

**In the
Supreme Court of the United States**

KEITH A. TUCKER; LAURA B. TUCKER,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

**REPLY IN SUPPORT OF PETITION FOR A
WRIT OF CERTIORARI**

GEORGE M. CLARKE III
PHILLIP J. TAYLOR
MIREILLE R. OLDAK
BAKER & MCKENZIE LLP
815 Connecticut Ave., NW
Washington, DC 20006
(202) 835-6184

GREGORY G. GARRE
Counsel of Record
BENJAMIN W. SNYDER
ERIC J. KONOPKA
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

Counsel for Petitioners

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	3
A. The Circuit Split Is Real	3
B. The Government’s Argument On The Merits Highlights The Need For Review.....	8
C. This Case Is An Ideal Vehicle	9
CONCLUSION	12

TABLE OF AUTHORITIES

Page(s)

CASES

<i>Ali v. Federal Bureau of Prisons</i> , 552 U.S. 214 (2008).....	3
<i>American Electric Power Co. v. United States</i> , 326 F.3d 737 (6th Cir. 2003), <i>cert. denied</i> , 540 U.S. 1104 (2004).....	4
<i>Billy F. Hawk, Jr., GST Non-Exempt Marital Tr. v. Commissioner</i> , 924 F.3d 821 (6th Cir. 2019), <i>petition for cert. filed</i> , No. 19-200 (Aug. 13, 2019).....	1, 5
<i>Coltec Industries, Inc. v. United States</i> , 454 F.3d 1340 (Fed. Cir. 2006), <i>cert. denied</i> , 549 U.S. 1206 (2007).....	8
<i>Dow Chemical Co. v. United States</i> , 435 F.3d 594 (6th Cir. 2006), <i>cert. denied</i> , 549 U.S. 1205 (2007).....	4
<i>Eldred v. Ashcroft</i> , 537 U.S. 186 (2003).....	3
<i>Gregory v. Helvering</i> , 293 U.S. 465 (1935).....	4
<i>Helvering v. Gregory</i> , 69 F.2d 809 (2d Cir. 1934), <i>aff'd</i> , 293 U.S. 465 (1935).....	3

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Home Depot U.S.A., Inc. v. Jackson</i> , 139 S. Ct. 1743 (2019).....	2
<i>Horn v. Commissioner</i> , 968 F.2d 1229 (D.C. Cir. 1992).....	2, 5, 6
<i>Kisor v. Wilkie</i> , 139 S. Ct. 2400 (2019).....	3, 8
<i>Knetsch v. United States</i> , 364 U.S. 361 (1960).....	4
<i>Mazzei v. Commissioner</i> , 150 T.C. 138 (2018).....	7
<i>Mertens v. Hewitt Associates</i> , 508 U.S. 248 (1993).....	9
<i>Ross v. Blake</i> , 136 S. Ct. 1850 (2016).....	2
<i>Summa Holdings, Inc. v. Commissioner</i> , 848 F.3d 779 (6th Cir. 2017).....	<i>passim</i>

STATUTES

26 U.S.C. § 7701(o)(5)(C)	10, 11
---------------------------------	--------

OTHER AUTHORITIES

Amandeep S. Grewal, <i>Economic Substance and the Supreme Court</i> , 116 Tax Notes 969 (2007).....	9
--	---

TABLE OF AUTHORITIES—Continued

	Page(s)
Andy Grewal, Notice & Comment, <i>The Solicitor General’s Curious Defense of the Economic Substance Doctrine</i> , Yale J. on Reg. Blog (Sept. 9, 2019), http://yalejreg.com/nc/the-solicitor-generals-curious-defense-of-the-economic-substance-doctrine/	1, 8, 10, 11
H.R. Rep. No. 111-443 (2010)	10
I.R.S. Notice 2010-62, 2010-40 I.R.B. 411.....	11

INTRODUCTION

At issue in this case is whether the federal courts enjoy a free-ranging power to disregard the plain and unambiguous text of tax laws whenever they deem the results of those laws unduly distasteful under the judge-made “economic substance” doctrine—a power that makes the Executive’s claims to deference over its interpretation of statutes and regulations look almost quaint by comparison. *Cf. Billy F. Hawk, Jr., GST Non-Exempt Marital Tr. v. Commissioner*, 924 F.3d 821, 831 (6th Cir. 2019) (Sutton, J.), *petition for cert. filed*, No. 19-200 (Aug. 13, 2019).

The government’s response only brings this question into sharper relief. The government does not dispute that the statutes and regulations at issue here are unambiguous and mechanical; that the petitioner, Mr. Tucker, followed those laws; or that the Fifth Circuit, invoking an extreme conception of the economic substance doctrine, disregarded the results of those laws because it believed they were abusive. BIO 9, 11, 16. That makes this case an ideal vehicle to decide a question that has long divided the lower courts: “when, if ever, courts may use the economic substance doctrine to override federal tax statutes.” Andy Grewal, Notice & Comment, *The Solicitor General’s Curious Defense of the Economic Substance Doctrine*, Yale J. on Reg. Blog (Sept. 9, 2019) (Grewal, Notice & Comment).¹

As explained in the petition (at 13–23), there is a clear circuit split on this issue. The D.C. and Sixth Circuits have held that, in our system of government,

¹ Available at <http://yalejreg.com/nc/the-solicitor-generals-curious-defense-of-the-economic-substance-doctrine/>.

the courts’ role is to interpret the requirements of the necessarily technical tax laws, not to override them. But other circuits, including the Fifth Circuit below, have disagreed. The government tries to dismiss this direct conflict as turning on the particulars of each case, but the circuits themselves recognize it is real. *See Horn v. Commissioner*, 968 F.2d 1229, 1234 (D.C. Cir. 1992) (expressly recognizing that the D.C. Circuit’s approach on the question presented was contrary to the “conclusions reached by three sister circuits, the Tax Court and the Commissioner”).

Trying to sidestep the conflict, the government’s lead response is that this Court’s review is unnecessary because the Fifth Circuit’s decision is “correct[],” and that courts really do have the authority to dismiss results they do not like—“*even if* the transactions technically comply with the statutory and regulatory provisions that authorize [the tax benefits at issue].” BIO 10–11. Far from diminishing the case for certiorari, the government’s defense of the decision below underscores the need for this Court’s review. Indeed, the government itself recognizes—and even touts as a virtue—that this judge-made doctrine is regularly invoked to refuse tax benefits in an “endless” number of scenarios where a court concludes that “technical[]” compliance lacked sufficient real-world significance. *Id.* at 11. At a minimum, that extraordinary conception of the role of the courts warrants this Court’s review.

This Court has repeatedly rejected “extra-textual exception[s]” to statutes, *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016), that “relegat[e] the text to an afterthought,” *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1755 (2019) (Alito, J., dissenting). And while the government tries to package its far-

reaching position as sound tax policy, this Court has moved “away from open-ended policy appeals and speculation about legislative intentions and toward the traditional tools of interpretation judges have employed for centuries to elucidate the law’s original public meaning.” *Kisor v. Wilkie*, 139 S. Ct. 2400, 2442 (2019) (Gorsuch, J., concurring in the judgment). After all, respect for Congress requires “giv[ing] effect to the text Congress enacted,” *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 228 (2008), even where a court believes Congress “pursued very bad policy,” *Eldred v. Ashcroft*, 537 U.S. 186, 222 (2003).

This Court’s intervention is needed.

ARGUMENT

A. The Circuit Split Is Real

The government’s attempt (at 14–20) to obscure the direct circuit conflict on the question presented by focusing on transaction-specific details of the cases fails, because the cases make clear that the circuits squarely disagree on the threshold question of when the economic substance doctrine is relevant.

1. In the Sixth Circuit, economic substance is relevant only where it is *made* relevant by specific statutory or regulatory provisions that are grounded in real-world economics—not where it represents a means of “text avoidance.” *Summa Holdings, Inc. v. Commissioner*, 848 F.3d 779, 787 (6th Cir. 2017). Thus, the Sixth Circuit held that, “[i]f the Code authorizes the ‘formal’ transaction the taxpayer entered into, . . . ‘it is of no consequence that it was all an elaborate scheme to get rid of income taxes.’” *Id.* (quoting *Helvering v. Gregory*, 69 F.2d 809, 810 (2d Cir. 1934) (L. Hand, J.), *aff’d*, 293 U.S. 465 (1935)). In

other words, courts lack the authority to “reject a Code-compliant transaction in the service of general concerns about tax avoidance.” *Id.*

As the Sixth Circuit has explained, this text-based approach follows from this Court’s precedents. The Court’s seminal decisions in this area all involved statutory terms—like a “reorganization” or “debt”—that depend on real-world economic realities. *Id.* at 785 (discussing *Gregory v. Helvering*, 293 U.S. 465, 468–69 (1935), and *Knetsch v. United States*, 364 U.S. 361, 365–66 (1960)); *see also* Pet. 28–29 & n.11. “[A]t issue in each of these cases,” therefore, was “the *meaning of words* in the Code like ‘income,’ ‘reorganization,’ and ‘debt,’” such that their focus on economic substance simply showed the need “to attend to economic realities in deciding whether one of these terms covers a transaction.” *Summa Holdings*, 848 F.3d at 787 (emphasis added).²

The government tries (at 17) to distinguish *Summa Holdings* on the ground that it involved “the distinct, though related, substance-over-form doctrine.” But ironically, the government’s distinction is all form and no substance. The Sixth Circuit’s decision was not particular to the substance-

² Contrary to the government’s suggestion (at 18), *Summa Holdings* did not need to “overrule” the Sixth Circuit’s prior precedents to hold that economic substance is relevant only where the text makes it relevant. In the cases cited, the claimed tax treatment turned on a showing of “indebtedness,” which undeniably *does* make economic substance relevant. *See Dow Chem. Co. v. United States*, 435 F.3d 594, 598 (6th Cir. 2006), *cert. denied*, 549 U.S. 1205 (2007); *American Elec. Power Co. v. United States*, 326 F.3d 737, 740–41 (6th Cir. 2003), *cert. denied*, 540 U.S. 1104 (2004). The rule of *Summa Holdings* is therefore perfectly consistent with those older decisions.

over-form doctrine, which is precisely why its analysis drew so heavily on cases, like *Gregory*, about the economic substance doctrine. See *Summa Holdings*, 848 F.3d at 787 (noting that *Gregory* was “the case that gave rise to the economic-substance doctrine”). Instead, in *Summa Holdings*, the Sixth Circuit held more generally that *regardless* of which of these “related” doctrines the government might invoke, “economic-substance principles . . . do not give the Commissioner purchasing power” unless the *text* makes them relevant. *Id.* at 786.

Thus, in the Sixth Circuit, where a taxpayer has “complied in full with the printed and accessible words of the tax laws,” the IRS and the courts must give effect to those laws. *Id.* at 781. As the Sixth Circuit has put it: “If Congress authorizes taxpayers to do something—[such as] employing Code-compliant ‘shell corporations . . . that have no economic substance’—the Commissioner can’t override the constitutional forces of bicameralism and presentment.” *Billy F. Hawk, Jr., GST Non-Exempt Marital Tr. v. Commissioner*, 924 F.3d 821, 831 (6th Cir. 2019) (alteration in original) (quoting *Summa Holdings*, 848 F.3d at 786). The Fifth Circuit, however, did just that in refusing to give effect to the plain terms of the tax laws here. Pet. 20–23.

2. The government’s attempt to dismiss the D.C. Circuit’s position is also unavailing. In *Horn v. Commissioner*, the D.C. Circuit clearly stated its view that the economic substance doctrine does not apply “independently of” text, and declined to apply it because the relevant statute allowed tax losses even when taxpayers engaged in meaningless financial transactions. 968 F.2d 1229, 1238 (D.C. Cir. 1992); see *id.* at 1236 (“Congress has the power to authorize

these transactions, whether or not they are economic shams.”). The D.C. Circuit expressly rejected the notion that the economic substance doctrine could be invoked to “preempt congressional intent” as expressed in the text itself. *Id.* at 1236.

This position puts the D.C. Circuit squarely in conflict with the extra-statutory approach employed by the Fifth Circuit and by other circuits. Pet. 17–20. And, driving the point home, the D.C. Circuit in *Horn* explicitly disagreed with other courts that, in considering the exact same issue, had applied the economic substance doctrine to override the plain terms of the statute that the D.C. Circuit found controlling. See 968 F.2d at 1234 (allowing the tax losses despite “some trepidation in light of the contrary conclusions reached by three sister circuits, the Tax Court and the Commissioner”).

3. The government’s attempt (at 20) to distinguish *Summa Holdings* and *Horn* on the ground that Congress specifically intended the tax benefits claimed in those cases fails. Both *Summa Holdings* and *Horn* are premised on the understanding that Congress expresses its intent through the text of the laws it passes; if the text leads to a tax benefit, then that is what Congress intended. See *Summa Holdings*, 848 F.3d at 788–89 (“The best way to effectuate Congress’s nuanced policy judgments is to apply each provision as its text requires—not to elevate purpose over text when taxpayers structure their transactions in unanticipated, tax-reducing ways.”); *Horn*, 968 F.2d at 1234 (holding that the “statute means what it says” even if it “ought not say what it says”). The focus of both courts was on the text rather than an extra-statutory divination of congressional purpose or intent. Indeed, the *Summa*

Holdings court even acknowledged that the tax benefits achieved there “may be an unintended consequence of Congress’s legislative actions,” but found that point irrelevant because they were “a text-driven consequence no less.” 848 F.3d at 790.

On that understanding, this case would have come out differently: The government itself does not dispute that the plain terms of the pertinent statutes and regulations entitle Mr. Tucker to the tax benefits he claimed. Congress is of course free to change those laws, but, in our system, the courts are not.

4. The government (at 15–17) claims that other courts have treated transactions like those at issue here in the same manner as the Fifth Circuit did. Notably, however, those cases do not come from the Sixth or D.C. Circuits, and most of them come from circuits already identified as on the other side of this split. *Compare* BIO 15–17, *with* Pet. 17–20. That those courts might agree with the Fifth Circuit’s approach to the economic substance doctrine, as well as its handling of this case, only highlights one side of a split that this Court should resolve.³

The ability of taxpayers to rely on the tax laws as written should not depend on where they happen to reside or conduct their business.

³ The government does not deny that the Tax Court itself is internally divided on when the economic substance doctrine is relevant. *See, e.g., Mazzei v. Commissioner*, 150 T.C. 138, 197 (2018) (Holmes, J., dissenting) (“The majority’s approach—perhaps more common in tax law than in any other legal specialty—is to abandon general principles of statutory construction in favor of using judge-made doctrines that undermine or ignore the text of the Code to recast transactions to avoid ‘abuse.’ And here ‘abuse’ means something like a result inconsistent with a judge’s notion of a Code section’s purpose.”).

B. The Government’s Argument On The Merits Highlights The Need For Review

Perhaps recognizing the conflict is genuine, the government’s lead response (at 10–11) is to argue the merits. But while the government is adamant that the decision below is “correct[],” it conspicuously fails to try to reconcile the Fifth Circuit’s extreme conception of the economic substance doctrine with the usual rules of statutory interpretation. *See* BIO 11–13. There is good reason for that silence: Applying the judge-made economic substance doctrine to override the text deeply conflicts with how courts normally treat statutes and regulations and “presents a major separation of powers issue that the Court should resolve.” Grewal, Notice & Comment.

One of the most important legal developments in the past quarter-century is this Court’s emphasis that courts must give effect to the plain and unambiguous text of statutes and regulations. *See, e.g., Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (“If uncertainty does not exist . . . [t]he regulation then just means what it means—and the court must give it effect, as the court would any law.”). Yet some courts, like the Fifth Circuit below, invoke the economic substance doctrine to override clear text, rather than to interpret ambiguities. *See* Pet. 17–20; *Coltec Indus., Inc. v. United States*, 454 F.3d 1340, 1351 (Fed. Cir. 2006) (disallowing a tax loss even though, “under the literal terms of the statute,” the loss was proper), *cert. denied*, 549 U.S. 1206 (2007). Remarkably, they treat the economic substance doctrine as a roving license to override unambiguous laws on policy grounds.

This Court would not stand for such a blatant policy-notwithstanding-text mode of adjudication in

any other field of law, *see, e.g., Mertens v. Hewitt Assocs.*, 508 U.S. 248, 261–62 (1993) (ERISA), and it should not do so for tax law either. The tax law—perhaps more than any other area of law—“uses language, lots of language, with nearly mathematic precision.” *Summa Holdings*, 848 F.3d at 789. If the government and courts can ignore that language and “undo transactions that the terms of the Code expressly authorize, it’s fair to ask what the point of making these terms accessible to the taxpayer and binding on the tax collector is.” *Id.* at 782.

The government rebuts none of this. Instead, it argues (at 11–12) that this Court has already bought into this text-avoidance rule in cases like *Gregory* and *Knetsch*—cases from a different era. But as explained, this Court did no such thing; in those cases, the Court merely disregarded statutory labels used by the taxpayers to claim tax benefits in circumstances where the labels, properly interpreted, did not apply. *See supra* at 4; Pet. 28–30 & n.11; Amandeep S. Grewal, *Economic Substance and the Supreme Court*, 116 Tax Notes 969, 978–86 (2007).

Of course, ultimately, the government’s arguments on the merits should be reserved for . . . the merits. Nevertheless, those arguments only underscore the need for this Court’s review.

C. This Case Is An Ideal Vehicle

The government does not dispute that determining when the economic substance doctrine is relevant, and thus applicable, is important. On the contrary, it cites (at, *e.g.*, 15) a bevy of cases applying the doctrine, proving that its proper place *is* important. And, while in the past the government has opposed certiorari on the ground that the lower courts

have not applied the economic substance doctrine to override the text of tax laws, in this case it acknowledges that they do. Grewal, Notice & Comment. That makes this case an ideal vehicle.

Nevertheless, the government argues (at 20–21) that the Court should await a case involving 26 U.S.C. § 7701(o). But here again, the government is just asking this Court to ignore the plain text of a statute. Section 7701(o) clarifies the contours of the economic substance doctrine when it is “relevant,” but, critically, it also states 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.*” 26 U.S.C. § 7701(o)(5)(C) (emphasis added); see H.R. Rep. No. 111-443, at 295–96 (2010) (“The provision provides a uniform definition of economic substance, but . . . does not change current law standards in determining when to utilize an economic substance analysis.”).

This case asks this Court to decide when the economic substance doctrine is relevant. The D.C. and Sixth Circuits hold that the doctrine is relevant only when a statute or regulation *makes it relevant*, as was true in cases like *Gregory*, where the statute at issue used a malleable economic term or concept (“reorganization”) that courts had to construe. See Pet. 30. The government’s position, by contrast, is that the doctrine is essentially *always* relevant, so that it may be invoked to disregard the results of unambiguous tax laws that do not use such malleable terms. Whichever side is right, that determination, Section 7701(o) instructs, “shall be made in the same manner as if this subsection had never been enacted.” 26 U.S.C. § 7701(o)(5)(C). The government’s reliance

on Section 7701(o) to *prevent* the Court from making that determination is therefore nonsensical.

The government also disregards what the IRS has said about Section 7701(o). When it is not trying to avoid certiorari on this issue, the IRS has recognized that “the case law regarding the circumstances in which the economic substance doctrine is relevant will continue to develop,” and that “codification of the economic substance doctrine should not affect the ongoing development of authorities on this issue.” I.R.S. Notice 2010-62, 2010-40 I.R.B. 411, 412; *see id.* (The IRS “will continue to analyze when the economic substance doctrine will apply in the same fashion as it did prior to the enactment of section 7701(o).”).

In short, the question presented here “has nothing to do with whether the Court decides a case before or after Congress enacted [Section 7701(o)].” Grewal, Notice & Comment. Instead, Section 7701(o) makes clear that Congress has left the question presented here for the courts to resolve—“as if this subsection had never been enacted.” 26 U.S.C. § 7701(o)(5)(C).

This case presents a perfect opportunity to do so.

CONCLUSION

The petition should be granted.

Respectfully submitted,

GEORGE M. CLARKE III	GREGORY G. GARRE
PHILLIP J. TAYLOR	<i>Counsel of Record</i>
MIREILLE R. OLDAK	BENJAMIN W. SNYDER
BAKER & MCKENZIE LLP	ERIC J. KONOPKA
815 Connecticut Ave., NW	LATHAM & WATKINS LLP
Washington, DC 20006	555 Eleventh Street, NW
(202) 835-6184	Suite 1000
	Washington, DC 20004
	(202) 637-2207
	gregory.garre@lw.com

Counsel for Petitioners

September 18, 2019