No. 16-6371

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

**MART D. GREEN, TRUSTEE OF THE DAVID AND
BARBARA GREEN 1993 DYNASTY TRUST,**

Plaintiff-Appellee

v.

UNITED STATES OF AMERICA,

Defendant-Appellant

ORAL ARGUMENT REQUESTED

**ON APPEAL FROM THE JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
No. 5:13-cv-01237
JUDGE TIMOTHY D. DEGIUSTI**

REPLY BRIEF FOR THE APPELLANT

DAVID A. HUBBERT
Acting Assistant Attorney General

TERESA E. MCLAUGHLIN (202) 514-4342
GEOFFREY J. KLIMAS (202) 307-6346
Attorneys
Tax Division
Department of Justice
Post Office Box 502
Washington, D.C. 20044

Of Counsel:

MARK A. YANCEY
United States Attorney

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GLOSSARY

Acronym	Definition
Aplt. App.	Separately bound record appendix
Br.	Appellee's brief filed by the Trust
I.R.C.	Internal Revenue Code of 1986 (26 U.S.C.)
IRS	Internal Revenue Service
Op. Br.	Appellant's opening brief filed by the Government
The Trust	The David and Barbara Green 1993 Dynasty Trust
Treas. Reg.	Treasury Regulation (26 C.F.R.)

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Plaintiff–Appellee

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ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

REPLY BRIEF FOR THE APPELLANT

This reply brief is addressed only to those points raised in the answering brief that we believe warrant a further response. With respect to those points not discussed herein, we rely on our opening brief.

INTRODUCTION

The question presented in this case is whether the District Court erred in allowing the David and Barbara Green 1993 Dynasty Trust (the Trust) a charitable deduction that included $18.3 million in

unrealized appreciation of the property donated. I.R.C. § 642(c)(1) allows trusts a charitable deduction for donations to charity, but its plain language limits that deduction to the "amount of the gross income" donated. There is no dispute that gross income does not include unrealized appreciation, *i.e.*, the amount by which a property's fair market value exceeds the owner's adjusted basis.

Consequently, as we explained in our opening brief, the District Court erred in allowing the Trust to deduct this unrealized appreciation. By construing the "amount of the gross income" in I.R.C. § 642(c)(1) to include not just amounts of gross income, but also amounts that were, broadly speaking, derived from gross income, the court expanded the scope of I.R.C. § 642(c) beyond its plain text. (*See* Op. Br. 31-36.) As one commentator wrote after we filed our opening brief, "[t]he puzzling decision in the *Green* [ ] case . . . is so clearly incorrect that one can only marvel at the way the court got to this result." Lawrence P. Katzenstein, "A Potpourri of Charitable Planning Tricks and Traps," SY013 ALI-CLE 1717 at 35 (Apr. 19-21, 2017) (footnote omitted).

On appeal, however, the Trust defends the decision below by arguing that I.R.C. § 642(c)(1) should be construed liberally to encourage the type of donation at issue here. The Trust further argues that this policy goal can be accomplished by construing "amount of the gross income" to include amounts that are derived from gross income, extending even to a donated property's unrealized appreciation in value. The Trust finally argues that such a construction finds support in various statutory provisions, although those provisions are not incorporated into I.R.C. § 642, lack the same operative language, and do not specifically address the question at issue. Nor is there any no basis for the Trust's approach of substituting policy considerations and wide-ranging analysis for the plain text of I.R.C. § 642(c). *See* Part A, *infra*.

Alternatively, the Trust argues for the first time that it can deduct unrealized appreciation under I.R.C. § 512(b)(11) in conjunction with I.R.C. § 170. This contention is barred by the variance doctrine. It has no merit in any event because the plain text of I.R.C. § 512(b)(11) limits charitable deductions thereunder to tax-exempt trusts, which the Trust is not. *See* Part B, *infra*.

ARGUMENT

The District Court erred in allowing the Trust to deduct unrealized appreciation of the donated property

A. The plain text of I.R.C. § 642(c)(1) limits the Trust's charitable deduction to amounts donated from gross income, thereby excluding unrealized appreciation

1. The District Court adopted an unduly broad reading of I.R.C. § 642(c)(1)

Although the Trust admits that gross income does not include unrealized appreciation, it argues that the phrase "amount of the gross income" should be "liberally construed" to include unrealized appreciation derived from gross income. (Br. 14, 19, 22-23, 32, 36-37, 44, 50.) The so-called liberal construction urged by the Trust and adopted by the District Court ignores, rather than interprets, the text of I.R.C. § 642(c)(1). It also results in a duplicative tax benefit by allowing a deduction for an amount that was never taxed.

It is obvious that the "amount of the [Trust's] gross income" consists only of items included in its gross income. Words in taxing statutes are construed according to their ordinary meanings. *E.g.*, *Commissioner v. Soliman*, 506 U.S. 168, 174 (1993); *True Oil Co. v. Commissioner,* 170 F.3d 1294, 1299 (10th Cir. 1999). Contrary to the

District Court's conclusion, it was not sufficient that the properties were purchased with gross income. By analogy, interest earned on a bank deposit would not, in ordinary usage, be described as an amount of principal, even though the interest was derived from the principal. By the same token, "gross income" cannot be stretched to include other items derived therefrom, but not includible as such, including unrealized appreciation on property. (*See* Op. Br. 26-29.)

The Trust casts its unnatural reading of "amount of the gross income" as a liberal construction of the statute to encourage charitable giving. (Br. 34-35.) Even if adopting such a reading would generally encourage charitable giving, it would not justify rewriting the statute. *E.g.*, *Pavelic & LeFlore v. Marvel Entm't Group, Div. of Cadence Indus. Corp.,* 493 U.S. 120, 126 (1989); *True Oil*, 170 F.3d at 1305 (citation and internal quotations omitted). Although the Supreme Court acknowledged that the statutory predecessor to I.R.C. § 642(c)(1) was designed to encourage charitable giving, *United States v. Benedict*, 338 U.S. 692, 696 (1950), it still applied the gross income limitation in accordance with the text, *id.* at 698-699 nn.10-11. Moreover, as we already explained (Op. Br. 32), the only effect of the words "without

limitation" was to make clear that the percentage limits capping charitable deductions by individuals and corporations do not apply to trusts and estates. *Benedict*, 338 U.S. at 697 n.8; *accord*, *Katzenstein*, SY013 ALI-CLE 1717 at 36. The unambiguous language of the statute, which limits the Trust's charitable deduction to gifts from gross income, simply precludes the deduction at issue here.

Moreover, the Internal Revenue Code should not be construed to allow "the practical equivalent of a double deduction . . . absent a clear declaration of intent by Congress." *United States v. Skelly Oil Co.*, 394 U.S. 678, 684 (1969) (citation and internal quotations omitted); Katzenstein, SY013 ALI-CLE 1717 at 36. The Trust does not contest that its reading of I.R.C. § 642(c)(1) would, for practical purposes, provide it with just such a double deduction: it would avoid paying taxes on approximately $18.3 million of unrealized gain, and also use that untaxed gain to claim a charitable deduction and shield millions of dollars of additional income from tax. (*See* Op. Br. 34-35.)

The Trust points to nothing evincing clear Congressional intent to provide this double tax benefit here. Instead, it points to clear Congressional intent to provide this benefit to individuals in certain

circumstances, *see* I.R.C. § 170(e)(1), (3); Treas. Reg. § 1.170A-1(c)(1), and then argues there "is no reason to suppose" that Congress intended a different result for trusts. (Br. 42-43.) Of course, there is a world of difference between a "clear declaration of intent" and "no reason to suppose" otherwise. Importantly, the expression of one thing is the exclusion of another. *E.g.*, *Russello v. United States*, 464 U.S. 16, 23 (1983); *Elwell v. Okla. ex rel. Bd. of Regents of Univ. of Okla.*, 693 F.3d 1303, 1312 (10th Cir. 2012). The fact that Congress expressed clear intent to provide this double tax benefit to individuals in certain circumstances, but expressed no clear intent to do so for trusts, provides a strong "reason to suppose" that it intended a different result. *See* *W.K. Frank Trust of 1931 v. Commissioner*, 145 F.2d 411, 413 (3d Cir. 1944).[1]

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[1] Citing an advisory opinion from the Internal Revenue Service (IRS) Office of Chief Counsel, the Trust claims that "the IRS agrees that *W.K. Frank* does not apply" here. (Br. 38-39.) In fact, the Office of Chief Counsel merely acknowledged the existence of factual differences between *W.K. Frank Trust* and the situation here (*i.e.*, that the donated property there (stock rather than real estate) was purchased with an amount from corpus). The Chief Counsel determined – consistent with "the majority view of the courts and commentators as well as our own" – that those differences were immaterial. IRS Chief Counsel Advisory 201042023, 2010 WL 4149009 (May 10, 2010). At all events, the

2. The District Court erred in misapplying a gloss as a substitute for applying the words of the statute

The Trust urges this Court to affirm the District Court's holding that deductibility under I.R.C. § 642(c)(1) turns neither on the donation's status as gross income nor on its being reported and taxed as such. (Br. 14, 19, 22-23, 32, 36-37, 44, 50.) Rather, the Trust argues that what matters is whether the donation was paid out of amounts that were – broadly speaking – sourced from, and traceable to, an amount of gross income. (*Id.*) In addition to being divorced from the statutory text, the Trust's approach is unsupported by authority and, indeed, inconsistent with precedent. It would also generate illogical results.

First, the Trust's proposed test is unsupported by authority. In articulating a tracing requirement inherent in I.R.C. § 642(c), linking a contribution to an item of income in order to qualify for a deduction, several courts have stated that a contribution must be sourced from and traceable to gross income. *E.g., Crestar Bank v. I.R.S.*, 47 F. Supp. 2d 670, 677 (E.D. Va. 1999). As we explained our opening brief, every

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advisory opinion "may not be used or cited as precedent." *Id.*; I.R.C. § 6110(k)(3).

court applying this gloss has done so in order to enforce the clear statutory proscription against trusts and estates claiming charitable deductions over and above amounts included in gross income. (Op. Br. 36-39.) Until now, no court has used that gloss as a substitute for applying the plain text of I.R.C. § 642(c).

Second, the Supreme Court and the Second and Third Circuits have held that the statutory language creates a bright-line test that distinguishes between amounts included in gross income, which are deductible, and amounts excluded from gross income, which are not. *Benedict*, 338 U.S. at 698-99 n.10-11 (amounts "excluded from statutory gross income" were not deductible). *Accord, Commissioner v. Central Hanover Bank & Trust Co.*, 163 F.2d 208, 210 (2d Cir. 1947) ("the deduction here must be limited to that portion of the charitable gift which was made out of statutory gross income"); *W.K. Frank Trust*, 145 F.2d at 412-13 n.2 (plain meaning of "any part of the gross income, without limitation" excluded both trust corpus and unrealized appreciation). The Trust disregards this bright-line test.

Third, the Trust's approach would lead to illogical results because it would sometimes include in "amount of the gross income" items that

are explicitly excluded from gross income. *See* I.R.C. §§ 101-140. For example, suppose a trust were to purchase with tax-paid money a state or local bond, the interest on which is excludable from gross income under I.R.C. § 103(a). Under the Trust's approach, the interest would be sourced from and traceable to an amount of gross income. But it strains credulity that Congress intended the "amount of the gross income" in I.R.C. §642(c) to include interest explicitly excluded from gross income.

3. The District Court erred by importing into I.R.C. § 642(c) provisions of I.R.C. § 170 that Congress omitted

The District Court held that it was required to construe I.R.C. § 642(c) *in pari materia* with I.R.C. § 170, and specifically to consider section 170's provisions regarding valuation. (Aplt. App. 337-38.) The Trust attempts to defend the court's reliance on section 170 (Br. 43-44), but in doing so only confirms the fallacy of that reliance.

As a threshold matter, as we already explained (Op. Br. 44-45), the *in pari materia* canon does not apply where, as here, the language at issue is unambiguous. *See, e.g.*, *United States v. Fisher*, 456 F.2d

1143, 1145 (10th Cir. 1972). The Trust fails, however, to acknowledge or address this precedent.

Hurrying past this defect, the Trust asserts that the court's reliance on I.R.C. § 170 was appropriate because I.R.C. § 642(c)(1) "plainly references and relates" to section 170. (Br. 43-44.) This assertion is incomplete at best. I.R.C. § 642(c)(1) refers to three specific provisions of section 170, and other provisions of I.R.C. § 642 likewise incorporate two specific provisions of 170. *See* I.R.C. § 642(c)(1), 642(c)(2)(A)(i), (c)(2)(B)(iii), (c)(3), (c)(5)(A). But I.R.C. § 642(c)(1) conspicuously omits section 170's provisions regarding valuation. Because I.R.C. § 642(c)(1) expressly incorporates several provisions of section 170, but omits the provisions regarding valuation, an inference arises that the omission was intentional. *See Russello*, *supra*; *Elwell*, *supra*. And if there were any doubt, Congress went further and expressly provided that the deduction under I.R.C. § 642(c) was "in lieu of the deduction allowed by section 170(a)." I.R.C. § 642(c)(1); *W.K. Frank Trust*, 145 F.2d at 413. Here again, the Trust neither acknowledges nor addresses these problems with the District Court's reasoning.

Moreover, textual differences between I.R.C. §§ 170 and 642(c)(1) further undercut any argument that the former's valuation provisions are instructive in construing the latter. *See W.K. Frank Trust*, 145 F.2d at 413. Section 170 allows individuals and corporations to claim a deduction for "any charitable contribution," I.R.C. § 170(a), a term that is susceptible to various valuation methodologies for a donation other than cash. *Cf. Schwab v. Commissioner*, 715 F.3d 1169, 1171 (9th Cir. 2013) (considering how to interpret "amount actually distributed" in I.R.C. § 402(b)(2)). To address this potential ambiguity, Congress specified criteria addressing when to value noncash donations at fair market value and when to apply a special valuation rule. I.R.C. § 170(e)(1), (3); Treas. Reg. § 1.170A-1(c)(1) (amount of deduction depends on type of property, length of time held by donor and type of donee). By contrast, I.R.C. § 642(c)(1) allows estates and trusts to claim a deduction when contributing to charity any "amount of the gross income," a term that is necessarily expressed in dollars. The fact that Congress did not consider it necessary to provide special rules for valuation in this context should be viewed not as an oversight requiring judicial gap filling, but rather the logical result of Congress's decision to

fix the amount of a deduction at the amount of gross income reported, taxed and donated.

Instead of addressing the sharply divergent terms of I.R.C. §§ 170 and 642(c), the Trust repeats its claim that the language "amount of the gross income" is no more than a sourcing requirement. (Br. 44.) But the Trust cites no authority for this claim, and there is no support for it in the text or structure of I.R.C. § 642(c). *See* I.R.C. § 642(c)(1) ("there shall be allowed as a deduction . . . any amount of the gross income, without limitation, . . . paid").

4. The District Court's decision also flouts the language of the trust instrument

To qualify for a deduction under I.R.C. § 642(c)(1), a charitable donation must be made "pursuant to the terms of the governing instrument." Here, the trust instrument tracked the statute in authorizing the Trustee to distribute "amounts from gross income" to charity. (Aplt. App. 20.) Because unrealized appreciation is not gross income, the Trust's donation of unrealized appreciation could not have been made pursuant to the terms of the governing instrument. The Trust resists this result on two grounds, one legal and one factual. (Br. 24-25.) Neither has merit.

The Trust first argues that, as the District Court held, any and all charitable contributions by a trust should be considered made "pursuant to the terms of the governing instrument" as long as the governing instrument authorizes charitable contributions of some kind. (*Id.*) This approach cannot be reconciled with the Supreme Court's holding that the words "pursuant to" in the predecessor to I.R.C. § 642(c)(1), linking the donation with an authorization therefor in the trust instrument, should be construed according to their usual sense. *Old Colony Trust Co. v. Commissioner*, 301 U.S. 379, 381, 383 n.3 (1937). That usual sense connotes "acting or done in consequence or in prosecution (of anything); hence, agreeable; conformable; following; according." *Id.* (internal quotations omitted); *Crestar Bank*, 47 F. Supp. 2d at 675-76; *Ernest and Mary Hayward Weir Found. v. United States*, 362 F. Supp. 928, 939 (S.D.N.Y. 1973) ("The normal usage of the words 'pursuant to' conveys more than 'not in violation of.'"), *aff'd*, 508 F.2d 894 (2d Cir. 1974).

Tellingly, in *Weir Foundation*, the court held that charitable contributions could not have been made "pursuant to the terms of the governing instrument" when the instrument did not authorize the

trustee to make any charitable contributions. 362 F. Supp. at 939, *aff'd*, 508 F.2d at 894. It did not hold that any and all contributions must be considered made pursuant to the terms of the governing instrument just because the instrument authorizes one kind of charitable contributions. *Id.* So, too, here, the Trust instrument authorized gifts to be made from gross income and gross income alone. As a result, the unrealized appreciation of the donated property did not qualify for donation under the express terms of the instrument and fails to satisfy the statute for that reason as well.

Similarly unpersuasive is the Trust's alternative argument that, as a matter of fact, its governing instrument authorized charitable contributions of amounts not included in its gross income. (Br. 24-25.) Article 2.1 of the trust instrument provided that the settlors intended for the Trust to benefit their children and grandchildren, as well as provide for charity, but that this "expression[ ] of intent" was not intended to limit the trustee's discretion. (Aplt. App. 19-20.) Article 2.2, by contrast, limited the trustee's discretion by authorizing him to distribute "net income and/or principal" to the settlors' children and grandchildren, and "also . . . distribute to charity such amounts from

the gross income of the Trust as the Trustee determines appropriate." (*Id.*, 20.) But the trust instrument's specific language, which limited charitable distributions to "amounts from the gross income," controlled over the general language about charitable intent. *See First Enter. Bank v. Be-Graphic, Inc.*, 149 P.3d 1064, 1068 (Okla. Civ. App. 2006).

5. To the extent it is appropriate to look beyond the text of I.R.C. § 642(c)(1), doing so further supports the Government's position

In matters of statutory interpretation, clear and unambiguous language "is controlling absent rare and exceptional circumstances." *True Oil*, 170 F.3d at 1299 (citation and internal quotations omitted). *Accord, United States v. Husted*, 545 F.3d 1240, 1245-46 (10th Cir. 2008). Of course, "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 819 (1989); *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133-43 (2000); *Dalzell v. RP Steamboat Springs, LLC*, 781 F.3d 1201, 1207 (10th Cir. 2015). Courts may also look at other statutes where "Congress has specifically addressed the question at issue." *Brown & Williamson*, 529 U.S. at 121; *United States v. Ko*, 739 F.3d 558, 560-61

(10th Cir. 2014). And courts obviously may consider other statutory provisions that Congress has expressly incorporated by reference.[2] *True Oil*, 170 F.3d at 1299-1300. But absent these or other "rare and exceptional circumstances," *see id.* at 1299, a court's interpretation of a plain and unambiguous statutory provision begins and ends with that provision. *Salazar v. Butterball, LLC*, 644 F.3d 1130, 1136 (10th Cir. 2011).

Here, neither the Trust nor the District Court has identified any such justification for going beyond the plain text of I.R.C. § 642(c)(1). Accordingly, the unambiguous text of I.R.C. § 642(c)(1) controls and precludes the deduction in issue. *See Butterball*, 644 F.3d at 1136; *True Oil*, 170 F.3d at 1299, 1301.

Even assuming, *arguendo*, that it is appropriate to go beyond the text of I.R.C. § 642(c)(1), the most relevant authorities are other provisions of the Internal Revenue Code that use the language in question – "amount of gross income" – as well the legislative history of

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[2] It is this principle that requires the portion of a deduction allowed under I.R.C. § 642(c), but allocable to a trust's unrelated business income, to be reduced in accordance with I.R.C. § 681(a) and the accompanying regulations. *See* I.R.C. § 642(c)(4) (incorporating I.R.C. § 681).

I.R.C. § 642(c)(1) and the Treasury Regulations thereunder. By contrast, the authorities relied on by the Trust – subsequently enacted statutory provisions (I.R.C. §§ 57(a)(6) (now repealed) and 643(e)), and the instructions for Form 8283, Noncash Charitable Contributions – do not elucidate the issue.

i. Other Code provisions using the words "amount of gross income" support the Government's construction

In our opening brief, we explained that, throughout the Internal Revenue Code, "amount of gross income" consistently refers to the amount of gross income earned and reported. (Op. Br. 41-42). In support of this position, we cited four examples in which the language was so used and argued that "amount of the gross income" in I.R.C. § 642(c)(1) should be ascribed the same meaning, absent statutory instruction to the contrary. (*Id.*)

In response, the Trust identifies no instance in which the Internal Revenue Code uses the language "amount of gross income" to refer to anything beyond the statutory definition of gross income. Instead, it argues that the Code seemingly contains "only four other instances of the phrase 'amount of gross income'" and that this Court should

therefore interpret the phrase on a case-by-case basis "depending on the section of the I.R.C. in which it appears." (Br. 48-49.) In doing so, the Trust ignores Congress's explicit instruction that the definition of gross income contained in I.R.C. § 61 – as interpreted by more than a century of case law – governs "[e]xcept as otherwise provided in this subtitle." I.R.C. § 61(a). The Trust also ignores the reality that the Internal Revenue Code uses "amount of gross income" approximately a dozen times, in each instance using the definition of gross income in I.R.C. § 61 as an outer limit. *See* I.R.C. §§ 50(b)(3), 57(a)(2)(C)(i), 150(b)(3)(A)(ii), 501(c)(25)(G)(ii), 643(a)(6)(A), 936(h)(4)(A)(iii), 1244(c)(2)(C), 5000A(c)(2)(B), (e)(2), 6013(b)(3)(ii), 6248(c)(2) and 6501(e)(1)(A)(i).

ii. The legislative history and regulations likewise support the adjusted-basis limitation

In our opening brief, we also explained that the legislative history of I.R.C. § 642(c)(1) and Treas. Reg. § 1.642(c)-3(b)(1) support capping the charitable deduction at the adjusted basis of donated property. Each construes the statute as providing that, if a trust makes a donation to charity that includes both items of gross income and other

amounts, its deduction is limited to the amounts that actually entered into the trust's gross income. (Op. Br. 42-44.) Applying this guidance here, the Trust's deduction would include the amount of its adjusted basis in the donated properties (which entered into the Trust's gross income) and exclude unrealized appreciation (which did not). (*Id.*)

The Trust does not dispute that, at least when viewed in isolation, this guidance from Congress and the Treasury supports the Government's position, limiting the deduction to the Trust's adjusted basis in the donated properties. Instead, the Trust asserts that, when viewed in conjunction with Treas. Reg. § 1.642(c)-3(b)(2), the guidance means only that a trust must "comply with the formality" of limiting its deduction to those contributions "sourced from gross income," and, it contends, it is "[t]he trust's governing instrument" that determines whether the contributions are so sourced. (Br. 49-50.) But the Trust grossly misreads Treas. Reg. § 1.642(c)-3(b)(2).

Treas. Reg. § 1.642(c)-3(b)(2) describes the extent to which provisions in wills and trusts will be respected if they direct that charitable donations should be "deemed" made from a particular type of income (*e.g.*, ordinary income, capital gains income, or unrelated

business income). The regulation honors such provisions as have independent economic effects, such as requiring that all ordinary income be donated to charity and all remaining income be distributed to beneficiaries. The regulation warns, however, that such provisions will not be respected if they are devoid of independent economic effects and serve only to reduce tax liability, such as providing that donations should be deemed paid first from ordinary income and second from capital gains. Treas. Reg. § 1.642(c)-3(b)(2) Exs. 1-2. Absent a provision having independent economic effects, a trust's charitable donations (*i.e.*, "the amounts of income so paid, permanently set aside, or used for a purpose specified in section 642(c)(1), (2), or (3)") are "deemed to consist of the same proportion of each class of the items of income of the estate or trust as the total of each class bears to the total of all classes." Treas. Reg. § 1.642(c)-3(b)(2).

Unlike Treas. Reg. § 1.642(c)-3(b)(1), which is addressed to the availability and amount of a charitable deduction under I.R.C. § 642(c), Treas. Reg. § 1.642(c)-3(b)(2) is addressed to the character of a charitable donation. Far from allowing deductions for charitable donations in excess of the gross income of a will or trust, Treas. Reg.

§ 1.642(c)-3(b)(2) prevents estates and trusts from manipulating deductions under I.R.C. § 642(c) to artificially reduce their tax liabilities. This regulation does nothing to expand the plain text of I.R.C. § 642(c)(1), undercut the legislative history or override Treas. Reg. § 1.642(c)-3(b)(1).

iii. The Trust misconstrues the effect of former I.R.C. § 57(a)(6)

In its opening brief, we anticipated that the Trust would renew is argument below that the congressional intent underlying I.R.C. § 642(c)(1) should be construed in light of the text of I.R.C. § 57(a)(6) as in effect from 1988 until it was repealed in 1993. (Op. Br. 50-53.) The thrust of the Trust's argument was that the now-defunct tax preference in I.R.C. § 57(a)(6) would have temporarily been rendered a nullity unless I.R.C. § 642(c) permitted trusts to claim a deduction for the fair market value of appreciated property. (*Id.*) We pointed out, however, that this Court should hesitate to rely on a subsequently enacted, since repealed statutory provision here. (*Id.*, 51-52.) We further argued that even if this Court were to consider the now-defunct tax preference in I.R.C. § 57(a)(6), our interpretation of I.R.C. § 642(c)(1) would not have

rendered the tax preference a nullity. The preference would still have reduced the charitable deductions available to estates and trusts under the circumstances described in Revenue Ruling 83-75, 1983-1 C.B. 114. (Op. Br. 52-53.)

The Trust now makes precisely the argument we anticipated. (Br. 44-46.) It fails, however, to acknowledge or address the authority cautioning against reliance on subsequently enacted, or since repealed, statutory provisions. It similarly fails to acknowledge or address Revenue Ruling 83-75, which conclusively demonstrates that the Government's interpretation of I.R.C. § 642(c)(1) would not have rendered the now-defunct tax preference in I.R.C. § 57(a)(6) a nullity.

iv. The Trust's construction is not supported by the 1984 enactment of I.R.C. § 643(e)

The Trust further argues that this Court should construe I.R.C. § 642(c)(1) in light of another subsequently enacted statutory provision, I.R.C. § 643(e). (Br. 44, 46.) Once again, the Trust fails to acknowledge or address the authority cautioning against reliance on subsequently enacted statutory provisions. And once again, the Trust's argument does not withstand scrutiny.

By way of background, I.R.C. § 661(a)(2) allows estates and trusts to claim deductions for amounts distributed to their beneficiaries, subject to certain limitations. *See also* Treas. Reg. § 1.661(a)-2. For a distribution of property other than cash, I.R.C. § 643(e) provides that the deduction is limited to the estate or trust's adjusted basis in the property or the property's fair market value, whichever is less. *See* I.R.C. § 643(e)(1), (2).

Although its argument is not entirely clear, the Trust apparently contends that, if Congress had intended to limit the charitable deduction of an estate or trust to its adjusted basis in appreciated property, then it would have used language similar to that found in I.R.C. § 643(e)(2), which limits the deduction to the lesser of adjusted basis or fair market value. (Br. 46.) This contention is meritless for the simple reason that Congress did not intend such a result. In enacting I.R.C. § 642(c)(1), Congress intended to allow a deduction to estates and trusts equal to the "amount of the gross income" in appreciated property. *See* I.R.C. § 642(c)(1). In this case, the same deduction would be produced here under either approach, whether it is (i) the lesser of adjusted basis or fair market value or (ii) the amount of the gross

income. The Trust's adjusted basis in the donated properties, which was less than their fair market value, was paid from its gross income, while the unrealized appreciation thereon was not. *See* 9 *Mertens Law of Fed. Income Tax'n* § 36.75 (2017). But this will not always always be the case. *See W.K. Frank Trust*, 145 F.2d at 413 (trust not entitled to deduct adjusted basis in appreciated property when paid out of corpus).

v. The Trust misplaces its reliance on the Instructions to Form 8283

The Trust argues that its reading of I.R.C. § 642(c)(1) is bolstered by the instructions to Form 8283, Noncash Charitable Contributions. (Br. 29.) To begin with, IRS forms and instructions are not binding; it is the statute and regulations that are authoritative. *E.g.*, *Armstrong v. Commissioner*, 139 T.C. 468, 484 (2012); *Casa De La Jolla Park, Inc. v. Commissioner*, 94 T.C. 384, 396 (1990); *Roberts v. United* States, 734 F. Supp. 314, 324 (N.D. Ill. 1990). Moreover, the instructions are not part of the record in this case, and the Trust has not asked this Court to take judicial notice of them.

In any event, the Trust's argument that the instructions for Form 8283 "impose a fair market value standard" for the charitable deduction at issue (Br. 29) lacks merit. As the instructions make clear,

"Form 8283 is filed by individuals, partnerships, and corporations," not trusts or other taxpayers to which I.R.C. § 642(c)(1) applies. Instructions for Form 8283 at 1 (Rev. Oct. 1998), https://www.irs.gov/pub/irs-prior/i8283--1998.pdf (last visited Aug. 11, 2017).

B. This Court lacks jurisdiction to consider the Trust's argument that it is entitled to a deduction under I.R.C. § 512(b)(11), which fails anyway because deductions thereunder are available only to tax-exempt trusts

The Trust now argues for the first time that it can deduct the unrealized appreciation at issue pursuant to I.R.C. § 512(b)(11) in conjunction with I.R.C. § 170, rather than pursuant to I.R.C. § 642(c)(1). (Br. 12, 26-32.) Because the Trust never raised this argument in its refund claim, this Court lacks jurisdiction to consider it under the variance doctrine. Even if this Court were to consider it, the argument fails because deductions under I.R.C. § 512(b)(11) are only available to tax-exempt trusts, and the Trust is not such a trust.

1. The Trust's I.R.C. § 512(b)(11) argument is barred by the doctrine of variance

A taxpayer filing a refund claim "must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to

apprise the Commissioner of the exact basis thereof." *True v. United States*, 190 F.3d 1165, 1171 (10th Cir. 1999) (citation and internal quotations omitted); *see United States v. Felt & Tarrant Mfg. Co.*, 283 U.S. 269, 272 (1931). These requirements are necessary "to provide the IRS with adequate information to consider and dispose of claims without the need for litigation, and thus to avoid surprise." *Angle v. United States*, 996 F.2d 252, 254 (10th Cir. 1993). *Accord, True,* 190 F.3d at 1171-72. The variance doctrine is jurisdictional. *True*, 190 F.3d at 1171. As a result, a taxpayer who fails to clearly and specifically raise particular grounds for recovery in its refund claim is barred from raising those grounds in a subsequent refund suit. *Id.*; *Angle*, 996 F.2d at 254-55 (taxpayer whose refund claim challenged computation of tax liability on two grounds could not later raise additional ground).

In its refund claim, the Trust stated that it was claiming the "charitable contribution deduction allowed by Sections 642(c) and 681 of the Code." (Aplt. App. 75.) It then provided calculations for that deduction which "followed the paradigm of Treas. Reg. § 1.681(a)-2(b)" (Br. 7; Aplt. App. 76-77), a regulation that only applies when

"determining the amount for which a charitable contributions deduction would otherwise be allowed under section 642(c)" (Treas. Reg. § 1.681(a)-2(b)). Although the mechanics of that determination necessarily took into account certain limitations derived from I.R.C. §§ 170(b)(1)(A), (1)(B), 512(b)(11) and 681(a) (*see* Op. Br. 24-25 n.7), the resulting deduction remained one under I.R.C. § 642(c) (*see* I.R.C. § 681(a); Treas. Reg. §§ 1.681(a)-1, 1.681(a)-2(a), (b)). Nowhere in its refund claim did the Trust suggest that it was entitled to a deduction under I.R.C. § 512(b)(11). It therefore cannot present that argument in court. *See Angle*, 996 F.2d at 254-55.

2. The plain text of I.R.C. § 512(b)(11) limits deductions thereunder to tax-exempt trusts, which the Trust is not

In any event, even if this Court had jurisdiction to consider the Trust's I.R.C. § 512(b)(11) argument, the argument lacks merit. To be sure, despite the provision in I.R.C. § 642(c)(1) that the charitable deduction thereunder is "in lieu of the deduction allowed [to individuals and corporations] by section 170(a)," I.R.C. § 512(b)(11) provides that certain trusts can, under limited circumstances, claim a charitable deduction under I.R.C. § 170. Specifically, a trust "described in section

511(b)" can claim a charitable deduction under I.R.C. § 170 to offset unrelated business income (*i.e.*, amounts allocable to a regularly conducted trade or business not in furtherance of an exempt purpose).

The Trust in this case clearly does not qualify for such treatment. Trusts "described in section 511(b)" are those exempt from income tax pursuant to I.R.C. § 501(a). I.R.C. § 511(b)(2) ("any trust which is exempt . . . from taxation under this subtitle by reason of section 501(a) and which, if it were not for such exemption, would be subject to subchapter J"). At no point has the Trust argued that it is exempt from income tax. Nor does the Trust point to anything in the record supporting such an argument. To the contrary, Article 3.3 of the trust instrument provided that the settlors' "primary objective" in creating the Trust was to benefit their children and grandchildren (Aplt. App. 22), which precludes the Trust from qualifying for tax-exempt status. *See* I.R.C. § 501(c)-(d). In addition, the Trust filed its refund claim on Form 1041 (Aplt. App. 70 *et seq.*), which is applicable to taxable trusts (Treas. Reg. § 1.6012-3(a)(1)(ii)), rather than Form 990, which is applicable to tax-exempt trusts (Treas. Reg. §§ 1.6012-3(a)(5), 1.6033-1(a)(2) *et seq.*). Under these circumstances, the Trust cannot

establish that it was a "trust described in section 511(b)." It therefore cannot qualify for a deduction under I.R.C. § 512(b)(11).[3]

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[3] The Trust asserts that, in denying its refund claim, "the IRS acknowledged that the Trust was entitled to a deduction under § 512(b)(11)." (Br. 9.) Even if this assertion were true (which it is not), such a statement would not affect the Trust's entitlement to such a deduction because refund suits are *de novo* proceedings in which the IRS is not bound by its substantive reasoning at the administrative level. *See Dye v. United States*, 121 F.3d 1399, 1407-08 (10th Cir. 1997).

CONCLUSION

The judgment of the District Court should be reversed, and the case remanded with instructions for judgment to be entered in favor of the United States.

Respectfully submitted,

DAVID A. HUBBERT
Acting Assistant Attorney General

/s/ Geoffrey J. Klimas

TERESA E. MCLAUGHLIN (202) 514-4342
GEOFFREY J. KLIMAS (202) 307-6346
Appellate.TaxCivil@usdoj.gov
Geoffrey.J.Klimas@usdoj.gov
Attorneys
Tax Division
Department of Justice
Post Office Box 502
Washington, D.C. 20044

Of Counsel:

MARK A. YANCEY
United States Attorney

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Date: August 28, 2017

/s/ Geoffrey J. Klimas
GEOFFREY J. KLIMAS
Attorney for the United States
Post Office Box 502
Washington, D.C. 20044
geoffrey.j.klimas@usdoj.gov
(202) 307-6346

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I hereby certify that on August 28, 2017, I electronically filed the foregoing using the court's CM/ECF system which will send notification of such filing to the following:

Michael L. Brooks
Michael.brooks@brookslawok.com
Len B. Cason
lcason@hartzoglaw.com
Michael A. Furlong
mfurlong@harzoglaw.com
Charles E. Geister, III
cgeister@hartzoglaw.com
J. Leslie LaReau
llareau@hartzoglaw.com

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Date: August 28, 2017

/s/ Geoffrey J. Klimas
GEOFFREY J. KLIMAS
Attorney for the United States
Post Office Box 502
Washington, D.C. 20044
geoffrey.j.klimas@usdoj.gov
(202) 307-6346