1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MICHAEL J. KNIGHT, TRUSTEE :

4 OF THE WILLIAM L. RUDKIN :

5 TESTAMENTARY TRUST, :

6 Petitioner :

7 v. : No. 06-1286

8 COMMISSIONER OF INTERNAL :

9 REVENUE. :

10 - - - - - - - - - - - - - - - - - - x

11 Washington, D.C.

12 Tuesday, November 27, 2007

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14 The above-entitled matter came on for oral

15 argument before the Supreme Court of the United States

16 at 10:02 a.m.

17 APPEARANCES:

18 PETER J. RUBIN, ESQ., Washington, D.C.; on behalf of

19 the Petitioner.

20 ERIC D. MILLER, ESQ., Assistant to the Solicitor

21 General, Department of Justice, Washington, D.C.; on

22 behalf of the Respondent.

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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument

4 first this morning in case 06-1286, Michael Knight,

5 Trustee, v. the Commissioner of Internal Revenue.

6 Mr. Rubin.

7 ORAL ARGUMENT OF PETER J. RUBIN

8 ON BEHALF OF THE PETITIONER

9 MR. RUBIN: Mr. Chief Justice, and may it

10 please the Court:

11 The question in this case is the meaning of

12 a statute that provides that, in arriving at a trust or

13 estate's adjusted gross income, amounts are allowable in

14 full if they are -- and I quote here from 26 U.S.C.

15 section 67(e), which you can find at the bottom of page

16 3a of the appendix to the blue brief -- "costs which are

17 paid or incurred in connection with the administration

18 of the estate or trust and which would not have been

19 incurred if the property were not held in such trust or

20 estate."

21 I'd like to make three broad points.

22 First, when one applies the traditional

23 tools of statutory interpretation, the statute can mean

24 only one thing. Second, "would not" does not mean

25 "could not." The Commissioner's current reading of the

1 statute and the Commissioner's previous readings of the
2 statute are wrong. Indeed, the logic of the
3 Commissioner's position supports us. It acknowledges
4 the distinctive nature of trusts and fiduciary
5 obligation. Finally, our reading makes sense. It is
6 consistent with the treatment of trusts and estates
7 elsewhere in the Code. It puts in place an
8 administrable rule that draws a clear line, and by
9 contrast the Commissioner has provided no reason at all
10 why Congress would have wanted to subject the fees at
11 issue here to the 2-percent floor.
12 JUSTICE KENNEDY: I think those three points
13 are certainly what would help me. Could I ask just two
14 preliminary questions? They don't necessarily have to
15 do with this case, just to get something straight. I
16 take it that you couldn't have claimed this deduction
17 under 162 without getting into an argument that it
18 should be capitalized and that's why 212 is in the Code?
19 MR. RUBIN: Well, 212 and 162 are really
20 sort of two sides of the same coin. 162 is for costs
21 incurred in a trade or business, and there's no -- the
22 trust isn't engaged in a trade or business any more than
23 an individual who invests for the protection of property
24 is in a trade or business. 212, by contrast -- and the
25 text of 212 can be found in the governor's -- the

1 government's brief appendix at 5a -- 212 is about
2 expenditures for the preservation of property and for
3 income in that context. So that's why this is a 212,
4 not a 162.
5 JUSTICE KENNEDY: My other question is
6 background only. Perhaps I should ask the government.
7 Are 162 expenses subject to the 2-percent ceiling?
8 MR. RUBIN: My recollection is that 162 --
9 162 expenses are not subject to the floor, they are
10 not miscellaneous itemized deductions.
11 CHIEF JUSTICE ROBERTS: Counsel, you agree
12 that as a taxpayer seeking an exception to a general
13 rule, you have the burden of proof in this case?
14 MR. RUBIN: No, Your Honor. We think that
15 -- well, there are really two things built into your
16 question, Mr. Chief Justice.
17 First there is the question of who bears the
18 burden of proof in tax cases specifically, and as this
19 Court has made clear, this was litigated below on a
20 slightly different theory. The government's theory has
21 changed during the pendency of the litigation. And
22 below they argued that this was a common expense for
23 individuals; yet they introduced no evidence of that.
24 And under United States v. Janis, this Court's
25 decision in that case, they can't -- the government is

1 required to come forward with something before assessing
2 tax. But in terms of exceptions and rules, we can --
3 CHIEF JUSTICE ROBERTS: We can't take -- I
4 guess it's not judicial notice, but we can't assume that
5 individual investors with several million dollars of
6 liquid assets might hire investment advisors?
7 MR. RUBIN: They might hire investment
8 advisors, Your Honor, but we don't think that's --
9 CHIEF JUSTICE ROBERTS: Wouldn't -- usually
10 hire investment advisors?
11 MR. RUBIN: I don't think it's clear that
12 they usually hire investment advisors, but I think the
13 important point here, in a way, is the premise of your
14 question, which is that only certain trusts with certain
15 assets, under a test that looked at what the
16 Commissioner used to argue, which is commonality or
17 customariness of a particular expense, only -- the
18 Commissioner herself now argues that -- that this test
19 is unmanageable because there's difficulty in figuring
20 out what the denominator of the fraction is. Do you
21 mean all people? Is it common among everyone, among
22 taxpayers, among taxpayers with certain assets? Would a
23 $100,000 trust have to be treated differently than a
24 million dollar trust? Then there's the question of what
25 do you mean by "common." You suggested "usually" or

1 "sometimes," "might." That's not clear either. And
2 then ultimately there would have to be a trial somewhere
3 to determine whether costs like this are indeed common
4 to whatever standard was articulated. And I think this
5 is why --
6 CHIEF JUSTICE ROBERTS: I guess you'd
7 concede, wouldn't you, that you're not entitled to all
8 of the investment advice that you receive but perhaps
9 only that that is related to the trust status? In other
10 words, if your investment advisor charges you $50,000
11 and, you know, 10,000 of it is unique to the trust, but
12 40,000 is the same sort of advice he'd give an
13 individual, you'd only be able to get the 10,000 outside
14 of the 2-percent limit?
15 MR. RUBIN: We think, Your Honor, that all
16 trust investment fees are distinctive, that what renders
17 them distinctive and renders them fully deductible under
18 the statute is that they are incurred as a result of
19 distinctive fiduciary obligations. We think the statute
20 draws a line between costs like that, that are incurred
21 as a result of distinctive fiduciary obligation, which
22 would include all investment management or advice fees,
23 and by contrast costs that inhere in ownership of a
24 particular piece of property and that any owner of that
25 property would have to pay.

1 JUSTICE SCALIA: Well, I don't -- I don't
2 really see that line. I mean, let's -- let's take, you
3 know, fixing the roof on a house that's in the trust.
4 Aren't there distinctive trustee obligations with
5 respect to preservation of property, just as there are
6 with respect to preservation of financial assets?
7 MR. RUBIN: Yes, Your Honor.
8 JUSTICE SCALIA: I think that's a very hard
9 line to draw.
10 MR. RUBIN: Yes, Your Honor. I think the
11 line is -- is actually easier to draw than your question
12 suggests. I think that fixing a roof on a house might
13 be a cost that is close to the line. It may be that
14 some -- for example, if there were an ordinance in a
15 community that required upkeep of a house, we think that
16 it would be subject to the 2-percent floor.
17 The archetypal example of a cost that we
18 think Congress intended and by this language we believe
19 Congress rendered subject to the 2-percent floor are the
20 costs of pass-through entities that might be owned by
21 the trust or estate. So, for example, if there's an S
22 corporation and its management incurs an expense, that's
23 reported back -- because the S corporation has no
24 independent existence -- that's reported back to the
25 owner, individual or trustee, and is reported as an

1 administrative expense. It would be subject to the
2 2-percent floor from the individual who incurred it,
3 and it would have been incurred, which is the language
4 of the statute, whether or not --
5 JUSTICE SCALIA: I'm still --
6 MR. RUBIN: -- it was held in such trust or
7 --
8 JUSTICE SCALIA: I'm still trying to get
9 back to my original question. I -- I would like to know
10 what you think is not an expense that's distinctive to
11 -- to a trust, other than fixing a roof, because you
12 haven't persuaded me on that.
13 MR. RUBIN: The --
14 JUSTICE SCALIA: I think fixing a roof is
15 fixing a roof.
16 MR. RUBIN: The cost of -- not distinctive
17 costs would be the costs incurred by an S corporation
18 owned by the trustee.
19 JUSTICE SCALIA: Anything else?
20 MR. RUBIN: A condo fee, for example, that
21 simply essentially runs with the property. Whoever owns
22 this land is going to have to pay the condo fee.
23 Required insurance on a vehicle.
24 JUSTICE SCALIA: Isn't there a trustee
25 obligation to pay all -- all expenses which if not paid

1 will -- would cause a depletion of the assets?
2 MR. RUBIN: It's a question of --
3 JUSTICE SCALIA: Can't you say that that's a
4 trustee response -- I mean, if the criterion is he paid
5 this money only to discharge an obligation as a trustee,
6 it seems to me all of his expenses are in that category,
7 with the possible exception of the S corporations you're
8 talking about.
9 MR. RUBIN: Well, Your Honor, the costs are
10 distinctive in the case of -- of those things that are
11 caused by fiduciary obligation in the sense that we
12 describe because that's how they are caused. These
13 costs are incurred without regard to that fiduciary
14 obligation. They're paid perhaps because of fiduciary
15 obligation, but they are incurred through ownership of
16 the property.
17 And there is a hint in the text. If you
18 look at the text, you'll note that costs that are paid
19 or incurred are deductible. But this asks about whether
20 they would have been incurred if the property were not
21 held in such trust or estate.
22 JUSTICE GINSBURG: But Mr. Rubin, you were
23 not willing to agree with the Chief when he said: Well,
24 maybe there are some investment expenses that are
25 special because this is a trust. But there must be some

1 that any investor would incur. But you say it's got to
2 be all one way.
3 MR. RUBIN: Yes, Justice Ginsburg. Trustees
4 cannot under law, and do not, invest as individuals do.
5 To begin with, they always have to keep their eye on
6 current, future, contingent and remainder beneficiaries
7 and treat them with equal fairness.
8 CHIEF JUSTICE ROBERTS: But they don't have
9 to hire investment advisors. There is a standard that
10 they may think they can meet on their own. They may --
11 you know, it may be an investment advisor that is the
12 trustee. He doesn't have to hire somebody else.
13 So it's not something that necessarily
14 inheres in the nature of the trust.
15 MR. RUBIN: Whenever a trustee hires an
16 investment advisor, it is to fulfill this fiduciary
17 obligation. It is true that there may be a trustee who
18 is expert in this.
19 CHIEF JUSTICE ROBERTS: Why -- if I could
20 pause you on that, why is that the case? Let's say it's
21 a -- the trustee understands perfectly his obligations
22 under the law. Let's just say he is supposed to
23 preserve capital and invest conservatively, but he wants
24 advice on which is the best conservative investment.
25 You know, is it railroads or is it

1 utilities? And that's the investment advice he seeks --
2 just that. He says: I know how I'm supposed to invest
3 as a fiduciary, but there are options in there, and I
4 just want advice on the options.
5 MR. RUBIN: Yes, Your Honor. I think that
6 that is actually quite a typical situation. The
7 trustee, of course, knows his or her obligations. It's
8 his or her inability to figure out how to fulfill them
9 that --
10 CHIEF JUSTICE ROBERTS: Well, isn't that
11 just like an individual investor? If you have an
12 individual investor with $10 million in liquid assets,
13 he or she might know what he wants to do, either capital
14 appreciation or preservation, you know, whatever the
15 option is, but just wants some advice on how best to go
16 about that. That sounds exactly like the trustee in our
17 hypothetical.
18 MR. RUBIN: Well, Your Honor, there are
19 unique obligations. Some of these are set out in
20 Connecticut statutes. This is in our brief at page 7 of
21 the blue brief. There are ten considerations that
22 Connecticut law requires trustees to examine, including
23 things unique to trusts: the nature of the trust, its
24 duration. The need for liquidity or income versus
25 capital, which is principal growth versus income, is a

1 uniquely trustlike concern.

2 CHIEF JUSTICE ROBERTS: No, no. You

3 see, that's my difficulty with your position. It's not

4 uniquely trust because you certainly have individuals

5 who may want income rather than capital appreciation or,

6 you know, preservation of capital. They may have

7 exactly the same objectives as a trustee. It's not

8 unique to the trust.

9 MR. RUBIN: It -- I guess I have two answers

10 to that, Your Honor. It may, by happenstance, be that

11 out of the black box of investment advice an individual,

12 by happenstance, gets the same advice as a trust

13 somewhere; but it would be by happenstance. The

14 decisional process leading to obtaining the advice,

15 incurring the cost, is distinct for trust, and indeed

16 the advice they receive is distinct.

17 JUSTICE KENNEDY: Well, it seems to me that

18 that just simply couldn't have been Congress's purpose

19 in passing this statute because now you have a recipe

20 for avoidance. In most States -- California has a rule

21 you have to -- a trustee has to make prudent business

22 investments. I assume a great number of businessmen

23 outside the trust context think that they have their

24 principal objective of making prudent business

25 investments. But under your theory all expenses for

1 that objective would fall within this exclusion. I just
2 don't think that's what the Congress could possibly have
3 intended.
4 MR. RUBIN: Well, Your Honor, to begin with,
5 there is no risk here of tax avoidance through creation
6 of a trust. These are non-grantor trusts. There are
7 substantial costs involved in creating them, but, among
8 other things, the top bracket of 35 percent --
9 JUSTICE KENNEDY: Well, is that true just in
10 your case?
11 MR. RUBIN: No --
12 JUSTICE KENNEDY: Universally, there is
13 never a danger of tax avoidance? You want us to write
14 the opinion on the assumption that tax avoidance is
15 never a problem in the creation of a trust?
16 MR. RUBIN: Well, the Commissioner concedes
17 at page 37 of her brief that there is no substantial
18 problem of income-splitting through the use of
19 non-grantor trusts; and, indeed, throughout --
20 JUSTICE GINSBURG: Is that true? And I'm
21 looking at testimony given by J. Roger Mintz in 1986
22 when this measure was before Congress, and in that
23 written testimony is the statement: "First, the
24 treatment of trusts as separate taxpayers with a
25 separate, graduated rate schedule can cause income to be

1 taxed at a rate lower than if the grantor had retained
2 direct ownership of the trust assets or given the assets
3 outright to the beneficiaries."
4 So apparently the Treasury was telling the
5 Congress that there is a problem.
6 MR. RUBIN: Yes, Justice Ginsburg. That
7 problem was solved in section 1 of 26 U.S. Code -- and
8 this is described at page 37 of our brief -- by a
9 compression of the tax brackets. The 35-percent bracket
10 kicks in for non-grantor trusts at $10,500. For an
11 individual it kicks in at $349,000. As a consequence,
12 there is no incentive to move money into a trust in
13 order to avoid taxation at a -- at a lower rate.
14 JUSTICE SCALIA: Excuse me. I am not sure
15 what you mean by "non-grantor trusts." What is a
16 "non-grantor trust"?
17 MR. RUBIN: A non-grantor trust is a real
18 trust with economic substance. A grantor trust is a
19 trust in which the grantor retains certain powers, for
20 example it's revocable, or whatever; and it's treated as
21 -- people set them up for estate-planning purposes, but
22 --
23 JUSTICE SCALIA: Every trust has a grantor,
24 I assume.
25 MR. RUBIN: Yes, yes, yes.

1 JUSTICE SCALIA: So a "non-grantor trust" --
2 MR. RUBIN: But this is -- I guess this is a
3 term of art.
4 JUSTICE SCALIA: -- is a trust without any
5 money.
6 MR. RUBIN: Yes.
7 JUSTICE GINSBURG: A grantor trust would be
8 one of those pass-throughs.
9 MR. RUBIN: Yes. And, indeed, this, I think
10 -- and part of the answer to Justice Kennedy's question:
11 The problem of tax avoidance was dealt with in section
12 67(c), where entities like that were -- were said to be
13 treated as pass-through entities with no independent
14 existence. But trusts and estates were excepted
15 specifically from that because of this absence of risk
16 of income-splitting. And, indeed, we think that the --
17 the structure of the statute, not merely its text, but
18 the structure of the statute, indicates that this is
19 what Congress intended.
20 It's not -- it's not written the way I would
21 have written it, Your Honor. But none of the other
22 readings are textually even supportable, and this --
23 JUSTICE STEVENS: May I ask this sort of
24 elementary question, and it may reveal my stupidity.
25 But actually sometimes these costs are incurred by

1 individuals, and sometimes they're not. But -- so that
2 you would normally think there's going to be a
3 case-by-case analysis of what happened in the particular
4 case.
5 But do I understand correctly that both you
6 and the government take the position that we should
7 apply the same rule across the board regardless of the
8 actual facts?
9 MR. RUBIN: I wouldn't say "regardless of
10 the actual facts," Your Honor. But I would say this:
11 We believe it's a categorical test.
12 The first of what the Commissioner calls her
13 "textually plausible readings" is literally a
14 case-by-case examination of what would have happened
15 with this property if it were held by whomever, the
16 beneficiary, the grantor, it's not clear whom. And, as
17 they described, Congress can't have meant that. And
18 this would be an imponderable. How would you ever --
19 JUSTICE STEVENS: That's the most normal
20 reading of the language, it's a case-by-case test. It
21 seems to me the -- probably the most unwise reading,
22 also.
23 MR. RUBIN: Well, Your Honor, I think -- I
24 see your point. And I think this is why, if you look at
25 the structure of section 67, which treats pass-through

1 entities but not trusts and estates as presenting a risk
2 of income-splitting; if you look at the Code more
3 broadly, which permits deductions by trusts and estates
4 in many circumstances -- section 68 does; section 154
5 does -- when they're not permitted by individuals and
6 especially when you look at the statutory history
7 here statutory history here.
8 Both houses of Congress -- well, this was
9 preexisting law, I should begin by saying. And then
10 both houses of Congress passed in the '86 Act this
11 statute without the second clause.
12 JUSTICE BREYER: I've read the legislative
13 history, which shows to me, anyway, precisely no light
14 whatsoever. It's -- the only relevant sentence, which
15 is the third sentence, simply repeats the statute. And,
16 therefore, I thought that what Congress is trying to do
17 is say, treat trusts like individuals, except in respect
18 to special expenses.
19 What are "special expenses"? Those that
20 are related to the trust and that an individual wouldn't
21 have occurred -- incurred. I can't say it much more
22 clearly than that. But I have an absolutely clear idea
23 what it means. To me it means that if this is an expense
24 that the trust is saying is special, I would say, would a
25 reasonable person who did not hold these assets in

1 trust, would such a person be likely to make that kind
2 of expenditure?
3 And if the answer to that question is yes,
4 well, then I would say it's not a special expense. And
5 if the answer is no, I would say it was.
6 And then the IRS and you will come and say
7 that isn't precise enough. And I'd say the IRS has
8 plenty of authority in its regs to give lists of
9 examples which they do in such instances.
10 Now, I'm posing that, not because I bought
11 into it, though I'm tempted to, but I'd like to know
12 what your response is.
13 MR. RUBIN: Well, Your Honor, I guess my
14 response is severalfold. To begin with, the statute
15 doesn't ask what usually happens on the outside or
16 commonly or customarily, and indeed the Commissioner has
17 abandoned this reading of the statute precisely because
18 it presents the kind of imponderables that I was
19 discussing with the Chief Justice: What is usually
20 done? Do trusts of different sizes have different
21 rules? When a trust's assets come below a certain
22 point, what about that? And most importantly, it's not
23 in the text of the statute.
24 Now, the Commissioner concedes the
25 distinctive nature of trusts. And if you look at the

1 examples that she gives on page 23 of her brief of what
2 it is that, that is deductible in full, it's the same as
3 this: Fiduciary income tax preparation. Well,
4 people -- many people get income tax preparation for
5 individual income tax returns. The only difference is
6 it's a Form 1040 or a Form 1041.
7 Our case is much further from the line than
8 that because the investment advice must be tailored to
9 these -- to these rules under Connecticut law.
10 CHIEF JUSTICE ROBERTS: Okay. Well, then
11 let's take that. Let's suppose that the trustee goes to
12 an investment advisor, doesn't tell him that he is a
13 trustee, just says, I need to know, I can't decide,
14 should I invest in Union Pacific or CSX? I'm going to
15 invest in a railroad; which one do you like better? He
16 doesn't tell him he's a trustee, gets some advice, then
17 gets a bill. Is that subject to the 2-percent floor,
18 because presumably the advice has got nothing to do with
19 fiduciary responsibilities?
20 MR. RUBIN: If it has nothing to do with
21 fiduciary responsibilities, Your Honor, we think it
22 would be a breach of fiduciary obligation to get --
23 waste the trust money paying for the advice and to act
24 upon it.
25 CHIEF JUSTICE ROBERTS: Oh, no. It's a

1 reasonable -- let's say a railroad stock is a reasonable
2 investment for a trust. He just wants to know which one
3 is the best one.
4 MR. RUBIN: We think that this is intended
5 as a categorical rule. And we think that asking that
6 question is in furtherance of these unique obligations
7 and the prudent investor standard, which is not -- this
8 is a new standard that's developed in the United States
9 over the last decade or so. It is not merely what a
10 prudent man would do under the old Harvard College v.
11 Amory common law test.
12 Investments that individuals can and do
13 invest in are not open to trustees who have a series of
14 rules, some of which are counterintuitive, in fact,
15 about what they can do. And these are listed at pages 7
16 to 10 of our brief. But that -- what you're describing
17 we think is investment advice and if it's properly
18 obtained it is distinctive.
19 I should say also in response --
20 CHIEF JUSTICE ROBERTS: How can it be
21 distinctive if the advisor doesn't even know that the
22 person's a trustee?
23 MR. RUBIN: Well, the question is the
24 decisional process of the trustee. When the trustee
25 calls up anyone, the income tax preparer, and says I'd

1 like to hire you, he doesn't have to say at the moment
2 of hiring it's for a trust.
3 CHIEF JUSTICE ROBERTS: Well, when it's
4 filled out --
5 MR. RUBIN: He'll figure it out --
6 CHIEF JUSTICE ROBERTS: -- he knows it's on
7 Form 1041 rather than 1040.
8 MR. RUBIN: He will eventually come to know
9 that the form is different, Your Honor, yes. But I
10 don't think the subjective knowledge of the person from
11 whom one gets the advice is the question. The question,
12 I think, is textually directed to the incurment of the
13 cost.
14 And I should say also, in response to part
15 of Justice Breyer's question, the statutory history
16 isn't merely the legislative history. It's the fact
17 that, despite having just the first prong in it when it
18 was passed by both houses of Congress, there was a floor
19 amendment in the Senate on the day that it passed the
20 Senate that dealt with pass-throughs. It's the first
21 part of 67(c), and the changes made in the conference
22 committee, again as the Commissioner acknowledges at
23 page 37 of her brief, the changes made in conference,
24 including the addition of this, were to deal precisely
25 with how should we deal with pass-throughs and trusts,

1 and trust ownership of pass-throughs --
2 JUSTICE BREYER: There's nothing that I
3 could find anywhere that talked about pass-throughs in
4 respect to the special situation of trusts and estates.
5 In the first sentence it speaks to it in respect to
6 individuals. It all makes sense. And what they seem to
7 be saying is just what I said initially. We do agree
8 trusts do have a special claim, but only in respect to
9 special trust expenses. And which are they? They're
10 the ones an individual wouldn't have incurred.
11 And I'll put a gloss on it, like we do in
12 law. I say a reasonable individual. I say wouldn't
13 reasonably have incurred. And then I leave it up to the
14 IRS to say which are the expenses that an individual
15 would likely incur and which ones he wouldn't likely
16 incur.
17 Now, that runs throughout tax law, doesn't
18 it, that kind of list, what's a necessary expenditure,
19 what isn't. I mean, they do that all the time, don't
20 they?
21 MR. RUBIN: Yes, Your Honor. Regulations,
22 however, have to be both reasonable --
23 JUSTICE BREYER: Not buying into they're
24 thing with "could." I mean, that isn't my problem.
25 MR. RUBIN: Okay. If they drew a list of

1 what are the distinct trust costs, it would have to
2 include, if it includes fiduciary income tax
3 preparation or, better yet, judicial accountings,
4 individuals do these in the case of guardianships and
5 so on. This is of the same caliber and at the same
6 level of generality we think would have to be covered.
7 JUSTICE ALITO: But have they issued a
8 regulation drawing up this list at this point?
9 MR. RUBIN: There's only a proposed
10 regulation, Your Honor. And we believe that because
11 their readings are not textually supportable, are
12 unadministrable and aren't what Congress intended,
13 that after applying the ordinary tools of statutory
14 construction, there is only one meaning that this text
15 can have.
16 I'd like to reserve --
17 JUSTICE GINSBURG: Why is it not
18 administerable? Whether you think it's a faithful
19 rendition of the statute is one thing, but this is
20 exactly what Justice Breyer was talking about. It says
21 these are the things that are special to the trust, and
22 then these are the things that are not. That's what the
23 proposed reg does, right?
24 MR. RUBIN: Yes, Your Honor. It is -- it's
25 a little bit of a moving target but it does say that.

1 If those are nonexhaustive lists and the difficulty of
2 allocating these costs of attributing them to one thing
3 or another, putting in place systems that trustees that
4 charge unitary fees, which is what corporate trustees
5 do, is enormous. And some of this can be seen in the
6 comments, the public comments to the regulation, some
7 excerpts of which are included in the appendix to our
8 reply brief.
9 But this is not a simple test. And indeed,
10 the Commissioner essentially concedes that, saying that
11 she would need to have safe harbors or some other
12 unprincipled line because of the difficulty.
13 I'd like to reserve the balance of my time.
14 CHIEF JUSTICE ROBERTS: Thank you,
15 Mr. Rubin.
16 Mr. Miller.
17 ORAL ARGUMENT OF ERIC D. MILLER
18 ON BEHALF OF THE RESPONDENT
19 MR. MILLER: Mr. Chief Justice, and may it
20 please the Court:
21 Section 67(e) creates a narrow exception to
22 the 2-percent floor for costs which would not have not
23 have been incurred if the property were not held in
24 trust.
25 JUSTICE GINSBURG: It wasn't narrow in the

1 beginning, right?

2 MR. MILLER: Well, that's correct, Your

3 Honor. The second clause was added in a floor

4 amendment. Initially Congress had drafted just the

5 "which are paid" -- "which are incurred or paid in

6 connection with the administration of the estate or

7 trust." Then the second clause was added. And that

8 clause demands that the costs would not have been

9 incurred if the property were not held --

10 JUSTICE GINSBURG: This is somewhat of a

11 mystery, the wording of that clause. And since it came

12 in at the very last minute, isn't it appropriate to give

13 it a limited reading, rather than, in your suggestion,

14 that this provision that up until the very end read just

15 administration, "costs paid or incurred in connection

16 with the administration of the estate or trust,"

17 period? And then there is this add-on. Why should we

18 give that an expansive meaning?

19 MR. MILLER: I think, regardless of the

20 timing, Your Honor, Congress chose to enact it and that

21 choice has to be given effect. And I think when you

22 look at the way that the section as a whole is set up,

23 67(e), the first introductory clause creates the general

24 principle that "for purposes of this section the adjusted

25 gross income of an estate shall be computed in the same

1 manner as in the case of an individual, except that,"
2 and then there is clause one.
3 So in the context of this section, we have a
4 general rule and then an exception. And that ought to
5 be interpreted in light of the usual principle that
6 exceptions, particularly ambiguous exceptions, should
7 not be construed so as to swallow up the entirety of the
8 rule, which is essentially what Petitioner's
9 interpretation would do.
10 JUSTICE SCALIA: Why do you think that the
11 only instances where the expense would not have occurred
12 are those instances where it could not have occurred?
13 That doesn't strike me as self-evident.
14 I mean, I understand why you do it, so that
15 can you have a nice clear line, which I am all for. But
16 the line given by your colleague is just as clear. I
17 don't know why I should accept yours when -- I mean,
18 "would" just does not mean "could." I mean, would have,
19 could have, should have, it's -- they're different
20 words.
21 MR. MILLER: Well, they are -- they're
22 certainly different words. We're not suggesting that
23 they are synonyms. But we are suggesting that there are
24 contexts in which the word "would" can carry the same
25 meaning that is also expressed through the word "could."

1 JUSTICE SCALIA: Give me a context where --
2 where -- other than this statute, where in common
3 parlance people use "would" to mean "could."
4 MR. MILLER: Another example would be if I
5 were to say that that glass would not hold more than 8
6 ounces of water, that would mean that it could not hold
7 more than 8 ounces of water.
8 JUSTICE SCALIA: No, I don't think it would
9 mean that.
10 JUSTICE BREYER: A glass --
11 JUSTICE SCALIA: Anything that could not be
12 done of course would not be done. But that doesn't mean
13 that the -- that the two words mean the same thing.
14 MR. MILLER: But --
15 JUSTICE SCALIA: It's true that one is
16 included within the other, but they don't mean the same
17 thing.
18 MR. MILLER: Would -- I think that the
19 unadorned use of the word "would" here --
20 JUSTICE SCALIA: What could not happen would
21 not happen, of course. But it doesn't mean that -- the
22 two concepts are not the same.
23 MR. MILLER: I think, when -- when you have
24 the word "would," as we do in this statute, that's not
25 qualified in any way, it's ambiguous in the sense that

1 it can mean "definitely would not have been incurred"
2 "probably would not have been incurred," "customarily,
3 ordinarily would not have been incurred," which is the
4 meaning --
5 CHIEF JUSTICE ROBERTS: You didn't think
6 much of this argument before the Second Circuit adopted
7 it, did you? You didn't argue this before the court of
8 appeals?
9 (Laughter.)
10 MR. MILLER: We did not argue it before --
11 CHIEF JUSTICE ROBERTS: So you have a
12 fallback argument.
13 MR. MILLER: Well, that -- that's right.
14 CHIEF JUSTICE ROBERTS: Well, now might be a
15 good time to fall back.
16 (Laughter.)
17 JUSTICE BREYER: Before -- I mean, we have
18 lots of good examples. I mean, I could have colored my
19 room at home, painted it with light green plastic, but I
20 wouldn't have done it. I mean, endless examples.
21 MR. MILLER: Right. And certainly the
22 statute also admits of the reading given to it by the
23 Fourth and Federal Circuits, which is that "would not
24 have been incurred" means customarily or ordinarily
25 would not have been incurred by individuals.

1 JUSTICE KENNEDY: If we can rush to the
2 fallback position, is it acceptable to have a test that
3 says would the expense have been incurred if the
4 nontrust business wanted to achieve an objective that
5 the trust wanted to achieve here, fixing the roof?
6 MR. MILLER: I -- I think that that raises
7 the question of what is the relevant comparison group
8 for -- for individuals outside of the trust context.
9 JUSTICE KENNEDY: And I think the structure
10 of the statute requires us to -- to do that.
11 MR. MILLER: That's right. And -- and we
12 would suggest that the relevant comparison is
13 individuals with -- with similar assets, right, because
14 it's in the absence of a trust, not if the property did
15 not exist. So you have to look at an individual who
16 held those assets outright, and an individual with those
17 assets trying to achieve those goals might well seek
18 investment advice.
19 JUSTICE ALITO: Will, you give as an example
20 of something that wouldn't fall within the 2-percent
21 floor, the cost of preparing and filing a fiduciary
22 income tax return. What is the difference between that
23 and getting fiduciary investment advice?
24 MR. MILLER: The -- the difference is --
25 JUSTICE ALITO: Just because it's a

1 different form that's filled out?

2 MR. MILLER: What --

3 JUSTICE ALITO: Is it more expensive to --

4 to fill out a 1041 than to fill out a 1040?

5 MR. MILLER: It's more expensive because

6 it's an additional cost. If an individual were to hold

7 the property outright, he or she would simply put the

8 income from that property on his own 1040. If in

9 addition there is a trust, then the trust has to fill

10 out a 1041, the trust also has to prepare Form K-1s and

11 send them out both to the beneficiaries and to the IRS,

12 showing the beneficiaries' share of the trust income,

13 and then the individual still has to file a 1040. So

14 the existence of the trust has created this whole

15 additional set of filing and reporting obligations.

16 JUSTICE SOUTER: Yes, but it's the

17 individual who has to file the 1040. What the trustee

18 is filing is the 1041. And -- and why do you place -- I

19 was going to ask the same question that Justice Alito

20 did, and that is why do you place so much significance

21 either in the label, i.e., it's a fiduciary return, or

22 in the peculiar fact that it is a fiduciary who is

23 filing that return?

24 It's a tax return and -- and I think your --

25 the government's argument is that with respect to -- to

1 other items that may be disputed, you should regard them
2 at a fairly general level, i.e., investment advice, not
3 fiduciary investment advice. But when you come to the
4 tax return, you don't regard it as a general -- at a
5 general level; you regard it at a very specific level,
6 i.e., a fiduciary tax return. It seems to me that the
7 government with respect to the tax return is doing
8 exactly what it criticizes the taxpayer for doing with
9 respect to investment advice. And I don't understand
10 the distinction.
11 MR. MILLER: With respect to the tax return,
12 it's not that it's a fiduciary tax return as opposed to
13 an individual tax return; it's that it's an extra tax
14 return that has to be filed.
15 JUSTICE SOUTER: Well, it's the only tax
16 return that the fiduciary has to file; isn't that
17 correct? The fiduciary files that tax return and the
18 beneficiary files a 1040.
19 MR. MILLER: That's right, but if the
20 beneficiary --
21 JUSTICE SOUTER: But the only return the
22 fiduciary is filing is the 1041; isn't that right?
23 MR. MILLER: That's the only -- but in that
24 -- in the system of the beneficiary and the fiduciary
25 there are two tax returns that have to be filed, whereas

1 --

2 JUSTICE SOUTER: Okay; I understand that

3 that is a factual difference, but I don't understand

4 what it is that makes that a difference in principle.

5 MR. MILLER: I think that -- that's an extra

6 obligation that would not have been incurred in the

7 absence of a trust. And I think, turning to the case

8 of investment advice, I think there is really no level

9 of generality or particularity at which one can look at

10 investment advice such that there is anything unique

11 about trust investment advice.

12 JUSTICE SOUTER: Well, can't you ask it --

13 can't -- can't you ask this question pointing towards

14 something unique: If the individual investor does a

15 very poor job of managing his investments, all he can

16 ultimately do is cry about it. But if the trustee does

17 a very poor job, the trustee is going to get sued. So

18 that when the trustee asks for an investment advisor's

19 advice, the trustee is addressing an issue that the

20 individual does not have. The trustee wants to be

21 covered. He also, I presume, wants to be a good

22 trustee. But he is in fact doing something which is, to

23 use your phrase, in addition to what the individual

24 investor would do. He is looking out for somebody else

25 and he is looking out for himself if the investment goes

1 south. Why isn't that a sufficient difference that is
2 at least comparable to the difference that you talk
3 about in the filing of a fiduciary tax return?
4 MR. MILLER: It's not a difference, because
5 if the individual invests poorly he'll lose money. And
6 if the -- and he'll lose his own money. If the
7 fiduciary invests poorly he may get sued and the measure
8 of damages in that suit will be the amount of money he
9 lost. So they're both facing the possibility of losing.
10 JUSTICE SOUTER: Yes, but whether -- whether
11 he gets socked with damages or not is going to depend in
12 part whether he is covered by an investment advisor's
13 bit of advice; and that is -- that is a different item
14 in the calculus of liability. He is providing for
15 something that the individual investor does not provide
16 for or need to provide for.
17 MR. MILLER: Well, the -- the standard of
18 conduct that is supposed to govern the fiduciary is the
19 prudent investor rule, which looks at what a reasonable,
20 prudent individual would do in managing his own money so
21 I think that --
22 JUSTICE SCALIA: I have the same problem.
23 I -- it seems to me that it is entirely reasonable to
24 say only a trustee can seek investment advice
25 concerning what he should do to fulfill his

1 responsibilities under the trust. Only a trustee can
2 do that. A private individual might seek investment
3 advice as to how he could maximize the income or -- or
4 the growth of the funds that he has, but only -- only a
5 trustee seeks advice as to how he can fulfill his
6 responsibilities under the trust. And you could say
7 that's distinctive. No individual would do that
8 because he's not a trustee.
9 MR. MILLER: But there's no distinction in
10 that case in the -- in the fee that's charged or in the
11 advice that's given by the investment advisor. In
12 either case somebody goes to the advisor and says, I
13 have the following goals that I want to achieve with
14 this money. It may be my money; it may be a trust's
15 money. And the advisor thinks about those goals and
16 comes up with -- with investment advice. And those
17 goals --
18 JUSTICE SCALIA: It may -- it may well be
19 the same advice, but in -- but in one case it is -- it
20 is advice sought by and given to a trustee, a unique
21 kind of advice. In -- in substance, it may turn out to
22 be the same; but it's not the same advice you're giving
23 to a private individual. You're saying here's the trust
24 instrument and here are the objects to be achieved by
25 the trust instrument and this is the -- the advice that

1 will best do that. That doesn't happen with an
2 individual.
3 MR. MILLER: I mean, but for the fact that
4 the word "trust" is in there, I think the substance of
5 the interaction with the investment advisor is exactly
6 the same.
7 JUSTICE ALITO: But doesn't your proposed
8 regulation concede that there is investment advisory
9 advice that is unique to -- to estates and trusts?
10 Isn't that what subparagraph C says?
11 MR. MILLER: No. Subparagraph C has two
12 lists, both of which are nonexclusive: a list of items
13 that are unique to trusts and a list of items that are
14 not unique to trusts. In the list of items that are not
15 unique to trusts is investing for total return. There
16 is no type of investment advice --
17 JUSTICE GINSBURG: Why that limitation? Why
18 wouldn't it say just "investment advice," but it's --
19 "investment for total return" is more limited?
20 MR. MILLER: I think perhaps because that's
21 most obviously the type of advice that is not unique to
22 trusts. But the -- the proposed regulation does not
23 identify any kind of advice that is unique to trusts.
24 JUSTICE GINSBURG: It doesn't say it's one
25 or the other. So it's not so sure, right? It's sure

1 about advice on investing for total return.
2 MR. MILLER: And --
3 JUSTICE GINSBURG: In other words, the
4 regulation, the proposed regulation, doesn't answer this
5 case of investment advice in general as opposed to
6 advice on investing for total return.
7 MR. MILLER: You're right that the
8 regulation in terms of the enumeration in subsection (b)
9 is silent on the question of other types of --
10 JUSTICE SCALIA: Can you really slice up
11 advice that way? You ask the advisor, say, which --
12 what percentage of your advice was the advice that went
13 to maximizing total return and what percentage went to
14 this other thing? I mean, gee, I don't want to get
15 courts into trying to figure that out, or private
16 individuals or financial advisors in trying to figure
17 that out. That's just a crazy way to run a tax system,
18 it seems to me.
19 MR. MILLER: I think that's right, and
20 that's why I think that the -- despite the fact that
21 investing for total return is the only example given in
22 the list, which, again, is described as not exclusive.
23 I think the best reading of the proposed regulation is
24 --
25 JUSTICE SCALIA: But that's not all advice.

1 That's just some of the advice, right?

2 MR. MILLER: Yes.

3 JUSTICE SCALIA: Now, what about the rest of

4 it? How do you slice up, you know -- now, investment

5 advisor, tell me what percentage of your advice went to

6 the total return and what percentage went to other

7 things. I don't think an investment advisor is going

8 to be able to tell you.

9 MR. MILLER: I think the best reading of the

10 proposed regulation, and perhaps the Service may well

11 clarify this during the rule-making process, is that all

12 advice is not unique to trusts because there's no type

13 of advice that a trustee could seek that an individual

14 could not --

15 JUSTICE GINSBURG: They certainly weren't

16 sure about it when they drafted this regulation,

17 proposed regulation.

18 MR. MILLER: Well, it is -- it's just a

19 proposal, again, and I think they picked what's perhaps

20 the most obvious -- example.

21 JUSTICE GINSBURG: But in other categories,

22 they express no such limitation. Custody or management

23 of property, not qualified. And they -- but when you

24 get to investing, it has that for total return.

25 Everything else has got maintenance, repair, insurance.

1 MR. MILLER: That's right. And there's also
2 a fairly extensive list of nonexclusive -- of nonunique
3 products or services, and that does not include any
4 other type of investment advice. So I think what one
5 can draw the opposite inference from that list, but in
6 any event, that's something that could be clarified in
7 the rule-making process.
8 Returning to Petitioner's --
9 CHIEF JUSTICE ROBERTS: Counsel, how does
10 your customary or commonly incurred test work? Let's
11 say you have two trusts, one $10 million, the other
12 10,000. I think an individual with $10 million might
13 well seek investment advice, but an individual with
14 only 10,000 might decide it's not worth it. Would you
15 have a different application of the 2-percent rule for
16 those two trusts?
17 MR. MILLER: I think if the test is whether
18 -- whether the individuals would have -- would commonly
19 or ordinarily incur that cost, I think one might well
20 look at that because the comparison would be individuals
21 with similar assets, and, as Your Honor knows, there
22 might be a difference depending on the size.
23 CHIEF JUSTICE ROBERTS: How many -- how many
24 individuals do you need? Let's say it's $3 million in
25 the trust, and we think maybe 60 percent of people would

1 hire an investment advisor; 40 percent would think they
2 can do just as well on their own. Is that customarily
3 incurred by individuals?
4 MR. MILLER: I think it might well be enough
5 that -- for something that the Service could clarify
6 through --
7 CHIEF JUSTICE ROBERTS: Your answer to both
8 questions was "might well be," and that's a fairly vague
9 line when it comes to taxes.
10 MR. MILLER: The --
11 JUSTICE SCALIA: And whatever line you --
12 you pick, I guarantee you, trusts are going to break
13 themselves up into mini-trusts that fall under the line.
14 I mean people aren't stupid.
15 (Laughter.)
16 CHIEF JUSTICE ROBERTS: Or, even worse,
17 advisors are going to break themselves up into different
18 advisors. There's going to be somebody who says I'm a
19 fiduciary advisor whenever a trustee calls, but, I'm a
20 normal advisor, when it's an individual.
21 MR. MILLER: I think the difficulty in
22 applying that test is one of the reasons why we suggest
23 that the categorical -- the more categorical approach,
24 which we think is also a permissible reading of the
25 statute, is the preferable one. But, in either event,

1 if the test is customarily or ordinarily incurred, it
2 was Petitioner's obligation in the Tax Court to show
3 that they qualified for the exemption from the 2-percent
4 floor. And so it would have been Petitioner's burden to
5 show that this was a cost that's not customarily or
6 ordinarily incurred by individuals.
7 CHIEF JUSTICE ROBERTS: What's your best
8 case for that proposition? Your colleague resisted the
9 notion that he had the burden and what's your best case
10 for that?
11 MR. MILLER: It's not a case, but it's the
12 rule. Tax Court Rule 142 places the burden of proof on
13 the taxpayer. Petitioner cites --
14 CHIEF JUSTICE ROBERTS: But I thought that
15 rule applied to the applicability of individual
16 exemptions. Here we have a different question. It's
17 how to read an exception to the general rule. Do you
18 have a case for the proposition that the taxpayer has the
19 burden in those cases? You said that in your brief, but
20 it didn't have a case cite with it.
21 MR. MILLER: No. We don't have a case, but
22 the rule is unqualified in terms of its applicability.
23 It doesn't say only on particular issues. And the case
24 that Petitioner cites is United States against Janis,
25 which is about a "naked" assessment, which is far

1 removed from what we have here. A "naked" assessment
2 is --
3 JUSTICE GINSBURG: Are we saying, on a
4 question of law, the taxpayer has the burden of proof?
5 If it isn't a question of proof, it isn't a question of
6 evidence?
7 MR. MILLER: No. I was referring to
8 questions of fact. I understood the question to be if
9 the legal test turns on the factual question of what is
10 -- what is customary or ordinary for individuals to
11 incur, then on that fact, that would be a factual issue.
12 JUSTICE BREYER: Well, what would -- that's
13 why I made the suggestion I had earlier. I was doubtful
14 about the wisdom of trying to turn this matter into a
15 purely factual one. And so suppose you said, which
16 would come to about the same thing, that expenditure
17 would be incurred in this instance by someone who didn't
18 hold these assets in trust. What that means is would a
19 -- an investor not in the trust, not holding it in
20 trust, reasonably have been, or a reasonable investor
21 have been likely to make this expenditure? That turns
22 it into a more quasi-legal question where people -- and
23 then it's a matter of judgment, which these things do
24 come down to. That's what judges are there for, to
25 judge. And thereby we avoid the burden-of-proof

1 problem. It comes to about the same thing. Is there
2 any objection to it? What's the reason not to do it?
3 MR. MILLER: If that is the test, then it's
4 very easy to apply to the case of investment advice,
5 because we know that the trustee's obligation is to act
6 as a reasonable and prudent individual would. And so we
7 know that if -- to the extent that the trustee seeks
8 investment advice in pursuance of that obligation --
9 JUSTICE BREYER: But are you --
10 MR. MILLER: -- that would --
11 JUSTICE BREYER: You would be, of course,
12 exactly right, that there could be trusts, very big
13 trusts. Children get into fights trying to split up the
14 assets. Millions is paid on lawyers and investment
15 advisors to see if each share, figured 14 different
16 ways, is going to earn this money or that money. And
17 that kind of thing exists. And there the investment
18 advisors are likely to be special. So you can't say
19 investment advice is always special or never special.
20 Now, again, this seems to me not unknown,
21 this kind of problem, to the Internal Revenue law, and
22 therefore there tend to be methods of allowing
23 exceptions, of putting burdens. I mean, is this case
24 somehow -- am I wrong about that?
25 MR. MILLER: I think that to the extent that

1 you're suggesting that the Service could be -- could
2 clarify the statute through the use of regulations, we
3 certainly agree with that. The Service has the ability
4 to resolve some of the ambiguities.
5 JUSTICE BREYER: I'm looking really for a
6 form of words to write that does not use the word
7 "could" but which gets at what I think the statute was
8 after, which is: Let them have this no floor for their
9 special stuff but not for ordinary stuff that others
10 would have incurred regardless. I want to know what
11 form of words. I find it difficult to go beyond the
12 statute, frankly.
13 JUSTICE SCALIA: I think "would not have
14 occurred" is pretty good --
15 JUSTICE BREYER: Yes.
16 JUSTICE SCALIA: -- actually.
17 JUSTICE BREYER: That's right. That's
18 right.
19 (Laughter.)
20 MR. MILLER: The -- the formulation that the
21 Service has proposed of course is to look at costs that
22 are unique to --
23 JUSTICE BREYER: If I reject this word
24 "could" and "uniqueness," now what form of word should I
25 write?

1 MR. MILLER: I think "ordinarily" or
2 "customarily" is also a permissible interpretation of --
3 JUSTICE BREYER: If had you to choose
4 between that and getting the idea of the reasonable
5 taxpayer who didn't hold this in trust, which would you
6 choose?
7 MR. MILLER: I think they are actually very
8 similar inquiries, because we expect that the reasonable
9 person is the ordinary person. So I think in practice,
10 those formulations get you to the --
11 JUSTICE KENNEDY: It almost sounds like
12 ordinary and necessary under 162?
13 MR. MILLER: Well, ordinary and necessary
14 under -- I mean here we are talking about -- as
15 Mr. Rubin said, it's under 212.
16 JUSTICE KENNEDY: 212. I understand that.
17 MR. MILLER: It's not in connection with a
18 trade or business. "Ordinary and necessary" in that
19 context means simply that it's a legitimately connected
20 to the production of income. That's a requirement for
21 it to be deductible at all.
22 JUSTICE ALITO: It seems to me the
23 difficulty is in characterizing the level of generality
24 at which you describe the cost, not whether it's
25 ordinary or customary or unique. You run into the same

1 problem no matter how you do that, but you have to
2 decide whether you're talking about investment advice or
3 fiduciary investment advice, tax preparation costs or
4 fiduciary tax preparation costs. And what is the
5 formula for making that distinction?
6 MR. MILLER: I think what the Service is
7 trying to do in the proposed regulation and what we have
8 suggested is appropriate is simply a common sense
9 practical approach to that. And there may be some
10 difficult cases at the margin. And that's one of the
11 things that the Service will try to --
12 JUSTICE GINSBURG: And this must be one.
13 The Service must think this is one because it was
14 certain about the tax return. It says tax return that
15 doesn't get the subject to the 2-percent but only this
16 kind of investment advice for total return. So that the
17 Service didn't see this as a clear and certain category.
18 MR. MILLER: Again, I think what the Service
19 was doing there was picking out just the most obvious
20 example. But there simply is no such thing as fiduciary
21 investment advice that is distinct from --
22 JUSTICE ALITO: How do we deal with this
23 problem until there is a regulation? It may be that if
24 the Service issues a regulation and says that these fall
25 into one category and these fall into the other, that

1 would be entitled to deference. But right now we
2 don't have a regulation, right? So what do we do?
3 MR. MILLER: I think what we have suggested
4 is there are two -- there are a couple of possible
5 readings of the statute based on the ambiguity in the
6 word "would." And in the absence of a regulation, we
7 are not suggesting that the Service's position is
8 entitled to deference under Chevron. But I think some
9 deference to the consistent position of the Service
10 since the statute was enacted that investment advice
11 fees are subject to the 2-percent floor.
12 JUSTICE STEVENS: May I ask you the same
13 question I asked your adversary? Whether you use the
14 term "could" or "customarily" or whatever you're
15 formulating, the bottom line, as I understand your
16 position, is that these costs will never be deductible?
17 MR. MILLER: They will -- they will be
18 deductible but they will be subject to the floor.
19 JUSTICE STEVENS: But they will never -- you
20 would not say some trusts yes, and some trusts no?
21 MR. MILLER: Well, under -- I mean, if the
22 test were customarily or ordinarily, it might be the
23 case that a trust could show that given the nature of
24 the assets in it, if it were --
25 JUSTICE STEVENS: That you would have to

1 have a case-by-case analysis of the facts as to whether
2 the particular advice would have been sought, whether
3 the advice was by a trustee or by an individual?
4 MR. MILLER: It's not -- we are not
5 suggesting that it's at the level of that particular
6 advice. The question would be --
7 JUSTICE STEVENS: -- cost of the advice.
8 JUSTICE SCALIA: What percentage of the
9 costs incurred by a trust do you think the investment
10 advice consists of? I mean, it seems to me the main
11 thing a trustee ordinarily does, at least if he is a
12 trustee of just cash, is to invest it. It seems to
13 me his major expense must be getting financial advice,
14 isn't that right?
15 MR. MILLER: I don't know the answer to
16 that. The Service --
17 JUSTICE SCALIA: Well, imagine something
18 else. Guess. What other, what other expense could even
19 approximate that?
20 MR. MILLER: One --
21 JUSTICE SCALIA: And then my follow-up is,
22 is there any -- I don't care about legislative history
23 but some of my colleagues do. Is there any -- is there
24 any indication that Congress thought it was, it was
25 whacking trusts with this immense new tax with respect

1 to their major expenditure? I expect it must be their
2 major expenditure.
3 MR. MILLER: To take your second question
4 first, the legislative history is silent on specifically
5 what Congress's objective was in section 67(e).
6 JUSTICE SCALIA: The dog didn't bark.
7 MR. MILLER: But I think -- but I think what
8 one can infer from legislative history of the '86 Act
9 and more broadly and from the text of the statute is
10 that Congress wanted property to be treated the same,
11 regardless of whether it was held by an individual
12 outright or held by a trust. So if an individual would
13 incur certain costs if he held the property outright,
14 those costs shouldn't be able to escape the 2-percent
15 floor simply because the property is placed into a
16 trust. But if the trust -- the existence of the trust
17 relationship creates some new or additional costs that
18 would not have existed otherwise, then those are not
19 subjected to the 2-percent clause.
20 JUSTICE SCALIA: Well, you know a trust is
21 sort of like a business. And deductions that an
22 individual could not take if he were not in a business
23 are perfectly okay for a business. And I don't know why
24 trusts wouldn't be treated the same way. A trust has to
25 get investment advice. True? When it's -- when it's an

1 individual getting it, you wouldn't allow a deduction,
2 but a trust is different.
3 And unless Congress is clearer than this
4 statute, I -- it seems to me that no individual would
5 get trust investment advice. Only a trust can get trust
6 investment advice.
7 MR. MILLER: Well, individuals could get --
8 could and do get investment advice that is no different
9 in substance from the advice the trust might get. And a
10 trustee might decide that he didn't need investment
11 advice if the trustee is financially sophisticated and
12 doesn't need an advisor. To go --
13 CHIEF JUSTICE ROBERTS: What if you get a
14 bill from the investment advisor, it's $50,000 and
15 it's broken up, 30,000 is general stock picking advice,
16 and 20 percent is specialized fiduciary advice? In
17 other words, they figure out what good stocks are they
18 pushing these days and they go down and say, well,
19 you're a trustee, you can't buy this you can't buy that.
20 You would -- would you agree that the $20,000 is not
21 subject to the 2-percent floor but the 30,000 is?
22 MR. MILLER: Yes. As we acknowledged in our
23 brief, if the advisor -- or another example would be if
24 the advisor imposed some extra charge on the fiduciary
25 accounts for whatever reason, that would be an expense

1 that an individual going to that same advisor could not
2 incur or ordinarily would not incur.
3 JUSTICE SCALIA: But an individual who
4 wanted to maximize income, for example, if the trustee
5 has to maximize income for some of the life
6 beneficiaries or something, an individual could seek
7 that same advice if he wanted that particular result
8 from the investment, couldn't he?
9 MR. MILLER: That's right. I understood the
10 question to refer to the case where the advisor charges
11 some extra fee because the client is a trust.
12 JUSTICE SCALIA: Oh, I didn't understand it
13 to be that. I thought it was going to be, you know, the
14 advisor had to figure out we need so much for the, for
15 the remainder man and so much for the life beneficiaries
16 and so forth. You don't think that would be enough?
17 MR. MILLER: No. No.
18 Thank you.
19 CHIEF JUSTICE ROBERTS: Thank you,
20 Mr. Miller.
21 Mr. Rubin, you have four minutes remaining.
22 REBUTTAL ARGUMENT OF PETER J. RUBIN
23 ON BEHALF OF THE PETITIONER
24 MR. RUBIN: Trust investment advice is
25 always distinct from the investment advice that's given

1 to individuals, both because of the demanding legal
2 obligations specifying certain factors that have to be
3 taken into account by the trustee in investing and
4 because of the risk of personal liability.
5 JUSTICE KENNEDY: What do you have to
6 support that? I resist accepting that broad
7 proposition, and I don't know where to look or who to
8 ask in order to determine its -- its truth or falsity.
9 MR. RUBIN: Well, I think, Your Honor, if
10 you look at, at our brief, at pages 7 through 10, there
11 is a discussion of the specific legal factors that are
12 codified in Connecticut law in the Uniform and Prudent
13 Investor Act, which does not, as the Commissioner
14 suggested, require people to invest as a prudent
15 individual, but it's a different standard.
16 So, for example, safe investments,
17 conservative investments are not permitted anymore in
18 many circumstances to trustees when an individual could
19 well engage in that kind of investment. Investment in
20 areas that the trustee is familiar with is not adequate
21 to meet this obligation. So the advice really is
22 tailored as a matter of State law in the trust
23 instrument in every case to the trust.
24 CHIEF JUSTICE ROBERTS: But it could also be
25 tailored to an individual with particular circumstances

1 that are similar to that of the trust. So an individual
2 could incur it. An individual with the same amount of
3 money involved probably would incur it.
4 MR. RUBIN: No trust, Your Honor, has
5 exactly the same circumstances as a trust, because
6 trusts always have, by definition, more than one
7 beneficiary. There is always a remainder beneficiary,
8 at least. Ordinarily there will be --
9 CHIEF JUSTICE ROBERTS: So an individual
10 might have more than one child he wants to provide for
11 and as far as a remainder, there may be more than one
12 grandchild. It could be exactly the same -- an
13 individual could have exactly the same objectives as a
14 trustee.
15 MR. RUBIN: The decision process for the
16 investments will be different in the case of a trustee,
17 though, than for an individual. And a trust, of course,
18 could be multigenerational. This trust will probably
19 last for about a hundred years from the time that it was
20 initially adopted.
21 I should also say --
22 JUSTICE SCALIA: Mr. Rubin, is it the advice
23 that's different or is it -- is it the inquiry that's
24 different?
25 MR. RUBIN: Both. The decision -- the

1 decision to hire the investment advisor is an exercise
2 of fiduciary judgment taking into account these -- these
3 factors; and the advice that you're paying for is a
4 different service that's tailored to the trust. This,
5 therefore -- the Commissioner acknowledges that -- that
6 the -- that trusts are distinct. But -- but resists
7 the -- the analogy between, for example, fiduciary
8 income tax returns or judicial accountings and other tax
9 returns.
10 JUSTICE STEVENS: Mr. Rubin, is there a
11 subcategory of investment advisors who hold themselves
12 out to be fiduciary investment advisors?
13 MR. RUBIN: I believe, Your Honor, there may
14 be specific fees for trust investments that are offered
15 by firms that -- that provide investment advice.
16 Whether there are specific advisors who will take only
17 fiduciary clients, I don't --
18 JUSTICE STEVENS: Or even those who
19 advertise themselves as specialists in fiduciary advice?
20 I never heard of them. Maybe there are.
21 MR. RUBIN: Well, I think that this actually
22 points out, Justice Stevens, part of the problem with
23 the Commissioner's position, which is it relies on
24 labels. The Commissioner has said it's a common --
25 JUSTICE GINSBURG: As far as a tax return,

1 are there accountants this specialize in trust tax
2 returns as opposed to individual or corporate returns?
3 MR. RUBIN: Not that I know of, Your Honor.
4 My sense is that an income tax preparer will be willing
5 to prepare an income tax return for a fiduciary or an
6 individual. I see that my time has expired.
7 CHIEF JUSTICE ROBERTS: Thank you,
8 Mr. Rubin. The case is submitted.
9 (Whereupon, at 11:03 a.m., the case in the
10 above-entitled matter was submitted.)
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