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Eleventh Circuit Court of Appeals Holds Congress’ State Tax Cut Ban Unconstitutional, in NCLA Win

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

Washington, DC (January 20, 2023) – The Eleventh Circuit handed down a [ruling](#) today in *West Virginia v. U.S. Department of the Treasury*, upholding the district court’s decision to permanently enjoin the Secretary of the Treasury from enforcing a “Tax Cut Ban” against the 13 states that sued her: West Virginia, Alabama, Alaska, Arkansas, Florida, Iowa, Kansas, Montana, New Hampshire, Oklahoma, South Carolina, South Dakota, and Utah. The ruling marks NCLA’s second *amicus* win on appeal—following [Commonwealth of Kentucky and State of Tennessee v. Janet Yellen, et al.](#)—in lawsuits contesting Congress’s attempt to usurp state taxing authority.

On March 11, 2021, President Biden signed the American Rescue Plan Act (ARPA) into law, allocating nearly \$200 billion to states, purportedly to mitigate the fiscal effects of the Covid-19 pandemic. But Congress attached an historically unprecedented condition on receiving these funds: states must surrender their core taxing power. A provision in ARPA, the Tax Cut Ban, prohibits states from using funds “to either directly or indirectly offset a reduction in the net tax revenue ... 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.

In the unanimous panel ruling, Judge Andrew L. Brasher first ruled that the states had standing to challenge ARPA’s ban on direct or indirect reduction of state taxes. He then held that “the condition imposed by the offset provision is not sufficiently ascertainable” to pass constitutional muster. Noting that “money is fungible,” the Eleventh Circuit panel highlighted that the offset provision does not include a baseline standard or benchmark, so state policymakers are in the dark in determining whether their state reduced net tax revenue and what would trigger a federal clawback. NCLA’s [amicus curiae brief](#) argued that the ambiguous and indeterminate condition (forbidding taxation policy that directly or indirectly lowers taxes), made the Tax Cut Ban fatally unconstitutional.

NCLA’s brief further argued that Treasury lacked the power to “rule by regulation” when it later promulgated a rule seeking to clarify and thereby save the scheme. An agency cannot exercise legislative power independently of Congress, which alone has the power to tax and spend—not the Executive Branch. So, the court agreed with NCLA that Treasury is not permitted to clarify the Tax Cut Ban’s ambiguous text through regulation. Finally, the panel highlighted that the novelty and grand scope of the Tax Cut Ban “make it even more important that Congress speak with a clear voice,” and said that Congress cannot craft a deal with only *some* of the strings attached. NCLA commends the U.S. Court of Appeals for the Eleventh Circuit for safeguarding states’ sovereign taxing authority.

NCLA released the following statements:

“With admirable clarity, the unanimous panel has preserved state fiscal autonomy essential to Americans’ self-governance. Further, the court rejected Treasury’s attempt to save this unprecedented federal power grab by arrogating authority to ‘rule by regulation.’ Lawmaking power is vested in *Congress*, not executive agencies. All circuit courts to have reached the merits of the Tax Cut Ban have now held it unconstitutional.”

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

“In addition to holding the ‘indirect offset’ language unconstitutionally ambiguous, the court ruled Treasury lacks authority to clarify ambiguity via regulations. If it were otherwise, unelected bureaucrats could invent and impose their own conditions on states. Agencies routinely rely on statutory ambiguity to impose rules Congress never approved. NCLA applauds the court for stopping Treasury from usurping Congress’ lawmaking powers here.”
— **Sheng Li, Litigation Counsel, NCLA**

For more information visit the *amicus* brief 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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