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Jordan Weeks

Elizabeth Martinez

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INTRODUCTION

Nothing sparks political controversy quite like student debt relief.[1] One side of the aisle argues that student loan forgiveness's $500 billion cost will further spike inflation.[2] Some have even called this relief "reckless."[3] Politicians like Mitch McConnell called student debt relief a "slap in the face" for individuals who did not attend college or already paid off their loans.[4] On the other side of the aisle, people argue that student debt relief will help borrowers better manage their budgets and guarantee financial security because they will receive the break that they need.[5] Proponents argue that student debt relief will help bridge the racial wealth divide.[6] And other proponents contend that this generation of borrowers ought to receive some relief given that COVID19 has crippled borrowers' ability to pay back their loans.[7] In short, this is a controversial and political issue.

[1] Libby Nelson, *Is student loan forgiveness fair? The debate over student loan forgiveness, explained*, VOX (Aug. 31, 2022), https://www.vox.com/policy-and-politics/23322129/student-loan-forgiveness-fair-inflation.
[2] Madeleine Ngo, *Will student loan forgiveness make inflation worse?*, VOX (Aug. 25, 2022), https://www.vox.com/2022/8/25/23320825/student-loan-debt-forgiveness-inflation.
[3] Jason Furman (@jasonfurman), Twitter (Aug. 24, 2022, 2:15pm), https://twitter.com/jasonfurman/status/1562503985529233410.
[4] Nelson, *supra* note 1.
[5] Rose Khattar & Zahir Rasheed, *Canceling at Least $10,000 of Student Loan Debt Will Help Lower the Cost of Living*, CENTER FOR AMERICAN PROGRESS (Aug. 23, 2022), https://www.americanprogress.org/article/canceling-student-debt-of-at-least-10000-will-help-lower-the-cost-of-living/.
[6] Andre M. Perry et al., *Student loans, the racial wealth divide, and why we need full student debt cancellation*, THE BROOKINGS INSTITUTION (Jun. 23, 2021), https://www.brookings.edu/research/student-loans-the-racial-wealth-divide-and-why-we-need-full-student-debt-cancellation/.
[7] *COVID-19 Emergency Relief and Federal Student Aid*, FAFSA, https://studentaid.gov/announcements-events/covid-19 (last visited Apr. 23, 2023).

Regardless, members of the Supreme Court have considered themselves above the political fray.[8] In fact, this conservative Court insists that political questions fall "beyond the reach of the federal courts" (also known as the "Political Question Doctrine").[9] But if something as political and controversial as student loans do not fall squarely within the Political Question Doctrine, where do they fall?

Two Supreme Court cases this term will try to answer this question.[10] These cases will determine whether students will receive $10,000, $20,000, or $0 in student debt relief. In short, President Biden issued an executive order in August of 2022, asking the Secretary of Education to forgive $10,000 in student loans for public loan recipients making less than $125,000 and an additional $10,000 in relief for Pell Grant recipients.[11] This Order also asked the Secretary of Education to continue the stay on student loan repayment issued under the former President's Secretary of Education, Betsy Devos.[12]

The Secretary of Education in both the Trump and Biden administrations claimed that Congress granted the executive branch the authority to implement these debt relief programs under the Higher Education Relief Opportunities for Students Act of 2003 (the "HEROES" Act).[13] In particular, the HEROES Act states that the Secretary of Education may "waive or modify any statutory or regulatory provision applicable to the student loan financial assistance program" in a "national emergency."[14] One of the objectives of this program is to ensure that "recipients of student financial assistance… are not placed in a worse position financially" after a national

[8] Ryan C. Williams, *Supreme Court justices say the institution must be nonpartisan – but they make it political*, NBC (Sept. 19, 2021), https://www.nbcnews.com/think/opinion/supreme-court-justices-say-institution-must-be-nonpartisan-they-make-ncna1279280.
[9] Rucho v. Common Cause, 139 S. Ct. 2484, 2506-07 (2019).
[10] *See* Dept. of Educ. v. Brown, 143 S. Ct. 541 (2022); Biden v. Nebraska, 143 S. Ct. 477 (2022).
[11] Nebraska v. Biden, 2022 U.S. Dist. LEXIS 191616 at *6 (E.D. Mo. Oct. 20, 2022).
[12] *Id.* at *5-6.
[13] *Id.*, 20 USC § 1098bb(a)(1).
[14] 20 USC § 1098bb(a)(1).

emergency.[15] The Secretary of Education argues that providing eligibility for current loan borrowers to receive student loan forgiveness is a "modification" of eligibility.[16] And thus, under the plain language of the statute, the Secretary holds this authority. But, two sets of plaintiffs in these cases disagree.

This case raises alarming questions for standing.[17] Under the current "standing" doctrine, plaintiffs must allege that they suffered an injury to be able to sue in federal court.[18] The first plaintiffs are six states who believe that the Biden administration exceeded its authority under the HEROES Act.[19] One state in particular shone throughout the oral argument—Missouri.[20] Missouri asserts that it has standing because a loan service provider, MOHELA, will lose income due to the consolidation of FFELP loans into Direct loans.[21] But MOHELA is an entity separate from Missouri that (1) can sue and be sued on its own behalf, (2) has financial independence from Missouri, (3) in preparation for this action did not give Missouri requested documents until Missouri sent requests through its Sunshine Laws, and (4) has funds that are almost entirely separate from Missouri and are exclusively controlled by MOHELA.[22]

The second set of plaintiffs are students who allege that the U.S. Department of Education failed to comply with the notice and comment procedures required under the Administrative Procedure Act.[23] One student alleges that she suffers harm from this program because she holds

[15] *Id.* at § 1098bb(a)(1)-(2).
[16] Nebraska v. Biden, 2022 U.S. Dist. LEXIS 191616 at *7 (E.D. Mo. Oct. 20, 2022).
[17] This paper focuses more on the Major Questions Doctrine and the policy choices by the Court & loan forgiveness programs. But, the issue is worth raising here.
[18] Spokeo, Inc. v. Robins, 578 U.S. 330, 338-39 (2016).
[19] Nebraska v. Biden, 2022 U.S. Dist. LEXIS 191616 (E.D. Mo., Oct. 20, 2022).
[20] For example, "Missouri" appeared approximately 41 times on the oral argument transcript, while "Arkansas" appeared 5 times and "Nebraska"—the named plaintiff—appeared 4 times. South Carolina was not mentioned a single time. *See Biden v. Nebraska Transcript*, HERITAGE REPORTING CORPORATION (Feb. 28, 2023), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/22-506_22p3.pdf.
[21] *Nebraska*, 2022 U.S. Dist. LEXIS 191616 at *10-11.
[22] *Id.* at *14-15.
[23] Brown v. United States Dep't of Educ., 2022 U.S. Dist. LEXIS 205875 (N.D. Tex., Nov. 10, 2022).

private loans and will not receive forgiveness.[24] The other student alleges that he suffers harm because he would receive $10,000 in loan forgiveness while Pell Grant recipients would receive $20,000 in loan forgiveness.[25] The Supreme Court will have to confront (1) whether a state can assert standing on behalf of an independent entity, and (2) whether some people receiving higher subsidies than others is considered a redressable "injury."

These cases are important for two additional reasons. First, student loans disproportionately affect people of color and people in poverty.[26] This loan forgiveness program would help alleviate that burden on those already struggling financially. And the program would help reduce the racial-wealth-inequality gap.[27] Second, these cases give another example of the Court's partisanship through its likelihood of playing the unworkable "Major Questions Doctrine" card to halt executive authority for Democratic Presidents. Yet, under Republican Presidents, the conservative majority had little problem with executive discretion.[28]

I. STUDENT LOANS & POVERTY

A. Pell Grant Recipients

In *Biden v. Nebraska*, the state of Nebraska challenged President Biden's executive order allowing recipients of federal Pell Grants up to $10,000 of student loan forgiveness in addition to the universal $10,000.[29] Pell Grant recipients come from the most financially struggling families who send their children to college. Pell Grants are given only to students with "exceptional

[24] *Id.* at *8.
[25] *Id.*
[26] *See* Perry et al., *supra* note 6.
[27] *Id.*
[28] According to a Congress Research Service study completed in November 2022, the Court has used the Major Questions Doctrine (or the rationale underlying the Major Questions Doctrine) to strike down executive actions under a Republican president in just two cases. *See The Major Questions Doctrine*, CONGRESSIONAL RESEARCH SERVICE (Nov. 2, 2022), https://crsreports.congress.gov/product/pdf/IF/IF12077. But, for Democratic presidents the Supreme Court has used this Doctrine to strike down agency regulations seven times. *Id.* The last time that the Supreme Court used this Doctrine to strike down an agency regulation for a Republican president was in 2006.
[29] Biden v. Nebraska, 143 S. Ct. 477 (2022).

financial need."[30] Ninety-three percent of Pell Grant recipients from the 2019-2020 and 2020-2021 school years came from families making less than $60,000 per year.[31] To understand who the Biden administration aimed to help with its initiative, it is important to understand the students who qualify for Pell Grants.

The Pell Grant program provides college funds for undergraduate students in poverty. Usually, Pell Grant recipients do not need to repay those funds.[32] The amount awarded depends on the following: expected family contribution, tuition costs, and whether the student attends full or part time. For the upcoming 2023-24 academic year, the maximum Pell Grant a student could receive is $7,385 per year.[33] During the 2022-2023 academic year, the average cost of college tuition was $10,423 at an in-state public college, $22,953 for out-of-state tuition at a public college, and $39,723 at a private college. This means that even students who qualify for the maximum Pell Grant and attend public schools still must take out several thousand dollars in loans without other financial assistance. If a student wants to attend college, they must fill this financial gap by other means, like federal or private loans, scholarships, or student and family savings.

Though the above scenario used an ideal mix of maximum aid and minimum tuition costs, most students will not achieve this perfect result. The local public college may not have the particular program a student needs, potentially forcing her to choose a more expensive private option, a public option in a more expensive location like an out-of-state school, or changing her desired area of study. Unsurprisingly, students with more financial means have more options than

[30] FAFSA, *Federal Pell Grants*, https://studentaid.gov/understand-aid/types/grants/pell (last visited Apr. 24, 2023).
[31] NITRO, *Average Student Loan Debt: 2022 Statistics in the United States*, https://www.nitrocollege.com/research/average-student-loan-debt#:~:text=In%20addition%20to%20the%20total%20student%20loan%20debt,%2437%2C172%204%20Average%20student%20loan%20payment%20%3D%20%24393%2Fmonth (last visited Apr. 24, 2023); FAFSA, *Title IV Program Volume Reports*, https://studentaid.gov/data-center/student/title-iv (last visited Apr. 24, 2023).
[32] FAFSA, *Federal Pell Grants*, https://studentaid.gov/understand-aid/types/grants/pell (last visited Apr. 24, 2023).
[33] *Id.*

students without family savings or assets to secure larger loans. In a worst-case scenario, students might decide to forego higher education entirely. This prohibitive cost for education can prevent students from gaining the benefits of a college education. And this could affect a person's lifetime earnings and job stability; after all, statistics show that workers with higher education levels had both higher earnings and greater job security, a situation illustrated by the Covid-19 pandemic's effect on different job sectors.[34]

Notably, student loans do not burden every demographic equally. Student loans disproportionately burden black borrowers and people in poverty. Twenty-one percent of families owed student debt in 2019 (with a median of $22,000).[35] Over 30% of those families who owe student debt were black families.[36] Yet, only 20% of those families who owe student debt were white families.[37] Only 5.7% of wealthy families in the top 10% of net worth owed student debt, while 36% of families in the bottom quartile owed student debt.[38] Not only are families in poverty likelier to owe student debt, but they are likelier to owe *more* student debt than their rich counterparts: families in the bottom quartile of net worth owed a median of $36,000 in student debt, while families in the top 10% owed a median of $20,000 in student debt.[39] Student debt relief would help alleviate these inequalities.

B. Other Potential Loan Forgiveness Recipients under the Higher Education Act

In *Sweet v. Cardona*, the 9th Circuit heard another case involving student loan forgiveness in a court-ordered settlement.[40] In *Cardona*, students at for-profit institutions successfully sued the

[34] Emma Kerr & Sara Wood, *See the Average College Tuition in 2022-2023*, US NEWS (Sept. 12, 2022), https://www.usnews.com/education/best-colleges/paying-for-college/articles/paying-for-college-infographic-2022.
[35] Jacqueline Demarco, *A Demographic Look at Who Has Student Debt*, LENDINGTREE (Jun. 14, 2022), https://www.lendingtree.com/student/student-debt-demographics-study/.
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] Sweet v. Cardona, No. C 19-03674 WHA, 2022 U.S. Dist. LEXIS 208319 (N.D. Cal., Nov. 16, 2022).

U.S. Department of Education for its failure to forgive their student loans through the Department's Borrower Defense Program.[41] As part of the class-action settlement, the Department of Education authorized the $6 billion settlement payment to these former students, but the plaintiffs, three for-profit schools, sued the Department to stop the settlement proceeding.[42] The court wrote that the settlement "should not be delayed any longer by three intervenor schools who were not parties to the settlement agreement and who were not in the long, hard-fought litigation that preceded it."[43] In response to the three schools' arguments that the Department exceeded its authority by paying the settlement, the court analyzed the Higher Education Act, concluding that "[u]pon a plain reading, it bestows the Secretary with broad discretion over handling — and discharging — student loans," ultimately concluding that the Higher Education Act applied to the loan forgiveness at issue in the case.[44] The three schools also argued that the settlement involves the Major Question Doctrine, discussed later in this paper, but the court held that this argument was not applicable because "[t]here is nothing unusual about the Secretary exercising his discretion to discharge student-loan debt, and the *scale* of relief here is inherently limited to the metes and bounds of this federal class-action litigation."[45]

The 9th Circuit refused to stay the settlement and the schools appealed their case to the Supreme Court. While the plaintiffs have applied to the for *cert*, if the Court does not hear the case, then the 9th Circuit case confirming the Higher Education Act and the Secretary of Education's authority to forgive student loans will stand. This is a different authority that the

[41] *Id.*
[42] Adam S. Minsky, *Another Student Loan Forgiveness Challenge Heads To Supreme Court — Key Updates*, FORBES (Apr. 6, 2023), https://www.forbes.com/sites/adamminsky/2023/04/06/another-student-loan-forgiveness-challenge-heads-to-supreme-court---key-updates/?sh=de9a48c45be6.
[43] *Cardona*, 2022 U.S. Dist. LEXIS 208319.
[44] *Id.* at *13 (citing West Virginia v. EPA, 142 S. Ct. 2587 (2022)).
[45] *Cardona*, 2022 U.S. Dist. LEXIS 208319 at *17.

Brown and *Nebraska* cases, which rely on the HEROES Act and a possible alternative authority for the Biden administration's student loan relief plans.[46]

C. Limits on Debt Relief and the Loan Forgiveness Program

The Biden Administration has not directed that all federally backed loans should be forgiven, nor have they allowed high-earners making hundreds of thousands of dollars a year to vacation on the public's dime. The White House's stated goal in designing the student debt relief program to help the student borrowers who needed it the most.[47] They did this by including $10,000 in loan forgiveness specifically for Pell Grant recipients and including income caps of $125,000 for individuals and $250,000 for married couples for any form of student loan relief. This targeted relief is the most effective way to ensure equitable relief for borrowers, especially black and Latinx borrowers, who generally owe more in student loans than white borrowers and take longer to repay those loans. Focusing on Pell Grant recipients, as the Biden program does, allows a more equitable relief for these former students

II. THE SUPREME COURT AND ITS NEW REGRESSIVE TOOL: THE MAJOR QUESTIONS DOCTRINE

Since 1984, the Supreme Court has deferred to agency interpretations of statutes if (1) the statute is ambiguous and (2) the agency's interpretation of the statute is reasonable.[48] Often referred to as "*Chevron* deference," its primary justification is that the executive agencies—not the lawyers on the bench—hold the expertise in broad and complex statutory schemes.[49] After all, the experts at the EPA likely know more about carbon emissions and the environment than any

[46] Minsky, *supra* note 42
[47] THE WHITE HOUSE, *FACT SHEET: President Biden Announces Student Loan Relief for Borrowers Who Need It Most* (Aug. 24, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/24/fact-sheet-president-biden-announces-student-loan-relief-for-borrowers-who-need-it-most/.
[48] Chevron, U.S.A. Inc. v. NRDC, Inc., 467 U.S. 837 (1984).
[49] *Id.* at 865.

judge. Moreover, the Supreme Court felt concerned that without this deference, courts would strike down any agency regulation and substitute their policy preferences.[50] Congress—not the courts—should draft rules and laws enshrining its policy preferences.[51] Although the Court has modified *Chevron* in the past,[52] the Major Questions Doctrine threatens to overhaul the *Chevron* framework by giving courts an avenue to avoid the *Chevron* question entirely.[53]

The Major Questions Doctrine is only a few decades old.[54] This Doctrine arises in cases challenging the executive branch's authority to issue a rule or regulation.[55] The Doctrine states that in "extraordinary cases" where an agency promulgates a regulation with enough "economic and political significance" without a clear enough grant from Congress, the Court should "hesitate before concluding that Congress" meant to confer that authority.[56] If this occurs, then the agency must point to "clear congressional authorization" for its regulation to survive.[57] In other words, if the Court thinks that the regulation is significant enough, then the Court can strike it down if it finds that Congress was not explicit enough in its authorization to the agency. But there is one glaring problem with this Doctrine: the standard is vague and unworkable.

The Doctrine only arises where the Court finds that the regulation will have a large enough "economic and political significance."[58] One could not draft a more vague standard if she tried. Additionally, it is not clear why "economics" should be the primary charger behind the doctrine. Why not pick "ecological and political significance"? Or "labor and political significance"? It is

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[50] *Id.*
[51] *Id.*
[52] *See, e.g.*, United States v. Mead Corp., 533 U.S. 218 (2001). *See also* Texas v. Becerra, 2022 U.S. Dist. LEXIS 151142 at *54 fn.11 (N.D. Tex. Aug. 23, 2022) (recognizing that the *Chevron* doctrine has "fallen out of favor" with the Supreme Court in light of recent rulings).
[53] *See generally*, West Virginia v. EPA, 142 S. Ct. 2587 (2022) (striking down the Biden-EPA's regulation on emission caps without answering the *Chevron* deference question or citing to the case altogether).
[54] *See* MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218 (1994).
[55] *See* CONGRESSIONAL RESEARCH SERVICE, *supra* note 28.
[56] *West Virginia*, 142 S. Ct. at 2595.
[57] *Id.*
[58] *Id.*

also not clear at what point Congress's authorization for the agency regulation becomes sufficiently "clear." Perhaps it requires the drafter of the enabling statute to state specifically that "this statute permits the Secretary to enact a specific regulation in this specific manner." But that does not match the legislative process. Hundreds of different members of Congress from different districts vote on bills for different reasons. Moreover, Congress necessarily enacts "general provisions" to allow agencies to "fill up the details."[59] After all, Congress cannot anticipate every problem arising in a statutory framework. So, agencies fill in the gaps to meet the purposes of the statute.

In the instant case, the plain meaning of the HEROES Act indicates that Congress conferred authority to the Secretary of Education to forgive loans in circumstances like this. The authorization statute provides that the Secretary of Education may "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs… as the Secretary deems necessary in connection with a war or other military operation or national emergency…"[60] Cancellation or student loan forgiveness, by its plain meaning, is a "waiver" of certain requirements for students to pay back their loans. COVID19 was a "national emergency" given that it halted significant parts of the United States economy.[61] And it is not a stretch to say that student loan defaults are "in connection with" the economy slowing down by COVID19. Under the traditional *Chevron* framework, this statutory interpretation would win the day because (1) the statute is ambiguous and (2) the interpretation is a reasonable interpretation.[62]

[59] Wayman v. Southard, 23 U.S. 1, 43 (1825).
[60] 20 USC § 1098bb(a)(1).
[61] Indeed, former president Trump declared COVID19 a "national emergency" in March 2020. And Secretary Devos issued a pause on federal loan repayment on March 20, 2020. Nebraska v. Biden, 2022 U.S. Dist. LEXIS 191616 at *5-6 (E.D. Mo. Oct. 20, 2022).
[62] Chevron, U.S.A. Inc. v. NRDC, Inc., 467 U.S. 837 (1984).

Not only is loan forgiveness *a* reasonable interpretation of the statute, but it is also the *most* reasonable interpretation of the statute. Congress used incredibly broad language in enacting this statute. The terms "waive" and "modify" are broad and do not identify the provisions that the Secretary may waive or modify under its plain text. The words "national emergency" are also undefined and broad, suggesting that Congress intended to give broad authority to the Secretary of Education in defining what a national emergency is. Critics might contend that "national emergency" means a military emergency given that it is preceded by "war or other military operation." But, Congress did not use the narrower terms "military national emergency" when it enacted the statute. Instead, it used the broad terms "national emergency." This suggests that the "national emergency" does not need to be a military emergency—because if it did, then Congress would have said so. Finally, the words "in connection with" are also broad and do not specify how connected or tenuous the "national emergency" must be to the loan forgiveness to satisfy the statute's requirements. This all suggests that Congress meant to give the executive branch broad authority to act quickly in a national emergency and assist student loan borrowers. So, this reading is not only reasonable, but it is likely the correct reading.

But if the plaintiffs can satisfy the "standing" requirement, then the Court will likely halt this debt forgiveness program using the Major Questions Doctrine. At oral argument, Justice Thomas implied that if Congress meant to confer the authority for the Secretary to cancel debt, then Congress would have used the term "cancel" with the terms "waive or modify."[63] Justice Roberts also expressed skepticism that the Secretary had this authority, stating that "modify" implies a "moderate change" rather than $400 billion dollars in loan forgiveness.[64] Justice Alito

[63] *Biden v. Nebraska transcript, supra* note 20, at 5:22-6:3.
[64] *Id.* at 7:10-19.

agreed, implying that if you "polled every member of Congress and asked whether, in the ordinary sense of the term [that loan forgiveness is a major question]," that they would agree.[65]

Even if the Court strikes down the loan forgiveness program, some moments in the oral argument indicate that the Secretary may continue the interest forbearance policy. For example, the Respondent pointed out to Justice Alito that the forbearance policy has been an "economically significant program"—much like the loan forgiveness program.[66] Justice Thomas stated later in oral argument that "I think that forbearance fits more comfortably in modify – waive or modify language."[67] But, the Petitioner pointed out that the forbearance policy took effect two years after the initial COVID19 lockdowns, suggesting that the forbearance policy is no longer "in connection with" the national emergency.[68]

CONCLUSION

For student loan borrowers, at the time of writing this paper, their fate still hangs in the balance of the Court composition. It is likely that the Court will strike down the loan forgiveness program under the Major Questions Doctrine. And in future cases, the Court will have to provide some workable standard for when agency actions are so "economically and politically significant" to invoke this doctrine. Otherwise, this Doctrine will allow the Supreme Court to continue legislating from the bench. Nevertheless, it remains unclear whether the Court will permit the forbearance policy. If the Court continues the forbearance policy, then loan borrowers will have a chance to continue accumulating wealth and defer repayment. And it would help narrow the racial inequality gap as it pertains to student debt. Perhaps one day Americans can live in a country where

[65] *Id.* at 13:16-21.
[66] *Id.* at 17:5-13.
[67] *Id.* at 40:2-4.
[68] *Id.* at 118:22-119:17.

they do not need to choose between a lifetime of debt and a fulfilling, meaningful education. But that day is not today.