



Presidential Power, Standing, and Student Loan Forgiveness

Thursday, March 2, 2023

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[00:00:00] Jeffrey Rosen: When President Biden announced a plan to cancel up to \$20,000 of student debt for low- to middle-income families, tens of millions rushed to sign up for the relief. The plan was rolled out last August during the tail end of the COVID pandemic, and it relied on the Higher Education Relief Opportunities for Students Act of 2003, otherwise known as the HEROES Act. That was a law passed after 9/11 that gives the secretary of education the power to waive or modify student loan programs during a national emergency. The price tag for the president's plan? An estimated \$400 billion. But did the president have the power to wipe out the debt or did he overstep his authority?

[00:00:50] Jeffrey Rosen: Hello, friends. I'm Jeffrey Rosen, president and CEO of the National Constitution Center. And welcome to *We the People*, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan nonprofit chartered by Congress to increase awareness and understanding of the Constitution among the American people. This week, the justices heard two separate challenges to the president's student loan forgiveness program, *Biden versus Nebraska* and *Department of Education versus Brown*.

[00:01:19] Jeffrey Rosen: At the heart of the oral arguments are two doctrines, the major questions doctrine and the standing doctrine. Joining us to unpack all this are two constitutional scholars who filed friends of the court briefs in the cases. William Araiza is the Stanley A. August professor of law at Brooklyn Law School. He filed a friend of the court brief in support of the Biden administration. Welcome, Bill.

[00:01:43] William Araiza: Well, thank you, Jeff. It's really wonderful to be here.

[00:01:46] Jeffrey Rosen: And Anastasia Boden is the director of the Cato Institute's Robert A. Levy Center for Constitutional Studies. She filed a friend of the court brief in the same cases, but on opposite sides. Anastasia, welcome to *We the People*.

[00:02:01] Anastasia Boden: Thanks so much for having me.

[00:02:02] Jeffrey Rosen: Let's jump right into the central legal question in the case. Bill, what is the HEROES Act and why do you believe it justifies the student loan forgiveness program?

[00:02:11] William Araiza: So the HEROES Act was enacted, as you said, in the immediate or medium-term aftermath of 9/11 and the prospect of war in Iraq. That, that intended to allow the president acting through his officials, in particular the secretary of education, to make

adjustments to important federal programs when there was either a military or a national emergency that would put, for example, student loan borrowers, uh, in, uh, uh, in tougher positions than they otherwise would have been. This was wide-ranging legislation that was designed to allow the, uh, executive branch to take actions that were necessary in response to national emergencies that had the potential for harming the well-being of the American people.

[00:02:56] Jeffrey Rosen: Anastasia, why do you believe the HEROES Act does not justify the debt forgiveness program?

[00:03:02] Anastasia Boden: Well, like most things in constitutional law, whether this exercise of authority or the, the policy at issue satisfies, uh, the standard will depend on how closely we are going to look at the exercise of authority at issue. And so, the first thing that we have to decide is, uh, that level of scrutiny. And under what's called the major questions doctrine, I would argue that we have to take a really close look, um, that because this is such a broad, uh, use of authority that has such national importance, that there has to be a clear delegation of power. And, and that's for two reasons. One is just a common-sense sort of interpretary norm, which is that if Congress is going to give the secretary such a broad amount of power, it should really say so.

[00:03:55] Anastasia Boden: In our amicus brief, we use the example of a parent who says to, uh, his or her child that they can use the car for the weekend to fix up the house. Now, of course, if, if the kid wants to take the car, um, to grab some paint from Home Depot, I think everybody would argue that's a natural interpretation of, uh, the parents' delegation of authority. But now if the kid says that it wants to sell the car to use that money, um, to build a new wing of the house, I think we're gonna take a little bit of a closer look because the kid is claiming a much broader, um, delegation of authority.

[00:04:31] Anastasia Boden: So here, I argue we need to take a really close look. And when we do, we see that this exercise of authority just isn't clearly authorized because it's not necessary to keep, um, borrowers from going into a worse position with regards to their loans. I mean, the secretary argues that it's gonna be, uh, more difficult for these borrowers to start repayment in light of COVID, and so now it must just totally wipe out a huge amount of their debt. But there are a vast amount of other things that the secretary could have done to help these borrowers, um, rather than this, uh, rather expansive action.

[00:05:07] Anastasia Boden: Secondly, I would argue that this doesn't merely waive or modify, uh, student loan provisions that already exist. This is a whole new creation, um, of a new program. So Chief Justice Roberts used the example at oral argument, he borrowed from Scalia a quote where he said, "Can we really truly say that the French Revolution modified the French aristocracy?"

[00:05:32] Chief Justice Roberts: He said modified in our view connotes moderate change. He said it might be good English to say that the French Revolution modified the status of the French nobility, but only because there's a figure of speech called understatement and a literary device known as sarcasm.

[00:05:47] Anastasia Boden: And similarly, here, this isn't just a mere modification of the statute, the secretary basically wiped the entire statute out and wrote something anew. And then lastly, I would argue that this is just a new and expansive use of power that the secretary has never done before. The, the HEROES Act has never been used to forgive debt. And if Congress wanted to authorize the secretary to permit a discharge, it could have done so, but didn't use the language normally, um, used. It didn't use the word discharge anywhere. So those are the basic reasons why I would argue that the secretary has just gone far beyond anything that Congress has delegated.

[00:06:23] Jeffrey Rosen: All right, Bill, let's just put the relevant statutory text on the table. 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 Higher Education Act as the secretary deems necessary in connection with a national emergency. And there was just a lot of debate at the oral argument about the meaning of the words waive, modify, and necessary. Tell us about, uh, your response to the claim that the wiping out of debt is not a waiving or modification of that debt.

[00:07:03] William Araiza: Sure. So at oral argument, Justice Kagan observed that very often, the court is required to parse a complex or inscrutable or, or perhaps just cryptic statutory language. But she observed, uh, this is not one of those times.

[00:07:19] Justice Kagan: And Congress doesn't get much clearer than that. We, we deal with congressional statutes every day that are really confusing. This one is not.

[00:07:26] William Araiza: Because, in fact, the language of the HEROES Act is really quite plain. As you said, Jeff, the authority that it gives to the secretary of education is to waive, and as well to modify, any statutory or regulatory provision that is merely applicable to, uh, student loan programs. That is to say, using words like waive, using words like any regulatory provision or terms like that, using terms like, uh, applicable to the student loan program.

[00:07:59] William Araiza: And I'll just add a word that you didn't use that's also in the statute, uh, "as the secretary deems necessary, uh, in connection with a national emergency." I would just note two things about that latter language. First of all, it's simply a matter for the secretary to deem, uh, that waiver or modification necessary. That's the authority that Congress clearly gave the secretary of education and its authority to do that, uh, in connection with a national emergency. Again, the words that were used in the statute are both clear and at the same time broad. And that does, indeed, authorize the secretary, uh, to do what he did in this case. It seems pretty clear to me that the use of these very broad words really kind of suggests that.

[00:08:46] William Araiza: And I would note, even Justice Kavanaugh, who's known for favoring more restrictive interpretations of statutory grants of power to the executive branch, even Justice Kavanaugh observed to, uh, uh, to the respondents' lawyers, um, that, um, the word waive is pretty awfully broad. And when you add waive in with these, with, with those other statutory terms that both you mentioned and, and that I added in, uh, it seems as though this is really extraordinarily broad authority and clear authority. Again, as Justice Kagan noted, sometimes the court has to read inscrutable statutory language. This is not inscrutable.

[00:09:24] Jeffrey Rosen: Anastasia, what was, uh, the opponent's response to Justice Kagan, as well as to Justice Kavanaugh? And, maybe sum up the oral argument what you, you heard on this crucial debate about the meaning of waive or modify.

[00:09:40] Anastasia Boden: Yeah. I think the response is that there's nothing in particular that the secretary is waiving. It's not as if, uh, the secretary is excusing compliance with certain eligibility criteria. Instead, it's just ignoring everything that's there and writing something anew. You can't point to any one provision that's standing in the way as a barrier and that is now being waived. It's more like there are certain criteria for forgiveness and the secretary is just ignoring all of that criteria and, and, and starting up its new, you know, its own scheme for to do what it wants.

[00:10:14] Anastasia Boden: And I think underlying this whole debate, and you can see this with some of the skepticism from the so-called conservative justices, is that, um, many people think that this is all a pretext, that it really isn't justified by the COVID-19 pandemic. But instead, this is something Biden has wanted to do for a long time. It's something he campaigned on. It's something that Congress considered and rejected, um, couldn't get it through Congress.

[00:10:38] Anastasia Boden: And so instead, the Biden administration has used, uh, the COVID-19 pandemic as a way of, of getting what it wants. You know, this, this all was done basically at the end of the pandemic, just weeks before Biden declared, you know, COVID-19 over. And so I think, I think that's what's going on here, is you see a lot more skepticism from certain justices about whether this is, um, an authentic use of regulatory power or a mere pretext.

[00:11:07] Jeffrey Rosen: Skepticism about whether it's a mere pretext. Several of the justices did express skepticism of the program. Justice Kavanaugh said that some of the court's most important moments have been resisting executive overreach.

[00:11:21] Justice Kavanaugh: Some of the biggest mistakes in the court's history were deferring to assertions of executive emergency power. Some of the finest moments in the court's history were, uh, pushing back against presidential assertions of emergency power. And that's continued not just in the Korean War, but post-9/11, in some of the cases there.

[00:11:43] Justice Kavanaugh: So, given that history and there's a concern, I suppose, that I feel at least about how to handle an emergency assertion. You know, some of the amicus briefs, one of them from a professor, says this is a case study and abuse of executive emergency powers. I'm not saying I agree with that. I'm just saying that's the assertion. And I wanna get your assessment. This is a big-picture question, so I'll give you a little time of how we should think about our role in, uh, assertion of presidential emergency power, given the court's history.

[00:12:18] Jeffrey Rosen: Bill, what is the government's response and what's your response to the claim that this is a pretext and that, uh, for that reason, uh, the court should take a very close look at it?

[00:12:30] William Araiza: Well, again, in as far as the argument that this is executive overreach, um, it would only be overreach if the executive was not authorized to take the actions that the secretary sought to take in this case. But he was, uh, authorized to do that. And so, to the

extent that this is a case simply of using statutory authority that Congress gave the executive, the secretary of education, uh, then there's really no serious question of executive overreach.

[00:13:00] William Araiza: We'd be having a very different conversation if the HEROES Act did not exist and if the president were citing some inherent authority that he might have. In a case like that, we would be, you know, basically talking about cases like Youngstown, where the president seeks on pure Article II authority alone. And in this case, I think the intent of Congress in intending a broad grant of authority to the agency is particularly important, is particularly obvious, um, because the language says any provision, waive any provision that he deems necessary to do, uh, to, to waive in connection with a national emergency. Those are very, very broad words. And in particular, the word deem.

[00:13:42] William Araiza: What strikes me as a grant recognition and a grant to the secretary, uh, uh, to use his discretion in deciding when something is necessary or not. The great concern would be that, uh, a contrary decision would constrain the, the choice of means that the agency, in this case the Education Department, could use, uh, uh, uh, to accomplish Congress' goals. And there may be occasions when that kind of limitation is appropriate. The statutory language here does not, uh, suggest that that kind of, that kind of limitation or channeling of this discretion, uh, is what Congress intended.

[00:14:22] Jeffrey Rosen: Other presidents have pursued their agendas through workarounds of inaction in Congress, uh, including Presidents Obama and Trump. The Supreme Court upheld Obama's efforts to shield immigrants from deportation and President Trump's efforts to divert funds to build the wall. Here, the justices seemed more skeptical, um, because of an invocation of, of this, the major questions doctrine. Tell us what the major questions doctrine is, what cases it arises from, and, and why the justices in this case may, may use it to repudiate President Biden's actions.

[00:14:57] Anastasia Boden: The major questions doctrine is the idea that where there's an issue of vast economic and political significance, Congress can have been expected to have given clear authority for the agency to, to legislate on that issue. And this ensures that elected representatives have actually delegated that authority to the agencies, and if not, that those big decisions remain with Congress and our Democratic branch, where it's harder to get things passed, where, you know, our representatives must consider a lot of voices and a lot of things and, and ostensibly have better expertise to do so than administrative agencies, and where these representatives can actually be held accountable compared to administrative agencies.

[00:15:40] Anastasia Boden: So really, it's a doctrine that, as I mentioned earlier, is not only rooted in sort of common sense that if, if you're gonna give a big exercise of authority, we expect you to say so more clearly. But it's also rooted in ideas of individual liberty underlying our Constitution and the separation of powers. So this case has sort of had a resurgence in recent years, primarily among the more conservative justices, where they have, have brought it up, you know, as recently as last year, having to do with the, uh, OSHA vaccine mandate, with the CDC eviction moratorium, with the EPA's creation of a clean power plant and its attempt to restructure our entire energy sector.

[00:16:18] Anastasia Boden: And you see them really wanting to take a closer look where the administrative state is growing and trying to interpret its power more broadly. And I love that quote that you pointed to, Jeff, during our argument from Justice Kavanaugh, because I think it really gets at the heart of the matter here, um, not just with regards to the major questions doctrine, but with regards to constitutional law really. And that's how much should judges be judging, you know? [laughs] How close of a look should they be taking? How closely do we want them getting involved and overriding the, uh, democratically elected branch?

[00:16:52] Anastasia Boden: And, you know, to my mind, I think the judges should, should judge and should take a healthy dose of skepticism to assertions of political power, for several reasons. I mean, because for one, because these actors are self-interested, because they have a tendency, as was written in the *Federalist Papers*, to continuously expand their power, because they're valuable, because political minorities get left out of the process. And so for all of these reasons, I think it's important to, to take a healthy look and not to overly defer to these agencies when they argue that they have the power to act, especially here where they're, uh, enacting a \$400 billion program that's gonna affect, uh, millions of borrowers across the United States. We wanna make sure that they have the power to do so.

[00:17:36] Jeffrey Rosen: Bill, As Anastasia noted, the major questions doctrine has arisen in three important cases before the court, the vaccine mandate case of OSHA, the, the eviction moratorium, and the greenhouse gas emissions restrictions of the EPA. Tell us why you believe that this case is different than those three cases. And given the justices' interest in the major questions doctrine, why do you think that they should not apply it here?

[00:18:04] William Araiza: Sure. So first of all, let me just, you know, s- suggest that, that I don't necessarily disagree with the concept of a major questions doctrine. Indeed, um, as early as 1986, nearly 40 years ago now, uh, Justice Breyer, in talking about the reach of the then recently decided *Chevron* case, uh, uh, suggested something that in some version could be understood as a precursor to the major questions doctrine. The idea that, when *Chevron* deference may be less appropriate when the agency is deciding issues that are not merely interstitial within the statute, but rather kind of borderline issues, uh, that really go to the scope of the agency's authority.

[00:18:51] William Araiza: So as a theoretical matter, there's, you know, it's not completely illogical to insist on something, uh, akin to a major questions doctrine. But this is not that. This is not a case where I think the major questions doctrine necessarily applies. So if, for example, you think about the, um, uh, uh, uh, about the eviction moratorium this is a case where an agency that really had nothing to do with landlord-tenant issues, with housing issues more generally, was using its author-, its public health authority to really do something that was far beyond what the solicitor general called yesterday the agency's wheelhouse.

[00:19:31] William Araiza: In this case, the secretary of education is absolutely acting within, uh, his wheelhouse. Administering the student loan program is exactly what the Department of Education does. And there is nothing unusual or, to use a word from one of the major questions cases, uh, extraordinary, there's nothing extraordinary about the secretary's use of authority in this case. To think, for example, about the West Virginia case, that is to say about the greenhouse

gases case, this was a case where the EPA, uh, was attempting, again, to extend its regulatory authority far beyond the normal understanding of what the Clean Air Act authorized the agency to do more generally.

[00:20:11] William Araiza: Again, this was a case of the agency pushing its regulatory authority, uh, kind of almost in a physical sense, because in that case, there was talk of the so-called fence line, uh, rule that the EPA could regulate sources of pollution but not downstream uses, uh, of the stuff that was created with that pollution. This is not so with the HEROES Act case. This is not a case where the agency is seeking to extend his regulatory authority beyond the heartland of the statute.

[00:20:41] William Araiza: This is a case that involves lots of money. And that's, that's correct. But it cannot be that things that involve lots of money necessarily involve major questions, because this is a very big government that spends lots of money. And, indeed, our brief talks about how much money the secretary of education in past years has, in fact, spent, doing exactly the kind of administration of this statute that's at issue in this case.

[00:21:07] William Araiza: So, the agency is not pushing its authority beyond its core, uh, uh, authority, uh, under the statute. Indeed, it's not pushing its authority beyond its core competence, which is to administer the student loan program. And, uh, the fact that it's simply spending lots of money, uh, does not necessarily make it, uh, a major question. And for those reasons, um, as intuitively appealing it might be to say this must be a major question because it's politically controversial, because it involves lots of money, um, that is really, I think, uh, not a good way of thinking about the major questions doctrine. That would expand the, the doctrine far beyond, uh, its intended and appropriate use.

[00:21:51] Jeffrey Rosen: The fact that it involves a lot of money does not trigger the major questions doctrine. Anastasia, uh, you argue that this argument runs headlong into a key limiting word in the statutory text, necessary. Tell us why you think that the fact that the program is not necessary does trigger the major questions doctrine and, and what you made with the exchange with Justice Gorsuch, who also was focusing on the word necessary.

[00:22:17] Anastasia Boden: Yeah. And, and first, I'll say, in response that the solicitor general also tried to make these distinctions, and this was a big part of oral argument, um, about why the...She basically acknowledged that this is a question of exceptional importance, but it's just not the usual type of exceptional importance that triggers the major questions doctrine, because she really tried to make this program seem narrow, targeted, tied to an emergency. Sure, it's a lot of money, but lots of programs, uh, until a lot of money. And I think that her primary argument was that this is a program that involves economic benefits rather than an exercise of regulatory authority. And I think there was some play there or argument about that.

[00:22:58] Anastasia Boden: But on the other hand, so what? So, what if it's about economic benefits? The same core separation of power concerns applies in both circumstances. And I think this also downplays the incredible effects that benefits programs can have on the economy. Like, yes, they don't involve sort of civil liberties or other things we may usually think of, you know, endangering us that we need more judicial review. But certainly, in our brief, we argue that, uh,

that this, that this program that's supposedly only just a matter of economic benefits is gonna have huge impacts across our economy that are really important to individuals, you know, that this has a tie to inflation, to ever-increasing tuition prices, and that the whole policy is regressive.

[00:23:40] Anastasia Boden: But in terms of why we say this isn't necessary, it's because the statute itself says that the secretary's action must be necessary to keep borrowers from falling into a worse position pre-emergency. And this simply isn't. It's sort of a Rube Goldberg scheme for that because there are so many other lesser intrusive things, less expansive things that the secretary could have done, including trying to channel people into income-based repayment. It could have extended forbearance.

[00:24:09] Anastasia Boden: There was no need to just wipe out the debt entirely in order to help people, uh, repay it. It's a really extreme measure. And so, I think that it's not a narrow targeted measure and it's not, um, something that, that the secretary is used to doing. It's something new. It's something novel. It's, it's an extraordinary use of power. And for that reason, the major questions doctrine does apply.

[00:24:33] Anastasia Boden: And I'll just add, I can't believe we haven't, up until this point in this conversation, used the phrase, um, "Congress doesn't hide elephants in mouseholes," the famous Scalia phrase. And I think the same thing applies here that, that if, if Congress really wanted to allow the secretary to do this, it could have said so, and it could have said so very clearly. But instead, it used this, this vague language that I think it's hard to square with the secretary's actions.

[00:24:57] Jeffrey Rosen: If Congress wanted to do this explicitly, it could have and it doesn't hide elephants in mouseholes. Thank you for using the magic words. Bill, Justice Gorsuch was focusing on the question of whether, um, the HEROES Act allowed borrowers to be, uh, not placed in a worse position financially because of the national emergency, and the question whether the borrowers who benefited here were worse off or better off. What was the exchange like about that?

[00:25:25] William Araiza: Sure. So that has to, that, that has to do with the, frankly, the policy wisdom of the secretary's decision, which, again, is something that it seems from the statutory language is really committed, uh, to the agency's discretion. But with regard to the question of being put in, being in a worse off or a better off position, the, the, the announcement of the loan forgiveness program, uh, was accompanied by analysis that explained that following long periods of forbearance, as was, you know, everyone seemed to agree, was necessary, uh, in light of the pan-, the pandemic's worst phases, that in the aftermath of the end of those forbearance periods, um, lots of borrowers, in, in fact, would encounter serious problems, uh, when it came to restarting their loan obligations.

[00:26:13] William Araiza: This is really common sense. If you haven't had to make loan payments for a very long period, and if you're in a particular economic situation where you simply don't have a lot of spare money floating around, you tend to earmark that money for other commitments. And restarting those obligations, um, especially in a period of high inflation and still significant economic uncertainty, and frankly, still uncertainty about the future trajectory of

the pandemic, um, it's kind of, you know, common sense in some ways to, you know, or at least certainly reasonable, uh, to conclude, um, that not providing this relief would, indeed, place borrowers in a worse position than they would have been otherwise.

[00:26:54] William Araiza: Does it place borrowers in a better position? Well, there may be some people who are. But, of course, Congress explicitly authorized the agency to act on a class basis rather than on a case-by-case relief basis, kind of suggesting that there would naturally be some, you know, either some, uh, um, you know, some, you know, some spilling over into people who don't necessarily technically fit the criterion or some under-spilling in terms of people actually not getting the benefit of the program, uh, who may in fact have needed it in order to avoid being placed in a worse position.

[00:27:29] William Araiza: So, then it was not, you know, it's never gonna be a perfect fit. The statute recognizes that, recognizes that, authorizes the, uh, the agency, uh, to act on a broad class-wide basis. Um, and with regard to the broad class, given the realities of restarting loan payments for people who don't make a lot of money and who haven't had to make the payments in a long time, limited forgiveness, which is what the program provides, is not an unreasonable way of trying to prevent people from being placed in a worse position than before.

[00:28:03] Jeffrey Rosen: Anastasia, General Prelogar responded to this question of worse off or better off by saying that the loan forgiveness program didn't involve the department's regulatory authority at all, but Congress gave the department broad power to provide benefits to borrowers. But Justice Alito was skeptical of her efforts to draw a line between regulatory programs and programs involving benefits. Tell us why and, and whether that exchange was significant.

[00:28:28] Anastasia Boden: Yeah. I think it was, um, because, because Justice Alito and the Chief Justice and Justice Kavanaugh repeated several times the idea that, that the core interest here is the separation of powers. And that interest applies no matter what type of regulatory scheme is, um, being considered. So, sure, this is just a government benefits program. But regardless, um, separation of powers is important and it exists for a reason and it exists to protect our liberty. And regulatory programs can have vast economic consequences for all of us. And so, in reality, this is a distinction with a difference. And I think that was, um, the main response that, that you heard from the justices was, "Okay, that's a distinction, but why should we throw out the major questions doctrine, um, based on that distinction?"

[00:29:15] Jeffrey Rosen: The core concern was separation of powers. Bill, as Chief Justice Roberts was centrally focused on that question we take very seriously, he told General Prelogar the idea that power should be divided among the three branches of government to prevent its abuse. And Chief Justice Roberts said the program reminded him of the Trump administration's effort to end the DREAMers program of the Obama administration. What was General Prelogar's response to Chief Justice Roberts' question about whether she'd recognize that the case presents extraordinarily serious, important issues about the role of Congress and the role we should exercise in scrutinizing that role?

[00:29:54] William Araiza: Sure. Well, I think the response is a relatively straightforward one, which is that this is a case where the agency is acting pursuant to statutory authority. Again, this is not a case where the agency is finding an elephant in a mousehole. If this is a mousehole, it's a pretty big mousehole because it includes words like waive, deem, in connection with, any provision. And so, we care about the separation of powers, we care about the executive branch not taking actions on its own authority, um, that may be spill over into legislative powers. Of course, those are the classic separation of powers cases that we all talk about.

[00:30:35] William Araiza: But this is not that. This is simply a case of the agency using yet again, because it's used this authority in the past, using this authority that Congress clearly gave by the use of clear but broad authorizing language. Now, let me say something about clear and authorizing. So, clear and broad rather. We very often think that any time Congress gives broad authority to the executive branch that that automatically creates a separation of powers problem. And maybe that might be the case if, in fact, we were willing to talk about the nondelegation doctrine.

[00:31:11] William Araiza: But in this case, um, the broad authority is clearly provided for, and it is that clarity that really cures any separation of powers problem here unless you wanna start saying that this is simply not authority that Congress can delegate at all. And I don't hear anyone really saying that. All the conversation was about did Congress actually choose to grant this authority. I think the answer to that is pretty clear. It did. And as a separation of powers matter, that means that the concerns that are reasonable concerns, uh, you know, about executive overreach, those concerns simply don't apply here.

[00:31:48] Jeffrey Rosen: Anastasia, Justice Sotomayor warned that, uh, the Supreme Court was being asked to serve as the third branch of government, changing Congress' words. What was the response to that concern?

[00:32:01] Anastasia Boden: Yeah. And this was something that Justice Ketanji Brown Jackson also reiterated. I thought it was really interesting 'cause she sort of took Chief Justice Roberts' argument and flipped it on its head, whereas Chief Justice Roberts had said, you know, "This is an issue of such importance. Doesn't it truly belong with Congress?" Justice Sotomayor and Justice Jackson said, "Well, if this truly belongs with Congress and/or the political branches, who are we to interfere? Shouldn't we allow Congress to step in if it wanted to?" Because, of course, Congress could step in, right, and, and then do all of this. And so who are we to do?

[00:32:33] Anastasia Boden: And I think the response to that is simply, "Well, judges must step in, um, where they are empowered to do so and where they think that there's a separation of powers violation going along." That's why judges exist. They exist to be counter-majoritarian. They exist to, to undo constitutional violations. And so, um, you know, this, again, this gets to this broader debate of, of where the justices sit in our society that I think is so interesting, and that's sort of lurking underneath all of this. The idea of judicial review, that's, it's one of the most important issues in our constitutional structure that's lurking here. And you have some justices who are more keen to intervene and others who think that there should be deference.

[00:33:15] Anastasia Boden: And for reasons that I've said earlier, you know, I, I happen to believe that there's a lot of reasons to, to take a skeptical look at exercises of power, particularly when they come from unaccountable, um, bureaucrats, uh, rather than Congress, and to make sure that if that power is delegated, that it really was, that that's what Congress intended, that it wasn't just, uh, using some words that are now being, uh, used out of context in order to get what the administration wants, but truly, our Democratic branch understood what was going on and, and wa-, and foresaw that as a possible consequence of its delegation.

[00:33:52] Jeffrey Rosen: Bill, Justice Ketanji Brown Jackson also raised the separation of powers question. Uh, she noted that on one of today's most debated policy questions the justices have to be concerned about jumping into the political fray unless they're doing so in a case in which someone has standing. Well, we've delayed talking about standing until this point in the conversation 'cause it, it tends to be so technical, but it was, it was central here. Tell us what Justice Jackson's concerns about standing were and why she felt that in both cases, and there are two on the table here, there was no standing.

[00:34:28] William Araiza: Sure. So, with regard to the lawsuit brought by the states, uh, the standing focus, centered, on the Missouri Higher Education servicing authority's, uh, standing to sue. Um, and the, the, the concern there, uh, as well as the concern with the private party plaintiffs, Brown and Taylor, uh, the concern is that, um, they don't have have, uh, injury causation and redressability factors. Those factors are not satisfied in the case of those two entities.

[00:35:01] William Araiza: So, it's the state of Missouri that is suing, not the Higher Education Financing Authority. Well, what, what is the injury of the state of Missouri? Well, the injury of the state of Missouri is that, um, because it gets money from this authority, MOHELA, um, maybe if this loan forgiveness means that there were fewer payments made, MOHELA's gonna collect fewer fees, which maybe means that MOHELA is not gonna be able to pay the money that it normally pays to the state, which in turn would cause an injury to the state of Missouri.

[00:35:35] William Araiza: Well, the court in the past has been very, very skeptical of that sort of attenuated causation reasoning as, of course, we all know as we teach our students in the one year, a butterfly can flap its wings in Japan and cause an earthquake in California. That doesn't mean that we would say that there's causation in any legal sense. And I think the state of Missouri's standing argument in the state's case, uh, suffers from the same infirmity.

[00:36:01] William Araiza: With regard to the individual borrowers, uh, my understanding from my read of the, of the oral argument was that, um, even the conservative justices were skeptical, uh, of the standing argument there for a very basic reason, which again goes to injury causation and redressability, in particular redressability, because as best as I could make out, um, the claim made by the individual borrower plaintiffs was that, um, the remedy they want is to have the secretary's action struck down, not that that would benefit them in itself. Indeed, one of the, one of the plaintiffs is actually getting some forgiveness which that plaintiff would lose if, in fact, they get the relief that they want.

[00:36:45] William Araiza: But what they really want, apparently, what they argue would really redress their injury, apparently, is that striking down the secretary's action might persuade the secretary to use a completely separate statutory authority to mount a completely separate program for loan forgiveness that might include both of the individual plaintiffs or might include them more robustly in the case of the one who was already included in the secretary's actual challenge program.

[00:37:14] William Araiza: Boy, that is the butterfly's wings. If that counts as the kind of judicial order that would redress their injury, then basically any plaintiff can argue anything. I could argue that the EPA should stop worrying about, uh, about water pollution because, uh, if you strike down the water pollution, regulations, then maybe this, the administrator will focus more on air pollution and use an entirely separate statutory program to regulate air pollution more. And as an asthmatic, that's something that I care about more. That would give me standing. I don't think I should have standing for that case. I don't think the individual plaintiffs should have standing for that reason.

[00:38:03] Jeffrey Rosen: Bill, we were in the same law school class.

[00:38:05] William Araiza: [laughs]

[00:38:05] Jeffrey Rosen: And I don't remember much about, standing at all from law school, but I do remember that idea that there has to be injury, in fact.

[00:38:12] William Araiza: Yes.

[00:38:12] Jeffrey Rosen: And you so helpfully said that there also has to be causation and redressability. And then you explained why the challengers think there's no traceable causation or redressability of the injury of the state of Missouri. I love that memorable metaphor, a butterfly can flap its wings in Japan and cause an injury in California, and also for the individual borrowers because they're claiming the secretary might hypothetically adopt another program if this one were struck down. Anastasia, we're right in the middle of standing doctrine. Please tell us why the challengers think that there is standing and injury both to the state of Missouri and to the individual borrowers.

[00:38:54] Anastasia Boden: Yeah. Well, at the outset, I'll say, I find the whole thing a little bit frustrating because the administration is, in a way, arguing that almost no one has standing, um, to challenge this law because nobody is injured by not getting a benefit because you're not entitled to that benefit. And I think this is something we see, um, recurring from, uh, both sides of the political aisle. It should be known that very often, people say, you know, "Standing for me, but not for me." The government always wants to say, no matter what kind of administration it is, that plaintiffs don't have standing, because they don't wanna confront the merits.

[00:39:25] Anastasia Boden: And, you know, I just have to full disclosure, I sued the government for 10 years before I, before I joined Cato. And so standing took up a good part of my time. And it's frustrating to me because I think, uh, very, uh, strict standing doctrines prevent plaintiffs from going to court and making, uh, very worthy constitutional claims. And it often becomes a game. There's a lot of gamesmanship that goes on in terms of crafting the statute so

that nobody can challenge it. There's a lot of bad faith. And I think, um, the whole thing is unfortunate because people should be able to go to court and to, to argue that the government has violated the Constitution.

[00:40:06] Anastasia Boden: So, so that's, you know, full disclosure there. What can I say? When a man walks into a room, he brings his whole life with him, right? So, I bring all of my baggage suing the government here when it comes to standing. I'm overly familiar with standing doctrine. But in any event, the argument for the states, uh, is, first, that MOHELA, this is that nonprofit loan servicer, um, created by the state of Missouri to, to service, um, uh, student loans.

[00:40:33] Anastasia Boden: Basically, Missouri argues that it has standing to sue on behalf of MOHELA because MOHELA is going to lose about 40% of its revenue or somewhere thereabouts, um, if all of these loans are forgiven. And so, Missouri says, "Hey, MOHELA is state-created. Um, the state speaks for MOHELA. MOHELA is performing an essential state function. Why can't the state sue in MOHELA's stead?" So that's one argument.

[00:40:58] Anastasia Boden: The second argument is that, um, MOHELA's revenue is going to be reduced and MOHELA has certain financial obligations to the state. And if you take away 40% of MOHELA's revenue, no doubt, that is going to jeopardize, um, its financial obligations to Missouri. And therefore, Missouri has its own injury, um, in the form of this threatened loss of, of revenue from MOHELA. And so, the idea there is that this isn't sort of a butterfly effect. This is really certain. I mean, how certain do you have to be that if MOHELA loses half of its operating revenue, um, its obligations are gonna be jeopardized?

[00:41:36] Anastasia Boden: And, you know, I take the point that there's some speculation that goes into this, but what's the alternative? Do we have to wait until MOHELA actually defaults? I mean, that's, that's a pretty, um, high burden for plaintiffs and it sort of would defeat the whole purpose. By then, all these debts would have been forgiven. They can't be undone. And so the state wants to come into court now based on that future speculative injury. The question is how speculative do you think that it is.

[00:42:02] Anastasia Boden: And then lastly, um, there is this argument about that the, that the states themselves are gonna lose revenue due to these discharges. And that's even more speculative, I would argue. And it didn't really come up at oral argument. I think the, the two main theories that were floating at oral argument and took up a lot of time at argument had to do with MOHELA. And I think that's what it's gonna come down to.

[00:42:24] William Araiza: Jeff, Jeff, uh, can I respond very briefly to a couple of comments that Anastasia made? Um, so, so the first thing I would note, as was made clear during the oral argument, under Missouri law, MOHELA can sue and be sued on its own behalf, and yet it chose not to for whatever reason. The attorneys said, "Well, there were political reasons for that. It seems to me that if you really wanna worry about the injured party being the one to sue, then MOHELA really should have been the one to sue political reasons. Well, you know, I'd be darned."

[00:42:52] William Araiza: I guess the second thing I will say, with regard to the causation chain is this. Let's assume I'm a tenant. And let's assume that as a tenant, I'm paying rent to a landlord. If I'm threatened with a loss of my job, which means that I won't have a lot of money, the theory that I understand states to be, uh, asserting here is that, or at least Missouri, is that, um, the landlord can sue my employer because the employer's action will deprive me, the tenant, of money, which in turn I will be unable to forward to the landlord as my rent.

[00:43:25] William Araiza: Now is that so bad in terms of, you know, actual kind of real-world, "Well, this is kind of the world, the way the world works, it's an interconnected web"? Yeah, I suppose that is the way the world works. We are an in- interconnected web. The butterfly in Japan can, in fact, flap its wings and cause an earthquake in California. That's not standing law. That is not standing doctrine as it's developed over the last 50 years. And, Anastasia, as, you know, having made a career out of, you know, thinking about standing as a plaintiff suing the government, uh, you know, uh, uh, um, you know, of course, uh, of course, uh, of course, knows that.

[00:44:00] Jeffrey Rosen: And, Anastasia, final thoughts on standing?

[00:44:03] Anastasia Boden: Yeah. Um, I guess my final thought would be that the, the liberal justices had asked at oral argument, "Wouldn't it be a huge extension of standing law to, um, rule that there is standing here for the states?" But the conservative justice response was that, "Well, um, there's no precedent really either way." Like, "We haven't ruled either way on this issue. And so, um, you could consider it an extension or you can, can consider it that we just haven't ruled whether there is standing under these circumstances."

[00:44:35] Anastasia Boden: And so, you know, I, I don't necessarily think it would be an extension. I just think it's something that hasn't been considered yet. Um, and in any event, I don't necessarily disfavor an extension of standing law because I think very often, all that we're doing is keeping, uh, uh, worthy claims out of court. Um, and again, this goes to, to both sides of the political aisle. Here, we have a Republican attorneys general, uh, challenging a, a, a Democrat administration's actions, but this also came up with regards to SB 8 in the Heartbeat bill in Texas, where that law was very deliberately designed to evade constitutional challenge. And so, um, it's something that we see repeatedly, uh, in, in the constitutional world and, and something that, you know, I don't, I don't fear a sea change when it comes to standing.

[00:45:23] Jeffrey Rosen: Well, the broad assumption is that the court will find standing here. Uh, Justice Barrett asked some skeptical questions about standing seeming to side with the liberal justices. Um, but if, as commentators seem to expect, the court does find standing and does strike down the program, what is the likely outcome, um, going to be? Uh, how will the Biden administration respond? And how could the case affect other Biden administration programs in the future, including the Consumer Financial Protection Bureau, which the court just agreed to review on constitutional grounds? Bill, what are your thoughts?

[00:46:04] William Araiza: Well, so I'm happy to answer that question with the, with the caveat that, uh, you know, I'm not a, I'm not a political prognosticator by trade. Uh, but, but, but to the extent I can speak to that, you know, policy decisions may... I've never worked in the White

House. Um, but po-, it seems to me that policy decisions are made in the White House with an eye both toward legality, uh, as well as to policy wisdom, uh, as well as to good old-fashioned good politics.

[00:46:30] William Araiza: And so it wouldn't surprise me, uh, if the Biden administration, you know, is able to take a quite possible and some might even say likely loss on this issue at the court, uh, to take it to the people and to say, "Hey, um, this is what we tried to do, um, and we were frustrated by a, you know, conservative Supreme Court." Leave that to the side, uh, what I'd really like President Biden might say in response is I would really like Congress to authorize, uh, th-, uh, this sort of loan forgiveness for all the good policy reasons that we've given, and then we have a political discussion about that.

[00:47:04] William Araiza: A policy discussion about that and a political discussion about that. I wanna separate those two out because they're distinct. But, I mean, I'm not saying the Biden administration would welcome a loss. No, I don't think any administration welcomes a loss. On the other hand, there's lemonade to be made when an administration is handed lemons. And I think that that's, they will try to make lemonade.

[00:47:23] William Araiza: Um, now, you had asked about the CFPB. I'll just say really, really quickly, I think the CFPB is an even more popular cause, uh, than student loan forgiveness. And if the CFPB's funding is struck down, and therefore the agency is crippled, then I think that's e-, an even more, uh, frankly, you know, an even bigger political gift to the administration than the student loan issue on which there is, indeed, some political controversy on about the fairness of the forgiveness program.

[00:47:48] Jeffrey Rosen: Anastasia, what are your thoughts about the Biden administration's likely response and the significance of a ruling against the administration for other cases involving the administrative state, including the Consumer Financial Protection Bureau?

[00:48:02] Anastasia Boden: Well, it's, it's nice to end the, the podcast on a note where we can agree. And I, I happen to agree that the administration will try to make lemons into lemonade here. I will say that at my former employer, Pacific Legal Foundation, we had a lawsuit challenging this program and we were kicked on, no surprise, standing. And from my experience being at PLF, I will say that out of all the cases that we do, people got the most worked up that I've ever seen about this case.

[00:48:29] Anastasia Boden: There was a lot of dissatisfaction with our having brought this case, a lot of disagreement. Um, people are really, really, really energized. And so in a way, even a loss might be a win for the Biden administration when it comes to loan forgiveness because he can use that to rally the base and to perhaps, you know, if not use this just generally in the election to get broader loan relief. So, so we'll see what happens there.

[00:48:52] Anastasia Boden: In terms of what this means, what a, what a bad decision would mean moving forward for the administration, it would be one more decision where the court is really showing its commitment to separation of powers doctrine. Conservative justices tend to say that justices should be humble, that they shouldn't get involved, that they should, you know,

show restraint. But this is one area of law where they've shown a lot of willingness to step in and enforce the Constitution. And so I think it would be a real signal to the administration that, that it needs to abide by the separation of powers and make sure that the proper, each branch is, is staying to its proper role.

[00:49:32] Jeffrey Rosen: I'm so grateful to both of you for a superbly civil, really illuminating, and extremely informative discussion of the debt forgiveness case. Um, Bill Araiza, Anastasia Boden, thank you.

[00:49:46] William Araiza: Thank you, Jeff.

[00:49:47] Anastasia Boden: Thanks.

[00:49:49] Jeffrey Rosen: Today's episode was produced by Sam Desai, Bill Pollock, Lana Ulrich, and Julia Redpath. It was engineered by Dave Stotz. Research was provided by Liam Kerr, Emily Campbell, and Sophia Gardell. Please recommend the show to friends, colleagues, or anyone anywhere who is eager for a weekly dose of constitutional debate. And always remember that the National Constitution Center is a private nonprofit. We rely on the generosity, the passion, the engagement of people from across the country who are inspired by our nonpartisan mission of constitutional education and debate. Support the mission by becoming a member at constitutioncenter.org/membership, or give a donation of any amount to support our work, including the podcast, at constitutioncenter.org/donate. On behalf of the National Constitution Center, I'm Jeffrey Rosen.