No. 23-1410

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LIBERTY GLOBAL, INC.,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court
For the District of Colorado, Hon. R. Brooke Jackson
No. 20-cv-3501

AMICUS CURIAE BRIEF OF NATIONAL TAXPAYERS UNION FOUNDATION IN SUPPORT OF APPELLANT LIBERTY GLOBAL, INC. AND REHEARING

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INTEREST OF *AMICUS CURIAE*

Founded in 1973, the National Taxpayers Union Foundation ("NTUF") is a non-partisan research and educational organization dedicated to showing Americans how taxes, government spending, and regulations affect everyday life. NTUF advances principles of limited government, simple taxation, and transparency on both the state and federal level. NTUF's Taxpayer Defense Center advocates for taxpayers in the courts, produces scholarly analyses, and engages in direct litigation and *amicus curiae* briefs upholding taxpayers' rights and challenging administrative overreach by tax authorities. Accordingly, *Amicus* has an institutional interest in this case, filing a brief also for the panel's consideration. Appellant consents and Appellee does not oppose the filing of this brief.[1]

SUMMARY OF THE ARGUMENT

The economic substance doctrine is a dangerous tool to give the government. Congress therefore limited its use only when "relevant." *See* 26 U.S.C. § 7701(o). But the IRS refused to set guidelines down on when it will consider applying the economic substance doctrine to a transaction, choosing instead regulation by litigation. Therefore, this Court must give strong guidance for taxpayers. Rehearing is therefore vital to give a standard for taxpayers to follow.

[1] *Amicus Curiae* confirms that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than *Amicus* and its counsel made a monetary contribution to the preparation or submission of this brief.

This Court's Panel Opinion departs from its sister Circuits and the Tax Court in how to apply § 7701(o). The Tax Court, for example, first makes a threshold determination, based on case law as it existed at the time of the passage of §7701(o), of whether the doctrine is relevant—before considering the facts of the tax dispute at issue. Similarly, the Sixth, Ninth, and Eleventh Circuits have articulated standards that give recognition that taxpayers are allowed to find ways to save on their tax bill, and the economic substance doctrine should be applied narrowly. Furthermore, the Panel Opinion gave only passing attention to the text of the substantive provisions Liberty Global utilized. Instead, the Panel focused almost entirely on the transactions themselves—a freewheeling approach to the doctrine, untethered from the text of the Code.

The Panel Opinion did not follow these other court approaches, and instead failed to give such a workable standard, as the Panel Dissent criticizes. Nor did the district court opinion below give any test. Indeed, the district court's gloss was that the relevance test was a "tautology"—it applies when the government says it applies. Taxpayers need more guidance than that, especially where the government may seek steep penalties for violating § 7701(o).

En banc review will give the chance to articulate a standard based on the substantive tax issues at stake, rather than whether Liberty Global's approach passes a subjective "I know it when I see it" style test.

ARGUMENT

The Panel Opinion gave an unworkable standard: the economic substance doctrine can be invoked when a taxpayer "mechanically compl[ies] with the Tax Code." Op. at 5. One would think that all taxpayers should comply with the Code. The majority held that Courts should look to the intent of Congress for any particular tax provision to determine if the economic substance doctrine applies. *See id*. at 4 n.6; *see also id*. at 8 (Eid, J., dissenting) ("the majority abandons its responsibility to meaningfully interpret text and precedent and merely looks to the "purpose of the statute," effectively handing the government a blank check to declare any transactions it does not like to be within the doctrine."). Relevancy must be more than whenever the government raises the issue or a judge thinks a transaction does not pass a subjective "I know it when I see it" test.

What is instead needed is direct guidance through rulemaking—but the Treasury and IRS have specifically avoided doing so. *See* IRS, *Interim Guidance Under the Codification of the Econ. Substance Doctrine & Related Provisions in the Health Care & Educ. Reconciliation Act of 2010*, 2010-40 I.R.B. 411, 412, 2010 WL 3529402 (Oct. 4, 2010) ("Treasury Department and the IRS" stating that they "do not intend to issue general administrative guidance regarding the types of transactions to which the economic substance doctrine either applies or does not apply."). Going instead with a regulation by litigation approach, the government

makes this Court do what the IRS should have done 16 years ago. That means the panel decision should have a clear test for when the economic substance doctrine is relevant. Further review is needed to articulate a test for future tax disputes.

I. THE PANEL'S APPLICATION OF THE ECONOMIC SUBSTANCE DOCTRINE IS INCONSISTENT WITH OTHER COURT DECISIONS.

Congress creates and controls the Code, not the courts. Congress articulated a condition for application of the economic substance doctrine: the doctrine applies only where "relevant." 26 U.S.C. § 7701(o)(1). Although the IRS may wish to employ the economic substance wherever it is unhappy with the tax consequences of a particular transaction, the doctrine can only be applied as Congress specified. In applying the test without first conducting a relevancy analysis and articulating a test for relevance, the Panel Opinion diverges from the text of the code and the approach taken by the Tax Court and other circuits.

The most extensive consideration of the § 7701(o) relevance issue comes from the Tax Court last year which "easily conclude[d] that the statute requires a relevancy determination. To put it plainly—the statute says so, right there, on its face." *Patel v. Comm'r*, 165 T.C. No. 10, at 10 (2025). Citing the statute's two mentions of "relevance" (26 U.S.C. § 7701(o)(1) and (5)(c)), the court noted that "Congress could hardly have been clearer, at least on this narrow point." *Id*. The Tax Court then carefully examined precedent to determine whether the economic

substance doctrine had been historically applied to the type of transactions at issue. *Id.* This approach anchors use of the economic substance doctrine in the statutory text and contrasts the District Court's analysis in this case, which dismissed the relevancy question as a "tautology" (App. Vol. 2 at 288), and the Panel Opinion, which approved of the District Court's approach. *See* Op. at 10 n.6; *cf. id*. 3–4 (Eid, J., dissenting) ("The district court's alternative reading of § 7701(o) fails to accord separate meaning to the express and repeated use of the term 'relevant' in the statute and was thus erroneous.").

Like the Tax Court, the Sixth Circuit also employed a relevancy requirement in *Summa Holdings, Inc. v. Commissioner*, 848 F.3d 779, 786 (6th Cir. 2017). There, the court concluded that the economic substance doctrine was inapplicable to the case at hand because the transactions at issue did not constitute "a labeling-game sham or defied economic reality." *Id*. The Sixth Circuit recognized that the economic substance doctrine (and the related substance-over-form doctrine) did not apply to all transactions, but rather must "hold[] true to its roots—when the taxpayer's formal characterization of a transaction fails to capture economic reality and would distort the meaning of the Code in the process." *Id*.

The Panel Opinion attempted to distinguish *Summa Holdings* by framing that case as one where Congress intended to allow "transactions 'that have no economic substance at all' to provide a specific tax benefit[.]" Op. at 15 n.10. This

misunderstands, however, the Commissioner's arguments in *Summa Holdings*, which asserted that Congress had not anticipated the substantial tax benefits that would flow from the combination of Domestic International Sales Corporations and Roth IRAs. *Summa Holdings*, 848 F.3d at 788–90. The Sixth Circuit rejected that argument. *See id.* at 790 ("That these laws allow taxpayers to sidestep the Roth IRA contribution limits may be an unintended consequence of Congress's legislative actions, but it is a text-driven consequence no less.").

Other courts have noted similar constraints on the doctrine, because "[t]he Code treats lots of categories of economically similar behavior differently." *United Parcel Serv. of Am., Inc. v. Comm'r*, 254 F.3d 1014, 1019 (11th Cir. 2001). The Eleventh Circuit reasoned that while "[t]here may be no tax-independent reason for a taxpayer to choose between… different ways of financing the business [i.e., through debt or equity]," it does not follow that the decision is invalid under the economic substance doctrine because nothing in the Tax Code suggests that economic reality or taxpayer motive is relevant to that choice. *Id.* "To conclude otherwise would prohibit tax-planning." *Id.* Similarly, the Ninth Circuit held "[i]f the government treats tax-advantaged transactions as shams unless they make economic sense on a pre-tax basis, then it takes away with the executive hand what it gives with the legislative." *Sacks v. Comm'r*, 69 F.3d 982, 992 (9th Cir. 1995).

The language of § 7701(o) explicitly incorporates prior-enactment case law into the analysis. *See* 26 U.S.C. § 7701(o)(5)(C) ("The determination… shall be made in the same manner as if this subsection had never been enacted."). The economic substance doctrine traces back to *Gregory v. Helvering*, 293 U.S. 465, 469 (1935), where the Court examined a series of transactions and concluded that they did not amount to a "reorganization" as contemplated by the Code. The Court's holding explicitly hinged on the statutory text: "the transaction upon its face lies outside the plain intent of the statute. To hold otherwise would be to exalt artifice above reality and to deprive the statutory provision in question of all serious purpose." *Id.* at 470. The Supreme Court's other economic substance decisions have been similarly text-centric. *See, e.g., Cottage Sav. Ass'n v. Comm'r*, 499 U.S. 554, 559 (1991) (parsing the code to determine whether a transaction was truly a "disposition of property"); *Knetsch v. United States*, 364 U.S. 361, 362 (1960) (determining loan-back scheme did not constitute "indebtedness" within the meaning of the Code).

The Panel Opinion does not resemble these text-driven decisions, paying only passing attention to the text of the provisions at issue: 26 U.S.C. §§ 245A, 351, 951A, 958(a), 959(d), 964(e), and 1248. *See* Op. at 5 n.2. Rather, the Panel focuses almost entirely on the transactions themselves—a freewheeling approach to the doctrine, untethered from the text of the Code. The contrast is even more stark when

compared to the dissent, which carefully parses the statutory text of each provision at issue. *See* Op. at 15–19 (Eid, J., dissenting). *En banc* review would allow the full Court to consider the statutory text and whether it implicates the economic substance doctrine before deploying the doctrine's two-part test.

This limited role of the doctrine is necessary to respect Congress's legislative prerogative and the variety of tax mechanisms and incentives it writes into the tax law to accomplish its purposes. The consequences of a circuit split on the economic substance doctrine should not be minimized. Doctrinal variation means that transactions constituting legitimate tax planning in one jurisdiction become tax avoidance in another.

II. THE PANEL OPINION FAILED TO PROVIDE A WORKABLE RELEVANCY TEST AND THEREBY DANGEROUSLY BROADENED THE SWEEP OF THE DOCTRINE.

The Panel Opinion failed to articulate a threshold test to determine whether the economic substance doctrine is relevant, which opens the door for the IRS to apply the doctrine to any of the hundreds of tax-advantaged provisions in the Code. Combined with the stiff penalties attached for violating § 7701(o), the panel decision placed a heavy burden on taxpayers trying to take advantage of the benefits granted by Congress. But as recently as 2008, the Supreme Court recognized that it has long been the rule that a taxpayer holds the "'legal right… to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law

permits.'" *Boulware v. United States*, 552 U.S. 421, 429 n.7 (2008) (quoting *Gregory*, 293 U.S. at 469) *see also Summa Holdings*, 848 F.3d at 787 ("[W]ho is to say that a low-tax means of achieving a legitimate business end is any less 'substantive' than the higher-taxed alternative?").

Many statutory tax provisions allow or even invite taxpayers to engage in transactions principally or solely for their tax reasons. For example, a business may elect to file as an S corporation rather than as a C corporation—a decision often based entirely upon the tax benefits. *See, e.g.*, 26 U.S.C. § 1361 *et seq.*; *Gitlitz v. Comm'r*, 531 U.S. 206, 209 (2001) (describing benefits of S corporation election). Historic rehabilitation credits attract investors to preserve historic buildings that might otherwise be demolished or allowed to deteriorate. *See*, *e.g.*, 26 U.S.C. § 47. An overly broad reading of the economic substance doctrine could also threaten key tax planning strategies utilized by millions of taxpayers. For example, even moving money from a brokerage account into a tax-favored Roth retirement account could fail both elements of § 7701(o)(1)—after all, the move was done *precisely* for the tax benefit and there is no profit at the end of the deal because the same amount of savings remains. To effect the will of Congress, the economic substance doctrine should therefore be applied narrowly, rather than as a freestanding test to be deployed whenever the IRS disapproves of a transaction. *En banc* review would

allow the Court to and articulate a relevance test for 26 U.S.C. § 7701(o), preventing it from swallowing up large swaths of the Code.

This is all the more perilous for taxpayers because the Code provides particularly harsh penalties when a transaction is disallowed under the economic substance doctrine, substantially raising the stakes for taxpayers in a already-confused area of law. Penalties under 26 U.S.C. § 6662(b)(6) apply to any accuracy-related underpayment attributable to "[a]ny disallowance of claimed tax benefits by reason of a transaction lacking economic substance (within the meaning of section 7701(o))[.]" Although the ordinary accuracy-related penalty is 20% of the underpayment, § 6662(i)(1) increases the penalty "attributable to one or more nondisclosed noneconomic substance transactions" to 40% of the underpayment. Moreover, the typical good faith exception to the accuracy-related penalties is explicitly unavailable when an underpayment results from a transaction disallowed as lacking economic substance, whether it was disclosed or not. § 6664(c)(2).

Taken together, these provisions mean that a taxpayer, acting in good faith and in full compliance with the text of the Code, is subject to a 20 to 40% penalty when an underpayment results from the application of the economic substance doctrine. Add a broad interpretation of the doctrine and a circuit split to this perilous cocktail, and what may be perfectly legitimate tax planning in one jurisdiction becomes financially ruinous in another.

CONCLUSION

For the foregoing reason, *Amicus Curiae* urges this Court to reverse the panel decision and articulate a relevance test for 26 U.S.C. § 7701(o).

Respectfully submitted,

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Dated: June 12, 2026

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B) and 29(a)(5) because this brief contains 2,440 words, as counted by Microsoft Word, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface and type style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word in Times New Roman 14-point font.

/s/ Tyler Martinez
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Dated: June 12, 2026

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing *Amicus Curiae* Brief of National Taxpayers Union Foundation in Support of Appellant Liberty Global, Inc. and Rehearing using the court's CM/ECF system. A Notice of Docket Activity will be emailed to all registered attorneys currently participating in this case, constituting service on those attorneys:

/s/ Tyler Martinez
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