avoids any need to show compliance with the statutory limitation on his authority. He simply "waives the elements of the discharge and cancellation provisions that are inapplicable in this debt cancellation program that would limit eligibility to other contexts."

Yet even that expansive conception of waiver cannot justify the Secretary's plan, which does far more than relax existing legal requirements. The plan specifies particular sums to be forgiven and income-based eligibility requirements. The addition of these new and substantially different provisions cannot be said to be a "waiver" of the old in any meaningful sense. Recognizing this, the Secretary acknowledges that waiver alone is not enough; after waiving whatever "inapplicable" law would bar his debt cancellation plan, he says, he then "modified the provisions to bring them in line with this program." So in the end, the Secretary's plan relies on modifications all the way down. And as we have explained, the word "modify" simply cannot bear that load.

The Secretary and the dissent go on to argue that the power to "waive or modify" is greater than the sum of its parts. Because waiver allows the Secretary "to eliminate legal obligations in their entirety," the argument runs, the combination of "waive or modify" allows him "to reduce them to any extent short of waiver"-even if the power to "modify" ordinarily does not

stretch that far. But the Secretary's program cannot be justified by such sleight of hand. The Secretary has not truly waived or modified the provisions in the Education Act authorizing specific and limited forgiveness of student loans. Those provisions remain safely intact in the U.S. Code, where they continue to operate in full force. What the Secretary has actually done is draft a new section of the Education Act from scratch by "waiving" provisions root and branch and then filling the empty space with radically new text.

Lastly, the Secretary points to a procedural provision in the HEROES Act. The Act directs the Secretary to publish a notice in the Federal Register "including *the terms and conditions to be applied in lieu of* such statutory and regulatory provisions" as the Secretary has waived or modified. In the Secretary's view, that language authorizes "both deleting and then adding back in, waiving and then putting his own requirements in"-a sort of "red penciling" of the existing law.

Section 1098bb(b)(2) is, however, "a wafer-thin reed on which to rest such sweeping power." The provision is no more than it appears to be: a humdrum reporting requirement. Rather than implicitly granting the Secretary authority to draft new substantive statutory provisions at will, it simply imposes the obligation to report any waivers and modifications he has made. Section 1098bb(b)(2) suggests that "waivers and modifications" includes additions.

The dissent accordingly reads the statute as authorizing any degree of change or any new addition, "from modest to substantial"-and nothing in the dissent's analysis suggests stopping at "substantial." Because the Secretary "does not have to leave gaping holes" when he waives provisions, the argument runs, it follows that *any* replacement terms the Secretary uses to fill those holes must be lawful. But the Secretary's ability to add new terms "in lieu of" the old is limited to his authority to "modify" existing law. As with any other modification issued under the Act, no new term or condition reported pursuant to §1098bb(b)(2) may distort the fundamental nature of the provision it alters.

The Secretary's comprehensive debt cancellation plan cannot fairly be called a waiver-it not only nullifies existing provisions, but augments and expands them dramatically. It cannot be mere modification, because it constitutes "effectively the introduction of a whole new regime." And it cannot be some combination of the two, because when the Secretary seeks to *add* to existing law, the fact that he has "waived" certain provisions does not give him a free pass to avoid the limits inherent in the power to "modify." However broad the meaning of "waive or modify," that language

cannot authorize the kind of exhaustive rewriting of the statute that has taken place here.

B

In a final bid to elide the statutory text, the Secretary appeals to congressional purpose. "The whole point of" the HEROES Act, the Government contends, "is to ensure that in the face of a national emergency that is causing financial harm to borrowers, the Secretary can do something." And that "something" was left deliberately vague because Congress intended "to grant substantial discretion to the Secretary to respond to unforeseen emergencies." So the unprecedented nature of the Secretary's debt cancellation plan only "reflects the pandemic's unparalleled scope."

The dissent agrees. "Emergencies, after all, are emergencies," it reasons, and "more serious measures" must be expected "in response to more serious problems." The dissent's interpretation of the HEROES Act would grant unlimited power to the Secretary, not only to modify or waive certain provisions but to "fill the holes that action creates with new terms"-no matter how drastic those terms might be-and to "alter provisions to the extent he thinks appropriate," up to and including "the most substantial kind of change" imaginable. That is inconsistent with the statutory language and past practice under the statute.

The question here is not whether something should be done; it is who has the authority to do it. Our recent decision in *West Virginia v. EPA* involved similar concerns over the exercise of administrative power. That case involved the EPA's claim that the Clean Air Act authorized it to impose a nationwide cap on carbon dioxide emissions. Given "the 'history and the breadth of the authority that the agency had asserted,' and the 'economic and political significance' of that assertion," we found that there was "'reason to hesitate before concluding that Congress' meant to confer such authority."

So too here, where the Secretary of Education claims the authority, on his own, to release 43 million borrowers from their obligations to repay $430 billion in student loans. The Secretary has never previously claimed powers of this magnitude under the HEROES Act. As we have already noted, past waivers and modifications issued under the Act have been extremely modest and narrow in scope. The Act has been used only once before to waive or modify a provision related to debt cancellation...

Under the Government's reading of the HEROES Act, the Secretary would enjoy virtually unlimited power to rewrite the Education Act. This would "effect a 'fundamental revision of the statute, changing it from one sort of scheme of . . . regulation' into an entirely different kind," *West Virginia*-one

in which the Secretary may unilaterally define every aspect of federal student financial aid, provided he determines that recipients have "suffered direct economic hardship as a direct result of a . . . national emergency."

The "'economic and political significance'" of the Secretary's action is staggering by any measure. Practically every student borrower benefits, regardless of circumstances. A budget model issued by the Wharton School of the University of Pennsylvania estimates that the program will cost taxpayers "between $469 billion and $519 billion," depending on the total number of borrowers ultimately covered...It amounts to nearly one-third of the Government's $1.7 trillion in annual discretionary spending. There is no serious dispute that the Secretary claims the authority to exercise control over "a significant portion of the American economy."

The dissent is correct that this is a case about one branch of government arrogating to itself power belonging to another. But it is the Executive seizing the power of the Legislature. The Secretary's assertion of administrative authority has "conveniently enabled him to enact a program" that Congress has chosen not to enact itself. Congress is not unaware of the challenges facing student borrowers. "More than 80 student loan forgiveness bills and other student loan legislation" were considered by Congress during its 116th session alone. And the discussion is not confined to the halls of Congress. Student loan cancellation "raises questions that are personal and emotionally charged, hitting fundamental issues about the structure of the economy."

The sharp debates generated by the Secretary's extraordinary program stand in stark contrast to the unanimity with which Congress passed the HEROES Act. **The dissent asks us to "imagine asking the enacting Congress: Can the Secretary use his powers to give borrowers more relief when an emergency has inflicted greater harm?" The dissent "can't believe" the answer would be no. But imagine instead asking the enacting Congress a more pertinent question: "Can the Secretary use his powers to abolish $430 billion in student loans, completely canceling loan balances for 20 million borrowers, as a pandemic winds down to its end?" We can't believe the answer would be yes.** Congress did not unanimously pass the HEROES Act with such power in mind. "A decision of such magnitude and consequence" on a matter of "'earnest and profound debate across the country'" must "rest with Congress itself, or an agency acting pursuant to a **clear delegation** from that representative body." As then-Speaker of the House Nancy Pelosi explained:

> **"People think that the President of the United States has the power for debt forgiveness. He does not.** He can postpone. He can delay. But he does not have that power. That

has to be an act of Congress." Press Conference, Office of the Speaker of the House (July 28, 2021).

...It has become a disturbing feature of some recent opinions to criticize the decisions with which they disagree as going beyond the proper role of the judiciary. Today, we have concluded that an instrumentality created by Missouri, governed by Missouri, and answerable to Missouri is indeed part of Missouri; that the words "waive or modify" do not mean "completely rewrite"; and that our precedent - old and new - requires that Congress speak clearly before a Department Secretary can unilaterally alter large sections of the American economy. We have employed the traditional tools of judicial decisionmaking in doing so. Reasonable minds may disagree with our analysis - in fact, at least three do. We do not mistake this plainly heartfelt disagreement for disparagement. It is important that the public not be misled either. Any such misperception would be harmful to this institution and our country.

The judgment of the District Court for the Eastern District of Missouri is reversed, and the case is remanded for further proceedings consistent with this opinion. The Government's application to vacate the Eighth Circuit's injunction is denied as moot. *It is so ordered.*

CONCURRENCE: BARRETT... Not Provided.

DISSENT: KAGAN/SOTOMAYOR/JACKSON...Not Provided.