

No. 23-1410

**IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

LIBERTY GLOBAL, INC.,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

On Appeal from the United States District Court for the
District of Colorado, No. 1:20-cv-03501-RBJ (Jackson, J.)

**BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED
STATES OF AMERICA AND THE AMERICAN FUEL &
PETROCHEMICAL MANUFACTURERS AS *AMICI CURIAE* IN
SUPPORT OF PANEL REHEARING OR REHEARING EN BANC**

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INTEREST OF *AMICI CURIAE*¹

The Chamber of Commerce of the United States of America (“Chamber”) is the world’s largest business organization. As the nation’s leading advocate for business, the Chamber represents companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the business community.

The American Fuel & Petrochemical Manufacturers (“AFPM”) is a national trade association whose members comprise virtually all U.S. refining and petrochemical manufacturing capacity. Among its other missions, AFPM engages in legal advocacy on issues important to its members.

Amici have a strong interest in the outcome of this appeal. The panel majority’s interpretation of the codified economic substance doctrine is contrary to the statutory text and legislative history, excessively broadens the doctrine’s scope, and threatens to upend reliance on permissible business transactions that follow the plain text of the Code.

¹ All parties have consented in writing to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici curiae*, their members, or their counsel, made any monetary contribution intended to fund its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

The economic substance doctrine is a limited judicial tool for effectuating—not overriding—congressional intent. When Congress codified the doctrine as section 7701(o) of the Internal Revenue Code of 1986, as amended (the “Code”), it erected an important guardrail, limiting application to when the doctrine is “relevant,” and directing that “the determination of whether the economic substance doctrine is relevant to a transaction shall be made in the same manner as” before the doctrine was codified. 26 U.S.C. § 7701(o). The district court, however, expressly jettisoned any relevance inquiry. And although the panel majority purported to avoid that misstep, it danced the same dance, “effectively handing the government a blank check to declare any transactions it does not like to be within the doctrine.” *Liberty Glob., Inc. v. United States*, 174 F.4th 1208, 1227 (10th Cir. 2026) (Eid, J., dissenting).

The panel majority’s misreading of the statute’s threshold relevance inquiry is an issue of exceptional importance and warrants rehearing. 10th Cir. R. 40.1(A), (B). Allowing the panel’s decision to stand will harm American businesses, which depend on clear and predictable tax rules to plan their operations. The IRS may not ignore Congress’s “highly reticulated” tax scheme to “recharacterize the meaning of statutes—to ignore their form, their words, in favor of [the IRS’s] perception of their substance.” *Summa Hldgs., Inc. v. Comm’r*, 848 F.3d 779, 785, 789 (6th Cir. 2017)

(Sutton, J.). The freewheeling application of the economic substance doctrine endorsed by the majority forces businesses to operate under the specter of significant tax consequences for large categories of otherwise routine transactions to which the doctrine is not “relevant” and should not apply.

This Court should grant rehearing. The plain language of section 7701(o) requires a “meaningful threshold relevancy determination,” *Liberty Glob.*, 174 F.4th at 1227 (Eid, J., dissenting), not the cursory and amorphous analysis the majority applied.

ARGUMENT

I. The Panel Majority Failed to Apply the Requisite Threshold Relevance Inquiry.

The economic substance doctrine functions as a narrow exception to the general rule that taxpayers are free to structure their transactions as they see fit to minimize taxes. Its limited applicability reflects the principle that federal tax law should consist of clear, unambiguous, and mechanical rules. Because the doctrine operates after a transaction has occurred and can upset a taxpayer’s settled expectations and reliance on the plain language of the Code, courts must be vigilant in respecting its boundaries. *See Nassau Lens Co. v. Comm’r*, 308 F.2d 39, 45 (2d Cir. 1962) (“cautious approach” necessary to disregard transactions that meet the Code’s requirements). The majority’s decision instead opens the floodgates, “contradicting not only the clear statutory language of § 7701(o), but also decades

of precedent.” *Liberty Glob.*, 174 F.4th at 1226 (Eid, J., dissenting).

A. The Codified Economic Substance Doctrine Requires a Meaningful Threshold Relevance Inquiry.

Since its inception, courts have developed various ways to limit use of the economic substance doctrine. Congress incorporated those limitations by specifying that it applies only to “relevant” transactions and directing courts to determine relevancy based on established precedent.

That established precedent employed two basic limiting principles. First, courts refrained from applying the doctrine to basic business transactions, where the form of the transactions was consistent with the underlying substance. Thus, for example, in *Siegel v. Comm’r*, 45 T.C. 566 (1966), the Tax Court respected the separate existence of a foreign corporation even though tax considerations were taken into account when organizing the corporation as a foreign rather than domestic corporation. *Id.* at 576–77 (The Code “permitted that result, and petitioner was free to take advantage of it.”).

Second, courts refrained from applying the doctrine where the operative statutes or regulations permitted the claimed tax benefits regardless of a transaction’s non-tax effects or the taxpayer’s intent. This principle is clearly articulated in *Horn v. Comm’r*, 968 F.2d 1229 (D.C. Cir. 1992): “Congress undoubtedly has the power to grant beneficial tax treatment to economically meaningless behavior” *Id.* at 1234; *see also Reinberg v. Comm’r*, 90 T.C. 116, 134 (1988) (“[W]e should not

disregard the existence of an asset for which Congress intended tax advantages merely because the parties attempted to maximize the advantage of those benefits”).

In 2010, to “provide greater clarity and uniformity in the application of the economic substance doctrine,” Congress codified the doctrine in section 7701(o). H.R. Rep. No. 111-443, pt. 1, at 295. Congress resolved uncertainty over the substantive analysis required when the doctrine is relevant by adopting a conjunctive test—requiring both a meaningful change in economic position and a substantial non-tax purpose—while making clear that it was not disturbing the well-established background principles governing when an economic substance analysis may be invoked. Section 7701(o)(1) directs application of the economic substance doctrine “[i]n the case of any transaction to which the ... doctrine is relevant.” 26 U.S.C. § 7701(o)(1). Additionally, 26 U.S.C. § 7701(o)(5)(C) provides that “[t]he determination of whether the economic substance doctrine is relevant to a transaction shall be made in the same manner as if this subsection had never been enacted.”

Together, “[t]hese provisions make clear that there exists a mandatory relevancy determination before the government may invoke the economic substance doctrine to disallow tax benefits.” *Liberty Glob.*, 174 F.4th at 1226 (Eid, J., dissenting). And that threshold relevancy determination is not a cursory box-

checking exercise; as Judge Eid correctly recognized, the threshold inquiry section 7701(o) demands is a “meaningful” one. *Id.* at 1227 (Eid, J., dissenting). The statute makes that requirement plain in two respects: first, its use of “determination” reflects “the process of reaching a conclusion” as to relevance, not simply accepting the IRS’s say-so. *Est. of Keeter v. Comm’r*, 75 F.4th 1268, 1280 (11th Cir. 2023); *see also Scar v. Comm’r*, 814 F.2d 1363, 1368 (9th Cir. 1987) (“By its very definition and etymology the word ‘determination’ irresistibly connotes consideration, resolution, conclusion, and judgment.” (citation omitted)).

Second, the statute mandates that the threshold relevance inquiry proceed based on pre-codification principles and jurisprudence, which meaningfully considered whether and when the doctrine applied. *See* 26 U.S.C. § 7701(o)(5)(C). The legislative history confirms the link between the relevancy requirement and the pre-codification caselaw. The House Committee Report emphasizes that “the provision does not change current law standards in determining when to utilize an economic substance analysis.” H.R. Rep. No. 111-443, pt. 1, at 295–96.

Moreover, the House Committee Report states specifically that—consistent with pre-codification caselaw—the doctrine should not be applied to basic business transactions or to disallow congressionally intended tax benefits, both categories important here. As the report explained, the codification was “not intended to alter the tax treatment of certain basic business transactions that, under longstanding

judicial and administrative practice are respected.” *Id.* at 296. The legislative history gave several “illustrative and not exclusive” examples, including: “(1) the choice between capitalizing a business enterprise with debt or equity; (2) a U.S. person’s choice between utilizing a foreign corporation or a domestic corporation to make a foreign investment; [and] (3) the choice to enter a transaction or series of transactions that constitute a corporate organization or reorganization under subchapter C.” *Id.* at 296 & n.125 (footnotes omitted). Moreover, “[i]f the tax benefits are clearly consistent with all applicable provisions of the Code and the purposes of such provisions, it is not intended that such tax benefits be disallowed if the only reason for such disallowance is that the transaction fails the economic substance doctrine” *Id.* at 296 n.124.

In sum, the statutory text of section 7701(o), confirmed by its legislative history and preexisting caselaw, requires a meaningful assessment as to whether the transaction at issue is one to which the economic substance doctrine applies before the significant step of overriding the plain language of the Code; to do otherwise makes a “parody of a purpose-based approach to interpretation.” *Summa Hldgs.*, 848 F.3d at 788.

B. The Majority Failed to Engage in Meaningful Consideration of Whether the Doctrine Is Relevant.

As the dissent correctly observed, the panel majority did not undertake the kind of “meaningful threshold relevancy determination” that section 7701(o)

requires. *Liberty Glob.*, 174 F.4th at 1227 (Eid, J., dissenting). Instead, the panel largely collapsed that threshold inquiry into its observation that Project Soy, viewed in its “entirety,” was not a basic business transaction. *Id.* at 1217. But that reasoning skips over the required initial step. The statute, which incorporates pre-codification precedent, compels a holistic analysis that adheres to the doctrine’s narrow application and asks whether the transaction at issue is one in which courts have traditionally invoked the doctrine. As Judge Eid explained, even though pre-codification cases of course do not turn on the word “relevant” as used in the statute, courts must still “survey the caselaw before enactment of § 7701(o) to discern any general principles that determine when the economic substance doctrine is relevant.” *Id.* at 1228 (Eid, J., dissenting). The majority’s analysis gives too little weight to those limiting principles and too much to a generalized appeal to statutory purpose.

That error is especially significant because it defeats one of Congress’s principal aims: “to provide greater clarity and uniformity in the application of the economic substance doctrine.” H.R. Rep. No. 111-443, pt. 1, at 295. Tying the relevance requirement to preexisting caselaw was designed to channel courts toward the limiting principles that historically confined the doctrine and thereby promote greater predictability and uniformity. Instead, the majority affirmed the district court’s dismissive interpretation of the threshold relevance requirement, which Judge Eid correctly noted “is not only wrong—it borders on the absurd, improperly

casting our court into the role of creating rather than construing legislation.” *Id.* at 1227 (Eid, J., dissenting). By collapsing the relevance inquiry into a generalized appeal to statutory purpose, the majority does the opposite, replacing a clarifying statutory screen with a vague standard that threatens reduced consistency across cases.

Given the doctrine’s circumscribed application, the majority’s failure to explain why this case falls within that narrow domain warrants rehearing. The dissent identified precisely the problem: the doctrine is not a “free-floating override to a tax-favorable result,” but a limited tool tied to circumstances in which other Code provisions “make economic reality or taxpayer motive relevant.” *Id.* at 1231 (Eid, J., dissenting). The majority failed to respect the doctrine’s limited reach and its historical roots by treating the absence of one of the basic business transactions enumerated in the legislative history (and pre-codification precedent) as effectively dispositive, notwithstanding the settled principle that taxpayers may make tax-driven choices as to entity classification, capitalization, and timing when the Code permits those choices. And, as the dissent warned, an approach like the majority’s authorizes the government to penalize transactions it does not like despite their compliance with the Code’s plain language. *Id.* at 1227 (Eid, J., dissenting). In contrast, a proper threshold inquiry would have started from the opposite premise—that the doctrine is exceptional and narrow—and then explained, based on the

relevant statutory provisions and pre-codification principles, why Project Soy is one of the uncommon cases in which that exceptional doctrine should be invoked.

II. The Panel Majority’s Decision Injects Significant Uncertainty into the Federal Tax Laws, Increasing Costs to Businesses and Consumers Alike.

By “effectively handing the government a blank check to declare any transactions it does not like to be within the doctrine,” *id.* (Eid, J., dissenting), the majority dramatically expands the reach of the economic substance doctrine and green lights its overly aggressive application by the IRS. The decision’s practical and economic effects imperil business and tax planning that will result in higher costs for businesses and higher prices for consumers.

Tax planning requires tax rules that are clear, predictable, and consistently applied; conversely, unsettled application of the tax laws makes it impossible for taxpayers to reasonably order their business activities and plan for the future. *See United States v. Generes*, 405 U.S. 93, 105 (1972) (In tax law, “certainty is desirable.”); *Chapman v. Comm’r*, 618 F.2d 856, 874 (1st Cir. 1980) (“[M]uch tax planning must proceed on the basis of settled rules.”). The need for certainty in this context is especially acute. Not only must a business determine the tax consequences of its actions in advance based on the Code, but it must also undertake the nearly impossible task of predicting the circumstances under which the IRS and courts may one day decide to retroactively alter the language of the Code. Businesses cannot

reasonably plan their activities and make strategic decisions when the government is operating with a “blank check” it can cash at any time and in any amount. *Liberty Glob.*, 174 F.4th at 1227 (Eid, J., dissenting).

The majority’s decision will also increase tax-related business costs, harming businesses and consumers alike. The Code imposes a strict-liability penalty for transactions lacking economic substance equal to 20% of any underpayment attributable to a failure to satisfy section 7701(o), increased to 40% if the transaction is not adequately disclosed. 26 U.S.C. §§ 6662(b)(6), (i). Because of these punitive penalties, it is particularly important to properly apply the relevance screen to narrow the doctrine’s scope in a manner consistent with Congress’s intent. Yet, the majority’s decision authorizes the IRS to expand the doctrine and use it as a blunt instrument to disallow or recharacterize transactions of which it does not approve, and which Congress has failed to address through the proper formal tax legislative process.

Taxpayers also will face a greatly increased burden in the form of audit and litigation costs incurred to defend against more economic substance assessments. Tax disputes are by their nature protracted and expensive—a fact which the IRS has long recognized—and thus impose massive costs on businesses. *See IRS IR-2000-33, New IRS Division Begins Work to Break Down Barriers for Large and Mid-Sized Businesses*, 2000 WL 718921, at *1 (June 5, 2000) (“Currently, some tax disputes

can take up to eight or nine years to resolve, which is costly for business and the government.”). This is particularly true when confronting a potentially nebulous doctrine like the economic substance doctrine. And the harms from increased tax costs flow down to consumers as well: increased litigation costs, inefficiencies, and diversion of resources all lead to higher prices and reduced output.

CONCLUSION

For the foregoing reasons, the Court should grant rehearing.

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This brief complies with the following:

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I hereby certify that on June 11, 2026, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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