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
CASE NO. 5:13-CV-01237
JUDGE TIMOTHY D. DEGIUSTI**

BRIEF FOR THE APPELLEE

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STATEMENT OF RELATED CASES

Pursuant to Tenth Circuit Rule 28.2(C)(1), counsel for Mart D. Green, Trustee of the David and Barbara Green 1993 Dynasty Trust, state that there are no prior or related appeals.

GLOSSARY

Abbreviation	**Definition**
App.	Appellant's Appendix
Donated Properties	The Oklahoma Property, Texas Property, and portion of the Virginia Property donated by the Trust to charity in 2004
Hob-Lob	Hob-Lob Limited Partnership
I.R.C.	Internal Revenue Code of 1986 (26 U.S.C.)
IRS	Internal Revenue Service
Oklahoma Property	A church and several outbuildings purchased by GDT CG1, LLC in Ardmore, Oklahoma
Texas Property	Approximately 3.8 acres of land purchased by GDT CG1, LLC in Dickinson, Texas
Trust	The David and Barbara Green 1993 Dynasty Trust
Trustee	Plaintiff-Appellee Mart D. Green
Treas. Reg.	Treasury Regulations (28 C.F.R.)
U.B.I.	Unrelated Business Income
Virginia Property	Approximately 109 acres and two industrial buildings purchased by GDT CG1, LLC in Lynchburg, Virginia

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**MART D. GREEN, TRUSTEE OF THE DAVID AND
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Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA

Defendant-Appellant,

**ON APPEAL FROM THE JUDGMENT
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BRIEF FOR THE APPELLEE

STATEMENT OF THE ISSUE

The Internal Revenue Code ("I.R.C.") provisions relevant to this appeal in allowing a trust to deduct charitable contributions are: I.R.C. § 642(c)(1) and §§ 681, 512(b)(11), and 170. Section 642(c)(1) allows a trust a deduction of "any amount of the gross income, without limitation, which pursuant to the terms of the governing instrument is, during the taxable year, paid for a purpose specified in section 170(c)[.]" If, however, a charitable contribution is "allocable to [a trust's]

unrelated business income", I.R.C. § 681 disallows the unlimited deduction otherwise permitted by § 642(c)(1). Instead, I.R.C. § 512(b)(11) permits a trust "the deduction allowed by I.R.C. § 170 (relating to charitable etc. contributions and gifts)", subject to "the limitations prescribed in section 170(b)(1)(A) and (B)[.]"

In 2004, the David and Barbara Green 1993 Dynasty Trust (the "Trust") donated real property to charity with a fair market value of $29,005,000, as determined at trial ("Donated Properties"). The Trust contends that the I.R.C. allows it to deduct the Donated Properties at their fair market value as of the date of donation. *See* Treas. Reg. § 1.170A-1(c)(1). The government acknowledges that the Trust is entitled to a charitable deduction for the Donated Properties but contends that the deduction is limited to the Trust's adjusted basis in the Donated Properties.

The District Court entered summary judgment in favor of the Trust, concluding that the I.R.C. permitted the Trust to deduct the Donated Properties at fair market value. The issue presented by the government in this appeal is whether the District Court erred in this decision.[1]

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[1] The government's brief frames the issue as "whether the District Court erred in allowing the Trust to deduct the unrealized appreciation of the properties, notwithstanding that such amounts were not included in its gross income." (Appellant's Br. at 3.) In fact, the District Court held that the Trust purchased the Donated Properties with an amount of its gross income and that the Trust was entitled to deduct the Donated Properties at fair market value. (App. at 340, 344 (*Green v. United States*, 144 F.Supp.2d 1254, 1260, 1262 (W.D. Okla. 2015)).)

STATEMENT OF THE CASE

A. The facts relevant to the issue on appeal.

1. The David and Barbara Green 1993 Dynasty Trust.

On December 7, 1993, David M. Green and Barbara A. Green, settlors, and Mart D. Green, trustee, created the Trust. (App. at 14-68, 168.) The Green family are the founders of the Hobby Lobby chain of craft stores. During the time relevant to this appeal (i.e., 2002-2004), the Trust was a 99% limited partner in Hob-Lob Limited Partnership ("Hob-Lob") which owned or operated a majority of the Hobby Lobby stores. (App. at 170, 330, *see also Green*, 144 F.Supp.2d at 1256.) The Trust also wholly owned an entity called GDT CG1, LLC. (App. at 169.) As the government points out, GDT CG1, LLC was disregarded as an entity separate from the Trust for tax purposes. (Appellant's Br. at 9, *Green*, 144 F.Supp.2d at 1256, n. 3 (citing 26 C.F.R. § 301.7701-3).)

The Trust provided for the trustee to make charitable contributions:

> The Trustee also may distribute to charity such amounts from the gross income of the Trust as the Trustee determines appropriate to help carry out the mission of our family to serve the Lord.

(App. at 20.) The Trust further provided:

> Distribution to Charities. A distribution may be made from the Trust to charity only when both the purpose of the distribution and the charity are as described in Section 170(c) of the [I.R.C.]. Notwithstanding anything else contained in the Trust to the contrary, the number of charities that would be eligible to receive a distribution under this Trust at any given time will be limited to a number that will not prevent the

> Trust from qualifying either as an Electing Small Business Trust ("ESBT") or otherwise as an S corporation shareholder under the [I.R.C.].

(App. at 19.) Finally, the Trust provided:

> General Guide for Trustee. As a guide to the Trustee, but without intending to limit or control its discretion, Settlors offer the following expressions of intent as to their purposes in creating this Trust. These expressions of intent will, for convenience, be stated in the first person.
>
> We want to provide for the relative health, education and maintenance needs of our children and descendants during the term of this Trust, and to provide for charity.

(App. at 19-20 (emphasis added).)

2. 2004 Real Property Donations.

The Trust used GDT CG1, LLC to purchase real property for donation to charity. (App. at 172-174.) In August 2002, the Trust purchased a church building and several outbuildings in Ardmore, Oklahoma for $150,000 (the "Oklahoma Property"). In February 2003, the Trust purchased approximately 109 acres of land and two industrial buildings in Lynchburg, Virginia for $10.3 million (the "Virginia Property"). (App. at 172.) In June 2003, the Trust purchased a parcel of land in Dickinson, Texas for $145,000 (the "Texas Property"). (App. at 174.)

Each of the Donated Properties was purchased with an amount of the Trust's unrelated business income, as defined by I.R.C. § 512. (App. at 172-174.) The government's brief acknowledges that the income used to purchase the Donated Properties was unrelated business income. (Appellant's Br. at 3, 7-8, and 12.)

On March 19, 2004, the Trust donated 73 acres and the two industrial buildings of the Virginia Property to the National Christian Foundation Real Property, Inc. (App. at 172.) At the time of the donation, the Trust's adjusted basis in the Virginia Property was $10,368,113. (App. at 173.) On October 5, 2004, the Trust donated the Oklahoma Property to the Southwest Oklahoma District Church of the Nazarene. (App. at 173.) At the time of the donation, the Trust's adjusted basis in the Oklahoma Property was $160,477. (App. at 173.) On October 5, 2004, the Trust donated the Texas Property to the Lighthouse Baptist Church. (App. at 174.) At the time of the donation, the Trust's adjusted basis in the Texas Property was $145,180. (App. at 174.) Thus, the Trust's total adjusted basis in the Donated Properties was $10,673,770.[2] Each recipient was an organization described in I.R.C. § 170(b)(1)(A). (App. at 172-74.)

3. The Trust's 2004 Income Tax Return.

On or about October 15, 2005, the Trustee timely filed the Trust's Form 1041 income tax return for the tax year 2004. (App. at 169.) The Trust reported gross

[2] The government stipulated that the Trust reported its adjusted basis for the Donated Properties on its tax return. (App. at 172-174.) The government did not contest the Trust's reported adjusted basis at any point in the District Court. The District Court relied on the Trust's reported adjusted basis in issuing its order that is the subject of this appeal. (App. 331-33 (*Green*, 144 F.Supp.3d at 1256-57).) The government now accepts the Trust's reported adjusted basis in the Donated Properties of "approximately $10.7 million[.]" (Appellant's Br. at 4.)

income of $58,760,085 and net unrelated business taxable income of $56,756,120. (App. at 76.)

The Trust reported total charitable contributions of $36,867,002. (App. at 75-76, 169.) This figure was the sum of $30,313,000, the reported fair market value of the Donated Properties (later reduced to $29,005,000 per the jury's verdict), and $6,554,002 of cash contributions attributable to the Trust. (App. at 76.)

With respect to each of the Donated Properties, the Trust filed a Form 8283, in which it disclosed the appraised fair market value of each property. *See* I.R.C. § 170(f)(11)(C) and IRS Instructions for Form 8283 at 2 (Cat. No. 62730R) (Oct. 1998) (*available at* https://www.irs.gov/pub/irs-prior/i8283--1998.pdf). The Trust reported the appraised fair market value of the donated portion of the Virginia Property at $29,500,000. (App. at 108 (Form 8283).) The Trust reported the appraised fair market value of the Oklahoma Property at $355,000. (App. at 109 (same).) The Trust reported the appraised fair market value of the Texas Property at $458,000. (App. at 110 (same).) The government's brief acknowledges that "[t]he Trust was not required to, and did not, report as income the properties' unrealized appreciation, which was approximately $19.6 million[.]" (Appellant's Br. at 11.)

With respect to the cash contributions, Hob-Lob made $6,600,000 of cash contributions in 2004 to Reach the Children and Book of Hope.[3] As a 99% limited partner of Hob-Lob, the Trust was permitted to deduct 99% of the cash contributions, subject to certain limitations imposed by IRC § 170(b). (App. at 76-77, 171.)

In its 2004 income tax return, the Trust incorrectly calculated its deduction using a 30-percent limitation of the Trust's adjusted gross income instead of a 50-percent limitation. The Trust claimed a charitable deduction of $20,526,383 and paid $8,431,318 in tax. (App. at 74-75, 169.)

4. Amended Return and Disallowance of Refund.

On October 15, 2008, the Trust timely filed an amended Form 1041 income tax return. (App. at 169.) On its amended return, the Trust recalculated its deduction using a 50-percent limitation, increasing its deduction for charitable contributions from $20,526,383 to $29,654,233. (App. at 75.) In calculating its revised charitable deduction, the Trust followed the paradigm of Treas. Reg. § 1.681(a)-(2)(b) because the Trust's charitable contributions were "allocable to its unrelated business income[.]" I.R.C. § 681(a). Statement 27 to Schedule A of the Trust's amended

[3] The government claimed at trial that Hobby Lobby Stores, Inc., not Hob-Lob, actually made $4,750,000 of the cash contributions. (App. at 362.) The jury found, however, that the Trust was entitled to report the $4,750,000 contested by the government. (App. at 387-388.) The government has not appealed the jury's verdict as to the cash contributions. Accordingly, the Trust does not address the issue further in this Brief.

return illustrates the calculation required by Treas. Reg. § 1.681(a)-(2)(b)(1). (App. at 76-77.) Because the Trust's charitable deduction was allocable to its UBI, I.R.C. § 512(b)(11) subjected the deduction to certain limitations imposed by I.R.C. § 170(b)(1).

The Trust explained that the increase was attributable to:

> [A] correction of the UBTI [i.e., § 170(b)] limitation as calculated on the original 2004 return. The original calculation incorrectly reduced the amount of UBTI by the Trust's income distribution deduction. In addition, the original UBTI limitation was calculated using a 30% percentage limitation instead of a 50% percentage limitation.

(App. at 75-76.) In other words, because the recipients of its 2004 charitable contributions were I.R.C. § 170(b)(1)(A) 50% charities instead of § 170(b)(1)(B) 30% charities, the Trust determined that the proper limitation was 50% and not 30%, resulting in lower tax and an entitlement to a refund. The government's Brief concedes that "the Trust's amended return was correct insofar as it applied a 50-percent limit under IRC § 681 and the accompanying regulations[.]" (Appellant's Br. at 13.) The Trust sought a refund of $3,194,748.[4] (App. at 74.)

On December 8, 2011, the IRS fully disallowed the Trust's claim for a refund. The disallowance letter concluded:

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[4] In the course of litigation, the refund to which the Trust was entitled was revised downward somewhat based on agreements reached between the Trust and the government as to various points and the jury's verdict. Ultimately, the District Court entered judgment in favor of the Trust in the amount of $2,754,514.00. (App. at 389-91.)

> The charitable contribution deduction for the real property donated in 2004 is limited to the basis of the real property contributions. In addition, computational limits apply to all contributions due to the Unrelated Business Taxable Income. Based on these limitations the total allowable charitable contributions are limited to $17,227,772.00, which is less than the amounts per the original return and amended return.

(App. at 162.) The "computational limits" described in the second sentence of the quoted paragraph are the 50% and 30% limitations imposed by I.R.C. § 170(b)(1)(A) & (B) on charitable contributions "allocable to [a trust's] unrelated business income" as described in I.R.C. § 681. In applying the § 170(b)(1) limits, the IRS acknowledged that the Trust was entitled to a deduction under § 512(b)(11) instead of §642(c)(1). Even though I.R.C. § 170 expressly permitted the Trust to deduct its charitable contributions at fair market value, the IRS decided, without reference to any controlling statute or Treasury Regulation, that the Trust was limited to deducting its adjusted basis in the Donated Properties.

B. Relevant procedural history.

1. The Trust's Complaint.

The Trustee filed a Complaint in the District Court on November 21, 2013, explaining that the Trust was entitled to a charitable deduction of $29,654,233 for the reasons stated in its amended tax return. (App. at 12-14.) The Trust sought a refund of $3,194,748, plus interest. (App. at 13.) The government answered and denied that the Trust was entitled to a refund. (App. at 165-67.)

2. Cross Motions for Summary Judgment.

In the course of litigation, the parties stipulated that the fair market value of the Oklahoma Property was $355,000 at the time of donation and that the fair market value of the Texas Property was $150,000 at the time of donation. (App. at 173-74.) The parties did not agree on the fair market value of the donated portion of the Virginia Property[5] but, for purposes of summary judgment motions, stipulated that the fair market value was in excess of the Trust's adjusted basis in the Virginia Property. (App. at 172-73.)

The parties filed cross motions for summary judgment on the issue of whether I.R.C. § 642(c)(1) permitted the Trust to report and deduct the fair market value of the Donated Properties on its tax return or whether § 642(c)(1) limited the Trust to reporting and deducting its adjusted basis.[6] (App. at 176-197 (Plaintiff's Motion for Partial Summary Judgment with Brief in Support), 198-231 (United States' Motion

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[5] In the course of the litigation, the parties used "Virginia Property" to describe the original 109 acres and two industrial buildings purchased by The Trust and to describe the 73 acres and two industrial buildings donated by the Trust. For clarity here, "Virginia Property" refers to the entire property and "donated portion of the Virginia Property" refers to the donated portion.

[6] At this stage of the litigation, this was the primary issue between the parties because the government had raised § 642(c)(1) as the basis for denying the Trust's request for a refund, despite the fact that the Trust's amended return calculated its charitable deduction pursuant to §§ 681, 512(b)(11), and 170(b)(1).

for Summary Judgment and Memorandum in Support of Motion for Summary Judgment).)

When the parties filed their cross motions for summary judgment asking the District Court to interpret § 642(c)(1), they were not yet in agreement regarding the application of I.R.C. §§ 512(b)(11) and 170. During the course of the litigation, the government did not concede (as it now has) that the Trust had correctly applied §§ 681, 512(b)(11), and 170 using the 50% limit of § 170(b)(1)(A). It was not until after the trial concluded that the government conceded that "the Trust's amended return was correct insofar as it applied a 50-percent limit under IRC § 681 and the accompanying regulations[.]"[7] (Appellant's Br. at 13.) At the dispositive motion stage of the litigation, the Trust was uncertain as to the government's position on this issue. Whether or not the Trust used a 50% limit under § 170(b)(1)(A) or a 30% limit under § 170(b)(1)(B) in its charitable deduction calculation would have significantly affected the refund sought by the Trust. But the § 642(c)(1) issue raised by the government needed to be addressed first because the government's position

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[7] The government's Brief suggests that the government dropped its dispute of the 50% limitation issue "[d]uring the course of the proceedings." (Appellant's Br. at 13.) As late as the Final Amended Pretrial Report, however, the parties listed the issue as unresolved. (App. at 358-359.) This was in spite of the fact that the parties had previously stipulated that the recipients of the Donated Properties were 50% charities under I.R.C. § 170(b)(1)(A). (App. at 172-74.) Regardless, the government has now clarified that it does not dispute that the 50% limitation applied in the Trust's amended return was correct.

was that § 642(c)(1) totally eliminated the Trust's refund. (*See* App. at 190 (Trust's Motion for Summary Judgment at 11, n. 6 (explaining why the § 642(c)(1) issue needed to be addressed)).)

When the District Court concluded that § 642(c)(1) imposes a fair market value standard, the parties turned their attention to the determination of the fair market value of the donated portion of the Virginia Property, which the jury determined to be $28.5 million. It was unnecessary at that point for the Trust to make a separate argument under §§ 512(b)(11) and 170, which clearly impose a fair market value standard. Thus, if § 642(c)(1) has a valuation standard other than fair market value, as the government contends on appeal, the Trust is still clearly entitled to a deduction at fair market value under §§ 512(b)(11) and 170, as explained below.

Noting the question was one of first impression, the Trust explained in its Motion for Summary Judgment that the appropriate standard for valuing non-cash charitable contributions by a trust is fair market value. (App. at 180-81.) The Trust highlighted the importance of broadly construing statutes authorizing charitable deductions in a manner that encourages charitable giving. It noted that the I.R.C. permits individuals and corporations to report and deduct non-cash charitable contributions at fair market value, whether such amount is more or less than the property's adjusted basis, subject to certain limitations in I.R.C. § 170. (App. at 191-92.) The Trust contrasted the deduction allowed by § 642(c)(1), which is "without

limitation", with other provisions of the I.R.C. limiting the deductibility of charitable contributions. (App. at 193). It pointed out that the IRS had identified no "prior case or authority in which the [IRS] has so limited a § 642(c)(1) deduction." (App. at 193, 196 (citing IRS Chief Counsel Advisory 201042023, 2010 WL 4149009).)

The government's motion for summary judgment acknowledged the Trust was entitled to a deduction for its 2004 charitable contributions but argued that § 642(c)(1) permitted the Trust to report and deduct only its adjusted basis in the Donated Properties. (App. at 217.) The government justified its position on the ground that the Trust was not required to realize and report the appreciation of the Donated Properties as income on its tax return. (App. at 221.) The government made the inferential leap that the Trust was therefore limited to deducting its adjusted basis in the Donated Properties. (App. at 221.) The government thus attempted to turn a rule designed to encourage charitable giving by allowing a deduction into a rule discouraging charitable giving.

The government also asserted that the Trust's governing instrument did not authorize the Trustee to make charitable contributions of the Donated Properties. (App. at 217.) Specifically, the government argued that under the terms of the Trust instrument, the Donated Properties had become part of the Trust's corpus and, accordingly, were not deductible when donated by the Trustee. (App. at 226.) The Trust addressed this issue in its response brief, noting that provisions governing the

allocation of receipts between principal and income for trust accounting purposes have nothing to do with whether a charitable contribution is deductible under § 642(c)(1). (App. at 281-87.)

The government's response to the Trust's Motion for Summary Judgment read into I.R.C. § 642(c)(1) a requirement that "charitable donations be sourced from income reported on a trust's tax return in order to be deductible." (App. at 253 (emphasis added).) The government agreed that the Trust's adjusted basis in the Donated Properties was traceable to gross income but argued that the full fair market value of the Donated Properties was not. (App. at 254.) Thus, the government attempted to convert the gross income sourcing aspect of § 642(c)(1)into a valuation standard other than fair market value. The government also disagreed with the Trust's position that § 642(c)(1) should be broadly construed to encourage charitable giving. (App. at 258-261.)

In short, the Trust and the government agreed that an item of noncash property sourced in gross income of a trust is deductible under § 642(c)(1). The parties parted ways as to how to value the deduction. The Trust contended that § 642(c)(1)'s allowance of a deduction "without limitation" points to a fair market value standard, which is "as close to a generalized valuation standard as there is in the tax code." *Schwab v. Comm'r*, 715 F.3d 1169, 1178-79 (9th Cir. 2013). The government contended that § 642(c)(1) limits a trust's deduction to adjusted basis in spite of the

fact that such a limitation would be even more severe than the limitations imposed on a trust under § 170(b)(1) for charitable contributions allocable to UBI.

C. Ruling presented for review.

The District Court granted the Trust's motion for partial summary judgment and denied the government's motion for summary judgment on the § 642(c)(1) issue. (App. at 344 (*Green*, 144 F.Supp.3d at 1262).) The District Court acknowledged its "duty . . . to determine congressional intent by beginning with the 'plain language of the law.'" (App. at 335 (*Id.* at 1258 (quoting *St. Charles Inv. Co. v. Comm'r*, 232 F.3d 773, 776 (10th Cir. 2000))).) The District Court additionally recognized both the usefulness of "[t]raditional canons of statutory interpretation" and the District Court's duty to "analyze the statute as a whole" by looking "to the 'disputed language in context, not in isolation[.]'" (App. at 335 (*Id.* (quoting *True Oil Co. v. Comm'r*, 170 F.3d 1294, 1299 (10th Cir. 1999))).[8])

The District Court noted that the deduction authorized by § 642(c)(1) is "in lieu of the deduction allowed by § 170(a)" and accordingly examined § 170(a) as an

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[8] In so doing, the District Court employed the same approach to statutory construction as that recently applied by the United States Supreme Court in *Henson v. Santander Consumer USA, Inc.*, No. 16-349 (Jun. 12, 2017) (Gorsuch, J.). In determining the meaning of "debt collector" in the Fair Debt Collection Practices Act, the Court "extend[ed its] gaze from the narrow statutory provision at issue to take in the larger statutory landscape[.]" *Id.* at 5, *see also* Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* at 167-69 (West 2012) (articulating the statutory cannon of *in pari materia*).

aid to interpretation, construing the two sections *in pari materia*. (App. at 336-38 (*Id.* at 1258-59).) It noted the Supreme Court and this Court have recognized that the purpose of the precursor statute to § 642(c)(1) was to "encourage charitable gifts[.]" (App. at 337 (*Id.* at 1259 (citing *Old Colony Tr. Co. v. Comm'r*, 301 U.S. 379 (1937) and *Comm'r v. F.G. Bonfils Tr.*, 115 F.2d 788 (10th Cir. 1940))).)

The District Court next considered the import of the words "without limitation" in § 642(c)(1). (App. at 338-39 (*Id.* at 1259-60).) It concluded that the government's attempt to impose a limitation on deductions allowed by § 642(c)(1) was inconsistent with the plain language of the statute. (App. at 338-39 (*Id.* at 1260).) It noted that charitable deduction statutes are not "matters of legislative grace", as contended by the government, but are "expression[s] of public policy" that should "be liberally construed in favor of the taxpayer." (App. at 339 (*Id.* at 1260 (citing *Weingarten v. Comm'r*, 825 F.2d 1027, 1029 (6th Cir. 1987))).)

Applying *Old Colony*, the District Court noted the meaning of "gross income" in § 642(c)(1) was not limited to "the year's [gross] income." (App. at 340 (*Id.* (citing *Old Colony Tr. Co.*, 301 U.S. at 384)).) It concluded, "[t]herefore, the fact that the Donated Properties were given to charities in a year subsequent to their purchase does not disqualify them . . . as charitable donations derived from gross income." (*Id.*) It addressed the government's assertion that a charitable contribution must be "*sourced from* and *traceable to* a trust's gross income." (App. at 340-41

(*Id.* at 1260-61 (emphasis in original)).) To the extent § 642(c)(1) imposed such a requirement, the Court found the Donated Properties "were purchased with an amount of the Trust's gross income." (App. at 341 (*Id.* at 1261).)

Turning at last to the question of how to value the Donated Properties for tax purposes, the District Court held:

> Under the facts of this case, using adjusted basis as a valuation standard would allow no consideration for the appreciation of real property donated in kind, regardless of whether such property was donated in the year of acquisition or in subsequent tax years. Defendant asks the Court to read a limitation into the statute where none expressly exists.
>
> Conversely, the "fair market value standard is as close to a generalized valuation standard as there is in the tax code." *Schwab v. Comm'r*, 715 F.3d 1169 (9th Cir. 2013). Notably, Congress did not specify a different standard of valuation in § 642. Further, considering the context of the statutory language in question and in light of § 170's general rule of fair market valuation regarding donations of property other than cash, a fair market valuation standard is consistent with the observation of the court in *Schwab*, and does not do violence to the plain language of § 642(c)(1).

(App. at 343-44 (*Id.* at 1262).) The government now seeks reversal of the District Court's well-reasoned and faithful reading of the plain text of § 642(c)(1).

SUMMARY OF ARGUMENT

This appeal presents a pure question of law: Whether the I.R.C. permits a trust to deduct a charitable contribution of noncash property at fair market value. The I.R.C. provides two paths for a trust to deduct a charitable contribution of noncash property. If a trust donates "any amount of [its] gross income" to charity,

I.R.C. § 642(c)(1) permits a deduction "without limitation". If, however, the trust's donation is "allocable to its unrelated business income", I.R.C. § 681 disallows the unlimited deduction provided by § 642(c)(1). Instead, § 512(b)(11) allows a trust "the deduction allowed by section 170 (relating to charitable etc. contributions and gifts)" subject to "the limitations prescribed in section 170(b)(1)(A) and (B)[.]"[9]

Thus, when it comes to charitable contributions generally, trusts enjoy a special status under § 642(c)(1), which "insulate[s] all income contributed to charity from taxation." *United Cal. Bank v. United States*, 439 U.S. 180, 194, n. 14 (1978). As the Supreme Court put it in another case:

> We find that the obvious purpose of [the predecessor statute to § 642(c)(1)] is to encourage the making of charitable contributions out of the gross income of the trust and, to that end, it completely exempts such contributions from income tax, without the limitations imposed upon charitable contributions made by individuals or corporations.

United States v. Benedict, 338 U.S. 692, 696-97 (1950). When a trust makes a charitable contribution allocable to its unrelated business income ("UBI"), however, it shares in some – but not all – of the limitations imposed on individuals and corporations by § 170. The Treasury Regulations promulgated under § 170

[9] Section 170 imposes additional limitations on charitable contribution deductions by individuals and corporations that do not apply to trusts making contributions of noncash property allocable to UBI. The government acknowledges this point in its Brief. (Appellant's Br. at 24-25, n. 7.)

expressly allow a trust to deduct charitable contributions of noncash property at fair market value. Treas. Reg. § 1.170A-1(c)(1).

The Trust's charitable contributions satisfied the threshold requirements imposed by § 642(c)(1). First, the parties agree that § 642(c)(1) requires sourcing in "any amount of the gross income" of a trust. The government agrees with the Trust that the Donated Properties were purchased with gross income. In this case, the fact that the Trust sourced its charitable contributions in UBI means, by extension, that it also sourced them in "any amount of [its] gross income[.]" Second, the District Court determined that the Trust made the charitable contributions at issue pursuant to the terms of its governing instrument. Third, the parties stipulated that the recipients of the Trust's charitable contributions were qualified charities under § 170(c). (App. at 172-74.)

Because the parties agree that the Trust's charitable contributions were allocable to its unrelated business income, the Trust was entitled to deduct its charitable contributions of noncash property at fair market value under I.R.C. § 170. Indeed, if § 170 did not apply, the Trust's amended tax return would have been largely unnecessary, given that it was prompted primarily by the Trust's determination that it was entitled to a deduction subject to § 170(b)(1)(A)'s 50% limitation instead of § 170(b)(1)(B)'s 30% limitation.

In spite of the foregoing, the government has taken the position that the Trust is only entitled to deduct its adjusted basis in the Donated Properties because the government argues that I.R.C. § 642(c)(1) imposes a valuation standard other than fair market value. The Trust disagrees. Not only is fair market value the standard under § 170, which applies to the contributions at issue here, it is also the valuation standard under § 642(c)(1), as the District Court correctly determined.

Thus, the Trust and the government differ with respect to whether, if the valuation of the Trust's charitable contributions is subject to § 642(c)(1) the Trust may calculate its charitable contribution deduction based on the fair market value of the Donated Properties. The government contends that § 642(c)(1) limits any deduction to the Trust's adjusted basis in the Donated Properties. In order to reach this conclusion, the government reads an adjusted basis limitation or income realization requirement into § 642(c)(1) where none exists. In contrast, the Trust submits that the plain language of § 642(c)(1), which allows a deduction "without limitation", permits the deduction of noncash charitable contributions at fair market value.

Accordingly, the Trust respectfully requests that this Court affirm the District Court.

ARGUMENT

The District Court correctly concluded that I.R.C. § 642(c)(1) permits the Trust to deduct the fair market value of the Donated Properties purchased from the Trust's gross income. Moreover, the District Court reached the correct result because charitable donations allocable to unrelated business income are deductible at fair market value under I.R.C. §§ 681, 512, and 170.

Standard of Review

This Court reviews matters of interpretation of the Internal Revenue Code *de novo*. *Tele-Commc'ns, Inc. v. Comm'r*, 104 F.3d 1229, 1232 (10th Cir. 1997). This Court may affirm a judgment of the District Court "on any basis supported by the record, even if it requires ruling on arguments not reached by the district court or even presented . . . on appeal." *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1130 (10th Cir. 2011) (noting the "heavy burden" of an appellant seeking reversal of a decision of the district court). In reviewing the decision of a lower court, "it must be affirmed if the result is correct [even if] the lower court relied upon a wrong ground or gave a wrong reason." *S.E.C. v. Chenery Corp.*, 318 U.S. 80, 88 (1943). The government's focus on § 642(c)(1) to the exclusion of other applicable I.R.C. provisions has resulted in an unfounded disagreement with the District Court's adjudication of the parties' motions for summary judgment. Taken as a whole, the I.R.C. clearly supports the District Court's decision with respect to the charitable contributions at issue.

A. THE PARTIES AGREE THAT THE TRUST SATISFIED THE REQUIREMENTS OF I.R.C. § 642(C)(1) TO THE EXTENT NECESSARY TO ENTITLE IT TO A DEDUCTION.

I.R.C. § 642(c)(1) provides as follows:

> In the case of an estate or trust (other than a trust meeting the specifications of subpart B), there shall be allowed as a deduction in computing its taxable income (in lieu of the deduction allowed by section 170(a), relating to charitable, etc., contributions and gifts) any amount of the gross income, without limitation, which pursuant to the terms of the governing instrument is, during the taxable year, paid for a purpose specified in section 170(c) (determined without regard to section 170(c)(2)(A)).

Thus, before any question of the valuation of noncash property donated to charity is reached, § 642(c)(1) requires a trust to show that the charitable contributions it seeks to deduct are: (1) sourced in "any amount of the gross income", (2) made "pursuant to the terms of the governing instrument", and (3) paid to a qualifying charity. The charitable contributions at issue here meet all three factors.

1. The Parties agree that the Trust sourced the Donated Properties in the Trust's gross income.

While disagreeing as to the valuation standard for the Donated Properties, the parties agree that the Trust sourced them in the Trust's gross income. If the Trust did not have UBI, its charitable contribution deduction would clearly be allowed solely under I.R.C. § 642(c)(1). But because the Trust had UBI, its charitable contribution deduction is also governed by I.R.C. §§ 681, 512(b)(11) and 170(b)(1).

The fact that the Trust chose to use its income to acquire real property for donation to charity does not limit the Trust's ability to take a deduction. The government has never suggested otherwise. Indeed, § 170 specifically contemplates a deduction for charitable contributions of noncash property, including real property.

Nonetheless, the government's brief looks askance at the fact that "the Trust claims deductions that far exceeded what it could have claimed had it simply donated the funds used to purchase the properties." (Appellant's Br. at 11.) The government's position is inconsistent with the well-known dictum that:

> Any one 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; there is not even a patriotic duty to increase one's taxes. Therefore, if what was done here, was what was intended by [the IRC], it is of no consequence that it was all an elaborate scheme to get rid of income taxes, as it certainly was.

Helvering v. Gregory, 69 F.2d 809, 810 (2d Cir. 1934) (L. Hand, J.) (*aff'd* 293 U.S. 465 (1935)). No adverse inference should be drawn from the fact that the Trust chose to structure a significant portion of its charitable giving as donations of real property instead of cash contributions. The Trust chose to give the Donated Properties to charity because it believed those gifts best carried out the mission of the Green family to serve the Lord, as stated in the governing instrument of the Trust.

2. The District Court found that the Trust's charitable contributions were made pursuant to the terms of the governing instrument.

As described above, the government moved for summary judgment on the issue of whether the Trust made its charitable contributions pursuant to the terms of the governing instrument of the Trust.[10] The Court found that the Trustee's contributions of the Donated Properties were consistent with the terms of the Trust instrument. *Green*, 144 F.Supp.3d at 1261. The District Court noted the government's "apparent concession that [the Trust] is entitled to a § 642(c)(1) deduction *in some amount*—at most, limited by the adjusted basis in the Donated Properties." *Id*. The District Court concluded, "here, there can be <u>no serious question</u> that the donations were made 'pursuant to the terms of the governing instrument'" of the Trust. *Id.* (emphasis added).

The District Court's determination of the governing instrument issue is supported by *Old Colony Tr. Co.*, which has been recognized as concluding that a governing instrument need only "possess some positive charitable intent or purpose of the settlor – not merely that the settlor did not exclude charity from all the possible beneficiaries of his bounty." *Ernest & Mary Hayward Weir Found. v. United States*, 362 F.Supp. 928, 935-37, 939 (S.D.N.Y. 1973) (citing *Old Colony Tr. Co.*, 301 U.S.

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[10] The parties' briefing in the District Court addressed a number of issues pertaining to the governing instrument not raised by the government on appeal. (*See*, *e.g.*, App. at 281-87.)

at 383-84). The portions of the Trust's governing instrument quoted above clearly indicate the "positive charitable intent or purpose" that § 642(c)(1) requires.

The government now concedes on appeal that the Trust's governing instrument permitted the Trust to "distribute to charity such amounts from gross income of the Trust as the Trustee deems appropriate . . . ." (Appellant's Br. at 48.) Thus, as the District Court pointed out, the government tacitly concedes that the Trustee contributed the Donated Properties consistent with the governing instrument of the Trust.

Based on its assumption that the Trust was not entitled to calculate its deduction based on the fair market value of the Donated Properties, however, the government argues that the District Court erred in holding that the Trustee contributed the Donated Properties to charity pursuant to the governing instrument. In other words, the government does not dispute that the Donated Properties were contributed pursuant to the governing instrument; it merely disputes the valuation standard to apply when calculating the Trust's deduction with respect to the Donated Properties. The governing instrument is accordingly not determinative of the issue in this appeal.

3. The Parties stipulated that the Trust made its charitable contributions to qualifying charities.

In their Joint Stipulation filed in the District Court, the Parties agreed that the recipients of the Donated Properties were qualified charities under I.R.C. § 170(b)(1)(A). (App. at 172-74.) It follows that the Trust's charitable contributions were "paid for a purpose specified in section 170(c)", a point the government does not dispute.

B. Because the Donated Properties were Allocable to the Trust's Unrelated Business Income, I.R.C. §§ 681, 512(b)(11), and 170 Entitled the Trust to a Charitable Deduction for the Donated Properties at Fair Market Value, Subject to the Limitations of § 170(b)(1).

The government acknowledges the Donated Properties were allocable to the Trust's UBI. Accordingly, the Trust was entitled to a charitable deduction under I.R.C. §§ 681, 512(b)(11), and 170(b)(1). With respect to the deductibility of charitable contributions allocable to UBI, I.R.C. § 681 provides as follows:

> **(a) Trade or Business Income**
> In computing the deduction allowable under section 642(c) to a trust, no amount otherwise allowable under section 642(c) as a deduction shall be allowed as a deduction with respect to income of the taxable year which is allocable to its unrelated business income for such year. For purposes of the preceding sentence, the term "unrelated business income" means an amount equal to the amount which, if such trust were exempt from tax under section 501(a) by reason of section 501(c)(3), would be computed as its unrelated business taxable income under section 512 (relating to income derived from certain business activities and from certain property acquired with borrowed funds).

> **(b) Cross Reference**
> For disallowance of certain charitable, etc., deductions otherwise allowable under section 642(c), see sections 508(d) and 4948(c)(4).

(Emphasis added.) The applicable Treasury Regulation explains that the effect of § 681 is to disallow entirely a § 642(c)(1) deduction "for any taxable year for amounts allocable to the trust's unrelated business income for the taxable year." Treas. Reg. § 1.681(a)-2(a) (emphasis added).

Notwithstanding § 681's disallowance of a deduction under § 642(c)(1), the I.R.C. provides an alternative path for a deduction for charitable contributions by a trust that are sourced from UBI:

> **(11)** In the case of any trust described in section 511(b), the deduction allowed by section 170 (relating to charitable etc. contributions or gifts) shall be allowed (whether or not directly connected with the carrying on of the trade or business), and for such purpose a distribution made by the trust to a beneficiary described in section 170 shall be considered a gift or contribution. The deduction allowed by this paragraph shall be allowed with the limitations prescribed in section 170(b)(1)(A) and (B) determined with reference to the unrelated business taxable income computed without the benefit of this paragraph (in lieu of with reference to adjusted gross income).

I.R.C. § 512(b)(11) (emphasis added.) Again, the applicable Treasury Regulation confirms that this is so:

> While the charitable contributions deduction under section 642(c) is entirely disallowed by section 681(a) for amounts allocable to "unrelated business income", a partial deduction is nevertheless allowed for such amounts by the operation of section 512(b)(11) . . . .

Treas. Reg. § 1.681(a)-2(a). Thus, but for § 512(b)(11), the Trust would not have been entitled to a charitable deduction for the donated properties allocable to UBI. The Trust recognized this in preparing its amended return, in which it took a deduction under § 512(b)(11) subject to the limitations of § 170(b)(1).

As summarized above, § 170(b)(1)(A) allows a deduction for certain charitable contributions at 50%. Section 170(b)(1)(B) allows a deduction for other contributions at 30%. In its original tax return, the Trust applied a 30% limitation to its deduction of the Donated Properties. The Trust later determined that it should have applied the 50% limitation of § 170(b)(1)(A). Indeed, the primary reason why the Trust filed an amended return was to correct its charitable deduction from applying the § 170(b)(1)(B) 30% limitation to the § 170(b)(1)(A) 50% limitation. The government's brief acknowledges that whatever amount the Trust was entitled to deduct as a charitable contribution was deductible at the 50% limitation of § 170(b)(1)(A). The government's brief also acknowledges, as it must, that the limitations of § 170(b)(1)(C), (D), and (E) do not apply to the Trust's contributions of the Donated Properties. (Appellant's Br. at 24-25, n. 7.)

Section 170 unquestionably permits the Trust to deduct the Donated Properties at fair market value. The applicable Treasury Regulation explains:

> If a charitable contribution is made in property other than money, the amount of the contribution is the fair market value of the property at the time of the contribution reduced as provided in section 170(e)(1) and

> paragraph (a) of § 1.170A-4, or section 170(e)(3) and paragraph (c) of § 1.170A-4A.

Treas. Reg. § 1.170A-1(c)(1).[11] Indeed, the Instructions for Form 8283, the form by which the Trust reported the value of its noncash charitable contributions, specifically impose a fair market value standard, defined as "the price a willing, knowledgeable buyer would pay a willing, knowledgeable seller when neither has to buy or sell." IRS Instructions for Form 8283 at 2 (Cat. No. 62730R) (Oct. 1998).

In sum, the Trust's charitable contribution of the Donated Properties was clearly allocable to its UBI. Under §§ 681 and 512(b)(11), the Trust's contribution of the Donated Properties was therefore deductible under § 170. Because § 170 unquestionably applies a fair market value standard to the value of donated noncash property, it follows that the Trust was permitted to deduct the Donated Properties at fair market value, subject only to the 50% limitation imposed by § 170(b)(1)(A). *See* Treas. Reg. § 1.170A-1(c)(1). That is precisely what the Trust did in its amended return and, accordingly, the Trust is entitled to the deduction it sought, subject to the determination of the fair market value of the Donated Properties by stipulation of the Parties and at trial.

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[11] The references to §§ 170(e)(1) and 170(e)(3) pertain to limitations under § 170 that are inapplicable here.

C. THE FAIR MARKET VALUE STANDARD OF I.R.C. § 170 APPLIES TO THE TRUST'S CHARITABLE CONTRIBUTIONS REGARDLESS OF THE VALUATION STANDARD OF § 642(C)(1).

In spite of the foregoing, the government argues that § 642(c)(1) does not allow the Trust to calculate its deduction based on the fair market value of the Donated Properties. The government's position is incorrect for the following reasons.

First, the applicable Treasury Regulations recognize the separate nature of a § 642(c)(1) deduction (arising out of charitable contributions soured from "any amount of the gross income" of the trust) and a §§ 512(b)(11) and 170 deduction (arising out of charitable contributions allocable to UBI). The two deductions are separate and different. Treas. Reg. § 1.681(a)-1 states:

> Under Section 681, the unlimited charitable contributions deduction otherwise allowable to a trust under section 642(c) is, in general, <u>subject to percentage limitations</u>, corresponding to those applicable to contributions by an individual under section 170(b)(1)(A) and (B), under the following circumstances; (a) to the extent that the deduction is allocable to 'unrelated business income'[.]"

(Emphasis added.) Additionally, Treas. Reg. § 1.681(a)-2(a) provides:

> While the charitable contributions deduction under section 642(c) is <u>entirely disallowed</u> by section 681(a) for amounts allocable to 'unrelated business income', a partial deduction is nevertheless allowed by for such amounts by the operation of section 512(b)(11).

(Emphasis added.)

While Treas. Reg. § 1.681(a)-1 could be read to provide that a charitable contribution allocable to UBI is permitted by § 642(c)(1) subject to the percentage limitations of § 170(b)(1), Treas. Reg. § 1.681(a)-2(a) plainly says otherwise. The latter closely tracks the language of § 681 in stating that a charitable contribution allocable to UBI cuts off a § 642(c) deduction while simultaneously opening the door to a (completely separate) deduction via §§ 512(b)(11) and 170.

The language of § 642(c)(1) states that the deduction permitted by that section is "in lieu of the deduction allowed by section 170(a)". To read the above-quoted Treasury Regulations as importing additional requirements or limitations of § 170 into a § 642(c)(1) deduction would render the quoted language superfluous. This Court does not construe statutes "in a way that renders words or phrases meaningless, redundant, or superfluous." *Osborne v. Babbitt*, 61 F.3d 810, 813 (10th Cir. 1995). Thus, the plain language of §§ 681 and 642(c)(1) mutually reinforce the conclusion that a trust's charitable deduction pursuant to § 642(c)(1) is determined separately from a trust's charitable deduction pursuant to §§ 512(b)(11) and 170.[12]

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[12] It is unclear whether I.R.C. § 642(c)(1) has any continuing effect with respect to a charitable contribution allocable to UBI. Some commentators regard § 681 as eliminating the "special rules of § 642(c)" (e.g., sourcing in gross income and authorization by the governing instrument) for contributions allocable to UBI. *See* Jonathan G. Blattmachr, F. Ladson Boyle, & Richard L. Fox, *Planning for Charitable Contributions by Estates and Trusts*, 44 Estate Planning 3 at 12 (Jan. 2017). Regardless, the Trust has established in this brief that it meets the requirements of § 642(c)(1) in addition to qualifying for a deduction under §§ 512(b)(11) and 170.

Indeed, Treasury Regulation § 1.681(a)-2(b) directly addresses allocation of a charitable contribution between unrelated business taxable income (governed by §§ 681, 512(b)(11), and 170) and "other income of the trust" (governed by § 642(c)(1)). In the latter instance, any portion of a charitable contribution sourced from the gross income of a trust is clearly subject to § 642(c)(1). In contrast, for a charitable contribution sourced in UBI, §§ 512(b)(11) and 170 control.

It is worth noting that the government takes the position throughout its Brief that § 642(c)(1) should be interpreted without any reference to other I.R.C. provisions. Yet the government conflates the deductions allowed by § 642(c)(1) and §§ 512(b)(11) and 170. It acknowledges that the Trust's charitable contributions are subject to the percentage limitations of § 170(b)(1)(A) while simultaneously arguing that § 642(c)(1) prohibits the Trust from calculating its charitable deduction based on the fair market value of the Donated Properties.

The government acknowledges that the Trust sourced the Donated Properties from its unrelated business income. Thus, even if § 642(c)(1) bears on the valuation of the Trust's charitable contributions, it must be applied in harmony with §§ 512(b)(11) and 170, which make clear the valuation standard for the Trust's charitable contributions is fair market value. *See* Treas. Reg. § 1.170A-1(c)(1).

D. THE DISTRICT COURT WAS CORRECT TO CONCLUDE THAT THE VALUATION STANDARD OF § 642(C)(1) IS FAIR MARKET VALUE.

To begin with the text of I.R.C. § 642(c)(1):

> In the case of an estate or trust (other than a trust meeting the specifications in subpart B), there shall be allowed as a deduction in computing its taxable income (in lieu of the deduction allowed by section 170(a), relating to deduction to charitable, etc., contributions and gifts) any amount of the gross income, without limitation, which pursuant to the terms of the governing instrument is, during the taxable year, paid for a purpose specified in section 170(c) (determined without regard to section 170(c)(2)(A)). . . .

(Emphasis added). The government correctly acknowledges in its Brief that the intent of § 642(c)(1) was to encourage charitable giving by trusts. *Old Colony Tr. Co.*, 301 U.S. at 383.

The parties do not dispute that donated real property can be sourced from "an amount of the gross income" of a trust.[13] They do not dispute whether the Trust sourced the Donated Properties from the gross income of the Trust. They part ways on the issue of (1) whether a trust can deduct the fair market value of donated real property that is sourced from "an amount of the gross income" or (2) whether a limitation should be read into I.R.C. § 642(c)(1) that a trust cannot deduct more than its adjusted basis in donated real property.

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[13] The government has conceded throughout this case that an "amount of gross income" can include donations of real property purchased with the Trust's gross income.

1. The government's narrow reading of I.R.C. § 642(c)(1) is inconsistent with good tax policy, including the policy favoring charitable giving.

The government insists that the deduction allowed by § 642(c)(1) should be read narrowly because it is a "matter of legislative grace." Appellant's Br. at 25 (citing *INDOPCO, Inc. v. Comm'r*, 503 U.S. 79, 84 (1982)). The government does not heed the admonition that charitable deductions "are an expression of public policy rather than legislative grace." *Weingarten*, 825 F.2d at 1029 (internal quotation marks omitted). As a result, "charitable deductions should . . . be liberally construed in favor of the taxpayer." *Id.*, *see also Helvering v. Bliss*, 293 U.S. 144, 151 (1934) and *Hartwick College v. United States*, 801 F.2d 608, 615 (2d Cir. 1986). Indeed, both the Supreme Court and the Tenth Circuit have recognized that § 642(c)(1) must be "judicially construed so as to further and not hinder [its] beneficent purpose" of encouraging charitable gifts by trusts. *F.G. Bonfils Trust*, 115 F.2d at 788, 791 and *Old Colony Tr. Co.*, 301 U.S. at 384.

The government questions the District Court's determination that it must construe any ambiguity in § 642(c)(1) in a manner that encourages, rather than hinders, charitable giving. *Green*, 144 F.Supp.3d at 1259, n. 11. As explained below, the government begs the question of whether its preferred narrow construction of § 642(c)(1) is correct. I.R.C. § 642(c)(1) is not subject to a narrow construction just because the government has settled on a preferred interpretation.

The Trust respectfully invites the Court to consider the policy implications of the government's position. Under the government's construction of § 642(c)(1), a taxpayer could contribute property to charity with a fair market value less than adjusted basis and still be able to deduct adjusted basis. If a rule that a deduction is always tied to adjusted basis is to be consistently applied, as good tax policy should, then a trust would be permitted to deduct adjusted basis whether less or more than fair market value. The Trust doubts whether the government would accept this implication of the rule it urges this Court to adopt. In fact, what is more likely is that the government seeks to impose a gloss on § 642(c)(1) that a trust may deduct fair market value or adjusted basis, whichever is less. This goes far afield of the plain language of § 642(c)(1) and is bad tax policy.

In contrast to the clear intent of Congress to encourage donations of appreciated property by providing a tax incentive to do so, the government's narrow and inconsistent interpretation of § 642(c)(1) would create a perverse incentive for trusts to donate only those properties that are valued at or below the trust's adjusted basis in the property. A trust would no longer have an incentive to do what the Trust did in this case, namely, donate its "winners" to charity. This outcome would be inconsistent with the twin policy goals of encouraging charitable giving and applying tax statutes consistently.

2. The government's narrow reading of I.R.C. § 642(c)(1) is inconsistent with the text of the statute.

The government emphasizes that a court's "task is to apply the [statutory] text, not improve upon it." *Pavelic & LeFlore v. Marvel Entm't Grp.*, 493 U.S. 120, 126 (1989). But it is the government itself that endeavors to improve upon the text of § 642(c)(1) by reading requirements and limitations into the statute that are not there.

The government cites a number of cases, all of which it interprets through a lens of assuming that the unrealized appreciation of the Donated Properties could not have been attributable to "any amount of the gross income" of the Trust. If § 642(c)(1) is read as strictly as the government proposes, no amount of the Donated Properties would be included in the Trust's "gross income." The government has agreed, however, that the source of the Donated Properties was the gross income of the Trust and that § 642(c)(1) entitled the Trust to deduct its adjusted basis in the properties.

From the outset, the government's § 642(c)(1) argument is a bit of a red herring because the Trust does not disagree that deductions under § 642(c)(1) must be sourced from gross income. The Trust simply contends, and the District Court agreed, that donated property sourced from gross income is deductible under § 642(c)(1) at its fair market value. In contrast, the government's analysis of § 642(c)(1) simply sidesteps the question of how noncash property that is concededly sourced from gross income should be valued when donated to charity. The District

Court concluded that in the absence of another valuation standard, fair market value controls.

Contrary to the government's assertion, the Trust does not seek to "write the limiting language – 'any amount of the gross income' – out of the statute." (Appellant's Br. at 41.) Instead, the Trust simply seeks to have the phrase interpreted consistent with its plain language, which imposes a sourcing requirement but not a valuation standard. It is the government that wants to write "any amount of the gross income" out of the statute and replace it with various narrower phrases it would prefer such as "only the adjusted basis" or "sourced from income reported on the trust's tax return." Section 642(c)(1) simply does not contain the additional restrictions that the government claims it does. The government's reliance on the income side of the equation breaks down when one considers that the government does not cite a single case holding that the difference between the fair market value of donated real property and a taxpayer's adjusted basis simply evaporates for deduction purposes if the taxpayer does not "realize" taxable income.

For example, the government cites *Cottage Savings Ass'n v. Comm'r*, 499 U.S. 554 (1991) in which the Supreme Court held that appreciation in value is not income until "the difference between the amount realized from the sale or other disposition of the property and its adjusted basis" is realized as income by the taxpayer. *Id.* at 559 (internal quotation marks omitted). In the charitable giving

context, the government acknowledges that parting with ownership without realizing gain does not give rise to taxable income in the donor. *Carrington v. Comm'r*, 476 F.2d 704, 709 (5th Cir. 1973), *see also Grove v. Comm'r*, 490 F.2d 241 (2d Cir. 1973) (a donor who donated stock to a college, which later redeemed the shares for cash and paid the donor income thereon for life, did not have income with respect to the amount realized in the redemption). These cases fit with the Trust's reading of § 642(c)(1), namely, that a trust is not required to recognize as income unrealized appreciation donated to charity. That fact alone does not answer the question of how to value noncash property contributed to charity.

The government next cites *W.K. Frank Trust of 1931 v. Comm'r*, 145 F.2d 411, 413 (3d Cir. 1944) in support of its proposition that a donation of unrealized appreciation was not deductible under the predecessor statute to § 642(c)(1). But the *W.K. Frank* court did not address the issue of deductibility of unrealized appreciation. Rather, the court disallowed a deduction sought by a trust because the trust had donated stock from the trust corpus, thus defeating *ab initio* its purported status as part of "gross income". *Id.* at 413. The Third Circuit did not announce a blanket prohibition on deducting properties sourced in gross income at fair market value. Furthermore, the IRS agrees that *W.K. Frank* does not apply:

> The present case differs from *W.K. Frank Trust* in that the contributions to charity were not made from property that was initially contributed to corpus of the trust, but rather property purchased in a previous year from gross income.

IRS Chief Counsel Advisory 201042023, 2010 WL 4149009. *W.K. Frank* is accordingly irrelevant to the case at hand.

The government also cites *United States v. Benedict*, a case addressing the "narrow question" of whether trustees were correct to deduct cash contributions sourced in certain realized capital gains subject to a provision of the I.R.C. that only 50% of the capital gains were includible in computing taxable income. 338 U.S. 692, 695 (1950). The District Court rejected the government's reliance on *Benedict* because the government attempted to liken the Donated Properties to cash gifts not fully derived from gross income. The District Court found *Benedict* inapposite because it found the Donated Properties derived entirely from the Trust's gross income. *Green*, 144 F.Supp.3d at 1262.

The government lastly cites a series of cases intending to support its position that deductions under § 642(c)(1) must be sourced from gross income. *E.g.*, *Crestar Bank v. IRS*, 47 F.Supp.2d 670 (E.D. Va. 1999) and *Mott v. United States*, 462 F.2d 512 (Ct. Cl. 1972).

Crestar Bank involved a very different issue. A decedent made a bequest to charity and the estate claimed a charitable deduction on the decedent's tax return. 47 F.Supp.2d at 671. The estate then attempted to claim the same charitable deduction on its income tax return, arguing that the deduction was allocable to its income since it had income in excess of the amount of the charitable donation. *Id.*

at 671-72. *Crestar Bank* addresses the type of "double deduction" that § 642(c)(1) is designed to prevent, concluding that because the estate could not show that it paid the charitable donation out of its income, it was not entitled to deduct the same on its income tax return. *Id.* at 672-73.

Crestar Bank is easily distinguishable from the facts of the instant case given that no one disputes that the Trust purchased the Donated Properties from gross income. The opinion simply says nothing about the treatment under § 642(c)(1) of properties sourced from gross income. Thus, the government's reading of *Crestar Bank* as "preventing taxpayers from claiming a deduction for any portion of a donation not reported as gross income" is overbroad and once more attempts to add an unnecessary gloss to § 642(c)(1) unsupported by the plain statutory language.

3. The District Court correctly read I.R.C. § 642(c)(1) as containing a fair market value standard.

Instead of the government's narrow focus on income, the key question, as framed by the District Court, is what valuation standard should be used to determine the deduction to which the Trust is entitled. *See* IRS Chief Counsel Advisory 201042023, 2010 WL 4149009 (describing the issue as whether the deduction for real property purchased with "gross income" is based on fair market value or adjusted basis). It is inconsistent with the rule of liberal construction of charitable donation statutes simply to assume, without further consideration, that the more restrictive option of the two must control by default.

The government critiques the District Court's reliance on the phrase "without limitation" in § 642(c)(1). It points to *Benedict*, in which the Supreme Court held that the same phrase in the predecessor statute to § 642(c)(1) "is only to make inapplicable the limitation [now codified in § 170] and any other statutory limitation which otherwise might apply to charitable contributions made out of the gross income of an estate or trust." 338 U.S. at 697, n. 8 (emphasis added). The limitations imposed by § 170 include limitations on the deductions for contributions of short term capital gain property and ordinary income property to adjusted basis instead of fair market value. *See* § 170(e)(1) and Boris I. Bittker & Lawrence Lokken, *Federal Taxation of Income, Estates, and Gifts* ¶ 35.2.2 (Thompson Reuters/Tax & Accounting, 2d/3d ed. 1993-2014). In fact, none of the adjusted basis limitations of § 170(e)(1) apply to donations governed by § 642(c)(1), as *Benedict* makes clear, further highlighting Congress' choice not to impose an adjusted basis standard on deductions under § 642(c)(1).

The government attempts to distinguish *Old Colony Tr.*, and *F.G. Bonfils Tr.*, relied on by the District Court. *See Green*, 144 F.Supp.3d at 1259 n. 11. Contrary to the government's interpretation, *Old Colony Tr.* is a good example of giving a charitable donation statute a broad reading in order to promote "the encouragement of donations by trust estates[.]" 301 U.S. 379, 384. In *Old Colony Tr.*, the Supreme Court held that donations from gross income are not limited to income from the year

in which a donation is made because the predecessor statute to § 642(c)(1) contained no words of limitation with respect to donations of income from other years. *Id.* In like manner, § 642(c)(1) does not limit the deduction for a donation of real property to a trust's adjusted basis in the property. Under the rule of *Old Colony Tr.*, it is not correct for a court to read "any amount of gross income" as "only the adjusted basis of noncash contributions" without any statutory authority to support such a reading. Similarly, *F.G. Bonfils Tr.* teaches that in interpreting the predecessor statute to § 642(c)(1), a court should not "give regard to mere theory" more than to "actuality." 115 F.2d at 791 (concluding that certain trust corpus was "permanently set aside" for charity in spite of a "remote" possibility that the corpus could be invaded).

The government lastly accuses the District Court of allowing the Trust a "double deduction." The government cites *United States v. Skelly Oil Co.*, which admonishes against allowing "the practical equivalent of a double deduction . . . <u>absent a clear declaration of intent by Congress</u>." 394 U.S. 678, 684 (1969) (emphasis added). The government freely admits that the tax policy of avoiding "double deduction" outcomes is somewhat suspended in the world of charitable donations, at least as far as individuals are concerned. Appellant's Br. at 35, n. 9 (referencing § 170). There is no reason to suppose that Congress intended to allow individuals a "double deduction" of sorts under § 170 but intended § 642(c)(1), which allows a deduction "without limitation", to prohibit a trust from deducting

donated property at fair market value. As discussed above, nothing in the plain text of § 642(c)(1) supports such a restrictive reading.

E. THE DISTRICT COURT DID NOT ERR IN CONSIDERING I.R.C. § 642(C)(1) *IN PARI MATERIA* WITH I.R.C. § 170.

The government argues that the District Court's analysis of I.R.C. §§ 642(c)(1) and 170 *in pari materia* "misses the mark." (Appellant's Br. at 44.) The government misconstrues the District Court's application of § 170. The District Court noted, correctly, that § 642(c)(1) expressly references § 170 in two instances. *Green*, 144 F.Supp.3d at 1259. It then noted that § 170 "distinguishes between charitable contributions of cash and property other than money, and values the latter at the fair market value at the time of contribution." *Id.* While § 170 places certain limits on deductions, the District Court drew a contrast with § 642(c)(1), which expressly states that it allows a deduction "without limitation." *Id.* The District Court made the reasonable inference that if § 170 allows charitable contributions at fair market value, then *a fortiori*, § 642(c)(1), which is "without limitation" and is subject to being "liberally construed", must at a minimum allow charitable contributions at fair market value as well.

It is clear that when the District Court said that § 642(c)(1) was "clear and capable of interpretation without resort to extraneous sources", it did not mean that § 642(c)(1) should be construed in isolation from § 170, which it plainly references and relates to. *Green*, 144 F.Supp.3d at 1259, n. 8. In fact, the District Court's

statement appears to be directed more at the government, which the District Court determined was "argu[ing] for a strained construction" while ignoring the clear intent of the charitable deduction scheme, taken as a whole. *Id*. at 1260.

The government points out that § 642(c)(1) does not expressly incorporate § 170's valuation scheme. Neither the Trust nor the District Court disagrees with this point. The District Court simply concluded that, in the absence of a valuation standard stated in § 642(c)(1), fair market value is the most reasonable standard to apply because fair market value is "as close to a generalized standard as there is in the tax code." *Id.* at 1262 (quoting *Schwab v. Comm'r*, 715 F.3d 1169 (9th Cir. 2013)). Having concluded that the Donated Properties were sourced from an "amount of the gross income" of the Trust, the District Court correctly applied the fair market value standard to determine the amount of the deduction to which the Trust was entitled.

1. Additional I.R.C. provisions further support the District Court's interpretation of I.R.C. § 642(c)(1).

Two subsequent legislative enactments illustrate the intent of Congress that non-cash charitable contributions are deductible at fair market value. The first is a provision that was formerly part of the Alternative Minimum Tax ("AMT"). I.R.C. § 57(a)(6) (1988) (repealed 1993). The second is a provision pertaining to beneficiary distributions of an estate or trust. I.R.C. § 643(e).

Congress enacted the AMT to ensure that certain high-income taxpayers pay a minimum amount of tax. In I.R.C. § 57, Congress identified certain deductions allowed against the regular income tax that are not allowed against the AMT. These deductions, known as items of tax preference, are added back to the taxpayer's taxable income for purposes of calculating the AMT.

Relevant to the present issue, I.R.C. § 57(a)(6) formerly provided that one item of tax preference, titled the "Appreciated property charitable deduction," was "[t]he amount by which the deduction allowable under section 170 or 642(c) would be reduced if all capital gain property were taken into account at its adjusted basis." I.R.C. § 57(a)(6)(A) (emphasis added). In other words, for purposes of the AMT, a taxpayer's taxable income would be computed as if appreciated property donated to charity was deductible only at is adjusted basis and not its fair market value. I.R.C. § 57(a)(6) therefore presumed that appreciated property was deductible at its fair market value for regular tax purposes. In enacting § 57(a)(6), Congress created an adjusted basis valuation standard solely for purposes of the AMT. If the valuation standard under § 642(c)(1) is adjusted basis as the government contends, then § 57(a)(6) would have been entirely superfluous. Courts "should not and do not suppose that Congress [has] enact[ed] unnecessary statutes." *Jackson v. Kelly*, 557 F.2d 735, 740 (10th Cir. 1977).

In 1993, Congress repealed § 57(a)(6) to "provide an additional incentive to taxpayers to make charitable contributions of appreciated property." H.R. Rep. No. 103-111, at 630, *reprinted in* 1993 U.S.C.C.A.N. 378, 861. Thus, taxpayers who donate appreciated property to charity are no longer subject to the AMT for such donations and it follows they are able to deduct said donations at fair market value. *See id.* (explaining that the repeal of § 57(a)(6) means that "the taxpayer is allowed to claim deduction for both regular tax and AMT purposes in the amount of the property's fair market value.").

Another statute that proves the intent of Congress that noncash property donated under § 642(c)(1) be deductible at fair market value is I.R.C. § 643(e). This statute limits a deduction previously available to a trust that made a distribution to a beneficiary. Unlike § 642(c)(1), which allows a deduction "without limitation", § 643(e) limits a trust distributing noncash property to the adjusted basis of the property in the hands of the beneficiary <u>or</u> the fair market value of the property, whichever is lower. While imposing this restriction on the deductibility of beneficiary distributions, Congress has not imposed a similar restriction on the deductibility of charitable contributions, pursuant to § 642(c)(1). This further bolsters the Trust's position that Congress did not intend the unlimited charitable deduction scheme allowed by § 642(c)(1) to be limited to adjusted basis.

Consideration of the above legislative history and statutory provisions buttresses the District Court's interpretation of § 642(c)(1). Congress' intent regarding the amount of the charitable deduction allowable for a real-property donation cannot be denied, as the government posits, by narrowly focusing on the literal meaning of the phrase "amount of . . . gross income . . . paid." The search for an answer cannot end with merely "examining [this] statutory provision in isolation," as the government contends. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Id.* at 133 (internal quotation marks omitted).

Put another way, "the meaning of statutory language, plain or not, depends on context." *Dalzell v. RP Steamboat Springs, LLC*, 781 F.3d 1201, 1207 (10th Cir. 2015) (internal quotation omitted). "This contextual analysis requires [the Court] to consider the statute's intended purpose" and to interpret the statute to effect that purpose. *Id.* It also requires the Court to "examin[e] related statutes." *United States v. Ko*, 739 F.3d 558, 560 (10th Cir. 2014). The Court should interpret related statutes "as a symmetrical and coherent regulatory scheme and fit, if possible, all parts into an harmonious whole." *See Brown & Williamson*, 529 U.S. at 133 (citation and internal quotation marks omitted). Here, the relevant contextual factors lead

ineluctably to the conclusion that § 642(c)(1) allows a trust to take a deduction based on the fair market value of real property donated to charity.

2. The government's own *in pari materia* analysis and legislative history do not support the government's position.

Remarkably, in spite of its strong objection to the District Court's application of the statutory construction canon of *in pari materia*, the government supplies its own list of I.R.C. sections that it believes demonstrate that "amount of gross income" cannot possibly include appreciation of donated trust property sourced from gross income. The sections cited do not support the government's interpretation. I.R.C. § 1244(c) caps certain deductions at "the amount of gross income" of a corporation. The provision says nothing about what is or is not included in "the amount of gross income." I.R.C. § 5000A(c)(2)(B), (e)(2) is a part of the Affordable Care Act that limits penalties based on an individual's gross income, which the statute also describes as "household income." I.R.C. § 6248(c)(2) creates a special statute of limitations for tax fraud by a partnership that exceeds "25 percent of the amount of gross income stated in its return[.]" I.R.C. § 6501(e)(1)(A)(i) pertains to tax assessments for a taxpayer who omits amounts properly includible in gross income.

It is telling that the government seemingly searched the entire I.R.C. and found only four other instances of the phrase "amount of gross income" or something similar. It does not appear that the phrase is one that Congress employs with regularity, suggesting that the phrase is subject to interpretation as to its precise

meaning depending on the section of the I.R.C. in which it appears. Critically, none of the sections cited by the government pertains to charitable deductions and, as such, is not subject to a more liberal interpretation designed to promote the public policy of encouraging charitable giving.

The government also attempts to make something of the fact that Congress, in 1954, changed the phrase in question from "any part of the gross income" to "any amount of the gross income." (Emphasis added.) It is not clear from the plain text of the two versions that the amendment made a substantive change of much significance. The government cites legislative history suggesting that Congress perceived a difference between a trust's "income" and its "gross income" (*see* I.R.C. § 61) and wanted to emphasize that only amounts of "gross income" are deductible under § 642(c)(1). The government also cites a Treasury Regulation stating essentially the same thing. *See* Treas. Reg. § 1.642(c)-3(b)(1). But the government omits the next paragraph, which bears on the question at hand:

> (2) **Determination of the character of an amount deductible under section 642(c).** In determining whether the amounts of income so paid, permanently set aside, or used for a purpose specified in section 642(c)(1), (2), or (3) include particular items of income of an estate or trust, whether or not included in gross income, a provision in the governing instrument or in local law that specifically provides the source out of which amounts are to be paid, permanently set aside, or used for such purpose controls[.] . . . In the absence of specific provisions in the governing instrument or in local law, the amount to which section 642(c) applies is 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. . . .

It is apparent, upon reading the regulation in full, that what Congress and the IRS are concerned with is that a trust comply with the formality of only taking deductions under § 642(c)(1) with respect to charitable contributions sourced from gross income. The trust's governing instrument, not the I.R.C., determines the source from which charitable contributions deductible under § 642(c)(1) are made.

The conclusions the government draws from the above-cited regulation are not consistent with the facts of this case. The government asserts that the Trust only included approximately $10.7 million in its gross income and is therefore entitled to deduct no more than that amount under § 642(c)(1). Under the regulation the government cites, the Trust is permitted a deduction under § 642(c)(1) so as long as its governing instrument provides that charitable contributions are sourced to gross income. As discussed above, the District Court found that the Trustee complied with the Trust's governing instrument in making contributions of the Donated Properties. *Green*, 144 F.Supp.3d at 1261.

The government attempts to rewrite § 642(c)(1)'s "amount of gross income" (a sourcing requirement) to "an amount included in gross income" because the latter eliminates any unrealized appreciation from the deduction. As discussed by the District Court, "sourced" means "a point of origin or procurement". *Green*, 144 F.Supp.3d at 1260, n. 14. The parties agree that the Donated Properties originated from and were procured with the Trust's gross income.

CONCLUSION

The District Court was correct to determine that the Trust was entitled to the charitable deduction it reported on its amended tax return. Whether viewed from a § 642(c)(1) analysis or a §§ 681, 512(b)(11), 170 analysis, the result is the same: the Trust was entitled to a deduction for its contribution of the Donated Properties to charity at fair market value. To reach any other result would disincentive charitable giving and, accordingly, be inconsistent with the admonition that "[p]rovisions regarding charitable deductions should . . . be liberally construed in favor of the taxpayer." *Green*, 144 F.Supp.3d at 1260 (quoting *Weingarten*, 825 F.2d at 1029).

The judgment of the District Court should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT

Counsel for Mart D. Green, trustee of The David and Barbara Green 1993 Dynasty Trust, respectfully inform the Court that this case involves important issues of tax administration and statutory interpretation on an issue of first impression that oral argument would help to resolve.

Respectfully Submitted,

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STATUTORY AND REGULATORY ADDENDUM

26 U.S.C. § 642(c):

(c) DEDUCTION FOR AMOUNTS PAID OR PERMANENTLY SET ASIDE FOR A CHARITABLE PURPOSE

(1) GENERAL RULE
In the case of an estate or trust (other then [sic] a trust meeting the specifications of subpart B), there shall be allowed as a deduction in computing its taxable income (in lieu of the deduction allowed by section 170(a), relating to deduction for charitable, etc., contributions and gifts) any amount of the gross income, without limitation, which pursuant to the terms of the governing instrument is, during the taxable year, paid for a purpose specified in section 170(c) (determine without regard to section 170(c)(2)(A)). If a charitable contribution is paid after the close of such taxable year and on or before the last day of the year following the close of such taxable year, then the trustee or administrator may elect to treat such contribution as paid during such taxable year. The election shall be made at such time and in such manner as the Secretary prescribes by regulations.

(2) AMOUNTS PERMANENTLY SET ASIDE
In the case of an estate, and in the case of a trust (other than a trust meeting the specifications of subpart B) required by the terms of its governing instrument to set aside amounts which was—

(A) created on or before October 9, 1969, if—

(i) an irrevocable remainder interest is transferred to or for the use of an organization described in section 170(c), or

(ii) the grantor is at all times after October 9, 1969, under a mental disability to change the terms of the trust; or

(B) established by a will executed on or before October 9, 1969, if—

(i) the testator dies before October 9, 1972, without having republished the will after October 9, 1969, be codicil or otherwise,

(ii) the testator at no time after October 9, 1969, had the right to change the portions of the will which pertain to the trust, or

(iii) the will is not republished by codicil or otherwise before October 9, 1972, and the testator is on such date and at all times thereafter under a mental disability to republish the will by codicil or otherwise,

there shall also be allowed as a deduction in computing its taxable income any amount of the gross income, without limitation, which pursuant to the terms of the governing instrument is, during the taxable year, permanently set aside for a purpose specified in section 170(c), or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, or for the establishment, acquisition, maintenance, or operation of a pubic cemetery not operated for profit. In the case of a trust, the preceding sentence shall apply only to gross income earned with respect to amounts transferred to the trust before October 9, 1969, or transferred under a will to which subparagraph (B) applies.

26 U.S.C. § 681:

(a) TRADE OR BUSINESS INCOME
In computing the deduction allowable under section 642(c) to a trust, no amount otherwise allowable under section 642(c) as a deduction shall be allowed as a deduction with respect to income of the taxable year which is allocable to its unrelated business income for such year. For purposes of the preceding sentence, the term "unrelated business income" means an amount equal to the amount which, if such trust were exempt from tax under section 501(a) by reason of section 501(c)(3), would be computed as its unrelated business taxable income under section 512 (relating to income derived from certain business activities and from certain property acquired with borrowed funds).

(b) CROSS REFERENCE
For disallowance of certain charitable, etc., deductions otherwise allowable under section 642(c), see sections 508(d) and 4948(c)(4).

26 U.S.C. § 512(b)(11):

(11) In the case of any trust described in section 511(b), the deduction allowed by section 170 (relating to charitable etc. contributions and gifts) shall be allowed (whether or not directly connected with the carrying on of the trade or business), and for such purpose a distribution made by the trust to a beneficiary described in section 170 shall be considered as a gift or contribution. The deduction allowed by this paragraph shall be allowed with the limitations prescribed in section 170(b)(1)(A) and (B) determined with reference to the unrelated business taxable income computed without the benefit of this paragraph (in lieu of with reference to adjusted gross income).

26 U.S.C. § 170(a)(1), (b)(1)(A)&(B):

(a) ALLOWANCE OF DEDUCTION

(1) GENERAL RULE
There shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year. A charitable contribution shall be allowable as a deduction only if verified under regulations prescribed by the Secretary.

(b) PERCENTAGE LIMITATIONS

(1) INDIVIDUALS
In the case of an individual, the deduction provided in subsection (a) shall be limited as provided in the succeeding subparagraphs.

(A) General rule
Any charitable contribution to—

(i) a church or a convention or association of churches,

(ii) an educational organization which normally maintains a regular faculty and curriculum and normally has a regularly enrolled body of pupils or students in attendance at the place where its educational activities are regularly carried on,

(iii) an organization the principal purpose or functions of which are the providing of medical or hospital care or medical education or medical research, if the organization is a hospital, or if the organization is a medical research organization directly engaged in the continuous active conduct of medical research in conjunction with a hospital, and during the calendar year in which the contribution is made such organization is committed to spend such contributions for such research before January 1 of the fifth calendar year which begins after the date such contribution is made,

(iv) an organization which normally receives a substantial part of its support (exclusive of income received in the exercise or performance by such organization of its charitable, educational, or other purpose or function constituting the basis for its exemption under section 501(a)) from the United States or any State or political subdivision thereof or from direct or indirect contributions from the general public, and which is organized and operated exclusively to receive, hold, invest, and administer property and to make expenditures to or for the benefit of a college or university which is an organization referred to in clause (ii) of this subparagraph and which is an agency or instrumentality of a State or political subdivision thereof, of which is owned or operated by a State or political subdivision thereof or by an agency or instrumentality of one or more States or political subdivisions,

(v) a governmental unit referred to in subsection (c)(1),

(vi) an organization referred to in subsection (c)(2) which normally receives a substantial part of its support (exclusive of income received in the exercise or performance by such organization of its charitable, educational, or other purpose or function constituting the basis for its exemption under section 501(a)) from a governmental unit referred to in subsection (c)(1) or from direct or indirect contributions from the general public,

(vii) a private foundation described in subparagraph (F),

(viii) an organization described in section 509(a)(2) or (3), or

(ix) an agricultural research organization directly engaged in the continuous active conduct of agricultural research (as defined in section 1404 of the Agricultural Research, Extension, and Teaching Policy Act of 1977) in conjunction with a land-grant college or university (as defined in such section) or a non-land grant college of agriculture (as defined in such section), and during the calendar year in which the contribution is made such organization is committed to spend such contribution for such research before January 1 of the fifth calendar year which begins after the date such contribution is made,

shall be allowed to the extent that the aggregate of such contributions does not exceed 50 percent of the taxpayer's contribution base for the taxable year.

(B) Other contributions
Any charitable contribution other than a charitable contribution to which subparagraph (A) applies shall be allowed to the extent that the aggregate of such contributions does not exceed the lesser of—

(i) 30 percent of the taxpayer's contribution base for the taxable year, or

(ii) the excess of 50 percent of the taxpayer's contribution base for the taxable year over the amount of charitable contributions allowable under subparagraph (A) (determined without regard to subparagraph (C)).

If the aggregate of such contributions exceeds the limitation of the preceding sentence, such excess shall be treated (in a manner consistent with the rules of subsection (d)(1)) as a charitable contribution (to which subparagraph (A) does not apply) in each of the 5 succeeding taxable years in order of time.

Treas. Reg. § 1.170A-1(c)(1):

(c) ***Value of a contribution in property.***

(1) If a charitable contribution is made in property other than money, the amount of the contribution is the fair market value of the property at the time of the contribution reduced as provided in section 170(e)(1) and paragraph (a) of § 1.170A-4, or section 170(e)(3) and paragraph (c) of § 1.170A-4A.

Treas. Reg. § 1.681(a)-1:

Under section 681, the unlimited charitable contributions deduction otherwise allowable to a trust under section 642(c) is, in general, subject to percentage limitations, corresponding to those applicable to contributions by an individual under section 170(b)(1)(A) and (B), under the following circumstances;

(a) To the extent that the deduction is allocable to "unrelated business income";

(b) For taxable years beginning before January 1, 1970, if the trust has engaged in a prohibited transaction;

(c) For taxable years beginning before January 1, 1970, if income is accumulated for a charitable purpose and the accumulation is (1) unreasonable, (2) substantially diverted to a noncharitable purpose, or (3) invested against the interests of charitable beneficiaries.

Further, if the circumstance set forth in paragraph (a) or (c) of this section is applicable, the deduction is limited to income actually paid out for charitable purposes, and is not allowed for income only set aside or to be used for those purposes. If the circumstance set forth in paragraph (b) of this section is applicable, deductions for contributions to the trust may be disallowed. The provisions of section 681 are discussed in detail in §§ 1.681(a)-2 through 1.681(c)-1. For definition of the term "income", see section 643(b) and § 1.643(b)-1.

Treas. Reg. § 1.681(a)-2(a) & (b):

(a) ***In general.*** No charitable contributions deduction is allowable to a trust under section 642(c) for any taxable year for amounts allocable to the trust's unrelated business income for the taxable year. For the purpose of section 681(a) the term *unrelated business income* of a trust means an amount which would be computed as the trust's unrelated business taxable income under section 512 and the regulations thereunder, if the trust were an organization exempt from tax under section 501(a) by reason of section 501(c)(3). For the purpose of the computation under section 512, the term *unrelated trade or business* includes a trade or business carried on by a partnership of which a trust is a member, as well as one carried on by the trust itself. While the charitable contributions deduction under section 642(c) is entirely disallowed by section 681(a) for amounts allocable to "unrelated business income", a partial deduction is nevertheless allowed for such amounts by the operation of section 512(b)(11), as illustrated in paragraphs (b) and (c) of this section. This partial deduction is subject to the percentage limitations applicable to contributions by an individual under section 170(b)(1)(A) and (B), and is not allowed for amounts set aside or to be used for charitable purposes but not actually paid out during the taxable year. Charitable contributions deductions otherwise allowable under section 170, 545(b)(2), or 642(c) for contributions to a trust are not disallowed solely because the trust has unrelated business income.

(b) ***Determination of amounts allocable to unrelated business income.*** In determining the amount for which a charitable contributions deduction would otherwise be allowable under section 642(c) which are allocable to unrelated business income, and therefore not allowable as a deduction, the following steps are taken:

(1) There is first determined the amount which would be computed as the trust's unrelated business taxable income under section 512 and the regulations thereunder if the trust were an organization exempt from tax under section 501(a) by reason of section 501(c)(3), but without taking the charitable contributions deduction allowed under section 512(b)(11).

(2) The amount for which a charitable contributions deduction would otherwise be allowable under section 642(c) is then allocated between the amount determined in subparagraph (1) of this paragraph and any

other income of the trust. Unless the facts clearly indicate to the contrary, the allocation to the amount determined in subparagraph (1) of this paragraph is made on the basis of the ratio (but not in excess of 100 percent) of the amount determined in subparagraph (1) of this paragraph to the taxable income of the trust, determined without the deduction for personal exemption under section 642(b), the charitable contributions deduction under section 642(c), or the deduction for distributions to beneficiaries under section 661(a).

(3) The amount for which a charitable contributions deduction would otherwise be allowable under section 642(c) which is allocable to unrelated business income as determined in subparagraph (2) of this paragraph, and therefore not allowable as a deduction, is the amount determined in subparagraph (2) of this paragraph reduced by the charitable contributions deduction which would be allowed under section 512(b)(11) if the trust were an organization exempt from tax under section 501(a) by reason of section 501(c)(3).

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

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Date: July 24, 2017

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CERTIFICATE OF SERVICE AND DIGITAL SUBMISSION

I hereby certify that on July 24, 2017, I electronically filed the foregoing using the court's CM/ECF system which will send notification of such filing to the following:

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I hereby certify that with respect to the foregoing:

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