No. 06-72961

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL SKLAR AND MARLA SKLAR,

Petitioners-Appellants

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee

ON APPEAL FROM THE DECISION
OF THE UNITED STATES TAX COURT

BRIEF FOR THE APPELLEE

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JURISDICTIONAL STATEMENT

On or about October 6, 2000, the Commissioner of Internal Revenue sent to Michael and Marla Sklar ("taxpayers") a notice of deficiency, determining a deficiency in their 1995 federal income tax.

(ER 1; Supp. ER 78-88.) 1/ The Tax Court had jurisdiction to consider taxpayers' timely-filed petition for redetermination of the deficiency under Sections 6213, 6214, and 7422 of the Internal Revenue Code ("I.R.C." or "the Code") (26 U.S.C.).2/

After concessions, trial was held on two issues—whether the Commissioner correctly disallowed $15,000 of taxpayers' claimed charitable contribution deductions, and whether taxpayers were liable for an accuracy-related penalty. The Tax Court upheld the IRS's deficiency determination, but not the penalty, in a memorandum opinion dated December 21, 2005, which, as amended February 7, 2006, was reported at 125 T.C. 281. (ER 270.) The Tax Court entered its decision on March 2, 2006, finally disposing of all claims of all parties. (ER 288.)

1/ "ER" references are to the pages of the Excerpts of Record filed with taxpayers' brief. "Supp. ER" references are to the Supplemental Excerpts of record filed with this brief. "Doc." references are to the docket entries on the Tax Court docket sheet, as numbered by the clerk of that court.

2/ Although filed January 10, 2006, the petition was timely under I.R.C. §§ 7502 and 6213(a), because it was postmarked January 3, 2006. (Doc. 1).

On May 31, 2006, taxpayers timely filed a notice of appeal to this Court. (ER 289); *see* I.R.C. § 7483; Fed. R. App. P. 13(a). This Court has jurisdiction under I.R.C. § 7482(a)(1).

STATEMENT OF THE ISSUE

Whether the Tax Court correctly held that taxpayers were not entitled to a charitable contribution deduction under I.R.C. § 170 for their 1995 tax year with respect to any part of tuition and other mandatory payments that taxpayers made to private religious schools that provided secular and religious education to their children.

STATEMENT OF THE CASE

This case arises out of the Commissioner's issuance of a notice of deficiency to taxpayers with respect to their 1995 federal income tax liability. Taxpayers petitioned the Tax Court for review of the deficiency determination. (ER 1.) After concessions, the issues remaining for trial were (1) whether taxpayers could deduct as a charitable contribution $15,000 of the $27,283 total amount that they paid in tuition and fees for their children's education; and (2) whether

petitioners were liable for the accuracy-related penalty because they deducted the tuition payments.

After trial, the Tax Court, in a December 21, 2005 opinion (Doc. 168), upheld the disallowance of taxpayers' claimed $15,000 deduction for amounts paid in school tuition and fees, but held that taxpayers were not liable for the accuracy-related penalty. On the Government's motion, requesting correction of a misstatement regarding parties' stipulation with respect to an IRS closing agreement with the Church of Scientology (Doc. 169), the Tax Court issued an amended opinion making minor corrections (ER 270-87). Taxpayers now appeal the disallowance of their claimed charitable deduction for tuition and fees paid to their children's schools. The Commissioner has not appealed the Tax Court's holding regarding the penalty.

STATEMENT OF THE FACTS

Taxpayers seek review of the Tax Court's determination that they are not allowed to claim a charitable deduction for $15,000 of the $27,283 in tuition and fees that taxpayers paid in 1995 to Orthodox Jewish day schools for their childrens' education. Taxpayers argue that

they are entitled to deduct the portion of the tuition that is allocable to religious education. The Tax Court concluded that none of the tuition was deductible.

A. California's education requirements and the schools taxpayers' children attended

1. Educational requirements for children

Children in California, as well as other states, are generally required by state law to attend public schools, but "[c]hildren who are being instructed in a private full-time day school by persons capable of teaching shall be exempted." Cal. Educ. Code § 48222 (West 1993). *See also* Allan E. Korpela, Annotation, What Constitutes a Private, Parochial, or Denominational School Within Statute Making Attendance at Such School a Compliance with Compulsory School Attendance Law, 65 A.L.R.3d 1222 (1975). The great majority of children in the United States attend public elementary and secondary schools. But more than 5 million children—ten percent of the school population—attend private schools. Stephen P. Broughman & Lenore A. Colaciello, U.S. Department of Education, Private School Universe

Survey, 1997-98 at 2, 5 (1999). Half of the private-school students are educated in Roman Catholic schools, 16 percent are educated in non-religious schools, and the remaining 34 percent attend other categories of religious schools. *Id.* Jewish schools educate 3.3 percent of all private-school students. *Id.* at 6.

2. Taxpayers' religion and choice of schools

Taxpayers are Orthodox Jews who had five school-aged children during 1995. (ER 271.) It is important to taxpayers to pass to their children a devotion to their faith, and they deeply believe that they should educate their children in an Orthodox Jewish environment. (ER 271; Supp. ER 14-16.) Accordingly, all of taxpayers' children were enrolled in one of two Orthodox Jewish day schools. (ER 271.) Although they did not consider any secular schools because of their concern with the religious component of their children's education (Supp. ER 16), taxpayers "were also interested in the quality of their secular education" (ER 272; *see also* Supp. ER 56-59, 70.)

Taxpayers educated all of their children at Emek Hebrew Academy ("Emek") or Yeshiva Rav Isacsohn Torath Emeth Academy

("Yeshiva Rav Isacsohn"), both of which are private Orthodox Jewish day schools in the Los Angeles area that provide classes for boys and girls from preschool through eighth grade. (ER 71, 271.) In 1995, taxpayers paid a total of $27,283 to Emek and Yeshiva Rav Isacsohn for tuition, registration and other mandatory fees, and Mishna classes, including $24,093 for tuition, $1300 for registration fees, $1715 for other mandatory fees, and $175 for an after-school Mishna program at Emek.3/ (ER 275.) During 1995, Emek and Yeshiva each were exempt from federal income tax under I.R.C. § 501(c)(3) and each qualified as an organization described in I.R.C. § 170(b)(1)(A). (ER 272.)

Both schools gave their students daily exposure to Jewish heritage and values and considered their goals to include educating their students in Jewish heritage and values and the tenets of the Jewish faith. (ER 272-74.) To this end, time was allocated in the school day for prayers and religious studies, students were required to

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3/ The Mishna class, which involved the study of Jewish oral law, was taught as an extra-curricular course and paid for separately. (ER 274-75.)

adhere to Orthodox Jewish dress codes, and boys and girls had separate classes. (*Id.*)

A child's day at each school included specified hours devoted to courses in religious studies and specified hours devoted to secular studies. The length of time that each student participated in secular classes, as opposed to religious studies, and the length of the total school day, varied with the gender and grade level of the particular student. (ER 273-74; Supp. ER 31-37, 74.)

Quality secular education that fulfilled the mandatory education requirements of the State of California also was a goal of both schools. (ER 273-74; Supp. ER 28, 38, 70, 93-95, 100.) Emek sought to provide a thorough and well-balanced curriculum in both Torah and secular studies so every student could succeed "in the most rigorous yeshiva high schools and other institutions of higher learning." (ER 273; Supp. ER 54-55, 100.) Yeshiva Rav Isacsohn sought to prepare its students for matriculation to yeshiva high schools and to attend a college or seminary. (ER 274; Supp. ER 76-77.)

Both schools satisfy the educational requirements of the State of California. (ER 272.) In 1994, the Bureau of Jewish Education of Greater Los Angeles mandated that all Jewish day schools in the Los Angeles area obtain academic accreditation by 2000.4/ (*Id.*; Supp. ER 29-30). On May 5, 1992, Yeshiva Rav Isacsohn became a candidate for academic accreditation by the Western Association of Schools and Colleges, Inc. (WASC), a regional association that accredits public and private schools, colleges, and universities. (ER 272.) Emek became a candidate for academic accreditation by WASC on June 28, 1995. (*Id.*) Both schools were engaged in the accreditation process during part or all of 1995, and WASC granted academic accreditation to both schools after they completed a 3-year self-study program. (*Id.*)

During the school years in issue, Emek and Yeshiva Rav Isacsohn required taxpayers to pay tuition and mandatory fees in order for their

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4/ The Bureau of Jewish Education provides educational support services and financial assistance to Jewish day schools in the Los Angeles area and imposes eligibility requirements on schools seeking its support. (ER 272 n.3.) Accreditation certifies to other educational institutions and to the general public that an institution meets established criteria or standards. (ER 272 n.4.)

children to attend classes.5/ (ER 274-75; Supp. ER 65-67, 102, 119-20.) To ensure payment, taxpayers were required to sign agreements with each school promising to pay the tuition and to give to each school postdated checks covering the tuition for the upcoming school year. (ER 275; Supp. ER 45, 47-49, 61-63a.) Both schools provided tuition discounts to families based on financial need, if documented by detailed financial information submitted to the schools' scholarship committees, but taxpayers did not seek or receive such assistance. (ER 275; Supp. ER 60, 71-72, 103-18.) Although an Orthodox Rabbinic ruling precluded either school from expelling students from the Jewish studies program during the school year, nonpayment of tuition could result in expulsion from secular studies and the schools' refusal to allow the children to register for classes in the subsequent school year. (ER 275; Supp. ER 63-64.)

5/ Hereinafter, references to "tuition" shall include other mandatory payments imposed by the schools.

B. Taxpayers' past attempts to claim charitable deductions for tuition payments

Taxpayers' attempt to deduct a part of their 1995 tuition payments follows several consecutive years in which taxpayers have attempted to claim the same deduction. (ER 275-76; Supp. ER 17-26.) In 1991, when taxpayers first claimed a deduction for school tuition, the Internal Revenue Service (IRS) inquired about the deduction, and correspondence indicated that the IRS mistakenly believed that taxpayers were members of the Church of Scientology—a misunderstanding which Mr. Sklar attempted to correct. (ER 275; Supp. ER 18-23, 89.) Ultimately, the IRS allowed the deduction for 1991, but nothing in the record establishes the IRS's reasoning. (*See* Supp. ER 23-26.)

Taxpayers then claimed deductions for a portion of their religious school tuition expenses on their 1992 (amended), 1993, and 1994 returns. (Supp. ER 25-27.) The IRS did not disallow the deductions for 1992 or 1993, but audited the 1994 return, disallowed the deduction, and determined a deficiency. (Supp ER 25-26.) Neither school had

provided taxpayers with an acknowledgment of a charitable deduction corresponding to any part of their tuition payments, as is required by I.R.C. § 170(f)(8)(C), for any of the years in which taxpayers attempted to deduct a part of their tuition payments. Only after the audit of taxpayers' 1994 return had begun, and well after taxpayers 1994 and 1995 returns had been filed, did the schools, at taxpayers' request, provide letters estimating that 55 percent of the curriculum was devoted to religious studies, and 45 percent to secular studies. (ER 276, 219, 227); *see also Sklar v. Commissioner*, 79 T.C.M. (CCH) 1815 (2000), *aff'd*, 282 F.3d 610 (9th Cir. 2002), *amending and superseding* 279 F.3d 697 (hereinafter, "*Sklar I*"). Mr. Sklar suggested the text of the substantiation letters, including that the allocation should be based on hours assigned to classes in each category. (Supp. ER 53.)

Taxpayers challenged the 1994 deficiency determination in the Tax Court, contending that the portion of their tuition payments allocable to religious education should be deductible as a charitable contribution. The Tax Court upheld the disallowance of the deduction, 79 T.C.M. (CCH) 1815, and this Court, in an opinion drafted by Judge

Reinhardt and joined by Judge Pregerson, affirmed, *Sklar I*, 282 F.3d 610. Judge Silverman filed a concurring opinion.

Citing *United States v. American Bar Endowment*, 477 U.S. 105 (1986), the *Sklar I* Court first opined that the Supreme Court has held that "generally, a payment for which one receives consideration does not constitute a 'contribution or gift' for purposes of § 170." 282 F.3d at 612. The Court further explained that, in *Hernandez v. Commissioner*, 490 U.S. 680 (1989), the Supreme Court "explicitly rejected the contention . . . [t]hat there is an exception in the Code for payments for which one receives only religious benefits in return." *Id.* This Court noted that the Supreme Court had "stated that to permit these deductions might force the IRS to engage in a searching inquiry of whether a particular benefit received was 'religious' or 'secular' in order to determine its deductibility, a process which . . . might violate the Establishment Clause." *Id.* at 613 (quoting *Hernandez*, 490 U.S. at 694).

In *Sklar I*, as here, taxpayers argued that I.R.C. §§ 170(f)(8) and 6115, added to the Code in 1993, reflected Congressional intent to make

payments for religious benefits deductible. The Court found it unnecessary to reach this issue directly, because it concluded that taxpayers had not met the standards for claiming a deduction under *American Bar Endowment*. The Court explained that in order to claim a deduction for part of a so-called "dual payment," taxpayers had to show that their payment exceeded the fair market value of the goods or services received, and taxpayers had not shown that their tuition payments included an "excess payment" above the fair market value of a comparable secular education. *Id.* at 621. The Court further concluded that taxpayers had "failed to show that they intended to make a *gift* by contributing any such 'excess payment,'" as *American Bar Endowment* required for the deduction to be allowed. *Id.* at 621.

Even though it had concluded it that it did not need to reach the issue, the Court noted that "[w]e seriously doubt the validity" of taxpayers' argument that Congress legislatively overruled *Hernandez*, and it indicated its agreement with the Government that in the 1993 amendments Congress had added substantiation requirements to the Code, without expanding the substantive definition of a deductible

charitable contribution. *Id.* at 610, 613. The Court also observed that taxpayers' claimed deduction had been "properly denied on the alternative ground that [taxpayers] failed to meet the requirement of [I.R.C.] § 170(f)(8)(A), (B) & (C)," that taxpayers present, prior to filing their return, a letter from the schools acknowledging their contribution and estimating the value of the benefit received. *Id.* at 621 n.15.

In *Sklar I*, as here, taxpayers also argued that they should be allowed a deduction for their religious education expenses because the IRS, through a 1993 closing agreement with the Church of Scientology, had permitted deduction of payments for "auditing" or "training" services by Church of Scientology members. The Court rejected taxpayers' attempt to rely on the closing agreement as the basis for their own deduction, stating that the Sklars had not shown that their tuition payments would constitute a partially deductible "dual payment" in any event. 282 F.3d at 612-13 & n.3, 612. The Court also noted that it believed the Tax Court likely had correctly held that the closing agreement was not relevant, because taxpayers, who sought a deduction for children's school tuition, did not appear to be similarly

situated to the Scientologists, who sought to deduct the costs of "auditing" and "training" for adult religious development. *Id.* at 620. The Court further opined that it would not be inclined to accept taxpayers' arguments that any benefits extended to the Church of Scientology also should be extended to them, because the Court would be reluctant to consider extending a questionable policy favoring one religion to all religions. *Id.* at 619-20.

In a concurring opinion, Judge Silverman opined that the relevant statutory and Supreme Court authorities clearly dictated that the deduction claimed should not be allowed, observing that (1) I.R.C. § 170 states that *quid pro quo* donations, for which a taxpayer receives something in return, are not deductible; (2) *Hernandez* holds that Section 170 applies to religious *quid pro quo* deductions; and (3) *American Bar Endowment* holds that charitable donations are deductible only to the extent that they exceed the fair market value of what is received in exchange. Judge Silverman concluded that *Hernandez* "clearly forecloses the argument that § 170 should not apply because the tuition payments are for religious education," and, because

taxpayers had not shown that what they paid for the children's education exceeded the fair market value of the education they received in return, they were not entitled to a deduction under *American Bar Endowment*. *Id.* at 622.

Judge Silverman further opined that the Church of Scientology closing agreement was not relevant, because "it has no bearing on whether the tax code permits the Sklars to deduct the costs of their children's religious education as a charitable contribution." *Id.* at 622. Judge Silverman explained:

> An IRS closing agreement cannot overrule Congress and the Supreme Court. . . .If the IRS does, in fact, give preferential treatment to members of the Church of Scientology —allowing them a special right to claim deductions that are contrary to law and rightly disallowed to everybody else—then the proper course of action is a lawsuit to stop *that* policy. The remedy is not to require the IRS to let others claim the improper deduction, too.

Id. at 622-23.

C. The 1995 deficiency notice and the Tax Court proceedings in the case at bar

On their 1995 return, taxpayers again claimed a charitable deduction for $15,000, or approximately 55 percent, of tuition they paid to Emek and Yeshiva Rav Isacsohn. (ER 276.) As in 1994, taxpayers did not obtain any contemporaneous acknowledgment from the schools to substantiate their deduction. Only in November of 1997, well after the October 15, 1996 filing of their 1995 return, did taxpayers obtain from the schools letters indicating that 55 percent of instruction time involved religious education. (ER 276, 219, 227; Supp. ER 53.)

The Commissioner again disallowed taxpayers' claimed charitable contribution deductions for tuition, and taxpayers again challenged the deficiency determination in the Tax Court. As in *Sklar I*, taxpayers argued that the 1993 amendments to the Code overruled *Hernandez* and made payments for intangible religious benefits deductible, and taxpayers argued that religious education for their children was an intangible religious benefit. (ER 277.) Taxpayers also again argued that they should be entitled to the claimed deduction based on their

assertion that the IRS, through a 1993 settlement, had allowed members of the Church of Scientology to deduct payments for religious education. Taxpayers sought discovery and subpoenaed representatives of the Church of Scientology, seeking information regarding the content and negotiations leading up to that agreement. The Government sought protection from such discovery and to quash the subpoenas, primarily on the grounds that its agreement with another taxpayer was not relevant to deciding the instant case, and was successful in obtaining such protection. (*See* ER 42-70.) The Government, however, did stipulate that it had entered into a closing agreement with the Church of Scientology that settled a variety of longstanding issues. (ER 73.) Taxpayers further offered into evidence a letter sent to them in 1994, in the course of resolving their claimed deductions, indicating that the settlement permitted Scientologists to deducted 80 percent of qualified religious services. (ER 285.)

The Government again argued that taxpayers' tuition payments were not deductible under I.R.C. § 170 and applicable Supreme Court precedent, and that it was not necessary to reach taxpayers' evidence of

the allocation between religious and secular education at Emek and Yeshiva Rav Isacsohn in order to so hold. The Government argued that taxpayers had not established, or even contended, that a gift was intended, and showed that taxpayers' tuition payments were comparable to or less than those at other private schools in the area. The Government again argued that the governing law was not changed by the 1993 amendments, which only added substantiation requirements to I.R.C. § 170. The Government also argued that taxpayers again had failed to meet I.R.C. § 170(f)(8)'s substantiation requirements.

The Tax Court agreed with the Government and disallowed the deduction. The court first analyzed the case without regard to the 1993 amendments, and considered whether under a "dual payment" analysis taxpayers could deduct their payments to the extent they exceeded the value of the secular education their children received. The court opined that a portion of a dual payment is deductible as a charitable contribution only (1) "if and to the extent" the the payment exceeds the market value of the benefit received; and (2) if the "excess payment" is

"'made with the intention of making a gift." ' (ER 278 (quoting *American Bar Endowment*, 477 U.S. at 117-18 (quoting Rev. Rul. 67-246, 1967-2 C.B. 104, 105)).)

The Tax Court concluded that the record did not support applying a dual-payment analysis in this case, because taxpayers, who had received a substantial benefit of an education for their children in exchange for their money, had not shown that any part of their tuition payments were a charitable contribution. (ER 280.) The court found that taxpayers had not shown, or even claimed, that a gift was intended. (ER 279-80). The court nonetheless went on to also conclude that the amounts taxpayers paid in tuition were "unremarkable" and not excessive for the substantial benefit of an education for their children that they received in exchange. (ER 270-80.) Indeed, the court found that the record showed that the price taxpayers paid in tuition was comparable to or less than what might be paid for only a secular education at other schools. (ER 279.)

The Tax Court rejected taxpayers' contention that I.R.C. §§ 170(f)(8) and 6115, added to the Code in 1993, changed the law to

authorized charitable contribution deductions for tuition payments allocable to intangible religious benefits, including religious education. (ER 280.) The court agreed with the Government that I.R.C. §§ 170(f)(8) and 6115 were added simply to enhance taxpayer compliance in connection with fund-raising events involving *quid pro quo* transactions and did not expand the scope of what was deductible, and the exceptions for "intangible religious benefits" were merely exceptions to the substantiation requirements. The court concluded that if Congress had "intended to overturn decades of caselaw disallowing charitable contribution deductions for tuition payments to schools providing a religious and secular education, Congress would have made such an intention clear. It did not." (ER 283.)

The Tax Court further found that the payments to the schools here did not qualify as payments for "intangible religious benefits" as defined in I.R.C. §§ 6115 and 170(f)(8), because a substantial part of each schools' purpose was to provide secular education, and thus neither school was organized exclusively for religious purposes. (ER 284.) The court did not find persuasive taxpayers' argument that

the schools must be organized solely for religious purposes because the IRS had excused the schools from filing Forms 990 (the return normally filed by a charitable organization)—an obligation from which churches and exclusively religious activities of a religious order are exempted. (ER 284.) Rather, the court found that "the Commissioner may relieve any exempt organization from filing a return where the Commissioner determines that filing is not necessary to the efficient administration of the internal revenue laws," and thus concluded that an inference that an entity was organized solely for religious purposes could not be drawn from the exemption from Form 990 filing requirements. (ER 284.)

Finally, the Tax Court considered whether the 1993 closing agreement between the IRS and the Church of Scientology affected its holding. (ER 285.) The court rejected taxpayers' argument that, because of that closing agreement, the Commissioner is constitutionally required also to allow a deduction for the tuition allocable to religious education. The court pointed out that in *Sklar I*, 282 F.3d at 619-620, this Court had previously declined to adopt the same arguments

regarding the Church of Scientology agreement. As in *Sklar I*, the court concluded that the payments did not meet the requirements for deductibility under *American Bar Endowment*, and that the closing agreement with the Church of Scientology did not change that outcome. (ER 278-80, 285-86.)

Having concluded that no deduction was allowed for tuition or mandatory fees, the Tax Court then considered separately whether taxpayers could deduct the payment for Mishna classes, held after the end of the regular school day. (ER 286.) The court concluded that taxpayers' payment for Mishna classes at Emek is not made deductible merely because Emek offers those classes after school for a separate fee. Rather, because taxpayers did not intend those payments to be a contribution or gift to Emek within the meaning of I.R.C. § 170(c), those payments were not deductible. (ER 286.)

In light of its conclusion that taxpayers had not intended to make a gift with any of their payments, the Tax Court concluded that it need not decide whether petitioners taxpayers complied with I.R.C. § 170(f)(8)'s substantiation requirements. (ER 286 n.18.) Finally, the

court concluded that taxpayers were not liable for the I.R.C. § 6662 accuracy-related penalty.

SUMMARY OF ARGUMENT

This is the second time that taxpayers, Orthodox Jews who send their children to private religious schools, have argued before this Court that they are entitled to deduct that portion of their children's school tuition that is allocable to religious education. In *Sklar I*, this Court held that taxpayers could not deduct any portion of the tuition payments for their children's education at the same religious schools for the 1994 tax year. In the instant case, the Tax Court correctly held that taxpayers' tuition expenses for their children's education at the same schools in 1995 also were not deductible.

1. As this Court explained in *Sklar I*, other Courts of Appeals and the Supreme Court, employing a *quid pro quo* analysis, have uniformly held that payments exchanged for consideration do not qualify as charitable deductions under I.R.C. § 170. Although the payments made for the dual purpose of purchasing some *quid pro quo* and making a charitable deduction may be deductible in part if the

payment is clearly disproportionate to the benefit received, the Supreme Court has made clear that such a partial deduction can be claimed only if a gift was intended and only to the extent the payment exceeds the fair market value of the *quid pro quo* obtained. Moreover, the Supreme Court has made clear that no exception to these rules exists where the *quid pro quo* received for a payment is a religious benefit.

Taxpayers are wrong that Congress legislatively overruled these precedents to allow a deduction for any amount allocable to intangible religious benefits. The 1993 amendments adding I.R.C. §§ 170(f)(8) and 6115, on which taxpayers rely, simply added substantiation requirements. Although payments for intangible religious benefits are excepted from these substantiation requirements in certain respects, nothing in the plain statutory language or legislative history suggests that Congress intended to change the law to make all payments for religious benefits deductible.

2. Applying the law governing charitable deductions to the record here, taxpayers cannot establish that they are entitled to any

deduction for their tuition payments. As the Tax Court correctly held, they are not entitled to a deduction under a dual payment analysis, because they have not established any part of their payments were intended to be a gift, and the payments were not out of proportion to the substantial benefit taxpayers' received of an education for their children.

Taxpayers have not seriously argued that the tuition payments were intended to be gifts. Further, even if this court were to engage in an analysis of whether taxpayers' payments exceeded the fair market value of what they received, taxpayers could not make that showing. Under the Supreme Court's opinion in *Hernandez v. Commissioner*, 490 U.S. 680 (1989), the correct inquiry would be whether the tuition paid exceeded the fair market value of *both* the secular and religious education taxpayers received in exchange. Taxpayers have not even argued that what they paid exceeded the value of the secular *and* religious education received. And, even assuming, as taxpayers contend, that the only relevant *quid pro quo* was the secular component of the education received, taxpayers could not prevail, because the

record indicates that taxpayers did not pay more than the cost of a comparable secular education elsewhere.

3. This Court also should affirm the decision below because taxpayers have not met the substantiation requirements of I.R.C. § 170(f)(8). Section 170(f)(8) requires a taxpayer claiming a charitable deduction to obtain a contemporaneous acknowledgment from the donee organization stating what, if any, portion of the payment is in exchange for consideration and the fair market value of that consideration. Section 170(f)(8)(C) defines "contemporaneous" as before the taxpayer's return is filed for the year at issue. Here, taxpayers did not obtain any documentation from the schools until well after they filed their 1995 return. Taxpayers are not excepted from this substantiation requirement based on the exception in Section 170(f)(8) for intangible religious benefits, because, for the exception to the substantiation requirement to apply the payment (1) must be solely for intangible religious benefits, (2) must be made to an organization that is organized exclusively for religious purposes, and (3) must be for a commodity not ordinarily sold in commerce. Here, taxpayers' tuition

paid for secular education and religious education, and thus were not made soley for intangible religious benefits. The schools served the purpose of providing that secular education to their students, as well as religious education, and thus were not organized exclusively for religious purposes. Finally, the private education they offered is a commodity generally sold in commerce.

4. The Tax Court also correctly rejected taxpayers' argument that they were entitled to a deduction on the separate ground that the Commissioner has allowed members of the Church of Scientology to deduct payments made for "auditing" and "training" and thus cannot be permitted to deny similar deductions by members of other religions. The Tax Court correctly held that the closing agreement with the Church of Scientology was of no relevance here, and, accordingly, correctly denied taxpayers' requests for discovery regarding that closing agreement's contents. As Judge Silverman's concurring opinion in *Sklar I* explains, it is the law as set forth in the Internal Revenue Code and governing precedent interpreting the relevant statutory provisions

that controls the outcome here — not the contents of a settlement with another litigant.

The decision of the Tax Court was correct and should be affirmed.

ARGUMENT

The Tax Court correctly held that no portion of taxpayers' tuition payments to private religious schools providing both religious and secular education qualify for charitable contribution deductions under I.R.C. § 170

Standard of Review

This Court reviews questions of law *de novo*. *Graham v. Commissioner*, 822 F.2d 844, 848 (9th Cir. 1987), *aff'd sub nom. Hernandez v. Commissioner*, 490 U.S. 680 (1989). Questions of fact are reviewed for clear error. *See Allen v. United States*, 541 F.2d 786, 788 (9th Cir. 1976). The trial court's rulings concerning discovery and the admission or exclusion of evidence are reviewed for an abuse of discretion. *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 726 (9th Cir.1999) (discovery); *Watec Co., Ltd. v. Liu*, 403 F.3d 645 (9th Cir. 2005) (admission of evidence).

A. Introduction to I.R.C. § 170 and the precedents interpreting it

Taxpayers, who paid Jewish day schools for a secular and religious education for their children, seek to deduct the portion of their children's school tuition that they contend is allocable to religious education. Taxpayers are wrong that they are entitled to such a deduction. Indeed, in *Sklar I*, this Court already has rejected taxpayers' arguments that they should be allowed deductions for identical payments in 1994. All the payments were made in exchange for consideration, *to wit*, an education for taxpayers' children, and, as this Court recognized in *Sklar I*, it is well established that payments exchanged for consideration are not charitable contributions. 282 F.3d at 612. This rule holds true where the consideration received is religious in nature. *Id.* at 612-13. *Hernandez v. Commissioner*, 490 U.S. 680 (1989).

1. I.R.C. § 170 does not allow a charitable contribution deduction for payments that are made in exchange for consideration—even if the benefits received are religious in nature

Since 1917 the federal tax laws have allowed deductions for gifts or contributions made to organizations operated exclusively for religious or educational purposes. *See* War Revenue Act, Pub. L. No. 50, § 1201(2), 40 Stat. 300, 330 (1917). That deduction is currently embodied in I.R.C. § 170, Addendum, *infra*, which allows a deduction for charitable contributions. The term "charitable contribution" is defined in Section 170(c) to include "a contribution or gift to or for the use of" an organization operated "for religious . . . or educational purposes." Under the Code however, personal, living, and family expenses generally are not deductible. *See* I.R.C. § 262(a).

Tuition payments, which are made with the expectation of a substantial benefit, or *quid pro quo*, of educational services in return, do not meet the statutory requirement for deductibility under I.R.C. § 170 of being a contribution or gift. Thus, it "is well settled that tuition paid for the education of the children of a taxpayer is a family

expense, not a charitable contribution to the educating institution." *DeJong v. Commissioner*, 309 F.2d 373, 376 (9th Cir. 1962); *see also Oppewal v. Commissioner*, 468 F.2d 1000 (1st Cir.1972); *Winters v. Commissioner*, 468 F.2d 778, 780-781 (2d Cir.1972); *Fausner v. Commissioner*, 55 T.C. 620 (1971); *McLaughlin v. Commissioner*, 51 T.C. 233 (1963), *affd. per curiam without published opinion,* 23 A.F.T.R. 2d 69-1763 (1st Cir. 1969); *Haak v. United States*, 451 F. Supp. 1087 (W.D. Mich. 1978); *Bass v. Commissioner*, T.C. Memo. 1983-536 (1983); *Brotman v. Commissioner*, T.C. Memo. 1977-65 (1975). The same is true here.

2. Dual payments

In *United States v. American Bar Endowment*, 477 U.S. 105 (1986), the American Bar Association's (ABA) charitable arm, the American Bar Endowment (ABE), sold insurance to ABA members, proceeds from which benefitted the ABE, and the ABA members claimed charitable deductions for the portions of their insurance premiums that went to the ABE. In concluding that no charitable contribution deductions should have been allowed, the Court explained

that "[a] payment of money generally cannot constitute a charitable contribution if the contributor expects a substantial benefit in return." *American Bar Endowment*, 477 U.S. at 116. Indeed, "[t]he *sine qua non* of a charitable contribution is a transfer of money or property without adequate consideration." *Id.* at 118.

Citing Rev. Rul. 67-246, 1967-2 C.B. 104, however, the Court recognized that "[w]here the size of the payment is clearly out of proportion to the benefit received," the taxpayer could "claim a deduction for the difference between" the amount of the payment to the charitable organization "and the market value of the benefit received in return, on the theory that the payment has the 'dual character' of a purchase and a contribution." *Id.* at 117. The Court applied the test set forth in Rev. Rul. 67-246 for deciding if part of a payment with dual character (a so-called "dual payment") was deductible. The dual payment is deductible "only if and to the extent it exceeds the market value of the benefit received," and "the excess payment must be 'made with the intention of making a gift.'" *Id.* at 117 (quoting Rev. Rul. 67-246, 1967-2 C.B. at 105)). In *American Bar Endowment*, the Court

concluded that the members did not qualify for the deductions claimed, because their payments did not exceed the market value of equivalent insurance policies, and, even if less expensive policies might have been available, the members had failed to demonstrate that they intentionally gave away more than they received. 477 U.S. at 118.

Subsequently, in *Hernandez v. Commissioner*, 490 U.S. 680 (1989), the Supreme Court held that where a taxpayer receives religious benefits in exchange for his payments, the taxpayer is receiving consideration in exchange for his payments, and no charitable deduction is available. In *Hernandez*, members of the Church of Scientology made payments to the church, at a price fixed by the church, for "auditing" and "training" sessions. "Auditing" sessions are a process whereby, with the guidance of an auditor, a person becomes aware of an immortal spiritual being within them. 490 U.S. at 684. "Training" sessions are comprised of the study of the tenets of Scientology and qualify persons to become auditors. *Id.* at 685. The proceeds of these sessions are the church's primary source of income,

and members claimed that their payments for these sessions were deductible contributions under I.R.C. § 170(a). *Id.*

The Supreme Court held that the payments were not deductible contributions within the meaning of I.R.C. § 170. 490 U.S. at 689-95. The Court noted that Congress intended to allow a deduction only for "unrequited payments" to charitable organizations, and not for "payments made . . . in return for goods or services." 490 U.S. at 690. The Court concluded that "it [wa]s readily apparent" that the payments did "not qualify as 'contribution[s] or gift[s]'" because they were "part of a quintessential *quid pro quo* exchange: in return for their money, [the taxpayers] received an identifiable benefit, namely, auditing and training sessions." *Id.* at 691.

The *Hernandez* Court went on to explicitly reject the argument that the *quid pro quo* analysis is inappropriate when the benefit received is purely religious in nature. 490 U.S. at 692-95. The Court held that I.R.C. § 170 does not differentiate between religious and non-religious benefits, nor does it make a "special preference for payments made in the expectation of gaining religious benefits or access to a

religious service." *Id.* at 693. Additionally, the Court observed that to allow the deduction for religious benefits would expand the deduction "far beyond what Congress has provided." *Id.* The Court specifically noted: "For example, some taxpayers might regard their tuition payments to parochial schools as generating a religious benefit or as securing access to a religious service; such payments, however, have long been held not to be charitable contributions under § 170." *Id.* Finally, the Court noted that to allow deductions for religious benefits "might raise problems of entanglement between church and state" as it "would inexorably force the IRS and reviewing courts to differentiate 'religious' benefits from 'secular' ones." *Id.* at 694.

In sum, the *Hernandez* Court reaffirmed that no charitable contribution deduction is allowed for a payment made in exchange for substantial consideration and clarified that no exception to this general rule exists if the benefit received in consideration for the payment is religious in nature. Thus, as the *Sklar I* Court concluded, the Supreme Court "has explicitly rejected the contention made here by the Sklars:

that there is an exception in the Code for payments for which one receives only religious benefits in return." *Sklar I*, 282 F.3d at 612-13.

3. Taxpayers' assertion that a charitable deduction nonetheless is allowed when a payment is exchanged for intangible religious benefits is wrong

Taxpayers' attempts to call into question the well-established precedent that we have just discussed and assert that payments exchanged for intangible religious benefits are deductible are not meritorious. After *Hernandez*, it cannot reasonably be argued that case law or administrative rulings support the conclusion that a charitable deduction is allowed when a payment is exchanged for religious benefits that are more than *de minimis* in nature. Moreover, taxpayers' contention that Congress changed the statute in 1993 to legislatively overrule *Hernandez* is wrong.

a. No case law or IRS guidance since *Hernandez* supports taxpayers' position

To the extent that taxpayers rely on pre-*Hernandez* cases for the proposition that the *quid pro quo* analysis is inapplicable where a payment is for religious benefits, those cases have been overruled by

Hernandez and are no longer good law. Taxpayers specifically rely upon *Foley v. Commissioner*, 844 F.2d 94, 96 (2d Cir. 1988), *vacated*, 490 U.S. 1103 (1989), and *Staples v. Commissioner*, 821 F.2d 1324 (8th Cir. 1987), *vacated*, 490 U.S. 1103 (1989). The reasoning of *Foley* and *Staples*, that the receipt of a religious benefit cannot serve as a *quid pro quo* because religious benefits are incidental in nature and of questionable financial or economic value was squarely rejected in *Hernandez*. Indeed, the Supreme Court unequivocally stated, "[w]e cannot accept" the argument that a *quid pro quo* analysis is inappropriate when the benefit the taxpayer receives is purely religious in nature, and further opined that such an argument was wholly without support in the language of I.R.C. § 170. *Id.* at 692. Thus, under *Hernandez*, where a substantial benefit is conferred in exchange for a payment, such as the one-on-one religious services at issue in *Hernandez* or the hours of religious education for taxpayers' children

here, the religious services represent a substantial *quid pro quo* that makes the payment nondeductible.6/

To be sure, the IRS has ruled that a benefit bestowed in return for a contribution can be incidental or *de minimis* so as to not affect the charitable nature of the entire payment. Thus, in the secular context, the IRS had suggested that rights to vote, hold office, or attend a social event constitute such incidental and insubstantial benefits as to not affect the charitable nature of the contribution. Rev. Rul. 55-70, 1955-1 C.B. 506, *obsoleted by*, Rev. Rul. 69-227, 1969-1 C.B. 315. Similarly, in the religious context, the IRS ruled that "pew rents" or admission tickets to obtain special seating at a religious service really are charitable donations that carry with them an incidental benefit, because the religious service is open to the general public, and the donor could attend it without the donation. *See* Rev. Rul. 70-47, 1970-1 C.B. 49. Such rulings making a fact-bound determination that the

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6/ It is also noteworthy that in *Foley*, 844 F.2d at 96, the court distinguished payments for religious observances, which were at issue in that case, from parochial school tuition payments, "which clearly are made with the expectation of a definite economic benefit" and, therefore, are nondeductible.

donor receives only an incidental benefit that does not alter the charitable nature of the gift, however, plainly do not stand for the proposition that all religious benefits must be treated as incidental. Indeed, the *Hernandez* Court squarely rejected the proposition that all religious benefits are so incidental or of such indeterminable monetary value that all payments for religious benefits are deductible. 490 U.S. at 692.

b. The 1993 amendments only added substantiation requirements; they did not expand what is deductible

Moreover, Congress's 1993 amendments to the Tax Code did not, as taxpayers contend (Br. 30), legislatively overrule *Hernandez* and permit a charitable deduction for any part of a payment allocable to an intangible religious benefit (into which category they contend religious education falls).7/ (*See* Br. 28-29.) Taxpayers assert that Congress has changed the law to permit a charitable deduction whenever an intangible religious benefit is received in exchange for a payment with

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7/ As discussed, *infra* (pp. 61-66), we submit that religious education is not an intangible religious benefit in any event.

the addition of I.R.C. §§ 170(f)(8) and 6115, which were enacted as part of the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13172(a), 107 Stat. 312, 455 (1993) (effective for contributions made on or after January 1, 1994).

As the Tax Court held (ER 280-85), nothing in the plain language of these provisions or their legislative history, however, supports taxpayers' contention that these new provisions overruled *Hernandez* or otherwise altered the law to make all payments exchanged for intangible religious benefits deductible. Rather, as this Court opined in Sklar I, it was "inclined to agree" that the 1993 amendments only added substantiation requirements. 282 F.3d at 610; *see also id.* at 622 (Silverman, J., concurring).

Section 170(f)(8)(A) provides that "[n]o deduction shall be allowed under subsection (a) for any contribution of $250 or more unless the taxpayer substantiates the contribution by a contemporaneous written acknowledgment of the contribution by the donee organization that meets the requirements of subparagraph (B)." Section 170(f)(8)(C) defines a "contemporaneous" acknowledgment as one that is received

by the taxpayer "on or before the earlier of (i) the date on which the taxpayer files a return . . ., or (ii) the due date (including extensions) for filing such return." As to what the acknowledgment must include, I.R.C. § 170(f)(8)(B) provides as follows:

> (i) The amount of cash and a description (but not value) of any property other than cash contributed.
>
> (ii) Whether the donee organization provided any goods or services in consideration, in whole or in part, for any property described in clause (i).
>
> (iii) A description and good faith estimate of the value of any goods or services referred to in clause (ii) or, if such goods or services consist solely of intangible religious benefits, a statement to that effect.
>
> For purposes of this subparagraph, the term "intangible religious benefit" means any intangible religious benefit which is provided by an organization organized exclusively for religious purposes and which generally is not sold in a commercial transaction outside the donative context.

In a parallel provision, I.R.C. § 6115 "requires that tax-exempt organizations inform taxpayer-donors that they will receive a tax deduction only for the amount of their donation above the value of any goods or services received in return for the donation and requires donee

organizations to give donors an estimate of this value, exempting *from this estimate requirement* contributions for which solely intangible religious benefits are received." *Sklar I*, 282 F.3d at 613.

Taxpayers contend that the addition of these substantiation and notice requirements altered the established law, to permit a charitable contribution deduction when a taxpayer has received a *quid pro quo* that consists of intangible religious benefits. As is apparent from the plain statutory language, however, I.R.C. § 170(f)(8) does not eliminate any substantive elements of a taxpayer's qualification for a charitable contribution. Section 170(c) was not changed by the 1993 amendment, and it specifically requires that a charitable contribution be "a contribution or gift." As noted above, this essential requirement dates back to 1917, and there is no indication that Congress intended to change this requirement.

Indeed, I.R.C. § 170(f)(8) is labeled "Substantiation Requirement for Certain Contributions," and it does not address the substantive requirements in Section 170(c) at all. *See also* J. Todres, *Internal Revenue Code Section 170: Does the Receipt by a Donor of an Intangible*

Religious Benefit Reduce the Amount of the Charitable Contribution Deduction? Only the Lord Knows for Sure, 64 Tenn. L. Rev. 91, 152 (1996) ("§ 170(f)(8) is a nonsubstantive substantiation provision"). Thus, nothing in Section 170(f)(8) provides that a deduction must be allowed for payments made to religious institutions in return for intangible religious benefits. Likewise, as this Court noted in *Sklar I*, 282 F.3d at 613, the exemption in Section 6115 is only an exemption from the requirement that an estimate of the value of the consideration be provided.

Furthermore, the legislative history gives no hint that Congress intended the 1993 amendments to change the substantive requirements for a charitable contribution deduction and overrule *Hernandez*. Instead, it is apparent that the purpose of the amendment was to curb abuse. The House Report accompanying its proposed version of I.R.C. § 170(f)(8) notes that the substantiation requirement was needed to resolve "[d]ifficult problems of tax administration" because donors were occasionally taking charitable contribution deductions when they had actually received goods and services in return. H.R. Rep. No. 103-111,

at 785 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 1016. Although there was no formal Senate Report for the Senate version of the bill (S. 1134), the Senate Budget Committee released a brief description of the bill. *See Reconciliation Submissions of the Instructed Committees Pursuant to the Concurrent Resolution on the Budget (H. Con. Res. 64)*, S. Prt. 103-36 at 219-24 (June 1993). As that committee print explains, the Senate likewise was concerned that charitable organizations and taxpayers were not complying with the *quid pro quo* rules described in Rev. Rul. 67-246. *Id.* at 219-21 & n.2; *see also Fiscal Year 1994 Budget Reconciliation Recommendations of the Committee on Finance*, S. Prt. 103-37 at 90-92 & n. 17 (June 1993) (containing the same language as S. Prt. 103-36).

On the face of the statute, the reference to "intangible religious benefits" in I.R.C. § 170(f)(8)(B) does no more than relieve organizations organized exclusively for religious purposes of the obligation to attempt to value such benefits. And the legislative history likewise does not provide any indication that the reference to "intangible religious benefits" was intended to change the substantive

law regarding charitable contribution deductions. Indeed, the Senate Budget Committee print not only makes clear that the exemption for intangible religious benefits is only an exemption from the substantiation requirements, but it further clarifies that tuition payments were not considered to be payments made in exchange for intangible religious benefits for purposes of Section 170(f)(8), providing (S. Prt. 103-36 at 223, emphasis added):

> The provision explicitly provides that, if in return for making a contribution of $250 or more to a religious organization, a donor receives in return solely an intangible religious benefit that generally is not sold in commercial transactions outside the donative context (e.g., admission to a religious ceremony[11]), then such a religious benefit may be disregarded *for purposes of the substantiation requirement.*
>
> [11] *This exception does not apply, for example, to tuition for education leading to a recognized degree,* travel services, or consumer goods. However, it is intended that *de minimus* tangible benefits furnished to contributors that are incidental to a religious ceremony (such as wine) generally may be disregarded.

See also S. Prt. 103-37 at 93 & n.26. Similarly, the Conference Report explains:

> However, with respect to the substantiation provision, the conference agreement clarifies that in cases where, in

> consideration (in whole or in part) for a contribution of $250 or more, a religious organization furnishes to the contributor solely an intangible religious benefit generally not sold in a commercial transaction outside the donative context, the written substantiation must contain a statement to the effect that an intangible religious benefit was so furnished, but the substantiation need not further describe, nor provide a valuation for, such benefit.[39]
>
> [39] As under the Senate amendment, charities are not required to make any disclosure under the *quid pro quo* disclosure provision when no benefit *other than* an intangible religious benefit is furnished to the donor.

H.R. Conf. Rep. No. 103-213, at 567 (1993), *reprinted in*, 1993 U.S.C.C.A.N. 1088, 1256 (emphasis added).

The legislative history thus makes clear that the reference to intangible religious benefits has relevance only to whether the new, more stringent, substantiation requirements must be followed. There is nothing in the bill or legislative history that indicates that Congress was intending to change the long-standing application of the *quid pro quo* rules to religious institutions or legislatively overrule *Hernandez*. Indeed, *Hernandez* is not even cited in the relevant portions of the legislative history, nor is any suggestion made that Congress was intending to reverse the rule enunciated in that case. To the contrary,

the Conference Report explained that "no inference is intended, however, regarding the full or partial deductibility of any payment outside the scope of the *quid pro quo* disclosure provision or substantiation provision under the present-law requirements of section 170." Conf. Rep. at 566 n.37, *reprinted in*, 1993 U.S.C.C.A.N. 1088, 1255. On this statutory language and legislative history, the inference taxpayers urge, that *Hernandez* was somehow overruled, is unfounded.8/

8/ Taxpayers further are wrong in their suggestion (Br. 31) that IRS must have recognized that the 1993 amendments to I.R.C. § 170(f)(8) overruled *Hernandez*, because Rev. Rul. 93-73, 1993-2 C.B. 75, announced that Rev. Rul. 78-189, 1978-1 C.B. 68, was obsolete. Rev. Rul. 78-189 had concluded that fixed payments by adherents of the Church of Scientology for "auditing" and "training" were not deductible as charitable contribution deductions. The inference taxpayers would draw from the obsoleting of Rev. Rul 78-189, that the IRS was rejecting *Hernandez*, cannot be properly made. A revenue ruling can be obsoleted for a variety of reasons and there is nothing in the record to establish that Rev. Rul. 78-189 was obsoleted for the reasons taxpayers suggest.

B. The Tax Court correctly concluded that the tuition payments here were not deductible

Applying the relevant law to the record here, the Tax Court correctly concluded that taxpayers were not entitled to the claimed charitable deduction for tuition payments for religious education.

1. No partial deduction is allowed here under a dual-payment analysis, because taxpayers did not intend a gift and their payments were not clearly disproportionate to the *quid pro quo* received

As the Tax Court correctly held (ER 279-80), under *American Bar Endowment*, part of a payment can be deducted under a dual-payment analysis only where the size of the payment is "clearly out of proportion to the benefit received" and the payment was made with the intention of making a gift. *American Bar Endowment*, 477 U.S. at 117. The payment is then deductible to the extent of the excess of the amount paid over the fair market value of what was received.

Here, the Tax Court correctly concluded that the requirements for a partial deduction under dual-payment analysis were not met, for taxpayers have not met the fundamental requirement of showing that

they intended to make a gift with respect to any part of their payments. Indeed, taxpayers do not contend that they intended to make a gift. (*See* Br. 34-35; ER 279). Rather, they simply reiterate the incorrect premise that, while charitable intent may be generally required for deductibility under Section 170, there is no specific requirement of charitable intent when payments are made in exchange for intangible religious benefits. (Br. 35.) As we have explained, *supra*, this is not the law.

Here, not only do taxpayers fail even to argue that a gift was intended, but the record also supports the conclusion that no gift was intended. Mr. Sklar, an accountant who is aware of the importance of classifying expenditures, recorded the tuition as educational expenses rather than donations in his Quicken software. (Supp. ER 50-52, 507-10.) As the Tax Court found (ER 279), the tuition payments were plainly structured as a *quid pro quo* exchange. At both schools, the payment of tuition was required, and students could not be enrolled without the payment of the required tuition. (ER 275; Supp. ER 62-64.) The schools sent out acknowledgments of donations, while no

acknowledgments were sent out with respect to tuition payments. (Supp. ER 29-41, 61.)

Furthermore, as noted above, it has long been recognized that school tuition payments are made with the expectation of a substantial benefit, or *quid pro quo*, of educational services in exchange for the payments and thus do not qualify for a charitable deduction. Indeed, we are not aware of any court that has ever allowed school tuition to be deducted as a charitable contribution.9/ *See also Hernandez*, 490 U.S. at 693 (expressing concern that the Court should not reach a holding that would "expand the charitable contribution deduction far beyond

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9/ As the Tax Court correctly noted (ER 279), this Court in *DeJong*, 309 F.2d at 379, held that where the taxpayer made payments to a religious organization which operated a school which imposed no explicit tuition charges, part of the payment was deductible as a charitable contribution because the payment exceeded the amount apparently expected to be paid to cover the school's estimated cost per student of operating the school's educational programs, both secular and religious. That kind of excess is not in dispute here. Rather, only mandatory tuition and fees are at issue here. The *DeJong* court did not allow a charitable contribution deduction for tuition paid for either the secular or the religious education, and concluded generally that school tuition is paid with the expectation of something in return.

what Congress has provided . . ." and lead taxpayers to "regard their tuition payments to parochial schools" as deductible when such payments "have long been held not to be charitable contributions under § 170").

That taxpayers did not intend to make a gift with their tuition payments is enough to preclude no charitable contribution was made. But as the Tax Court correctly found, the record also demonstrates that taxpayers' tuition payments were not "clearly out of proportion to the benefit received," as would be required for a dual-payment analysis to be appropriate. *American Bar Endowment*, 477 U.S. at 117. Indeed, the record shows that the tuition paid was comparable to the tuition at other secular and religious private schools in the area. Specifically, as the Tax Court found (ER 279), tuition at Emek and Rav Isacsohn was higher than the average tuition for Catholic Schools in the Los Angeles area, but equal to or lower than the average tuition at other area Jewish Orthodox day schools and than at private schools providing secular education only. (*See* ER 247-48, 257-61; Supp. ER 121-506,

12-47; *see also* Supp. ER 1-4).)10/ Accordingly, the Tax Court correctly held that no part of taxpayers' tuition payments was deductible.11/

Taxpayers arguments that they paid for more than they received are all based on the assumption that the only relevant *quid pro quo* is the secular education their children received, and that they are entitled to a deduction to the extent that their payments exceed the value of that secular education. (Br. 28-29; ER 279.) As we have explained,

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10/ We note that the charts at Supp. ER 1-4 are not admitted exhibits, but rather are graphical summaries of the data in other exhibits (as noted on the appendices themselves) prepared by counsel and included in the record as attachments to the Commissioner's trial brief. Because we believe they are a useful summary of the evidence, we have included the same charts in our Supplemental Record Excerpts.

11/ Taxpayers have not argued that their payments exceeded the fair market value of the combined religious and secular education of their children, or that they paid more than fair market value for the Mishna classes. (*See* Br.; Entire record.) Rather, taxpayers incorrectly (as demonstrated above) contend only that a deduction should be allowed for any part of their tuition payments that can be allocated to religious education. (*See* Br. 28-29, 44). Because taxpayers have not argued that they paid more than the fair market value of the entire education (both religious and secular) offered at Emek and Yeshiva Rav Isacsohn in their opening brief, taxpayers have waived any argument they might have in that regard. *See Dilley v. Gunn*, 64 F.3d 1365, 1367 (9th Cir.1995) (issues not raised in opening brief are waived on appeal).

however, *Hernandez* holds that payments made in exchange for religious benefits, such as religious educational services, are not deductible. Accordingly, to prevail on an argument that part of their payments are deductible under a dual-payment analysis, taxpayers would have to show that their tuition payments exceeded the fair market value of the entire education their children received – both religious *and* secular. It was not necessary for the Tax Court to delve into an analysis of the relative values of the religious and secular education the schools offered, as taxpayers urge (*See* Br. 17-21), in order to hold that taxpayers did not make that showing.

But even assuming—as taxpayers incorrectly contend (Br. 28-29)—that taxpayers could claim a deduction to the extent their payments exceed the market value of the secular education received, taxpayers still could not prevail. Under *American Bar Endowment*, 477 U.S. 117-18, the test for whether taxpayers paid more than the market value of the benefit received is whether they paid more than the cost at which a similar benefit could be obtained elsewhere. The allocation of time spent on secular education versus religious pursuits on which

taxpayers based the amount they deducted is irrelevant to this analysis. *See Sklar I*, 282 F.3d at 621.12/ Because, as noted above (p. 53), the record established that the tuition taxpayers paid was less than they would have paid at other private schools in the area for a secular education, taxpayers cannot show they could have purchased a comparable education for less. (*See* ER 269, 279; Supp. ER 1-4, 514-29.)

This Court should reject taxpayers' suggestion (Br. 17-20) that the secular education taxpayers' children received was less valuable than that offered by other schools. Such an analysis would be inconsistent with *American Bar Endowment*, which instructs that the price paid

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12/ Thus, in arguing (Br. 32-33) that other cases holding that parochial school tuition was not deductible are distinguishable because the schools did not divide the school day into specific religious and secular time slots, taxpayers make an irrelevant distinction.

should be compared with the other available alternatives in the marketplace.13/

Moreover, taxpayers' attempts to adjust the value of a secular education in the religious school environment, based on how much time the religious emphasis takes away from secular learning, would require engaging in an analysis of each school's allocation of effort between religious and secular studies. Such an allocation cannot be easily made and raises constitutional implications. *See Hernandez*, 490 U.S. at 694. Contrary to taxpayers' suggestion that allocation between religious and secular studies is as easy as looking to the classroom hours that are assigned religious or secular titles, the record demonstrates that these two categories of education are inexorably intertwined. Indeed, Yeshiva Rav Isacsohn's Self Study explains: "In many ways the Hebrew Studies program reinforces the General Studies . . . ," and

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13/ In *Hernandez*, 490 U.S. at 697-698, the Supreme Court noted that, to determine whether a gift was made, the IRS sometimes looked to the cost to the donee of providing the good or service, but only when "no comparable good or service is sold in the marketplace." Here, of course, as demonstrated above, both the religious and secular education offered by Emek and Yeshiva Rav Isacsohn were sold in the marketplace.

"There is no question that many of these skills learned and practiced in the morning [religious] program can be transferred to the afternoon [secular] studies." (Supp. ER. 73-73a (also noting that it is a school philosophy to integrate Judaic and secular knowledge where possible)); (Supp. ER 96-97 (Emek's school-wide learning expectations)). Thus, an inquiry into the allocation of time and effort between secular and religious studies would not only be an administrative impossibility, but it would lead to an impermissible entanglement by subjecting the curriculum at religious schools to scrutiny by the IRS and the courts. *See Hernandez*, 490 U.S. at 694 ("'pervasive monitoring' for 'the subtle or overt presence of religious matter' is a central danger against which . . .the Establishment Clause guards"). This Court should avoid the constitutional quagmire into which taxpayers urge it to step, *see Gomez v. United States*, 490 U.S. 858, 864 (1989), and conclude, as did the Tax Court, that it need not delve into the facts regarding allocation of the school day between religious and secular education to hold that no deduction is allowed here.

C. The decision below also should be affirmed because taxpayers have not met the contemporaneous substantiation requirements of I.R.C. § 170(f)(8)

The decision below also should be affirmed because taxpayers have not met the I.R.C. § 170(f)(8)'s substantiation requirements. Indeed, in *Sklar I*, where the facts regarding substantiation of the claimed deductions were essentially the same, the Court held that failure to provide such contemporaneous substantiation represented an alternative grounds for affirmance. 282 F.3d at 621 n.15.

As noted above (*see* pp. 42-45, *supra*), I.R.C. § 170(f)((8) imposes a strict requirement of contemporaneous substantiation by the donee organization of the extent to which a deductible gift is made, in order for the deduction to be allowed. Section 170(f)(8)(A) provides that no deduction shall be allowed under Section 170(a) for contributions of $250 or more unless the taxpayer substantiates the contribution by a contemporaneous written acknowledgment meeting the requirements of subparagraph (B). Section 170(f)(8)(B) requires the acknowledgment to state the amount of cash paid, any consideration the donee organization gave in return, and the fair market value of such

consideration. Section 170(f)(8)(C), in turn, defines the term "contemporaneous," making clear that the taxpayer must obtain the acknowledgment prior to filing his tax return. This Court has held that Section 170(f)(8) clearly provides that, where the requisite contemporaneous documentation is not supplied, no deduction for payments over $250 shall be allowed. *Addis v. Commissioner*, 374 F.3d 881 (9th Cir. 2004), *cert. denied*, 534 U.S. 1151 (2005); *see also Sklar I*, 282 F.3d at 613; *Stussy v. Commissioner*, 86 T.C.M. (CCH) 220 (2003).

Here, as in *Sklar I*, the schools did not provide contemporaneous substantiation before taxpayers filed their return. *See Sklar I*, 282 F.3d at 621 n.15. It was only well after taxpayers' October 15, 1996 filing of their 1995 return that, at Mr. Sklar's suggestion, the schools, in November 1997, provided letters estimating that 45 percent of the educational services provided were secular and 55 percent were religious. (ER 71, 219, 227.) Because the dates of those letters establish that they were provided well after taxpayers filed their 1995 return, the letters do not satisfy Section 170(f)(8)'s substantiation requirements.

No exception to the contemporaneous acknowledgment requirement applies here. Although Section 170(f)(8)(B)(iii) creates an exception, whereby no good faith estimate of the value of goods and services provided to the donor is required if such goods or services consist solely of intangible religious benefits, that exception does not apply here. That provision only exempts the taxpayer from the requirement of substantiating the value of intangible religious benefits. Sections 170(f)(8)(A) and (B), still require a contemporaneous acknowledgment from the donee organization that meets the remaining criteria of Section 170(f)(8)(B), and taxpayers obtained no such contemporaneous acknowledgment here.

Moreover, as the Court noted in *Sklar I,* 282 F.3d at 621 n.14, the exception from the substantiation requirements applies only where the *quid pro quo* consists "solely" of intangible religious benefits. None of the payments here qualify as intangible religious benefits within the meaning of Section 170(f)(8). Section 170(f)(8)(B) defines an "intangible religious benefit" as one that is "provided by an organization organized exclusively for religious purposes" and "generally is not sold in a

commercial transaction outside the donative context." I.R.C. § 170(f)(8)(B). Because the schools were in the business of providing secular education meeting the requirements of California state law and had obtained accreditation from nonreligious accrediting agencies, taxpayers' contention (Br. 35) that the schools were organized exclusively for religious purposes is simply untenable on its face. In any event, because the educational services taxpayers received here included secular education, taxpayers did not receive "solely" intangible religious benefits.

Furthermore, education, the commodity that taxpayers purchased, is a tangible commodity that is widely available in commercial transactions outside the donative context. Indeed, private education is a commodity widely offered in both parochial and secular private schools, and, as this very case demonstrates, schools compete against one another for students. A private education can be obtained from other Jewish day schools, private schools run by other religious organizations such as the Catholic Church, and from schools that offer only a secular education. (*See* ER 247-48, 257-61; Supp. ER 43-44.)

Parents decide which school to send their children to based upon what that particular school offers and the cost involved. (Supp. ER 43-44.) Emek and Rav Isacsohn, like other private schools, attempt to lure students with benefits such as discounts for families who send multiple children (Supp. ER 45-46), and schools take into account what other schools with similar educational programs and clientele are charging in setting their tuition (Supp. ER 42). Further, schools take steps to collect tuition or do not permit students to register again if a student's tuition is not paid. (ER 275; Supp. ER 41.)

Taxpayers are wrong in their contention (Br. 44-43) that letters from the IRS provide direct evidence that the IRS exempted the schools from the requirement of filing Form 990 Return of Organization Exempt from Income Tax, under I.R.C. § 6033(a) and that an inference can therefore be drawn that the schools are organized exclusively for religious purposes. As support for this contention, taxpayers rely upon letters attached to their brief that were never admitted into evidence, but rather were only submitted after trial in response to the Commissioner's request for an amendment of the opinion. (Supp. ER

5-13.) As such, we submit that they should not be considered on appeal. But, in any case, they do not support the inference taxpayers attempt to draw.

As the Tax Court correctly explained (ER 284), exemption from the requirement of filing a Form 990 can be based on the Commissioner's discretion under I.R.C. § 6033(a)(2)(B), as well as falling into one of the categories, such as organizations organized exclusively for religious purposes, which are statutorily exempted under I.R.C. § 6033(a)(1). (ER 284.) Although the letter to Yeshiva Rav Isacsohn states that it is granting exemption status based on that entity being a religious organization, the letter does not establish that the school is organized *exclusively* as a religious organization. Indeed, that Yeshiva Rav Isacsohn had made a request for exempt status suggests that they did not fit squarely within the statutory exemption, and thus sought exemption from filing Form 990 in the Commissioner's discretion under Section 6033(a)(2). Moreover, the second letter taxpayers attach to the brief states explicitly that Emek is exempt as an educational institution. Furthermore, as we have discussed, the

direct evidence of record clearly establishes that a significant purpose of both schools was to provide secular education. On this record, the inference taxpayers urge that the schools were organized exclusively for religious purposes, again, is untenable on its face.14/

Taxpayers also are in error in suggesting (Br. 34) that the education at Emek and Yeshiva Rav Isacsohn did not lead to a recognized degree and that, therefore, based on language in the Conference Report (*see* pp. 47-48, *supra*) suggesting that education leading to a recognized degree is not an intangible religious benefit, it follows the education at Emek and Yeshiva Rav Isacsohn must be an intangible religious benefit. The reference in the legislative history to tuition for education leading to a recognized degree was merely an example of an instance that would *not* qualify for the intangible

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14/ Here, where the record clearly establishes the secular educational purpose of the schools, and, indeed, taxpayers have conceded that purpose, the Government was not required, as taxpayers urge (Br. 44), to come forward with further proof that Emek and Yeshiva Rav Isacsohn were not organized solely for religious purposes. As the Tax Court correctly concluded, "[r]egardless of [taxpayers'] reasons for chosing to educate their children at Emek and Yeshiva Rav Isacsohn, those schools did not provide exclusively religious services." (ER 284.)

religious benefit exception. There is no indication that this example was intended to be all-inclusive and that an education not leading to a recognized degree necessarily is an intangible religious benefit. But in any event, the education children received at Emek and Yeshiva Rav Isacsohn was part of the process of obtaining a high school diploma and satisfied California's compulsory education laws.

Thus, the substantiation requirements apply and have not been met here. Accordingly, taxpayers would not be entitled to the claimed deduction, even if they otherwise met the requirements.

D. The IRS's settlement with the Church of Scientology is irrelevant to resolution of this case

Alternatively, taxpayers contend that the IRS permitted Church of Scientology members to deduct payments for religious education under a settlement, and that the Establishment Clause of the First Amendment requires that taxpayers therefore must also be allowed to deduct religious education expenses.

The Tax Court, however, correctly held that the closing agreement reflecting the IRS's settlement with the Church of

Scientology was not relevant, and thus did not abuse its discretion in granting the Governments' requests for protection against discovery regarding the negotiation of and content of that agreement. In *Sklar I*, the majority indicated its view that taxpayers, who paid tuition to religious elementary and middle schools, were not sufficiently similarly situated to the Church of Scientology members in the closing agreement to render the closing agreement relevant. In this suit, taxpayers sought discovery to prove to the contrary. The Tax Court, however, correctly denied such discovery as irrelevant, because the closing agreement, regardless of its contents, is not relevant for two much more fundamental reasons.

First, as Judge Silverman's concurring opinion in *Sklar I* explains, the closing agreement is not relevant because "it has no bearing on whether the tax code permits the Sklars to deduct the costs of their children's religious education as a charitable contribution." 282 F.2d at 622. Taxpayers' entitlement to the deduction claimed is determined by Section 170 and precedential case law interpreting that statute—not by a closing agreement reflecting settlement of litigation

with another taxpayer. *Id.* The closing agreement simply "does not enter into the equation by which the deductibility of the Sklars' payments is determined. An IRS closing agreement cannot overrule Congress and the Supreme Court."15/ *Id.* Indeed, as the product of a settlement in which both parties compromised with respect to points on which they believed they were legally correct, a closing agreement in no way establishes the correct governing law. For the same reason, such a settlement can hardly form the basis of a constitutional claim of disparate treatment.

Second, as both the majority and concurring opinions in *Sklar I* recognized, even if the closing agreement violated the Establishment Clause in allowing Scientologists a deduction that was not available to taxpayers of other religions, it would not be appropriate "to hold that the unlawful policy set forth in the closing agreement must be extended to all religious organizations," *id.* at 620, so that others are allowed to

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15/ Indeed, under Fed. R. Evid. 408, evidence regarding the terms of a compromise is not even properly admissible in evidence. *See, e.g., United States v. Contra Costa County Water Dist.*, 678 F.2d 90 (9th Cir. 1982).

"claim the improper deduction, too." *Id.* at 622 (Silverman, J., concurring). Rather, as Judge Silverman explained, the proper remedy would be a lawsuit to stop that action. *Id.*

In any event, even if discovery had been allowed and taxpayers' allegations regarding the closing agreement's contents proved correct, there is no indication whatsoever that taxpayers could possibly show that they are similarly situated to the Scientologists affected by the closing agreement, and thus no disparate treatment prohibited by the First Amendment occurred. The deductions allegedly allowed for the Church of Scientology were for "auditing" and "training," activities pertaining to spiritual guidance of adults. Thus, as the courts in two cases relied upon by taxpayer, *Foley*, 844 F.2d at 95, and *Staples*, 821 F.2d at 1325, both recognized, payments for "auditing" and "training" are for a type of religious benefit quite distinct from the education of school children that is at issue here. Taxpayers have not alleged that any school children are educated by the Churches of Scientology, let alone that deduction of tuition payments for such education is allowed by the IRS. Taxpayers also have not alleged, and indeed could not

correctly allege, that the IRS allows the deduction of tuition payments made to religious schools on behalf of any of the approximately 4 million school children in the United States who attend such schools. Indeed, as the Court in *Hernandez* (490 U.S. at 693), the dissent in *Hernandez* (490 U.S. at 705), the legislative history behind I.R.C. § 170(f)(8) (Conf. Rep. at 566 n.34), and this Court in *DeJong* recognized (309 F.2d 373), the IRS has consistently denied such deductions. Thus, taxpayers are being treated precisely the same as any other parents who choose to send their children to religious private schools. Irrespective of what religion is involved, no deduction is allowed for the tuition paid to enable a child to go to a religious day school.

Accordingly, the IRS's agreement with the Church of Scientology is not relevant here, and the Tax Court correctly issued a protective order precluding discovery regarding the details of that agreement.16/

16/ We submit also that the Government properly resisted discovery with regard to the negotiating and drafting of the closing agreement in light of the restrictions of I.R.C. § 6103. Although in *Sklar I*, this Court stated that it did not necessarily agree with the Government that I.R.C. § 6103 altogether precluded disclosure of the closing agreement or parts thereof, we submit that the broader sweep of discovery here (which extended to drafts and records of negotiations, which constitute return information) would raise a broader scope of Section 6103 issues. Moreover, I.R.C. § 6103(h)(4) makes it clear that return information of a third party may be disclosed in a judicial proceeding only when the treatment of an item on reflected on the third party's return is directly related to the resolution of an issue in the proceeding or when the information directly relates to a transactional relationship with a party to the suit. Here, treatment of payments to the Church of Scientology by parishioners for auditing or training does not directly relate to the resolution of the issue in the instant case, nor is there a transactional relationship between taxpayers and the church. In this regard, the legislative history of I.R.C. § 6103(h)(4) plainly provides that the disclosure of similarly situated, but unrelated, taxpayers' tax information is not authorized by the "item" or "transactional relationship" tests of Sections 6103(h)(4)(B) and (C). The disclosure of third party tax information, where the third parties are not involved in a relationship or transaction with the taxpayer whose liability is at issue in the proceeding, but are merely similarly situated, is not permitted under Sections 6013(h)(4)(B) or (C). *See* S. Rep. No. 94-938, Part I, at 325-26 (1976), *reprinted in* 1976 U.S.C.C.A.N. 3438, 3755; *see also Vons Companies, Inc. v. United States*, 51 Fed. Cl. 1, 17 (2001). Here, as discussed above and as this Court remarked in *Sklar I*, the

(continued...)

CONCLUSION

For the foregoing reasons, the decision of the Tax Court should be affirmed.

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16/ (...continued)
taxpayers are not even similarly situated.

STATEMENT OF RELATED CASES

Pursuant to Rule 28-2.6 of this Court, counsel for the appellant state that they are not aware of any cases pending before this Court that are related to the instant case.

STATUTORY ADDENDUM

INTERNAL REVENUE CODE (26 U.S.C.):

Section 170. Charitable, etc., contributions and gifts

(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.

(2) Corporations on accrual basis.--In the case of a corporation reporting its taxable income on the accrual basis, if--

(A) the board of directors authorizes a charitable contribution during any taxable year, and

(B) payment of such contribution is made after the close of such taxable year and on or before the 15th day of the third month following the close of such taxable year,

then the taxpayer may elect to treat such contribution as paid during such taxable year. The election may be made only at the time of the filing of the return for such taxable year, and shall be signified in such manner as the Secretary shall by regulations prescribe.

(3) Future interests in tangible personal property.--For purposes of this section, payment of a charitable contribution which consists of a future interest in tangible personal property shall be treated as made only when all intervening interests in, and rights to the actual possession or enjoyment of, the property have expired or are held by persons other

than the taxpayer or those standing in a relationship to the taxpayer described in section 267(b) or 707(b). For purposes of the preceding sentence, a fixture which is intended to be severed from the real property shall be treated as tangible personal property.

(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, or 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 (E), or

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

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.

* * *

(c) Charitable contribution defined.--For purposes of this section, the term "charitable contribution" means a contribution or gift to or for the use of--

(1) A State, a possession of the United States, or any political subdivision of any of the foregoing, or the United States or the District of Columbia, but only if the contribution or gift is made for exclusively public purposes.

(2) A corporation, trust, or community chest, fund, or foundation--

(A) created or organized in the United States or in any possession thereof, or under the law of the United States, any State, the District of Columbia, or any possession of the United States;

(B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals;

(C) no part of the net earnings of which inures to the benefit of any private shareholder or individual; and

(D) which is not disqualified for tax exemption under section 501(c)(3) by reason of attempting to influence legislation, and which does not participate in, or intervene in (including the

publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

A contribution or gift by a corporation to a trust, chest, fund, or foundation shall be deductible by reason of this paragraph only if it is to be used within the United States or any of its possessions exclusively for purposes specified in subparagraph (B). Rules similar to the rules of section 501(j) shall apply for purposes of this paragraph.

(3) A post or organization of war veterans, or an auxiliary unit or society of, or trust or foundation for, any such post or organization--

(A) organized in the United States or any of its possessions, and

(B) no part of the net earnings of which inures to the benefit of any private shareholder or individual.

(4) In the case of a contribution or gift by an individual, a domestic fraternal society, order, or association, operating under the lodge system, but only if such contribution or gift is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals.

(5) A cemetery company owned and operated exclusively for the benefit of its members, or any corporation chartered solely for burial purposes as a cemetery corporation and not permitted by its charter to engage in any business not necessarily incident to that purpose, if such company or corporation is not operated for profit and no part of the net earnings of such company or corporation inures to the benefit of any private shareholder or individual.

For purposes of this section, the term "charitable contribution" also means an amount treated under subsection (g) as paid for the use of an organization described in paragraph (2), (3), or (4).

* * *

(f) Disallowance of deduction in certain cases and special rules--

* * *

(8) Substantiation requirement for certain contributions.--

(A) General rule.--No deduction shall be allowed under subsection (a) for any contribution of $250 or more unless the taxpayer substantiates the contribution by a contemporaneous written acknowledgment of the contribution by the donee organization that meets the requirements of subparagraph (B).

(B) Content of acknowledgement.--An acknowledgement meets the requirements of this subparagraph if it includes the following information:

(i) The amount of cash and a description (but not value) of any property other than cash contributed.

(ii) Whether the donee organization provided any goods or services in consideration, in whole or in part, for any property described in clause (i).

(iii) A description and good faith estimate of the value of any goods or services referred to in clause (ii) or, if such goods or services consist solely of intangible religious benefits, a statement to that effect.

For purposes of this subparagraph, the term "intangible religious benefit" means any intangible religious benefit which is provided by an organization organized exclusively for religious purposes

and which generally is not sold in a commercial transaction outside the donative context.

(C) Contemporaneous.--For purposes of subparagraph (A), an acknowledgment shall be considered to be contemporaneous if the taxpayer obtains the acknowledgment on or before the earlier of--

(i) the date on which the taxpayer files a return for the taxable year in which the contribution was made, or

(ii) the due date (including extensions) for filing such return.

(D) Substantiation not required for contributions reported by the donee organization.--Subparagraph (A) shall not apply to a contribution if the donee organization files a return, on such form and in accordance with such regulations as the Secretary may prescribe, which includes the information described in subparagraph (B) with respect to the contribution.

(E) Regulations.--The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of this paragraph, including regulations that may provide that some or all of the requirements of this paragraph do not apply in appropriate cases.

* * *

Section 6115. Disclosure related to quid pro quo contributions

(a) Disclosure requirement.--If an organization described in section 170(c) (other than paragraph (1) thereof) receives a quid pro quo contribution in excess of $75, the organization shall, in connection with the solicitation or receipt of the contribution, provide a written statement which--

(1) informs the donor that the amount of the contribution that is deductible for Federal income tax purposes is limited to the excess of the amount of any money and the value of any property other than money contributed by the donor over the value of the goods or services provided by the organization, and

(2) provides the donor with a good faith estimate of the value of such goods or services.

(b) Quid pro quo contribution.--For purposes of this section, the term "quid pro quo contribution" means a payment made partly as a contribution and partly in consideration for goods or services provided to the payor by the donee organization. A quid pro quo contribution does not include any payment made to an organization, organized exclusively for religious purposes, in return for which the taxpayer receives solely an intangible religious benefit that generally is not sold in a commercial transaction outside the donative context.

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(s) _____
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Dated: November 17, 2006

CERTIFICATE OF SERVICE

It is hereby certified that the foregoing brief has been sent to the Clerk by First Class Mail on this 17th day of November, 2006. It is further certified that the foregoing brief has been served on counsel for the appellants, by sending two copies thereof by First Class Mail on this 17th day of November, 2006, in an envelope properly addressed as follows:

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