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NCLA Files Comments Deeming Treasury’s “Tax Cut Ban” Final Rule Opaque and Unconstitutional

Interim Final Rule – Coronavirus State and Local Fiscal Recovery Funds, 31 CFR Part 35

Washington, DC (July 15, 2021) – The U.S. Department of Treasury’s [Interim Final Rule](#) (IFR) implementing the “Tax Cut Ban” provision of the [American Rescue Plan Act of 2021](#) (ARPA) is unconstitutional, NCLA warns in [comments](#) filed today. ARPA offers approximately \$195 billion to states and their residents to assist with economic recovery from the Covid-19 pandemic, but only on the condition that the states accept the Tax Cut Ban provision of the bill that prohibits reducing state taxes.

The New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group, argues that the IFR is dead on arrival because the Tax Cut Ban the rule purports to interpret is itself unconstitutionally ambiguous, coercive, and not reasonably related to ARPA’s purposes. Furthermore, Treasury lacks the legislative authority needed to cure these unconstitutional defects.

The Final Rule mandates a complicated and burdensome regulatory scheme whereby each state is required to calculate and report the tax and spending effects of every new law, regulation, or administrative interpretation. This requirement turns state officials into federal bean counters. As a condition of acceptance, a state must agree not to use ARPA relief funds “to either directly or indirectly offset a reduction in the net tax revenue of such State ... resulting from a change in law, regulation, or administrative interpretation ... that reduces any tax.”

ARPA authorizes Treasury to claw back any funds spent in violation of the Tax Cut Ban. Recognizing the inherent ambiguity in the provision, in May 2021 Treasury published an IFR in the Federal Register that purports to interpret the abstruse ban on tax cuts. The Final Rule states that Treasury would consider all “facts and circumstances” it deems relevant to determine the amount to recoup, if any. The power the IFR confers onto Treasury to determine if and to what extent a state tax cut has been “paid for” using ARPA funds renders Treasury’s system a black box so opaque no state or citizen could decipher its meaning. Instead of curing the statute’s original constitutional defect, the IFR exacerbates the ambiguity problem.

Several states have challenged the Tax Cut Ban in federal courts around the country. Earlier this month, the U.S. District Court for the Southern District of Ohio Western Division became the first to [rule](#) that Treasury, the agency responsible for enforcing aspects of ARPA, could not enforce the Tax Cut Ban provision against the State of Ohio. The Court also rejected Treasury’s Interim Final Rule. In his ruling, United States District Court Judge Douglas Cole concluded that the Tax Cut Ban, as written, falls short of the clarity required for Congress to impose spending conditions under the Constitution. He also concluded that Congress never delegated Treasury power to issue regulations interpreting the Tax Cut Ban in the first place.

ARPA may sound good by offering funds to be expended by the states on a wide range of pandemic-related purposes, including responding to “negative economic impacts” by providing “assistance to households, small businesses, and nonprofits, or aid to impacted industries, such as tourism, travel, and hospitality.” But tax relief is one of the most obvious and direct means of providing such assistance to targeted groups. Prohibiting states

from providing tax-relief assistance is not merely unrelated to ARPA’s core purpose; it actively undermines it. NCLA is confident the courts will reject the federal government’s attempt to monopolize the ability to cut taxes while denying that same policy tool to state governments that operate closer to the people.

NCLA released the following statements:

“Treasury cannot wield unconstitutional power to cure the Tax Cut Ban’s underlying constitutional infirmities. Two wrongs do not make a right. Dressing up the Tax Cut Ban in fancy regulatory tax jargon in a rule many times the size of the statutory provisions it’s built on can’t cure the Tax Cut Ban’s fatal flaws.”

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

“Congress’ unprecedented incursion on state sovereignty and federalism cannot be saved by Treasury’s rule—which only compounds the constitutional injury. Americans elect state lawmakers to determine state fiscal policy, which can never be lawfully surrendered to federal bureaucrats conjuring up a rule that presumes to set the terms of such power.”

— **Peggy Little, Senior 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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