For the Third Time, the Roberts Court Rescues Obamacare

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For the third time under Chief Justice John Roberts, the Supreme Court has rejected an existential challenge to the Affordable Care Act, the health care law commonly known as Obamacare. In a 7–2 decision released today, the Court ruled that the challengers—a group of red-state attorneys general who argued that the entire law should be struck down—did not have standing to sue.

The case, at heart, was essentially an elaborate legal troll of Roberts, built on nearly a decade's worth of tortured legal reasoning and statutory gymnastics. Much of that history came into play in today's ruling.

Following the passage of Obamacare in 2010, the law faced its first major Supreme Court challenge, focused in part on the individual mandate, which challengers argued was unconstitutional because, under the Constitution's Commerce Clause, Congress could not require individuals to engage in commerce.

Roberts ruled that the health law's individual mandate provision, which at the time imposed a penalty for failing to carry sufficiently robust health insurance, was constitutional—but only as an exercise of the tax power, not as a command. Essentially, Roberts ruled that Congress couldn't *command* people to maintain health coverage, but it could *tax* them for failing to do so. It was, to put it mildly, a fine distinction.

That distinction, however, became relevant following the passage of the Tax Cuts and Jobs Act, a Republican bill that largely cut taxes, in 2017. Republicans aimed to eliminate the mandate, but because of the rules of the reconciliation process used to pass the tax bill, they settled for zeroing out the penalty—the tax—instead. That left Obamacare with a mandate that imposed no penalty for noncompliance. Technically, it was still on the books, but it was entirely toothless.

As a result, a group of red-state attorneys general, led by Texas, challenged the provision, arguing that a mandate that was only constitutional as a tax could no longer stand if there was no penalty for noncompliance. The essential feature of a tax is that it raises some amount of money; a mandate without a penalty was no tax at all. This part of the argument was, in my view, essentially sound.

But the red-state attorneys general took the argument even further, taking some signing statements affiliated with the original 2010 statute that said the mandate was an essential feature of the law, to claim that without the mandate, the whole law must fall. There was something somewhat amusing about this part of the argument, in that it attempted to take Roberts' original decision upholding the health law and flip it around into an argument for taking down the law. If nothing else, it was an attempt to force Roberts to reckon with his own too-clever ruling.

But the underlying argument was deeply flawed. The signing statements from the law's 2010 passage didn't have any bearing on the post-2017 law. By zeroing out the mandate penalty, Congress was in fact quite clear about its intentions, and its belief that the law could stand without a functioning mandate. Even if the zero-dollar mandate was unconstitutional, the rest of the law could still stand.

Even some of the fiercest critics of Obamacare have rejected the Texas-led argument. Notably, Cato Institute Health Policy Studies Director Michael F. Cannon and Case Western Reserve University Law Professor Jonathan Adler, whose work informed a previous Supreme Court challenge to the case, thought it didn't stand up to scrutiny.

There was another wrinkle, too. How could a nonexistent penalty result in harm? The toothless mandate caused no obvious injury to anyone. Without harm, there was no clear legal standing to sue. A law has to have some effect for it to be the subject of a challenge; the zeroed-out mandate had none. Yet in the original suit, two Texas consultants claimed they felt compelled by the mandate. As University of Michigan Law Professor Nicholas Bagley wrote in 2018, "There is no good legal argument for thinking that two guys from Texas have standing to challenge a law that doesn't require them to do anything."

The states, meanwhile, argued that the toothless mandate would somehow cause more people to enroll in state health insurance programs, adding to their fiscal burden. Once again, it wasn't clear how a mandate with no penalty for noncompliance would result in behavior changes. As Cato's Cannon wrote in 2019, "Since Congress zeroed out the mandate penalty, the mandate no longer injures anyone. Indeed, there is no longer a use of governmental power for plaintiffs to challenge."

Several lower court judges accepted parts of the challengers' arguments anyway, with one ruling that the law should be struck down entirely. Over the last several years, the case has proceeded through the system, finally landing at its inevitable stopping point, the Supreme Court.

Despite loud warnings from prominent Democrats that the health law's future was at stake, it was relatively clear, after last year's oral arguments, that the Supreme Court wouldn't buy into the bulk of the challengers' case.

As it turns out, the High Court chose not to reckon with the deeper arguments in play at all. Instead, four GOP-appointed justices—John Roberts, Clarence Thomas, Brett Kavanaugh, and Amy Coney Barrett—joined Democratic appointees Sonia Sotomayor, Elena Kagan, and Stephen Breyer, who penned the ruling, in rejecting the case on standing grounds.

The original Texas duo who challenged the law, Breyer writes, don't have standing to challenge the mandate "because they have not shown a past or future injury fairly traceable to defendants' conduct enforcing the specific statutory provision they attack as unconstitutional." There is no penalty for noncompliance, and therefore the mandate is "unenforceable." Similarly, Breyer says,

the states failed to prove that an unenforceable mandate would result in additional sign-ups to state health programs: "Neither logic nor evidence suggests that an unenforceable mandate will cause state residents to enroll in valuable benefits programs that they would otherwise forgo."

In some ways, this was the least interesting possible way for this case to resolve: no standing. No case. The end.

But there is at least some element of intrigue here in the open disagreements between the Court's conservatives. In a dissent written by Justice Samuel Alito and joined by Justice Neil Gorsuch, Alito calls the decision "the third installment in our epic Affordable Care Act trilogy" and says that, once again, with the health law in jeopardy, "the Court has pulled off an improbable rescue." Alito accuses the Court of punting on the core constitutional issues around the taxing power, writing that "instead of defending the constitutionality of the individual mandate, the Court simply ducks the issue."

To which Thomas replies, in a concurrence, that the Court's responsibility is to the specifics of the case: "Whatever the Act's dubious history in this Court, we must assess the current suit on its own terms. And, here, there is a fundamental problem with the arguments advanced by the plaintiffs in attacking the Act—they have not identified any unlawful action that has injured them…Today's result is thus not the consequence of the Court once again rescuing the Act, but rather of us adjudicating the particular claims the plaintiffs chose to bring."

This is notable since Thomas has previously voted to strike down the health law, and indeed he ends his concurrence by noting that the previous Supreme Court decisions were mistakes. "The plaintiffs failed to demonstrate that the harm they suffered is traceable to unlawful conduct. Although this Court has erred twice before in cases involving the Affordable Care Act, it does not err today." Obamacare remains bad policy in many ways, but this was a bad case, and so I am inclined to agree.