

ORAL ARGUMENT NOT SCHEDULED

No. 20-5203

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

CLETUS WOODROW BOHON, *et al.*,

Appellants,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,

Appellees.

On Appeal from the United States District Court
for the District of Columbia, No. 1:20-cv-00006-JEB

**BRIEF OF CONSTITUTIONAL LAW PROFESSORS AS *AMICI CURIAE*
SUPPORTING APPELLANTS**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), *amici* submit this certificate as to parties, rulings, and related cases.

A. Parties and Amici

Except for the following, all parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the Brief for Appellants: (1) *amici curiae* constitutional law professors, who submit this brief in support of Appellants; and (2) *amicus curiae* U.S. House of Representatives supporting Appellees.

B. Rulings Under Review

References to the rulings at issue appear in the Brief for Appellants.

C. Related Cases

This case was previously before this Court and resulted in the opinion *Bohon v. Federal Energy Regulatory Commission*, 37 F.4th 663 (D.C. Cir. 2022), which was vacated and remanded by the United States Supreme Court for further consideration in *Bohon v. Federal Energy Regulatory Commission*, 143 S. Ct. 1779 (2023).

Counsel for *amici curiae* is not aware of any related cases within the meaning of Circuit Rule 28(a)(1)(C).

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GLOSSARY

Section 324(e)(1)

Section 324(e)(1) of the Fiscal Responsibility Act of
2023

STATUTES AND REGULATIONS

Except for Section 324 of the Fiscal Responsibility Act of 2023, which appears in the addendum, all pertinent statutes and regulations appear in the Brief for Appellants.

IDENTITY AND INTEREST OF *AMICI CURIAE*¹

Amici listed in the appendix are scholars of constitutional law and federal jurisdiction. *Amici* believe Section 324(e)(1) of the Fiscal Responsibility Act of 2023 (“Section 324(e)(1)”), Pub. L. No. 118-5, § 324(e)(1), 137 Stat. 10, 47–48, raises serious constitutional concerns—particularly due process and the separation of powers under *United States v. Klein*, 80 U.S. 128 (1871)—if the provision strips jurisdiction over the federal constitutional claims in this case. *Amici* take no position on the merits of those underlying constitutional claims but agree Section 324(e)(1) cannot lawfully eliminate the Judiciary’s power to entertain them.

SUMMARY OF ARGUMENT

The Court should conclude that Section 324(e)(1) does not apply to this case. Any broader reading poses two serious constitutional concerns.

First, construing Section 324(e)(1) to apply here would leave Appellants with no judicial forum, state or federal, to hear their federal constitutional claims. The Supreme Court has never upheld such a law, and many including this Court assume a statute with that effect would violate due process. *Bartlett v. Bowen*, 816 F.2d 695, 703 (D.C. Cir. 1987), *reinstated and reh’g denied*, 824 F.2d 1240 (D.C. Cir. 1987). This cannot be what Congress intended.

¹ No party or its counsel, or any other person, other than *amici* and their counsel, authored this brief in whole or in part, or contributed money intended to fund preparing or submitting this brief.

Second, if Congress *did* intend Section 324(e)(1) to strip jurisdiction here, the provision violates bedrock separation-of-powers principles under *United States v. Klein*, 80 U.S. 128 (1871), by manipulating jurisdiction to dictate the outcome.

ARGUMENT

I. If Section 324(e)(1) Applies, It Threatens Due Process By Precluding All Judicial Review Of Constitutional Claims.

Construing Section 324(e)(1) to strip jurisdiction over this case would leave Appellants with no court to hear their federal constitutional claims. The gravamen of those claims is that the Natural Gas Act unconstitutionally delegates legislative power to the Federal Energy Regulatory Commission. *Amici* take no position on the merits of those claims, but urge that the Court should not lightly approve a jurisdiction-stripping provision that would eliminate any forum for judicial review of them. Indeed, the Supreme Court has never upheld such a statute and has often “strained to construe statutes” to “avoid squarely facing” the “serious constitutional question” that would be presented by a statute precluding all judicial review of constitutional claims. Richard H. Fallon, Jr. et al., *Hart and Wechsler’s The Federal Courts and the Federal System* 329 (7th ed. 2015) (citing *Webster v. Doe*, 486 U.S. 592 (1988); *Bowen v. Mich. Acad. of Fam. Physicians*, 476 U.S. 667 (1986); and *Johnson v. Robison*, 415 U.S. 361 (1974)).

Some, including this Court in *Bartlett*, posit that such a statute would violate at least the Due Process Clause of the Fifth Amendment. *See, e.g., Bartlett*, 816 F.2d

at 703; *Battaglia v. Gen. Motors Corp.*, 169 F.2d 254, 257 (2d Cir. 1948) (“[T]he exercise of Congress of its control over jurisdiction is subject to compliance with at least the requirements of the Fifth Amendment.”); Erwin Chemerinsky, *Federal Jurisdiction* 229 (8th ed. 2020) (“There is a strong argument that due process would be violated if the effect of the jurisdictional restriction is that no court, state or federal, could hear a constitutional claim.”); Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and A New Synthesis*, 124 U. Pa. L. Rev. 45, 76 (1975) (“[A] litigant has a fifth amendment right to an independent judicial hearing, state or federal, of a constitutional claim.”).

If Section 324(e)(1) applies to this case, the Court will have to confront this issue directly. Section 324(e)(1)’s terms are absolute: “no court shall have jurisdiction.” This language strips federal and state court jurisdiction alike over the claims within its ambit. *See, e.g., Tafflin v. Levitt*, 493 U.S. 455, 459–60 (1990) (state courts can be divested of their presumptive jurisdiction over federal claims by “explicit statutory directive”). So construing Section 324(e)(1) to include the claims in this case would “remove[] jurisdiction from all courts to vindicate *constitutional*

rights” and would thus pose “serious constitutional objections,” *Ramallo v. Reno*, 114 F.3d 1210, 1214 (D.C. Cir. 1997), including due process concerns.²

A narrow, fair reading of Section 324(e)(1) is that it does not apply to this case. This reading hews to the statutory text because the underlying constitutional claims challenge the decision of Congress in enacting the Natural Gas Act, not an “action taken by” any of the officials listed in Section 324(e)(1). *See Bartlett*, 816 F.2d at 702 (analogizing to the same reasoning in *Robison*, 415 U.S. at 367). This reading also avoids unnecessary constitutional conflict by following the “time-honored tradition” of finding “that Congress did not intend to preclude altogether judicial review of constitutional claims in light of the serious due process concerns that such preclusion would raise.” *Id.* at 699.

II. If Section 324(e)(1) Applies, It Violates The Separation Of Powers By Manipulating Jurisdiction To Dictate the Outcome.

If the Court concludes Congress *did* intend for Section 324(e)(1) to include this case, the provision violates the separation of powers under *Klein* by stripping

² In fact, due process concerns would lurk even if Section 324(e)(1) left state court jurisdiction untouched because the Constitution itself may preclude state courts from entertaining actions that seek injunctions against federal officials, as this one does against the Federal Energy Regulatory Commission. *See, e.g., Redish & Woods, supra*, at 88–92 (surveying cases and concluding state courts lack injunctive power over federal officers); Chemerinsky, *supra*, at 214 (noting potential due process problems from federal jurisdiction strip where “state courts are precluded from hearing certain matters altogether by federal law”).

jurisdiction to dictate the outcome. *Klein* and its progeny teach that Congress cannot pick winners and losers in pending litigation by compelling findings or results without supplying new substantive law for the courts to apply, *Bank Markazi v. Peterson*, 578 U.S. 212, 225 n.17 (2016), or by manipulating jurisdiction “as a means to an end,” *Klein*, 80 U.S. at 145. Section 324(e)(1) manipulates jurisdiction to dictate substantive results.

Klein invalidated a law targeting suits by pardoned Confederates seeking compensation for property seized during the Civil War. In a prior case, the Supreme Court had held that a pardon was proof of loyalty and entitled claimants to damages. Congress responded by passing a new law while *Klein* was pending that required courts to consider a pardon as proof of disloyalty and stripped jurisdiction over any cases where a claimant prevailed based on a pardon, directing that such claims be dismissed. *Id.* at 143–44. *Klein* held the new law unconstitutional because it withdrew jurisdiction “as a means to an end” in pending cases, imposing an “arbitrary rule of decision” on the judiciary and “pass[ing] the limit which separates the legislative from the judicial power.” *Id.* at 145–47.

In the years since *Klein*, the Supreme Court has narrowed *Klein*’s “rule of decision” language and adduced a test focused on whether Congress has supplied new substantive law (constitutional) or instead commanded results under old law (unconstitutional). *See Bank Markazi*, 578 U.S. at 226. But the Supreme Court has

not produced a controlling opinion since *Klein* that illuminates when a jurisdiction-stripping provision violates the separation of powers, and it splintered on this question in *Patchak v. Zinke*, 138 S. Ct. 897 (2018). *Patchak* upheld a statute requiring dismissal of any action relating to a specified parcel of land. *Id.* at 903–04. A four-Justice plurality concluded the statute stripped jurisdiction and thus effected a permissible change in law. *Id.* at 906–07 (plurality op.). Two concurred in the judgment on other grounds. *Id.* at 912–13 (Ginsburg, J., and Sotomayor, J., concurring in the judgment). And four Justices—an equal number to the plurality—agreed that “Congress cannot, under the guise of altering federal jurisdiction, dictate the result of a pending proceeding.” *Id.* at 919 (Roberts, C.J., dissenting); *see also id.* at 913 (Sotomayor, J., concurring in the judgment) (“Congress may not achieve through jurisdiction stripping what it cannot permissibly achieve outright, namely, directing entry of judgment for a particular party.”). The fractured analysis in *Patchak* did not supplant the core teaching of *Klein*.

The result is that *Klein*’s prohibition on stripping jurisdiction “as a means to an end” should remain the watchword. After all, if depriving a court of jurisdiction over particular pending cases in order to pick the winner “is sufficient to change the law” then Article III “‘provides no limiting principle’ on Congress’s ability to assume the role of judge and decide the outcome of pending cases.” *Id.* at 920 (Roberts, C.J., dissenting) (quoting *N. Pipeline Constr. Co. v. Marathon Pipe Line*

Co., 458 U.S. 50, 73 (1982)); *see also id.* at 913 (Sotomayor, J., concurring in the judgment) (“[A]n Act that merely deprives federal courts of jurisdiction over a single proceeding is not enough to be considered a change in the law[.]”); Fallon, *supra*, at 323 (*Klein* “stresses that Congress’[s] attempt to regulate jurisdiction is not a talisman that renders any such legislative effort constitutional.”).

Section 324(e)(1) closely parallels the unconstitutional proviso in *Klein* in at least four important ways. First, both statutes engage in self-dealing by manipulating jurisdiction to dictate the outcome of targeted pending cases for favored parties including the government itself. *Klein*, 80 U.S. at 145–46. Among other things, the asymmetry of both the *Klein* proviso and Section 324(e)(1) underscores their results-oriented use of jurisdiction “as a means to an end.” *Id.* at 145. The *Klein* proviso stripped appellate jurisdiction differently depending on which party prevailed below and on what grounds, *id.* at 130–34, and Section 324(e)(1) eliminates jurisdiction over any lawsuit challenging an agency action that “*grants . . . any . . . approval necessary*” for the Mountain Valley Pipeline but does not affect jurisdiction over suits challenging permit denials, § 324(e)(1) (emphasis added). Gerrymandering jurisdiction like this confirms that Section 324(e)(1) is a transparent attempt “to pick winners and losers in pending litigation.” *Patchak*, 138 S. Ct. at 921 (Roberts, C.J., dissenting).

Second, both statutes terminate a narrow class of claims. Section 324(e)(1) targets a discrete set of cases involving the Mountain Valley Pipeline, and the *Klein* proviso applied to other companion suits. *See, e.g., Armstrong v. United States*, 80 U.S. 154 (1871); *Pargoud v. United States*, 80 U.S. 156 (1871); *Backer v. United States*, 7 Ct. Cl. 551 (1871). The *Klein* proviso and Section 324(e)(1) are hardly examples of the broad jurisdiction strip in *Ex parte McCardle*, 74 U.S. 506 (1868), and—unlike *McCardle*—Section 324(e)(1) leaves no alternative avenue for judicial review of the claims it terminates.

Third, both statutes strip jurisdiction in a manner that would preclude review of underlying separation-of-powers questions—about the pardon power in *Klein* and the non-delegation doctrine in this case. 80 U.S. at 133–34. This constitutional dimension was an independent basis for decision in *Klein* and is not necessary to find that a statute violates the separation of powers. *See, e.g., United States v. Sioux Nation of Indians*, 448 U.S. 371, 404 (1980) (“[T]he proviso [in *Klein*] was unconstitutional in two respects[.]”). Nevertheless, its presence in *Klein* and in this case underscores the constitutional infirmity of Section 324(e)(1) if it applies here.³

³ The constitutional aspect of the underlying issues also distinguishes this case from *National Coalition to Save Our Mall v. Norton*, 269 F.3d 1092, 1096 (D.C. Cir. 2001), which reasoned that a statute stripping jurisdiction over constitutional claims would raise concerns absent in a case involving only statutory claims.

Finally, both statutes leave courts with nothing to do but dismiss the targeted cases, reducing the Judiciary to the role of “stenographer.” *See Patchak*, 138 S. Ct. at 918 (Roberts, C.J., dissenting). The statutes differ insofar as the *Klein* proviso used mandatory language that stripped jurisdiction *and* commanded dismissal, 80 U.S. at 143–44, whereas Section 324(e)(1) strips jurisdiction without narrating the consequence. But even if mandatory language would make Section 324(e)(1) a closer match for the facts of *Klein*, its absence does not place Section 324(e)(1) on the constitutional side of the line. There is no “material difference between a law stating ‘The court lacks jurisdiction over Jones’s pending suit against Smith’ and one stating ‘In the case of *Smith v. Jones*, Smith wins[.]’ In both instances, Congress has resolved the specific case in Smith’s favor.” *Patchak*, 138 S. Ct. at 920 (Roberts, C.J., dissenting). When it comes to Section 324(e)(1), the effect can hardly be disputed. In fact, as the pipeline company told the Fourth Circuit in a case that plainly fell within the scope of the provision, “Section 324’s unambiguous text prevents the Court from taking any further action in this case other than dismissing it.” Intervenor’s Opp’n to Mot. for Temp. Admin. Stay at 3, *The Wilderness Soc’y v. U.S. Forest Serv.*, No. 23-1592 (4th Cir. July 7, 2023), ECF No. 35. If Section 324(e)(1) applies to this case, it bears the hallmarks of an unconstitutional statute under *Klein*.

CONCLUSION

Section 324(e)(1) raises serious constitutional concerns if it applies to this case. The Court should conclude Section 324(e)(1) does not apply here, but should hold the provision unconstitutional if the Court concludes it does.

Dated: November 13, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the appropriate type-volume limitation. Because this brief is not submitted during initial consideration of the case on the merits, the type-volume limitation of Fed. R. App. P. 29(a)(5) is not controlling and there is no rule directly on point. This brief contains 2,286 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1), which is over 1,000 words fewer than the maximum length of 3,500 words allowed for the parties' supplemental response briefs pursuant to the Order dated September 27, 2023, Doc. No. 2019070, and is below the 2,500 word limitation sought in *amici's* motion for leave to file this brief.

2. I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

Date: November 13, 2023

/s/ Spencer Gall
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CERTIFICATE OF SERVICE

I certify that, on November 13, 2023, I filed the foregoing brief, and all addenda and appendices thereto, with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Date: November 13, 2023

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ADDENDUM

PUBLIC LAW 118-5—JUN. 3, 2023

FISCAL RESPONSIBILITY ACT OF 2023

137 STAT. 10

PUBLIC LAW 118–5—JUN. 3, 2023

Public Law 118–5
118th Congress

An Act

June 3, 2023

[H.R. 3746]

Fiscal
Responsibility
Act of 2023.
2 USC 900 note.

To provide for a responsible increase to the debt ceiling.

*Be it enacted by the Senate and House of Representatives of
the United States of America in Congress assembled,*

SECTION 1. SHORT TITLE.

This Act may be cited as the “Fiscal Responsibility Act of 2023”.

SEC. 2. TABLE OF CONTENTS.

The table of contents for this Act is as follows:

- Sec. 1. Short title.
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- Sec. 102. Special adjustments for fiscal years 2024 and 2025.
- Sec. 103. Budgetary treatment of previously enacted emergency requirements.

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- Sec. 111. Authority for Fiscal Year 2024 Budget Resolution in the House of Representatives.
- Sec. 112. Limitation on Advance Appropriations in the House of Representatives.
- Sec. 113. Exercise of rulemaking powers.

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- Sec. 121. Authority for fiscal year 2024 budget resolution in the Senate.
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- Sec. 313. Supplemental nutrition assistance program under the Food and Nutrition Act of 2008.
- Sec. 314. Waiver transparency.

TITLE III—PERMITTING REFORM

- Sec. 321. Builder Act.
- Sec. 322. Interregional Transfer Capability Determination Study.
- Sec. 323. Permitting streamlining for energy storage.
- Sec. 324. Expediting completion of the Mountain Valley Pipeline.

DIVISION D—INCREASE IN DEBT LIMIT

- Sec. 401. Temporary extension of public debt limit.

SEC. 3. REFERENCES.

Except as expressly provided otherwise, any reference to “this Act” contained in any division of this Act shall be treated as referring only to the provisions of that division.

DIVISION A—LIMIT FEDERAL SPENDING

TITLE I—DISCRETIONARY SPENDING LIMITS FOR DISCRETIONARY CATEGORY

SEC. 101. DISCRETIONARY SPENDING LIMITS.

(a) IN GENERAL.—Section 251(c) of the Balanced Budget and Emergency Deficit Control Act of 1985 (2 U.S.C. 901(c)) is amended—

- (1) in paragraph (7)(B), by striking “and” at the end; and
- (2) by inserting after paragraph (8) the following:

“(9) for fiscal year 2024—

“(A) for the revised security category, \$886,349,000,000 in new budget authority; and

“(B) for the revised nonsecurity category; \$703,651,000,000 in new budget authority; and

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SEC. 324. EXPEDITING COMPLETION OF THE MOUNTAIN VALLEY PIPELINE.

(a) **DEFINITION OF MOUNTAIN VALLEY PIPELINE.**—In this section, the term “Mountain Valley Pipeline” means the Mountain Valley Pipeline project, as generally described and approved in Federal Energy Regulatory Commission Docket Nos. CP16–10, CP19–477, and CP21–57.

(b) **CONGRESSIONAL FINDINGS AND DECLARATION.**—The Congress hereby finds and declares that the timely completion of construction and operation of the Mountain Valley Pipeline is required in the national interest. The Mountain Valley Pipeline will serve demonstrated natural gas demand in the Northeast, Mid-Atlantic, and Southeast regions, will increase the reliability of natural gas supplies and the availability of natural gas at reasonable prices, will allow natural gas producers to access additional markets for their product, and will reduce carbon emissions and facilitate the energy transition.

(c) **APPROVAL AND RATIFICATION AND MAINTENANCE OF EXISTING AUTHORIZATIONS.**—Notwithstanding any other provision of law—

(1) Congress hereby ratifies and approves all authorizations, permits, verifications, extensions, biological opinions, incidental take statements, and any other approvals or orders issued pursuant to Federal law necessary for the construction and initial operation at full capacity of the Mountain Valley Pipeline; and

(2) Congress hereby directs the Secretary of the Army, the Federal Energy Regulatory Commission, the Secretary of Agriculture, and the Secretary of the Interior, and other agencies as applicable, as the case may be, to continue to maintain such authorizations, permits, verifications, extensions, biological opinions, incidental take statements, and any other approvals or orders issued pursuant to Federal law necessary for the construction and initial operation at full capacity of the Mountain Valley Pipeline.

(d) **EXPEDITED APPROVAL.**—Notwithstanding any other provision of law, not later than 21 days after the date of enactment of this Act and for the purpose of facilitating the completion of the Mountain Valley Pipeline, the Secretary of the Army shall issue all permits or verifications necessary—

Deadline.

(1) to complete the construction of the Mountain Valley Pipeline across the waters of the United States; and

(2) to allow for the operation and maintenance of the Mountain Valley Pipeline.

(e) **JUDICIAL REVIEW.**—

(1) Notwithstanding any other provision of law, no court shall have jurisdiction to review any action taken by the Secretary of the Army, the Federal Energy Regulatory Commission, the Secretary of Agriculture, the Secretary of the Interior, or a State administrative agency acting pursuant to Federal law that grants an authorization, permit, verification, biological opinion, incidental take statement, or any other approval necessary for the construction and initial operation at full capacity of the Mountain Valley Pipeline, including the issuance of any authorization, permit, extension, verification, biological opinion, incidental take statement, or other approval described in subsection (c) or (d) of this section for the Mountain Valley Pipeline,

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whether issued prior to, on, or subsequent to the date of enactment of this section, and including any lawsuit pending in a court as of the date of enactment of this section.

(2) The United States Court of Appeals for the District of Columbia Circuit shall have original and exclusive jurisdiction over any claim alleging the invalidity of this section or that an action is beyond the scope of authority conferred by this section.

(f) EFFECT.—This section supersedes any other provision of law (including any other section of this Act or other statute, any regulation, any judicial decision, or any agency guidance) that is inconsistent with the issuance of any authorization, permit, verification, biological opinion, incidental take statement, or other approval for the Mountain Valley Pipeline.

DIVISION D—INCREASE IN DEBT LIMIT

31 USC 3101
note.
Time period.

SEC. 401. TEMPORARY EXTENSION OF PUBLIC DEBT LIMIT.

(a) IN GENERAL.—Section 3101(b) of title 31, United States Code, shall not apply for the period beginning on the date of the enactment of this Act and ending on January 1, 2025.

Effective date.

(b) SPECIAL RULE RELATING TO OBLIGATIONS ISSUED DURING EXTENSION PERIOD.—Effective on January 2, 2025, the limitation in effect under section 3101(b) of title 31, United States Code, shall be increased to the extent that—

(1) the face amount of obligations issued under chapter 31 of such title and the face amount of obligations whose principal and interest are guaranteed by the United States Government (except guaranteed obligations held by the Secretary of the Treasury) outstanding on January 2, 2025, exceeds

(2) the face amount of such obligations outstanding on the date of the enactment of this Act.

(c) RESTORING CONGRESSIONAL AUTHORITY OVER THE NATIONAL DEBT.—

Deadline.

(1) EXTENSION LIMITED TO NECESSARY OBLIGATIONS.—An obligation shall not be taken into account under subsection (b)(1) unless the issuance of such obligation was necessary to fund a commitment incurred pursuant to law by the Federal Government that required payment before January 2, 2025.

(2) PROHIBITION ON CREATION OF CASH RESERVE DURING EXTENSION PERIOD.—The Secretary of the Treasury shall not issue obligations during the period specified in subsection (a) for the purpose of increasing the cash balance above normal