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## **Analysis: Supreme Court's conservatives duck 'big waves' as storms loom**

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June 18, 2021

Even with a 6-3 conservative majority, the U.S. Supreme Court has its limits.

With two rulings on Thursday, June 17, the court added a note of moderation to what has been a rightward shift since the arrival of three Donald Trump appointees. The court rejected the latest Republican attack on the Affordable Care Act and gave religious-rights advocates only a narrow victory in a clash over Philadelphia's foster-care program and same-sex parents.

Together, the rulings mean the court potentially will close out Justice Amy Coney Barrett's first term with no watershed conservative victories. Although the court still has 15 remaining cases, including a clash over the Voting Rights Act, the term's theme so far has been more incrementalism than revolution.

Whether that trend continues is another matter. The court under Chief Justice John Roberts has already scheduled showdowns over abortion and gun rights for the nine-month term that starts in October. The abortion case could gut the landmark 1973 *Roe v. Wade* ruling.

"What we saw today is the product of several justices — the chief justice among them — working to build consensus and avoid making big waves," said Allison Orr Larsen, a professor and director of the Institute of the Bill of Rights Law at William & Mary Law School. "This may be a short-lived strategy, though, given the hot-button cases already on the docket for next term."

The Affordable Care Act was the biggest potential prize for conservatives looking for a legal trophy after Trump's appointment of Barrett, Brett Kavanaugh and Neil Gorsuch. States led by Texas contended a 2017 tax change, passed by a Republican-controlled Congress, was enough to unravel the entire law, also known as Obamacare.

The change eliminated the penalty for noncompliance with the so-called individual mandate to acquire insurance. The penalty had been pivotal in 2012 when the Supreme Court upheld the law as a legitimate use of Congress' constitutional taxing power.

**Questionable case**

Even some conservatives saw the attack as an especially weak one. In seeking to invalidate the whole law, Texas was asking the court do something that Congress itself wasn't willing to do, even with Republicans in control.

"The question was never whether Texas would lose but how," said Jonathan Adler, a law professor at Case Western Reserve University School of Law.

The rejection came in the form of a 7-2 decision that said the challengers, which included two individuals, lacked the legal right to sue because they hadn't shown they were injured by the now-toothless individual mandate.

Liberal Justice Stephen Breyer wrote the majority opinion, an assignment that under the court's normal practices came from Roberts. The majority included Trump appointees Kavanaugh and Barrett, as well as conservative stalwart Clarence Thomas.

During her confirmation hearing in October, Senate Democrats tried to cast Barrett as a potential vote to invalidate Obamacare.

"Anyone who was hoping or fearing that this would finally be the time the court struck down Obamacare, they were either misunderstanding or being disingenuous," said Ilya Shapiro, vice president of the libertarian Cato Institute. It should end the "demagoguery that was thrown at Amy Coney Barrett at her confirmation hearings that she was supposedly appointed to take health care away from poor people."

### **Compromise ruling**

The foster-care ruling bore signs of a compromise. The court ruled unanimously that Philadelphia violated the Constitution when officials excluded Catholic Social Services from part of the city's foster-care program because the group wouldn't help place children with same-sex couples.

Writing for six justices, Roberts pointed to a provision in Philadelphia's foster-care contracts that gives a city official discretion to waive its anti-discrimination requirements. Roberts said the provision meant those rules were constitutionally suspect because they weren't "generally applicable."

Roberts' opinion was narrow enough to attract the votes of the court's three liberals — Breyer, Sonia Sotomayor and Elena Kagan — as well as Kavanaugh and Barrett.

It also left some of his more conservative colleagues frustrated. Justice Samuel Alito said Philadelphia could circumvent the ruling by dropping the exemption language from its contracts. "If it does that, then, voila, today's decision will vanish — and the parties will be back where they started," Alito wrote in an opinion joined by Gorsuch and Thomas.

Gorsuch was equally unsparing toward Roberts' reasoning. "From start to finish, it is a dizzying series of maneuvers," he wrote in a separate opinion for the three conservatives.

The three indicated they would overrule a 1990 decision that said the government can enforce generally applicable laws without making an exception for religious groups. That ruling, though written by conservative Justice Antonin Scalia, has become a prime target of religious-rights groups.

In a separate opinion, Kavanaugh and Barrett expressed doubts about the 1990 decision but said the court didn't need to address it to resolve the Philadelphia case.

Liberals also got a consolation prize Thursday when the court gave companies a broader shield against lawsuits by victims of overseas atrocities. The court said the allegations in the case — accusing Nestle SA's U.S. unit and Cargill Inc. of complicity in the use of child slavery on Ivory Coast cocoa farms — lacked enough of a U.S. connection to go forward.

But five justices also indicated they read the 1789 Alien Tort Statute as allowing lawsuits against U.S. corporations, implicitly rejecting a separate line of argument Nestle and Cargill had made.

The court is scheduled to issue more opinions on Monday, Wednesday and Friday next week and finish its term the following week. In addition to the Voting Rights Act, the court will rule on school speech, union rights, compensation for college student-athletes, a securities-fraud case against Goldman Sachs Group Inc., the constitutionality of a patent review board and a high-stakes lawsuit by Fannie Mae and Freddie Mac shareholders.

A week from now, "maybe things look different," Shapiro said.