VOLUME 77 ◆ NUMBER 8

Employee Benefit Plan Review

# What Do Cancelling Student Loan Debt and Banning Noncompetes Have in Common? The U.S. Supreme Court's Recent Student Loan Decision May Reveal How it Would Rule on the Federal Trade Commission's Proposed Noncompete Ban

By Erik W. Weibust

The U.S. Supreme Court's decision last year in *West Virginia v. EPA* made it clear that the Federal Trade Commission (FTC) does not have the authority to use its rulemaking powers to ban (or otherwise regulate) noncompetition agreements because it does not have "clear congressional authorization" to do so.

Now, the Supreme Court's decision in *Biden v. Nebraska*,[1] striking down the Biden administration's student loan forgiveness plan, further confirms that the Supreme Court would likely strike down any noncompete rule promulgated by the FTC under the so-called Major Questions Doctrine.

In *Biden v. Nebraska*, the Court considered a plan established by the U.S. Secretary of Education (the Secretary) that "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," pursuant to the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act). The HEROES Act was passed in the aftermath of the September 11, 2001 terrorist attacks and permits 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*."[2] The Biden administration argued that the COVID-19 pandemic was a national emergency that permitted the Secretary to cancel billions of dollars in student debt under the HEROES Act.

## The Court's Decision

The Supreme Court rejected that argument and struck down the debt forgiveness plan. In addition to holding that the text of the HEROES Act did not authorize the loan forgiveness plan, the Court concluded that the Secretary did not have "clear congressional authorization" under the HEROES Act to

enact the plan. In so doing, the Court hearkened back to its 2022 decision in *West Virginia v. EPA* in which it set forth the parameters of the Major Questions Doctrine (with apologies for the lengthy block quote, although the context is important) to hold that the case did not involve whether the agency made the right policy but whether it had the right to make such a policy:

> *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. 597 U. S. ___ (2022). 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] ha[d] 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." Id.*, at ___ (slip op., at 17) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 159–160 (2000); first alteration in original). . . . Under the Government's reading of the HEROES Act, the Secretary would enjoy virtually unlimited power to rewrite the Education Act. This would "effec[t] a 'fundamental revision of the statute, changing it from [one sort of] scheme of . . . regulation' into an entirely different kind," *West Virginia*, 597 U.S., at ___ (slip op., at 24) (quoting *MCI*, 512 U.S., at 231) – 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." 20 U.S.C. §1098ee(2)(D). The "'economic and political significance'" of the Secretary's action is staggering by any measure. *West Virginia*, 597 U.S., at ___ (slip op., at 17) (quoting *Brown & Williamson*, 529 U.S., at 160). 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. App. 108. That is ten times the "economic impact" that we found significant in concluding that an eviction moratorium implemented by the Centers for Disease Control and Prevention triggered analysis under the major questions doctrine. *Alabama Assn.*, 594 U. S., at ___ (slip op., at 6). It amounts to nearly one-third of the Government's $1.7 trillion in annual discretionary spending. Congressional Budget Office, The Federal Budget in Fiscal Year 2022. *There is no serious dispute that the Secretary claims the authority to exercise control over "a significant portion of the American economy." Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014) (quoting *Brown & Williamson*, 529 U.S., at 159).
>
> *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. West Virginia*, 597 U.S., at ___ (slip op., at 27). *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.* M. Kantrowitz, Year in Review: Student Loan Forgiveness Legislation, Forbes, Dec. 24, 2020.8 *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."* J. Stein, Biden Student Debt Plan Fuels Broader Debate Over Forgiving Borrowers, *Washington Post*, Aug. 31, 2022.

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 "[i]magine asking the enacting Congress: Can the Secretary use his powers to give borrowers more relief when an emergency has inflicted greater harm?" *Post*, at 27–28. The dissent "can't believe" the answer would be no. *Post*, at 28. 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 "res[t] with Congress itself, or an agency acting pursuant to a clear delegation from that representative body." West Virginia*, 597 U.S., at ___, ___ (slip op., at 28, 31) (quoting *Gonzales v. Oregon*, 546 U.S. 243, 267–268 (2006)). . . . The dissent insists that "[s]tudent loans are in the Secretary's wheelhouse." *Post*, at 26 (opinion of KAGAN, J.). But in light of the sweeping and unprecedented impact of the Secretary's loan forgiveness program, it would seem more accurate to describe the program as being in the "wheelhouse" of the House and Senate Committees on Appropriations. Rather than dispute the extent of that impact, the dissent chooses to mount a frontal assault on what it styles "the Court's made-up major questions doctrine." *Post*, at 29–30. But its attempt to relitigate *West Virginia* is misplaced. As we explained in that case, while the major questions "label" may be relatively recent, it refers to "an identifiable body of law that has developed over a series of significant cases" spanning decades. *West Virginia*, 597 U.S., at ___ (slip op., at 20). . . .

In *King v. Burwell*, 576 U.S. 473 (2015), we declined to defer to the Internal Revenue Service's interpretation of a healthcare statute, explaining that the provision at issue affected "billions of dollars of spending each year and . . . the price of health insurance for millions of people." *Id.*, at 485. *Because the interpretation of the provision was "a question of deep 'economic and political significance' that is central to [the] statutory scheme," we said, we would not assume that Congress entrusted that task to an agency without a clear statement to that effect. Ibid.* (quoting *Utility Air*, 573 U.S., at 324). That the statute at issue involved government benefits made no difference in *King*, and it makes no difference here. All this leads us to conclude that "[t]he basic and consequential tradeoffs" inherent in a mass debt cancellation program "are ones that Congress would likely have intended for itself." *West Virginia*, 597 U.S., at ___ (slip op., at 26). In such circumstances, we have required the Secretary to "point to 'clear congressional authorization'" to justify the challenged program. *Id.*, at ___, ___ (slip op., at 19, 28) (quoting *Utility Air*, 573 U.S., at 324). *And as we have already shown, the HEROES Act provides no authorization for the Secretary's plan even when examined using the ordinary tools of statutory interpretation—let alone "clear congressional authorization" for such a program.*[3]

## Analysis

There are several key points in this decision that one could apply to the FTC's proposed noncompete rule. To be sure, as the Court wrote, "[t]he question . . . is not whether something should be done" about noncompetes – that is certainly open to debate, and is being vigorously debated in state legislatures across the country – but rather "who has the authority to do it." There is little dispute that Congress could pass legislation regulating noncompetes if appropriately crafted. Indeed, there are currently five separate bills pending in Congress that would do just that.

Nor is there really any question that state legislatures may do so, provided they abide by the U.S. Constitution's Contract Clause – they have done so for over 200 years, and have been particularly active in this space over the past decade or so. The question is whether the FTC has the authority to do so, and under *West Virgina v. EPA*, and now *Biden v. Nebraska*, it seems likely that the Supreme Court would determine that it does not, because the FTC does not have "clear congressional authorization" to regulate noncompetes.

To begin, "[t]here is no serious dispute that the [FTC] claims the authority to exercise control over 'a significant portion of the American economy,'" as the Court wrote in *Biden* v. Nebraska. Indeed, the FTC itself estimates[4] that "noncompete clauses bind about one in five American workers, approximately 30 million people," and that "the proposed rule could increase workers' earnings across industries and job levels by $250 billion to $296 billion per year" (although the Minnesota Federal Reserve recently issued a report[5] finding that those numbers are far lower).

Moreover, just as in *West Virginia v. EPA*, and now as the Court wrote in *Biden v. Nebraska*, "[t]he [FTC]'s assertion of administrative authority has 'conveniently enabled [it] to enact a program' that Congress has chosen not to enact itself," and to does so even though "Congress is not unaware of the challenges facing" employees subject to noncompetes. As noted above, there are currently five bills pending in Congress that would limit, if not outright ban, noncompetes, and no fewer than eighteen (18) noncompete bills have been introduced by federal legislators from both political parties since 2015. Yet Congress has chosen not to enact any of those bills.

Likewise, "'[a] decision of such magnitude and consequence' on a matter of 'earnest and profound debate across the country' must 'res[t] with Congress itself, or an agency acting pursuant to a clear delegation

from that representative body.'" Whether, and to what extent, noncompetes should be permissible, and to what extent, is undoubtedly a "matter of earnest and profound debate across the country," as evidenced not only by the myriad stories in the media covering the issue (often focusing on outlier cases), but more importantly in the debates raging in state legislatures across the country. Indeed, in 2022 alone, no fewer than 98 noncompete bills were introduced in 29 state legislatures, and already this year 84 bills have been introduced in 33 state legislatures. Indeed, the Minnesota legislature banned noncompetes effective July 1, 2023, and the New York legislature passed legislation that would do the same if signed by the governor.

## Conclusion

At bottom, no matter whether the FTC issues a final rule identical to the proposal, or in some altered or less-expansive form, the final rule will immediately be challenged in court, most likely by the U.S. Chamber of Commerce[6] (if not others). Once that happens, a nationwide injunction barring its implementation will likely issue, which will be followed by years-long litigation that ultimately is expected to end up before the Supreme Court.

If the current composition of the Supreme Court remains unchanged, the Court's recent decisions suggest it would probably strike the rule down under the Major Questions Doctrine, as laid out in its decision last year in *West Virginia v. EPA*, and again just last week in *Biden v. Nebraska*.

## Notes

1. *Biden v. Nebraska*, No. 22-506 (U.S. June 30, 2023).
2. 20 U.S.C. §1098bb(a)(1) (emphasis added).
3. Id. (emphasis added; footnotes excluded).
4. https://www.ftc.gov/system/files/ftc_gov/pdf/noncompete_nprm_fact_sheet.pdf.
5. https://www.minneapolisfed.org/article/2023/new-data-on-non-compete-contracts-and-what-they-mean-for-workers#_ftnref5.
6. https://www.wsj.com/articles/chamber-of-commerce-will-fight-ftc-lina-khan-noncompete-agreements-free-markets-overregulation-authority-11674410656.

**The author, a member of Epstein Becker & Green, P.C., may be contacted at eweibust@ebglaw.com.**