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INTEREST OF *AMICUS CURIAE*

The Taxpayers Protection Alliance (“TPA”) is a nonpartisan nonprofit 501(c)(4) organization dedicated to advocating for free markets and a fair, predictable, and light-touch tax system. TPA endeavors to educate the public on the economic impact of governmental overreach. In its role as a watchdog, TPA holds federal, state, and local bureaucracies to account through articles, analyses, and congressional testimony. TPA has written extensively on the tax system and has criticized the Internal Revenue Service for initiating arbitrary enforcement and failing to safeguard the rights of taxpayers.¹ A clear statement of the metes and bounds of the economic substance doctrine—when it applies and when it doesn’t—is integral to a fair and predictable tax system. Section 7701(o)², which codifies the economic substance doctrine, opens with a crucial threshold relevancy requirement. TPA submits this brief to help inform this Court’s analysis of the application of the

¹ See, e.g., Ross Marchand, *Latest IRS Cash Grab on Mergers Cripples the Economy*, The Washington Times (Nov. 11, 2025), <https://www.washingtontimes.com/news/2025/nov/11/latest-irs-cash-grab-mergers-cripples-economy/>. TPA and its affiliated 501(c)(3) organization, the Taxpayers Protection Alliance Foundation (“TPAF”), also regularly file amicus briefs in cases that implicate free-market and limited-government principles. See, e.g., Brief for Taxpayers Protection Alliance as Amicus Curiae Supporting Respondents, *FDA v. Wages & White Lion Invs., LLC*, 604 U.S. 542 (2025) (No. 23-1038); Brief for Reason Foundation, et. al. as Amici Curiae Supporting Respondents, *Moody v. NetChoice, LLC*, 603 U.S. 707 (2024) (Nos. 22-277 and 22-555).

² Unless otherwise noted, all “section” references are to the Internal Revenue Code of 1986, as amended (“Code”), and all “regulations” references are to the Treasury Regulations issued thereunder (“Treas. Reg.”).

relevancy requirement and illustrate the importance of establishing a specific framework for relevancy given the potential application of the strict-liability penalty.³

SUMMARY OF ARGUMENT

Words matter. They're "how the law constrains power." *Niz-Chavez v. Garland*, 593 U.S. 155, 172 (2021). As this Court unanimously found, section 7701(o) on its face "requires a relevancy determination" before the two-part economic substance test may be applied. *Patel v. Commissioner*. 165 T.C. No. 10, at 17 (Nov. 12, 2025). This relevancy test is separate and independent from the two-part test, as conflating the two would ignore Congress's directive to determine relevancy and deprive section 7701(o)'s "reference to relevance of independent meaning." *Id.*

Section 7701(o)'s relevancy requirement is essential to a fair and even-handed application of section 6662(b)(6)'s strict-liability penalty. Articulating a clear

³ Petitioners consented to the filing of this brief. Counsel for TPA reached out to Respondent's counsel to determine whether Respondent objects to TPA filing this brief. Counsel for TPA followed up with Respondent's counsel noting that counsel for TPA would assume Respondent objects to TPA filing this brief to the extent Respondent did not respond. Respondent did not respond and therefore TPA assumes for purposes of this brief that Respondent objects. No counsel for a party authored this brief in whole or in part. No party or a party's counsel contributed money intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

framework for determining relevancy based on caselaw is necessary to provide taxpayers “fair notice . . . of the conduct that [would] subject [them] to punishment.” *BMW of N. Am. v. Gore*, 517 U.S. 559, 574 (1996).

Caselaw illustrates the foundational principles that circumscribe the relevancy determination. First, the doctrine is never relevant to a taxpayer’s choice among options that the Code otherwise allows, such as operating a business through a partnership rather than a corporation or capitalizing a business through the issuance of debt rather than equity. Second, the text of the operative statute applicable to the transaction determines when the doctrine is—and is not—relevant. Specifically, if the statutory text at issue explicitly incorporates a term related to economic reality or economic motive, the doctrine may be relevant to the transaction. *See Liberty Global v. United States*, No. 23-1410, slip op. at 32 (10th Cir. Apr. 21, 2026) (Eid, J., dissenting). But the economic substance doctrine does not apply if the statute is subject to a more specific anti-abuse or anti-avoidance rule. Carefully tying the relevancy requirement to the statute at issue also ensures that statutes expressly providing a tax benefit are not read out of the Code and that the economic substance doctrine cannot be used to sacrifice intricate statutory text on the altar of shifting notions of legislative “intent.”

In short, the Code’s precise language defines and delimits Congress’s intent. *Summa Holdings, Inc. v. Commissioner*, 848 F.3d 779, 789 (6th Cir. 2017)

("[P]urpose must be grounded in text. It cannot be invoked to save the statute from itself."). The relevancy inquiry ensures that the economic substance doctrine operates as it has done historically: as a substantive canon to interpret statutory terms that involve an economic condition. *See Santander Holdings USA, Inc. v. United States*, 844 F.3d 15, 21 (1st Cir. 2016). The relevancy requirement, properly applied, constrains the power to override the Code and create a tax result different from the one compelled by Congress in the text of the operative statute. Accordingly, clearly articulating the standards for determining relevancy is essential to ensuring taxpayers have fair notice as to what is prohibited and avoiding constitutional concerns related to the separation of powers.

ARGUMENT

When Congress codified rules for applying the economic substance doctrine in section 7701(o), it made clear that a relevancy determination must be made before a transaction may be tested under the two-part test. *Patel v. Commissioner*, 165 T.C. No. 10, at 17 (Nov. 12, 2025) ("easily conclud[ing] that the statute requires a relevancy determination").⁴ This relevancy requirement constrains the

⁴ Substantially all of the judges to consider the statutory text of section 7701(o) recognized this relevancy requirement. *See Patel v. Commissioner*, 165 T.C. No. 10 (Nov. 12, 2025) (18 judges agreed that the statute includes a threshold relevancy requirement); *Liberty Global*, slip op. at 29 (Eid, J. dissenting) ("Congress said exactly what it meant: the economic substance doctrine is not relevant to all transactions.").

Commissioner's power and is necessary to (1) avoid constitutional concerns of fair notice given the simultaneously enacted strict-liability penalties for transactions that fail section 7701(o)'s economic substance test, and (2) maintain separation of powers as the Constitution does not permit either the IRS or courts to enforce economically coercive consequences that Congress itself chose not to impose.

I. Clearly Identifying the Metes and Bounds of the Relevancy Determination Is Necessary to Safeguard Fair Notice and the Separation of Powers.

When Congress enacted section 7701(o), it simultaneously enacted a penalty under section 6662(b)(6) for transactions lacking economic substance. Health Care and Reconciliation Act of 2010, Pub. L. 111-152, § 1049(b), 124 Stat. 1029, 1068-69. The section 6662(b)(6) penalty applies to an under-payment attributable to “[a]ny disallowance of claimed tax benefits by reason of a transaction lacking economic substance (within the meaning of section 7701(o)) or failing to meet the requirements of any similar rule of law.” If the transaction is not disclosed, the penalty increases from 20% to 40% of the pertinent underpayment. I.R.C. § 6662(i)(1). This is a strict-liability penalty, as the reasonable-cause and good faith defense does not apply. *See* I.R.C. § 6664(c)(2).

In light of this strict-liability penalty, “[e]lementary notions of fairness . . . dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that [the government] may

impose.” *BMW*, 517 U.S. at 574. “This requirement of clarity . . . is essential to the protections provided by the Due Process Clause of the Fifth Amendment.” *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (citation omitted).

Fundamental due process rights are subverted if the statute “fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.” *Id.* (quoting *United States v. Williams*, 553 U. S. 285, 304 (2008)). Without clear boundaries for section 7701(o)’s relevancy requirement, taxpayers lack any meaningful ability to predict whether textually applicable Code provisions will be applied to their transactions or whether such provisions will simply be ignored under the guise of section 7701(o). The absence of fair notice—an essential component of due process—raises “‘a serious doubt’ . . . about the constitutionality of” the strict-liability penalty. *Jennings v. Rodriguez*, 583 U.S. 281, 296 (2018) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). To avoid improper application of the penalty, a court must “first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided.” *Id.* Clearly articulating the principles for determining relevancy is thus necessary to ensure taxpayers are provided fair notice of prohibited conduct and to avoid constitutional concerns.

Section 7701(o)’s threshold relevancy determination therefore serves a critical structural function, operating as a constitutional gatekeeper on the exercise of power.

That role is analogous to the separation-of-powers principle that the Supreme Court reaffirmed in *Learning Resources, Inc. v. Trump*, where the Court emphasized that executive action may not enforce economically coercive consequences that Congress chose not to impose. 146 S. Ct. 628, 639 (2026) (“[B]oth separation of powers principles and a practical understanding of legislative intent’ suggest[] Congress would not have delegated ‘highly consequential power’ through ambiguous language.”) (first alteration in original) (citation omitted); *see also West Virginia v. EPA*, 597 U.S. 697, 723 (2022) (Congress does not “use oblique or elliptical language to empower an agency to make a ‘radical or fundamental change’ to a statutory scheme”) (citation omitted). Here, Congress did not provide the IRS (or the courts) with unlimited authority to impose strict-liability penalties. Defining the scope of section 7701(o)’s relevancy requirement is thus necessary to ensure the executive branch cannot impose punitive measures or use penalties as a cudgel to force settlements when Congress has already specified statutory outcomes.⁵

These concerns are particularly acute in this case, as the Commissioner has identified the section 6662(b)(6) strict-liability penalty as “an enhanced incentive to

⁵ In April 2022, the IRS eliminated its longstanding requirement that exam teams obtain executive level approval before asserting the codified economic substance doctrine or the related strict-liability penalties, substantially lowering internal procedural safeguards on the doctrine’s use. *See* IRS LB&I, Interim Guidance Memorandum on Economic Substance Doctrine and Related Penalties, LB&I 04 0422 0014 (Apr. 22, 2022); I.R.M. § 4.46.4.12.9 (Sept. 6, 2023).

concede to respondent.” Index No. 158 ¶ 32 (Sept. 22, 2025). The Commissioner’s use of the strict-liability penalty to force other taxpayers to comply with his view of the law results in an enforcement scheme that’s unrecognizable to Congress, unpalatable to taxpayers, and unappealing to anyone but the Commissioner. Instead of furthering the sound goal of voluntary compliance, the Commissioner’s embrace of severe penalties likely “make[s] it difficult to preserve marginal deterrence,” “inflict[s] more collateral damage” (by applying the penalty to compliant taxpayers), and “increase[s] the incentive for disputes.”⁶ The Commissioner’s approach also contravenes the Supreme Court’s decades-old observation that tax penalties have a “remedial character” and are not punitive or coercive. *Helvering v. Mitchell*, 303 U.S. 391, 401 (1938). Ultimately, the Commissioner’s black-box ploy to use the strict-liability penalty to bring taxpayers to heel underscores the need for precision and clarity in the determination of when the economic substance doctrine is relevant (or not). Otherwise, taxpayers are left to guess at what might (and might not) incur the Commissioner’s wrath.

In sum, the constitutional imperatives of fair notice and separation of powers are satisfied only if section 7701(o)’s relevancy requirement has clear and precise

⁶ See Eric Lopresti, *What’s Wrong with Strict Liability and Nonmonetary Penalties? The Case for Reasonable Fault-Based Civil Tax Penalties and Procedural Protections*, 72 Tax Law. 589, 596-97 (2019) (describing economic and behavioral outcomes of improper use of penalties).

metes and bounds. Relevancy cannot mean that the IRS can raise the doctrine and impose the penalty at its whim, regardless of which statutes are at issue. Instead, the relevancy requirement must apply and be determined using the following foundational principles established by caselaw for determining when the economic substance doctrine is and is not relevant.

II. The Economic Substance Doctrine Is Not Relevant to a Taxpayer's Choice Among Options the Code Otherwise Allows.

Courts often trace the origin of the economic substance doctrine to *Gregory v. Helvering*, 293 U.S. 465 (1935). There, the Court rested its substance-based inquiry on the bedrock proposition that “[t]he legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted.” *Id.* at 469. The “legal right” to “decrease” or “avoid” taxes inheres in every transaction that the “law permits.” *Id.* Identifying what the law permits involves a close analysis of statutory text—here, to determine what actions are and are not subject to tax.

If the law permits two different options for a transaction, then the taxpayer “may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury” *Helvering v. Gregory*, 69 F.2d 809, 810 (2d Cir. 1934) (L. Hand, J.) (emphasis added), *aff'd*, 293 U.S. 465 (1935). This foundational principle of tax choice is more than 150 years old. *See*,

e.g., *United States v. Isham*, 84 U.S. 496 (1873) (holding that a taxpayer has the legal right to avoid the payment of stamp tax duties by choosing the form of payment).

The Code and the Treasury regulations contain myriad choices, none of which are subject to the economic substance doctrine unless the text makes them so. As an example, the doctrine isn't relevant to the choice of whether to operate a business through a partnership or a corporation. Indeed, Treasury Regulations expressly allow taxpayers to choose the form of their business, regardless of tax motivations. Taxpayers may elect the type of entity they want for U.S. federal income tax purposes by checking a box on IRS Form 8832 (the "check-the-box" regulations). *See* Treas. Reg. § 301.7701-1 et seq. Courts recognize that this election is purely tax-motivated (it has to be: there is no non-tax effect) and doesn't "require that the taxpayer have a business purpose for such an election." *See Dover Corp. and Subs. v. Commissioner*, 122 T.C. 324, 351 n.19 (2004). If Congress sees the potential for abuse with respect to use of a particular form of business, Congress enacts specific rules to combat that particular abuse. *See, e.g.*, I.R.C. § 532 (applying the accumulated earnings tax "to every corporation . . . formed or availed of for the purpose of avoiding the income tax . . . by permitting earnings and profits to accumulate instead of being divided or distributed.").

Similarly, a taxpayer may fund its business operations through either debt or equity as the Code, to our knowledge, doesn't contain any provision that always

requires the taxpayer to issue debt instead of equity. *Patel*, 165 T.C. No. 10, at 18 (citing H.R. Rep. No. 111-443, pt. 1, at 296 (2010)) (recognizing Congress explicitly said the economic substance doctrine is not relevant to a taxpayer’s choice between capitalizing a business with debt or equity); *United Parcel Serv. of Am., Inc. v. Commissioner*, 254 F.3d 1014, 1019 (11th Cir. 2001) (“There may be no tax-independent reason for a taxpayer to choose between [] different ways of financing the business [i.e., through debt or equity],” but the economic substance doctrine does not nullify that tax-motivated choice because the Code does not make economic reality or taxpayer motive relevant to that choice).

The doctrine is likewise not relevant to transactions that result in taxable gains or losses from the sale of property. For example, the Supreme Court declined to invoke the economic substance doctrine in *Cottage Savings Ass’n v. Commissioner*, 499 U.S. 554, 557, 567-68 (1991), a case where there was no question that the taxpayer sustained the loss claimed, but engaged in the transaction “to ‘generate tax losses’ that did not ‘substantially affect the [taxpayer’s] economic position.’” *Liberty Global*, slip op. at 36 (Eid, J. dissenting) (citing *Cottage Savings*, 499 U.S. at 557). *See also Hobby v. Commissioner*, 2 T.C. 980, 985 (1943) (rejecting arguments to disregard sales that lacked business purpose and explaining that “[t]he question is not one of purpose, but whether the transactions were in fact what they appear to be in form.”). Similarly, the doctrine is not relevant to the decision of timing for gain

in an installment sale under section 453—specifically, the choice to apply the default method to recognize gain in installments or to elect to recognize all the gain in the year of sale. These examples underscore that where Congress offers choices to taxpayers, the economic substance doctrine has no role to play unless the statute signals otherwise.

Congress recognized this basic principle of taxpayer choice in the legislative history to section 7701(o), which identifies multiple examples of choices to which the economic substance doctrine is simply not relevant. *See* H.R. Rep. No. 111-443, pt. 1, at 296 (2010). In addition to several of those identified above, the legislative history also addresses the choice between using a foreign corporation or a domestic corporation to make a foreign investment;⁷ the choice to enter a transaction or series of transactions that constitute a corporate organization or reorganization under Part III of Subchapter C of the Code; and the choice to use a related-party entity in a transaction, provided that the arm’s-length standard of section 482 and other applicable concepts are satisfied. *See* H.R. Rep. No. 111-443, pt. 1, at 296.

In short, longstanding judicial precedent and Congress’s own statements show that the economic substance doctrine isn’t relevant to a taxpayer’s choice among lawful alternatives. To be sure, the taxpayer is bound by that choice and must take

⁷ *See Siegel v. Commissioner*, 45 T.C. 566 (1966) (court’s inquiry cannot be clouded by the use of a foreign, rather than domestic, corporation, as that choice was permitted).

the tax benefits together with the tax burdens that follow from that choice. But unless the statute specifies otherwise, the government cannot invoke the economic substance doctrine to override a taxpayer's choice.

III. Statutory Text Determines When the Doctrine Is—and Is Not—Relevant.

In *Patel*, this Court took an important step in recognizing the existence of a threshold relevancy requirement in section 7701(o) and in clarifying that this requirement is not coextensive with the two-part test. 165 T.C. No. 10. While directionally helpful, the opinion did not define the specific parameters of that requirement, other than to say that it was determined as if the economic substance doctrine had never been enacted (*see* I.R.C. § 7701(o)(5)(A) and (C)) and that it was informed by pre-codification case law. Unfortunately, TPA anticipates the Commissioner will take advantage of this lack of precision to contend that the statutory doctrine applies as long as some pre-codification case considered the common-law doctrine in some nebulous and overly broad category. Of course, this approach effectively neuters the relevancy requirement, allowing the Commissioner to pay lip service to it while simultaneously making it substantively meaningless and effectively standardless.

Fortunately, the text of the Tax Code provides a remedy for this problem. Precise statutory text drives the precise operation of the federal income tax. As the Sixth Circuit has explained, “if there is one title of the United States Code most

deserving of attention to text, it is Title 26.” *Summa Holdings*, 848 F.3d at 789. The Code is detailed and precise, not vague or rife with ambiguity. “This is the highly reticulated Internal Revenue Code, which uses language, lots of language, with nearly mathematic precision.” *Id.* Accordingly, the operative statutory text circumscribes the economic substance doctrine’s relevancy inquiry and determines when the economic substance doctrine may or may not be relevant. *Liberty Global*, slip op. at 31 (Eid, J., dissenting) (citing *Boulware v. United States*, 552 U.S. 421, 429 (2008); *id.* (“[T]he economic substance doctrine can be relevant only when there is a dispute about whether the taxpayer actually has done in substance what a Code provision—from an economic perspective—requires.”). Indeed, “federal income tax is, and always has been, based on statute. The economic substance doctrine . . . can thus perhaps best be thought of as a tool of statutory interpretation” *Santander Holdings USA, Inc. v. United States*, 844 F.3d 15, 21 (1st Cir. 2016).

A. If the Statute Includes a Term That Requires an Inquiry Into Economic Reality or Economic Purpose, the Economic Substance Doctrine May Be Relevant.

Supreme Court precedent reinforces the paramount importance of statutory text, tying economic substance inquiries to specific statutory terms regarding the underlying economics or purpose of the transaction. Simply put, the Court has applied the doctrine only where the statutory term required further consideration of

economic realities or purpose of the transaction (to determine if the transaction satisfied the applicable statute).

For example, in *Gregory* the Court considered the term “reorganization” under section 112 of the Revenue Act of 1928. 293 U.S. at 468. There, a corporation transferred certain securities to a newly organized subsidiary and distributed the subsidiary’s stock to the corporation’s sole shareholder (Mrs. Gregory), who then liquidated the subsidiary and sold the securities received in the liquidation. Mrs. Gregory reported the transfer of shares to the newly organized subsidiary as a tax-free reorganization. *Id.* at 467. The Court analyzed the text of section 112 and concluded that the phrase “in pursuance of a plan of reorganization” required the transfer to be made to pursue corporate business, and not the pursuance of a plan having no relation to the business. *Id.* at 468-70. Because the transaction was “a preconceived plan, not to reorganize a business or any part of a business, but to transfer a parcel of corporate shares to the petitioner,” the Court concluded that “the transaction upon its face lies outside the plain intent of the statute.” *Id.* at 469-70.

Likewise, in *Knetsch v. United States*, 364 U.S. 361, 362 (1960), the Court considered whether payments constituted “interest paid . . . on indebtedness” within the meaning of section 23(b) of the 1939 Code and section 163(a) of the 1954 Code. The taxpayer borrowed \$4 million from an insurance company at a 3.5% interest rate so he could invest the money, with the same company, in deferred annuity bonds

that offered only a 2.5% return. *Id.* at 362-63. Under then-applicable law, interest payments were immediately deductible on the loan, but interest income was deferred on the annuity. The statute thus required an economic inquiry to determine whether the transaction gave rise to indebtedness (and related interest payments). The Court held that the transaction was a fiction because the taxpayer's equity (i.e., the excess of the cash value of the contracts over the escalating debt) did not exceed \$1,000 and the only thing ostensibly lent back was the rebate of a substantial part of the so-called interest payments. *Id.* at 365-66. Because the taxpayer's transaction was not in substance a loan and "there was nothing of substance to be realized by [the taxpayer] from this transaction beyond a tax deduction," the Court disregarded the transaction and disallowed the taxpayer's interest payment deduction. *Id.* at 366.

Similarly, in *Frank Lyon Co. v. United States*, 435 U.S. 561 (1978), the Court considered a sale-lease-back transaction and taxpayer's deduction of interest under section 163(a) of the 1954 Code. There, the taxpayer borrowed money, bought a building from a bank, and leased the building back to a bank for rent equal to the taxpayer's payments of principal and interest on the loan. The lease agreement also provided the taxpayer with a fixed rate of return. *Id.* at 562-69. The Court considered—and ultimately rejected—the application of the economic substance doctrine because the transaction was a substantive, genuine multi-party transaction that was encouraged by business and regulatory realities. The Court concluded that

the taxpayer was entitled to interest deductions and depreciation deductions because “the obligations on which [taxpayer] paid interest were its obligations alone” and it was the taxpayer’s capital that was invested in the building. *Id.* at 580-81.

In *Glass v. Commissioner*, 87 T.C. 1087, 1163 (1986), this Court followed the Supreme Court’s approach in *Gregory* and *Knetsch* by first looking to the language of the statute to see if it required an inquiry into economic reality. Because sections 165 and 108 included a “for profit” requirement, this Court considered the profitability of certain commodity straddle transactions in the absence of an earlier closure of the taxpayer’s sold options. *Id.* The transactions weren’t profitable without that earlier closure, so this Court concluded that the options transactions lacked economic substance. *Id.* at 1177.⁸ In *Salley v. Commissioner*, 55 T.C. 896, 900 (1971), *aff’d* 464 F.2d 479 (5th Cir. 1972), this Court similarly focused on the language of the statute, explaining that the “crucial question” was whether the transaction created “indebtedness” on which they paid “interest” within the meaning of section 163(a) of the 1954 Code. This Court concluded that the application of the

⁸ *Glass* was affirmed on appeal in the First, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits. *See Dewees v. Commissioner*, 870 F.2d 21 (1st Cir. 1989); *Friedman v. Commissioner*, 869 F.2d 785 (4th Cir. 1989); *Killingsworth v. Commissioner*, 864 F.2d 1214 (5th Cir. 1989); *Herrington v. Commissioner*, 854 F.2d 755 (5th Cir. 1988); *Ratlff v. Commissioner*, 865 F.2d 97 (6th Cir. 1989); *Yosha v. Commissioner*, 861 F.2d 494 (7th Cir. 1988); *Kielmar v. Commissioner*, 884 F.2d 959 (7th Cir. 1989); *Lee v. Commissioner*, 897 F.2d 915 (8th Cir. 1989); *Keane v. Commissioner*, 865 F.2d 1088 (9th Cir. 1989); *Bohrer v. Commissioner*, 945 F.2d 344 (10th Cir. 1991); *Kirchman v. Commissioner*, 862 F.2d 1486 (11th Cir. 1989).

definitions of indebtedness and interest “is governed by the economic realities of the transaction rather than the form in which it is cast.” *Salley*, 55 T.C. at 900. Thus, while the transactions were cast in the form of loans, the transactions lacked economic substance because the economic reality was not that of indebtedness.

Pre-codification caselaw thus demonstrates the economic substance doctrine is relevant only when the operative statute requires inquiry into economic reality or economic purpose. If it does, then section 7701(o)(1)’s two-part test may be used to evaluate whether the economic requirements of the particular statute are satisfied.

B. Statutory Context Dictates Whether a Specific Anti-Abuse or Anti-Avoidance Test Should be Applied in Lieu of the Economic Substance Doctrine.

The Code is full of targeted and narrowly tailored anti-abuse and anti-avoidance provisions that mandate very specific tax treatment. For example, section 269(a) denies tax benefits from corporate acquisitions if “the principal purpose for which such acquisition was made is evasion or avoidance of Federal income tax.” Similarly, section 355(a)(1)(D) prohibits taxpayers from keeping certain stock if it was held “in pursuance of a plan having as one of its principal purposes the avoidance of Federal income tax.”⁹

⁹ Other examples abound. *See, e.g.*, §§ 170(f)(9) (denying charitable deductions made to avoid application of section 162(e)); 269B(b) (preventing tax avoidance through use of stapled entities); 357(b)(1) (excepting tax-avoidance plans from the operation of 357(a)); 467(b)(2) (requiring “constant rental accrual in case of certain tax avoidance transactions”); 877 (addressing expatriations undertaken to avoid tax).

Some anti-abuse rules apply mechanically and mandate specific tax consequences for particular transactions. For instance, Congress enacted section 304 to ensure that taxpayers don't circumvent the redemption and distribution provisions of sections 301 through 303. To achieve that end, section 304 requires a particular tax outcome: it deems certain sales as redemptions if both the target and acquiring corporation are controlled by a common group. *See Webb v. Commissioner*, 67 T.C. 293, 303 (1976) (acknowledging Congress closed a loophole with section 304), *aff'd per curiam*, 572 F.2d 135 (5th Cir. 1978). If a statute includes an anti-abuse rule, then courts apply the statutory rule and do not apply the economic substance doctrine. *See Canaverl Int'l Corp. v. Commissioner*, 61 T.C. 520 (1974) (solely applying section 269(a) anti-abuse rule, not economic substance doctrine); *Trans City Life Ins. Co. v. Commissioner*, 106 T.C. 274 (1996) (solely applying section 845(b) anti-abuse rule). To do otherwise would render specific statutory anti-abuse rules superfluous, and a fundamental rule of statutory construction is that "[a] statute is to be construed so that each of its provisions is given full effect and not to render parts of the statute inoperative or superfluous." *Phillips v. Commissioner*, 114 T.C. 115, 125 (2000) (citing *Duke v. Univ. of Tex.*, 663 F.2d 522, 526 (5th Cir. 1981)).

C. Clearly Defining Relevancy Ensures That Statutes Expressly Providing a Tax Benefit Are Not Read Out of the Code.

As this Court has recognized, Congress routinely uses the Code to incentivize certain behavior. *Fox v. Commissioner*, 82 T.C. 1001, 1021(1984) (acknowledging

that “many such tax-motivated transactions are congressionally approved and encouraged”). The Ninth Circuit underscored this principle in *Sacks v. Commissioner*: Congress provided a tax benefit “for alternative energy investments . . . to induce investments which otherwise would not have been made.” 69 F.3d 982, 992 (9th Cir. 1995). “If 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.” *Id.* Similarly, in *Mazzei v. Commissioner*, the Ninth Circuit concluded that the foreign sales corporations (“FSCs”) provisions at issue “expressly elevated form over substance” and that the Tax Court erred by using economic substance principles to effectively reverse Congressional judgement and disallow what the statutory scheme expressly allowed (i.e., the ability for the income of FSCs to be taxed at lower rates). 998 F.3d 1041, 1043 (9th Cir. 2021). Carefully applying the relevancy requirement thus leaves the statute to achieve Congress’s policy objectives as expressed by the statutory elements to obtain the tax benefit, which the taxpayer must still satisfy.

In line with these precedents, in the legislative history to section 7701(o), Congress pointed out that the economic substance doctrine is not relevant if the tax benefits of a transaction follow from the plain language of the Code: “If 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 as defined in this provision.” H.R. Rep. No. 111-443, pt. 1, at 296 n.124.

D. Tying the Relevancy Inquiry to the Applicable Statutory Text Ensures That Shifting Notions of Legislative “Intent” Will Not Dictate the Application of the Economic Substance Doctrine.

While courts in the past have sometimes taken a “revenue raising” purposive approach to statutory interpretation of the tax laws,¹⁰ modern Supreme Court precedent rejects such an inquiry and instead dictates that “the text of a law controls over purported legislative intentions unmoored from any statutory text.” *Oklahoma v. Castro-Huerta*, 597 U.S. 629, 642 (2022). It follows that courts “may not ‘replace the actual text with speculation as to Congress’[s] intent.’” *Id.* (quoting *Magwood v. Patterson*, 561 U.S. 320, 334 (2010)). The Supreme Court reiterated this principle in *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 374 (2024), explaining that “Courts interpret statutes, no matter the context, based on the traditional tools of statutory construction, not individual policy preferences.” Modern courts no longer

¹⁰ See, e.g., *Gilbert v. Commissioner*, 248 F.2d 399, 411 (2d Cir. 1957) (Hand, J., dissenting) (“[W]e cannot suppose that it was part of the purpose of the act to provide an escape from the liabilities that it sought to impose.”) (citations omitted); *United States v. Klinger*, 199 F.2d 645, 648 (2d Cir. 1952) (“[H]ow far is it proper to read the words out of the literal meaning in order to realize their overriding purpose? . . . Flinch as we may, what we do, and must do, is to project ourselves, as best we can, into the position of those who uttered the words, and to impute to them how they would have dealt with the concrete occasion.”).

take the “Emperor’s” view “that the ‘overarching’ purpose of the Code . . . is to increase revenue to the government.” *Summa Holdings*, 848 F.3d at 788 (rejecting application of the economic-substance doctrine) (citation omitted). Instead, modern courts know that “[t]he best way to effectuate Congress’s nuanced policy judgments” is “not to elevate purpose over text” but instead “to apply each provision as its text requires.” *Id.* at 788-89. Simply put, the economic-substance doctrine does not sacrifice intricate statutory text on the altar of shifting and subjective notions of statutory “purpose.”

Further, the “thing which the statute intended” (*Gregory*, 293 U.S. at 469) can be determined only by interpreting the words of the statute, as “[t]he primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used.” *United States v. Goldenberg*, 168 U.S. 95, 102-03 (1897).¹¹ Failing to apply this fundamental principle of statutory interpretation to, of all things, the tax laws, in favor of a doctrine that can only be a tool of statutory interpretation would create an approach “good for tax law only”—something the Supreme Court has refused to countenance. *Mayo Found. for Med. Educ. & Rsch. v. United States*, 562 U.S. 44, 55 (2011).

¹¹ See Judge James S. Halpern, *Putting the Cart Before the Horse: Determining Economic Substance Independent of the Language of the Code*, 30 Va. Tax Rev. 327, 327-329 (2010) (criticizing atextual application of the doctrine).

Thus, if the statute requires the particular tax outcome, the economic-substance doctrine is not relevant, regardless of subjective notions of congressional “intent.” Simply put, the doctrine is not a tool for using policy considerations to override statutory text. Courts should reject “naked policy appeals” and “apply[] the law’s demands as faithfully as [they] can in the cases that come before [them].” *Bostock v. Clayton County*, 590 U.S. 644, 680-81 (2020). Thus, “[w]hen the express terms of a statute give [a court] one answer and extratextual considerations suggest another, it’s no contest. Only the written word is the law” *Id.* at 653.

Supreme Court precedent makes clear that the economic-substance doctrine is not relevant if the statute requires the particular tax outcome, regardless of whether the government or the court believes that some other outcome is preferable as a matter of tax policy. *See, e.g., Gitlitz*, 531 U.S. at 220 (reversing Tenth Circuit’s application of the economic-substance doctrine and permitting a double tax benefit because the “Code’s plain text permits the taxpayers here to receive these benefits”); *Boulware v. United States*, 552 U.S. 421, 430-31 (2008) (rejecting asserted intent requirement where statute dictated tax consequences based on facts wholly independent of intent); *United States v. Cumberland Public Serv.*, 338 U.S. 451 (1950) (permitting tax benefit where Congress mandated the tax consequences).

The Supreme Court’s *Gitlitz* opinion illustrates this rule. There, the Court held that a single transaction entitled stockholders to two separate benefits—an increase

in tax basis and an exemption from income tax—based on the plain statutory text. *Gitlitz v. Commissioner*, 531 U.S. 206, 219-20 (2001). The Tenth Circuit previously concluded the losses were properly denied because it did “not believe Congress intended to confer such a windfall.” *Gitlitz v. Commissioner*, 182 F.3d 1143, 1148 (10th Cir. 1999), *rev’d*, 531 U.S. 206 (2001). To reach what it viewed as the appropriate result, the Tenth Circuit did not apply the statute as written, and instead adjusted the application to eliminate the perceived double-benefit. *Id.* The Supreme Court rejected this approach, declining to “address this policy concern” because the “Code’s plain text permit[ed] the taxpayers here to receive these benefits.” 531 U.S. at 219-20. Ultimately, the constitutional system worked exactly as the Founders designed. Congress amended the Code in the wake of *Gitlitz* to reverse the impact of the holding. *See* H.R. Rep. No. 107-251, at 51-52 (2001). This shows that if Congress perceives a flaw in the statute, Congress—and Congress alone—has the power to change the statute. *See Loper Bright*, 603 U.S. at 371, 403 (explaining the role of the court is “to independently interpret the statute and effectuate the will of Congress subject to constitutional limits” and that if Congress disagrees with how the court performed its job, Congress is “free to act by revising the statute”).

This brings us back to the beginning: tax motive is not relevant in determining whether what was done, was the thing the statute intended. *See, e.g., Gregory*, 293 U.S. at 468-69. To the contrary, the Code’s plain text defines the tax consequences

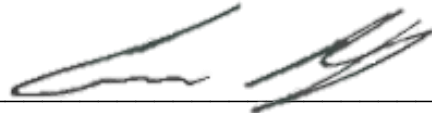
of the transaction. And the economic-substance doctrine does not allow the government or courts to override plain statutory text any time they subjectively consider a tax outcome to be too beneficial. The relevancy requirement, properly applied, constrains the power to override the Code and create a tax result different from the one compelled by Congress in the text of the operative statutory provision.

CONCLUSION

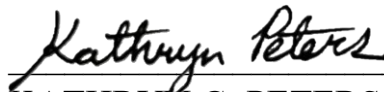
Section 7701(o)'s threshold relevancy requirement follows Congress's command to first conclude that the economic substance doctrine is relevant before delving more deeply into the transaction itself. This relevancy determination is informed by pre-codification caselaw. *See* I.R.C. § 7701(o)(5)(C); *Patel*, 165 T.C. No. 10, at 21. Caselaw demonstrates that the economic substance doctrine is not relevant to a taxpayer's choice among options that the Code otherwise allows. Supreme Court precedent clarifies that the potential relevancy of the economic substance doctrine depends on whether the operative statute is subject to a more specific anti-abuse rule or explicitly incorporates a term related to economic reality or economic purpose. Tying relevancy to the text of the operative statute, as courts have done for years when applying the common-law economic substance doctrine, is the only way to provide taxpayers with fair notice of the law that applies to their transactions and to maintain the separation of powers.

Dated: May 19, 2026

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CORPORATE DISCLOSURE STATEMENT

(See Rule 20(c).)

The undersigned counsel for Taxpayers Protection Alliance certifies that the filer does not have a parent corporation, nor is there any publicly held corporation that owns 10% or more of the filer's stock.

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CERTIFICATE OF SERVICE

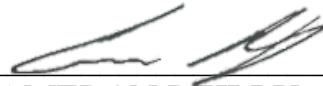
This is to certify that a copy of the foregoing brief was served on the parties' counsel on May 19, 2026 by sending to the following email addresses to the following address, first class postage prepaid.¹²

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