No. 21-6108

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

COMMONWEALTH OF KENTUCKY and STATE OF TENNESSEE,

Plaintiffs-Appellees,

v.

JANET YELLEN, in her official capacity as Secretary of the Treasury; RICHARD K. DELMAR, in his official capacity as Acting Inspector General of the Department of the Treasury; and the U.S. DEPARTMENT OF THE TREASURY,

Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Kentucky

BRIEF FOR APPELLANTS

BRIAN M. BOYNTON
Acting Assistant Attorney General

MARK B. STERN
ALISA B. KLEIN
DANIEL WINIK
Attorneys, Appellate Staff
Civil Division, Room 7245
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530
(202) 305-8849

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Regulations

STATEMENT REGARDING ORAL ARGUMENT

The issues presented by this case are also presented in *Ohio v. Yellen*, No. 21-3787, in which oral argument is scheduled for January 26, 2021. To ensure consistent rulings, we respectfully suggest that this case be assigned to the same panel that will hear the *Ohio* appeal, which can determine whether oral argument in this case would be helpful.

STATEMENT OF JURISDICTION

Kentucky and Tennessee invoked the district court's jurisdiction under 28 U.S.C. § 1331. Amended Complaint ¶ 9, RE23, PageID #133-134. The district court entered final judgment in plaintiffs' favor on September 24, 2021. RE43, PageID #645-646. The federal government timely appealed from that judgment on November 22, 2021. RE45, PageID #648-649; *see* Fed. R. App. P. 4(a)(1)(B). This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

The American Rescue Plan Act provided nearly $200 billion in federal grants to help States mitigate the fiscal effects of the COVID-19 pandemic. 42 U.S.C. § 802(a)(1). The Act gives States considerable flexibility in determining how to use these new federal funds but specifies that a State "shall not use the funds … to either directly or indirectly offset a reduction in the net tax revenue of such State" resulting from changes in state tax law during the covered period. *Id.* § 802(c)(2)(A) (the "Offset Provision"). The district court permanently enjoined the federal government from enforcing the Offset Provision against Kentucky and Tennessee on the theory that it is unconstitutionally coercive. The questions presented are:

1. Whether the district court's judgment should be reversed because this suit does not present a concrete controversy.

2. Whether, assuming the district court had jurisdiction, its judgment should be reversed on the merits.

STATEMENT OF THE CASE

A. Statutory Background

In the American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4, Congress created a Coronavirus State Fiscal Recovery Fund. 42 U.S.C. § 802. The Fund provides nearly $200 billion in new federal grants to help States and the District of Columbia mitigate the fiscal effects of the COVID-19 pandemic. *Id.* § 802(a)(1); *see id.* § 803(b)(3)(A). Section 802 allows States to use Fiscal Recovery Funds to cover broadly defined categories of costs incurred through 2024, including to provide assistance to households, businesses, and industries affected by the pandemic; to provide premium pay to workers performing essential work during the pandemic; to pay for state government services to the extent of revenue losses due to the pandemic; and to make necessary investments in water, sewer, or broadband infrastructure. *Id.* § 802(c)(1).

In addition to identifying the permissible uses of Fiscal Recovery Funds, Section 802 includes two "[f]urther restrictions" on the use of the funds. 42 U.S.C. § 802(c)(2). One is that a State may not deposit the funds into a pension fund. *Id.* § 802(c)(2)(B). The other, at issue here, is that a State "shall not use the funds … to either directly or indirectly offset a reduction in the net tax revenue of such State" resulting from a change in state law during a covered time period. *Id.* § 802(c)(2)(A).[1]

[1] The covered period began on March 3, 2021 and ends on the last day of the state fiscal year "in which all funds received by the State … have been expended or returned to, or recovered by," the Treasury Department. 42 U.S.C. § 802(g)(1).

A State can receive its federal grant after providing "a certification" that it "requires the payment … to carry out the activities specified in" § 802(c) and that it "will use any payment … in compliance with" that provision. 42 U.S.C. § 802(d)(1). If a State uses its Fiscal Recovery Funds for impermissible purposes, it may be required to repay an amount equal to the funds misused. *Id.* § 802(e).

B. Implementing Regulations

Congress authorized the Treasury Department "to issue such regulations as may be necessary or appropriate to carry out" Section 802, which established the Fiscal Recovery Fund. 42 U.S.C. § 802(f). In May 2021, the Department issued an interim final rule detailing how it would implement the statutory conditions on the use of Fiscal Recovery Funds, including the Offset Provision. *Coronavirus State and Local Fiscal Recovery Funds*, 86 Fed. Reg. 26,786 (May 17, 2021) (codified at 31 C.F.R. § 35.1 *et seq.*); *see id.* at 26,815. In January 2022, the Department issued a final rule implementing the statutory conditions. *Coronavirus State and Local Fiscal Recovery Funds* (Jan. 6, 2022), https://go.usa.gov/xtDWp (publication in Federal Register forthcoming).

C. This Action

Kentucky and Tennessee brought this action in April 2021, shortly after the enactment of the American Rescue Plan Act. The complaint (as amended in June 2021) alleges that the Offset Provision—which plaintiffs dub the "Tax Mandate"—"prohibits any State accepting federal financial assistance under the Act from lowering the tax burden on its citizens for the next four years." Amended Complaint ¶ 5, RE23, PageID

#132. Plaintiffs challenged the constitutionality of the so-called Tax Mandate on various grounds. *Id.* ¶¶ 52-83, RE23, PageID #148-154.

Plaintiffs moved for summary judgment, and the federal government moved to dismiss the complaint. The district court granted summary judgment in plaintiffs' favor. *Kentucky v. Yellen*, 2021 WL 4394249 (E.D. Ky. Sept. 24, 2021). The court based its conclusion that plaintiffs had established an Article III controversy on the theory that they faced "a credible threat" that the Offset Provision would be enforced against them. *Id.* at *2-3. On the merits, the court concluded that the Offset Provision was unconstitutionally coercive on the theory that the grants offered by Congress in the Fiscal Recovery Fund were so generous that States could not realistically turn them down. *Id.* at *3-6. The court did not address plaintiffs' other constitutional challenges. *Id.* at *7. It enjoined the enforcement of the Offset Provision against plaintiffs. *Id.* at *9.

SUMMARY OF ARGUMENT

In the American Rescue Plan Act, Congress offered Kentucky and Tennessee billions of dollars in new federal funds to help mitigate the effects of the pandemic. The statute gives States considerable flexibility to use these federal funds for a range of specific purposes, but the Offset Provision specifies that the funds may not be used to directly or indirectly offset a reduction in their net tax revenue resulting from a change in tax law adopted by the recipient. The district court permanently enjoined the federal government from enforcing the Offset Provision against Kentucky or Tennessee on the theory that it is unconstitutionally coercive.

The district court's injunction rests on two legal errors. As a threshold matter, Kentucky and Tennessee failed to establish a concrete controversy over the Offset Provision. As other courts addressing analogous challenges have emphasized, the Offset Provision does not prohibit state tax cuts; it merely prohibits a State from *using the new federal funds* to pay for a reduction in net tax revenue. Thus, if a State offsets tax cuts by other means—such as by revenue derived from macroeconomic growth, by tax increases, or by spending cuts in areas in which the State is not using the new federal funds—the Offset Provision is not implicated. To the extent plaintiffs have identified any actual or imminent tax cuts that could implicate the Offset Provision, they have not shown that they plan to pay for those tax cuts by means that would even arguably run afoul of the Offset Provision. They have accordingly failed to establish any live controversy supporting Article III jurisdiction.

Assuming the merits are presented, the Offset Provision is an unremarkable exercise of Congress's power to establish the permissible uses of federal grants. The Supreme Court's decision in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), forecloses any contention that a restriction on the use of new federal grants is coercive; that decision makes clear that a State is not coerced by conditions, such as the Offset Provision, that Congress places on the use of *new* federal funding.

STANDARD OF REVIEW

The district court's permanent injunction presents issues of law that are reviewed de novo by this Court. *See EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 978 F.3d 418, 428 (6th Cir. 2020).

ARGUMENT

I. PLAINTIFFS FAILED TO ESTABLISH AN ARTICLE III CONTROVERSY

The premise of this suit is that the Offset Provision—which Kentucky and Tennessee refer to as the "Tax Mandate"—"prohibits any State accepting federal financial assistance under the Act from lowering the tax burden on its citizens for the next four years." Amended Complaint ¶ 5, RE23, PageID #132.

That premise is contrary to the Offset Provision's plain text, as other courts addressing analogous challenges have explained. The Offset Provision "'does not prohibit a State from cutting taxes; it merely restricts a State's ability to use *federal funds* distributed under the [Fiscal Recovery Fund] to offset a reduction in net tax revenue.'" *Missouri v. Yellen*, 2021 WL 1889867, at *4 (E.D. Mo. May 11, 2021), *appeal pending*, No. 21-2118 (8th Cir.). The court considering Arizona's challenge accordingly recognized that Arizona's recent enactment of "a $1.9 billion tax cut" did not contravene the Offset Provision, in the absence of a showing that the State "used [federal] funds to supplement a reduction in its net income." *Arizona v. Yellen*, 2021 WL 3089103, at *5 (D. Ariz. July 22, 2021), *appeal pending*, No. 21-16227 (9th Cir.). Likewise, the court considering Missouri's challenge emphasized that "Missouri's sovereign power to set its own tax policy

is not implicated by the" Offset Provision, which leaves the "Missouri legislature … free to propose and pass tax cuts as it sees fit." 2021 WL 1889867, at *4.

Like Arizona and Missouri, the plaintiff States here did not show that they intend to take concrete actions that would contravene the Offset Provision. Kentucky submitted no evidence that it had cut taxes, or imminently intended to cut taxes, at all. Tennessee submitted a declaration stating that it "has a long history of cutting taxes," identifying various tax cuts undertaken "[s]ince 2011," and describing certain tax cuts "proposed but not yet pursued." Decl. of N. Antonio Niknejad ¶¶ 6-9, RE25-2, PageID #222-223. But that declaration identifies only modest tax changes that fall within the period covered by the Offset Provision: a "one-time" "sales tax holiday for food and food ingredients and prepared food sold at eating and drinking establishments," which the State expected to reduce tax revenue by $50 million, and minor changes to the sales tax on aviation fuel, the revenue effect of which the State does not identify. *Id.* ¶¶ 10-11, RE25-2, PageID #223-224. And Tennessee does not suggest that it will use Fiscal Recovery Funds to pay for reductions in its tax revenue caused by those changes or any others it imminently plans to implement. As the Treasury Department has emphasized, the Offset Provision is not implicated if state tax cuts are offset not by Fiscal Recovery Funds but by revenue derived from macroeconomic growth, increases in other taxes, or spending cuts in areas where the State is not spending Fiscal Recovery Funds. *See* 86 Fed. Reg. at 26,810. Plaintiffs thus have not estab-

lished the prerequisites for standing to bring a pre-enforcement challenge—"'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute,'" and "'a credible threat'" that the statute will be enforced against their conduct, *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014).

The district court believed that Kentucky and Tennessee had established standing to bring a pre-enforcement challenge to the Offset Provision on the theory that "they wish to accept" Fiscal Recovery Funds but "interpret the [Offset Provision] as proscribing *use of the funds* for their 'preferred tax policies in the coming years.'" *Kentucky v. Yellen*, 2021 WL 4394249, at *3 (E.D. Ky. Sept. 24, 2021) (emphasis added). But plaintiffs do not assert a right to *use Fiscal Recovery Funds* to pay for tax cuts, in defiance of the restriction imposed by Congress on the use of the funds. Any such argument would flout Congress's well settled "authority to condition the receipt of funds on the States' complying with restrictions on the use of those funds," in order to "ensure[] that the funds are spent according to its view of the 'general Welfare,'" *National Fed'n of Indep. Bus. v. Sebelius* (*NFIB*), 567 U.S. 519, 580 (2012) (plurality opinion). Rather, plaintiffs' argument is that the Offset Provision transgresses the bounds of Congress's Spending Clause authority by dictating how they spend their *own* funds in pursuit of their preferred tax policies. Yet plaintiffs have failed to identify any respect in which the Offset Provision even arguably prevents them from undertaking tax cuts.

Moreover, even if the Offset Provision could arguably be read as forbidding States to cut taxes, and even if such an interpretation would be constitutionally suspect,

a court would be obligated to reject that interpretation so long as a constitutionally unproblematic interpretation were also available, which is plainly the case here. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018) ("When 'a serious doubt' is raised about the constitutionality of an act of Congress, 'it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932))). A court could not properly adopt a merely "arguable" reading of an Act of Congress and then enjoin the enforcement of the statute on the theory that the interpretation raises serious constitutional issues.

Nor can plaintiffs establish the existence of an Article III controversy on the other ground they asserted before the district court: that the Offset Provision imposes reporting and compliance burdens. Even if there were no Offset Provision, plaintiffs would be obligated to keep track of their expenditures and ensure that they used Fiscal Recovery Funds for permissible purposes—purposes that do not include offsetting tax cuts. *See* 42 U.S.C. § 802(c)(1) (enumerating permitted purposes); *id.* § 802(d)(2) (requiring a State that accepts Fiscal Recovery Funds to submit to the Treasury Department "periodic reports providing a detailed accounting" of "the uses of funds by such State"). The Treasury Department has made clear, moreover, that States may rely on their existing budget projections in determining the anticipated revenue effects of changes to their tax laws. 86 Fed. Reg. at 26,807 ("In order to reduce burden, the interim final rule's approach also incorporates the types of information and modeling already

used by States and territories in their own fiscal and budgeting processes. By incorporating existing budgeting processes and capabilities, States and territories will be able to assess and evaluate the relationship of tax and budget decisions to uses of the Fiscal Recovery Funds based on information they likely have or can obtain.").

In short, nothing in the record establishes a concrete conflict between the Offset Provision and Tennessee's or Kentucky's plans for using their allocated Fiscal Recovery Funds. Plaintiffs have accordingly shown no "'realistic danger of sustaining a direct injury as a result of'" the Offset Provision's "'enforcement.'" *Arizona*, 2021 WL 3089103, at *5 (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). And the district court erred in not dismissing their attempt to seek what amounts to an advisory opinion on the Offset Provision. "'[N]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.'" *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). "The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches," and the standing inquiry is "'especially rigorous when reaching the merits of the dispute would force'" a court "'to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional.'" *Id.* To "determine the scope of the" Offset Provision in a "hypothetical context" is not a "'proper exercise of the judicial function.'" *Missouri*, 2021 WL 1889867, at *5.

Dismissing this suit for lack of jurisdiction will not deprive Tennessee or Kentucky of an opportunity to seek relief if either State is ever actually harmed by the Offset Provision. If a concrete dispute over allegedly misused Fiscal Recovery Funds were to arise, the affected State could assert its challenge at that time. *See, e.g.*, *Bennett v. Kentucky Dep't of Educ.*, 470 U.S. 656, 658 (1985) (explaining that "the dispute is whether the Secretary correctly demanded repayment based on a determination that Kentucky violated requirements that Title I funds be used to supplement, and not to supplant, state and local expenditures for education"); *Bennett v. New Jersey*, 470 U.S. 632, 637 (1985) (dispute arose from the Secretary's final decision ordering repayment of specified federal education funds).

II. PLAINTIFFS' CHALLENGE TO THE OFFSET PROVISION IS MERITLESS

Assuming the district court had jurisdiction, its permanent injunction should be reversed on the merits. The Supreme Court has repeatedly "upheld Congress's authority to condition the receipt of funds on the States' complying with restrictions on the use of those funds, because that is the means by which Congress ensures that the funds are spent according to its view of the 'general Welfare.'" *NFIB*, 567 U.S. at 580 (plurality opinion). And the Offset Provision is a familiar exercise of Congress's authority to specify the permissible and impermissible uses of Fiscal Recovery Funds.

In Section 802, Congress appropriated hundreds of billions of dollars to help States mitigate the fiscal impacts of the pandemic. Congress identified broad categories of permissible uses of these federal funds, such as providing assistance to households

and businesses affected by the pandemic and providing premium pay to workers performing essential work during the pandemic. And Congress placed certain limited restrictions on the uses of these federal funds, including that they may not be used to fill a revenue hole created by state tax cuts. That is all well within the authority recognized in *NFIB*, as is Congress's further specification that a State cannot use fiscal machinations to circumvent the prohibition against using Fiscal Recovery Funds to pay for tax cuts. If a State were simply to deposit its federal grant into its general treasury in order to fill a revenue hole created by (say) a $2 billion tax cut, the State would be using the federal funds to directly offset a reduction in state tax revenue. Congress permissibly forbade the State from achieving the same result "indirectly," 42 U.S.C. § 802(c)(2)(A), by reducing the State's own expenditures by $2 billion to offset the tax cut and using $2 billion in Fiscal Recovery Funds to pay for those expenditures instead.

By preventing States from "'us[ing] federal funds distributed under the [Fiscal Recovery Fund] to offset a reduction in net tax revenue,'" *Missouri*, 2021 WL 1889867, at *4 (emphasis omitted), the Offset Provision serves to reinforce Section 802(c)'s identification of purposes for which the funds *may* be used. In effect, it simply prevents States from choosing to eliminate a source of non-federal revenue ordinarily used to pay for a state expenditure, replacing that source with Fiscal Recovery Funds, and using the saved state funds to pay for a tax cut. It thus resembles the maintenance-of-effort requirements that are a longstanding feature of Spending Clause legislation. *See, e.g.*,

Bennett v. Kentucky Dep't of Educ., 470 U.S. at 659 (explaining that Title I of the Elementary and Secondary Education Act "from the outset prohibited the use of federal grants merely to replace state and local expenditures"); *Mayhew v. Burwell*, 772 F.3d 80 (1st Cir. 2014) (upholding a Medicaid maintenance-of-effort requirement); *South Carolina Dep't of Educ. v. Duncan*, 714 F.3d 249, 252 (4th Cir. 2013) (describing the maintenance-of-effort requirement in the Individuals with Disabilities Education Act, which generally requires the Secretary to reduce a State's grant by the same amount by which the State has failed to maintain its expenditures for special education for children with disabilities).

The district court concluded that the Offset Provision is unconstitutionally coercive because it is so generous that no State could resist the temptation to accept it. But the Supreme Court's decision in *NFIB* squarely forecloses that reasoning. In *NFIB*, as noted above, the Court reaffirmed "Congress's authority to condition the receipt of funds on the States' complying with restrictions on the use of those funds," and it observed that *South Dakota v. Dole*, 483 U.S. 203 (1987), had applied a coercion analysis to a condition on federal highway funds only because "the condition was not a restriction on how the highway funds … were to be used." 567 U.S. at 580 (plurality opinion). Consistent with that distinction, a majority of the Justices held in *NFIB* that Congress could not make a State's *preexisting* Medicaid funding contingent on the State's agreement to extend coverage to all low-income adults—an expansion that the majority regarded as an entirely new program. *See id.* at 580-585 (plurality opinion); *id.* at 681-689

(joint dissent). But a different majority of Justices upheld the same requirement as a condition on the *new* federal funds offered by the Affordable Care Act, which totaled $100 billion per year. *See id.* at 576, 585-586 (Roberts, C.J., joined by Breyer, J., and Kagan, J.) (emphasizing that "[n]othing in our opinion precludes Congress from offering funds under the Affordable Care Act to expand the availability of health care, and requiring that States accepting such funds comply with the conditions on their use"); *id.* at 646 (Ginsburg, J., jointed by Sotomayor, J., agreeing with this aspect of the plurality opinion). Even the dissenting Justices agreed that "Congress could have made just the *new* funding provided under the ACA contingent on acceptance of the terms of the Medicaid Expansion," although they disagreed with the majority about whether that funding condition was severable. *Id.* at 687-688 (joint dissent). And other courts have recognized the same distinction between conditions on the use of federal funds (which are permissible) and conditions that seek to leverage a grant of federal funds to require a State to undertake, or prevent it from taking, actions in another sphere. *See, e.g.*, *Gruver v. Louisiana Bd. of Supervisors*, 959 F.3d 178, 183-184 (5th Cir. 2020); *Mississippi Comm'n on Envtl. Quality v. EPA*, 790 F.3d 138, 179 (D.C. Cir. 2015) (per curiam). The offset provision plainly falls into the first category: It is simply a "restriction on the use of [federal] funds." 42 U.S.C. § 802(c)(2) (heading).

Even if *NFIB* had not foreclosed the argument, moreover, common sense refutes the notion that Congress loses its power to determine how grants will be used if

the grants exceeds a certain (unspecified) size. For example, if Congress offered Kentucky or Tennessee a multi-billion dollar grant to build bridges and roads, the States could not seek to invalidate that condition and use the grant for other purposes simply because, given their present degree of economic hardship, they could not reasonably turn down the funds. There is no generosity exception to the rule that "[t]he power to keep a watchful eye on expenditures … is bound up with congressional authority to spend in the first place," *Sabri v. United States*, 541 U.S. 600, 608 (2004).

CONCLUSION

The district court's judgment should be reversed.

Respectfully submitted,

BRIAN M. BOYNTON
Acting Assistant Attorney General

MARK B. STERN
ALISA B. KLEIN

/s/ Daniel Winik
DANIEL WINIK
Attorneys, Appellate Staff
Civil Division, Room 7245
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 305-8849
daniel.l.winik@usdoj.gov

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 3,869 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in 14-point Garamond, a proportionally spaced typeface.

/s/ Daniel Winik
Daniel Winik

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Under Sixth Circuit Rule 28(b)(1)(A)(i), the government designates the following district court documents as relevant:

Record Entry	Description	Page ID # Range
RE 23	Amended Complaint with Exhibits	130-165
RE 25-1	Exhibit A to Plaintiffs' Motion for Summary Judgment	219
RE 25-2	Exhibit B to Plaintiffs' Motion for Summary Judgment	220-226
RE 25-3	Exhibit C to Plaintiffs' Motion for Summary Judgment	227-232
RE 41	Transcript of Motion Hearing	577-627
RE 42	Opinion & Order	627-644
RE 43	Judgment	645-646
RE 45	Notice of Appeal	648-650

ADDENDUM

TABLE OF CONTENTS

42 U.S.C. § 802

§ 802. Coronavirus State Fiscal Recovery Fund

(a) Appropriation

In addition to amounts otherwise available, there is appropriated for fiscal year 2021, out of any money in the Treasury not otherwise appropriated—

(1) $219,800,000,000, to remain available through December 31, 2024, for making payments under this section to States, territories, and Tribal governments to mitigate the fiscal effects stemming from the public health emergency with respect to the Coronavirus Disease (COVID-19)..

(b) Authority to make payments

…

(3) Payments to each of the 50 States and the District of Columbia

(A) In general

The Secretary shall reserve $195,300,000,000 of the amount appropriated under subsection (a)(1) to make payments to each of the 50 States and the District of Columbia.

…

(6) Timing

(A) States and territories

(i) In general

To the extent practicable, subject to clause (ii), with respect to each State and territory allocated a payment under this subsection, the Secretary shall make the payment required for the State or territory not later than 60 days after the date on which the certification required under subsection (d)(1) is provided to the Secretary.

…

(c) Requirements

(1) Use of funds

Subject to paragraph (2), and except as provided in paragraph (3), a State, territory, or Tribal government shall only use the funds provided under a payment made under this section, or transferred pursuant to section 803(c)(4) of this title, to cover costs incurred by the State, territory, or Tribal government, by December 31, 2024—

(A) to respond to the public health emergency with respect to the Coronavirus Disease 2019 (COVID-19) or its negative economic impacts, including assistance to

households, small businesses, and nonprofits, or aid to impacted industries such as tourism, travel, and hospitality;

(B) to respond to workers performing essential work during the COVID-19 public health emergency by providing premium pay to eligible workers of the State, territory, or Tribal government that are performing such essential work, or by providing grants to eligible employers that have eligible workers who perform essential work;

(C) for the provision of government services to the extent of the reduction in revenue of such State, territory, or Tribal government due to the COVID-19 public health emergency relative to revenues collected in the most recent full fiscal year of the State, territory, or Tribal government prior to the emergency; or

(D) to make necessary investments in water, sewer, or broadband infrastructure.

(2) Further restriction on use of funds

(A) In general

A State or territory shall not use the funds provided under this section or transferred pursuant to section 803(c)(4) of this title to either directly or indirectly offset a reduction in the net tax revenue of such State or territory resulting from a change in law, regulation, or administrative interpretation during the covered period that reduces any tax (by providing for a reduction in a rate, a rebate, a deduction, a credit, or otherwise) or delays the imposition of any tax or tax increase.

(B) Pension funds

No State or territory may use funds made available under this section for deposit into any pension fund.

…

(d) Certifications and reports

(1) In general

In order for a State or territory to receive a payment under this section, or a transfer of funds under section 803(c)(4) of this title, the State or territory shall provide the Secretary with a certification, signed by an authorized officer of such State or territory, that such State or territory requires the payment or transfer to carry out the activities specified in subsection (c) of this section and will use any payment under this section, or transfer of funds under section 803(c)(4) of this title, in compliance with subsection (c) of this section.

(2) Reporting

Any State, territory, or Tribal government receiving a payment under this section shall provide to the Secretary periodic reports providing a detailed accounting of—

(A) the uses of funds by such State, territory, or Tribal government, including, in the case of a State or a territory, all modifications to the State's or territory's tax revenue sources during the covered period; and

(B) such other information as the Secretary may require for the administration of this section.

(e) Recoupment

Any State, territory, or Tribal government that has failed to comply with subsection (c) shall be required to repay to the Secretary an amount equal to the amount of funds used in violation of such subsection, provided that, in the case of a violation of subsection (c)(2)(A), the amount the State or territory shall be required to repay shall be lesser of—

(1) the amount of the applicable reduction to net tax revenue attributable to such violation; and

(2) the amount of funds received by such State or territory pursuant to a payment made under this section or a transfer made under section 803(c)(4) of this title.

(f) Regulations

The Secretary shall have the authority to issue such regulations as may be necessary or appropriate to carry out this section.

(g) Definitions

In this section:

(1) Covered period

The term "covered period" means, with respect to a State, territory, or Tribal government, the period that--

(A) begins on March 3, 2021; and

(B) ends on the last day of the fiscal year of such State, territory, or Tribal government in which all funds received by the State, territory, or Tribal government from a payment made under this section or a transfer made under section 803(c)(4) of this title have been expended or returned to, or recovered by, the Secretary.

…