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NCLA *Amicus* Brief Challenges Congress’ Brazen Gambit to Seize State Governments’ Taxing Authority

State of Ohio v. United States Department of the Treasury, et al.

Washington, DC (May 27, 2021) – Never before in the history of the United States has Congress conditioned the receipt of federal funds on state governments’ surrendering inherent and core sovereign taxing powers. As NCLA’s brief puts it, “a Founder who suggested that Congress’ Spending Power meant it could purchase from states the authority to oversee state spending and budgets would have been laughed out of Philadelphia—if not tarred and feathered.”

[The American Rescue Plan Act of 2021 \(ARPA\)](#), enacted on March 11, 2021, includes a constitutionally alarming provision—the “Tax Cut Ban”—which impermissibly seizes taxing authority from every state. The New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group, filed an [amicus curiae brief](#) in the U.S. District Court for the Southern District of Ohio, arguing that the ambiguity at the heart of ARPA cannot be cured by the Department of Treasury’s new guidance seeking to clarify the parameters of the Tax Cut Ban.

ARPA offers state governments approximately \$195 billion to assist with recovery from the economic damage inflicted by the Covid-19 pandemic. The much-needed funds, collected from taxpayers across the country, are only available under ARPA to those states that agree not to use the funds “to either directly or indirectly offset a reduction in the net tax revenue.” The Department of Treasury can claw back every dollar used for such an offset. This provision, which is intended to deter states from reducing their taxes, flunks the Constitution’s requirement that Congress spell out clear conditions for state aid. The District Court has already declared that it “has no idea what an ‘indirect offset’ to net tax revenues may be.”

In response to the District Court ruling, Treasury issued an [Interim Final Rule](#) that purports to supply the missing clarity. Yet, the 150-page document actually sows greater confusion by mandating an overly complicated and burdensome scheme whereby each state is required to calculate and report the tax and spending effects of every new law, regulation, or administrative interpretation, so Treasury can decide whether to penalize the state. In other words, Treasury conferred on itself power to second-guess every single state government fiscal decision, backed up with the threat of financial sanction. The Constitution does not allow Treasury to wield such boundless power, and the Interim Final Rule, issued in an effort to save the Tax Cut Ban’s constitutionality, is therefore itself unconstitutional.

NCLA argues, in this case and in an [amicus curiae brief](#) filed in *State of West Virginia, et al. v. United States Department of the Treasury, et al.*, that the conditions of the Tax Cut Ban are ambiguous and breathtakingly broad. Further, the power of the state governments to tax or not to tax is a core attribute of state sovereignty. Congress cannot coerce states into surrendering taxing powers, especially with a heavy-handed offer-a-state-can’t-refuse for federal pandemic relief funds. The U.S. District Court for the Southern District of Ohio should declare the Tax Cut Ban unconstitutional, enjoin its enforcement, and set aside the Interim Final Rule as unlawful.

NCLA released the following statements:

“The Tax Cut Ban is a constitutionally prohibited condition on spending. Congress has delegated powers to Treasury that it could never enact in a statute—essentially the right to serve as dictator, arbiter, auditor and adjudicator of state fiscal and tax policy. The Tax Cut Ban’s provisions offend state sovereignty, federalism and anti-commandeering principles, the Constitution’s guarantee of a republican form of government and the Tenth Amendment, and it should be declared unconstitutional for these reasons.”

— **Peggy Little, Senior Litigation Counsel, NCLA**

“The Interim Final Rule is a fig leaf that cannot save the Tax Cut Ban from invalidation. One would have thought it impossible to make the Tax Cut Ban any more ambiguous than it already was. But the Interim Final Rule manages to worsen the statute’s clarity in multiple ways. Treasury offers up a black box of loopholes that would let it usurp core state taxing powers and shred the Constitution.”

— **Sheng Li, Litigation Counsel, NCLA**

For more information visit the case page [here](#).

ABOUT NCLA

[NCLA](#) is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar [Philip Hamburger](#) to protect constitutional freedoms from violations by the Administrative State. NCLA’s public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans’ fundamental rights.

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