AGUDATH ISRAEL OF AMERICA
LEGAL SUPPORT SERVICES
42 Broadway, New York, NY 10004 • (212) 797-9000 • Fax (646) 254-1650

No. 00-7073

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MICHAEL SKLAR and

MARLA SKLAR

Appellants

v.

COMMISSIONER OF INTERNAL REVENUE

Appellee

On Appeal from the United States Tax Court

BRIEF AMICUS CURIAE OF AGUDATH ISRAEL OF AMERICA IN SUPPORT OF THE APPELLANTS

JAY A. FRIEDMAN
10 Hanover Square
New York, NY 10005
(212) 357-9050

DAVID ZWIEBEL
MORDECHAI BISER
AGUDATH ISRAEL OF AMERICA
84 William Street
New York, NY 10038
(212) 797-9000

Attorneys for the Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

REGULATIONS

PRELIMINARY STATEMENT, INCLUDING INTEREST OF THE AMICUS CURIAE

Agudath Israel of America, founded in 1922, is a national grassroots Orthodox Jewish organization. Among its other functions and activities, Agudath Israel articulates and advances the position of the Orthodox Jewish community on a broad range of legal issues affecting religious rights and liberties in the United States. One of Agudath Israel's roles in this connection is to serve as an advocate for Jewish schools and Jewish education, which Orthodox Jews see as both a personal religious obligation and a critical factor – perhaps the critical factor – in ensuring Jewish religious continuity.

The overwhelming majority of Agudath Israel's constituents, like the appellants in this case, choose to send their children to Orthodox Jewish elementary and/or secondary schools that come under the umbrella of Torah Umesorah – The National Society for Hebrew Day Schools. A recent survey (M. Schick, *A Census of Jewish Day Schools in the United States*, January 2000) reported 670 Jewish day schools in the country (the vast majority of which are Torah Umesorah Orthodox schools) servicing some 184,000 students. Agudath Israel and its constituency thus have a direct stake in the outcome of this case,

which turns on the issue of whether tuition payments designated for religious instruction programs in Orthodox Jewish schools like Yeshiva Rav Isacsohn Torath Emeth Academy and Emek Hebrew Academy are tax-deductible as charitable contributions.

Central to this case is an understanding of the structure and purpose of the Orthodox Jewish day school. Jewish elementary and secondary schools in the United States provide a dual program of instruction. Each school is, in effect, two schools in one: a religious studies school, typically with its own principal and staffed by rabbis and scholars of Jewish learning, whose function is to educate students in the traditions of the Jewish faith; and a separate secular studies school, typically with *its* own principal and staffed by Jewish and non-Jewish teachers alike, whose purpose is to provide a secular education substantially equivalent to that provided in public and non-denominational private schools, in accordance with the requirements of state law – though from the perspective of the Jewish religious mission that defines the school's essence. Both of the day schools involved in the instant case follow this model, teaching religious studies in the mornings and secular studies in the afternoons. See *Sklar v. Commissioner*, 79 T.C.M. 1815 (April 5, 2000), Excerpts of Record (hereinafter "EOR"), Exhibit 9-J; Exhibit 21-J.

It is essential to note that the religious education programs provided by Yeshiva Rav Isacsohn and Emek do not satisfy any of the applicable educational requirements imposed on students or schools under California law. California Basic Education Code §48222 requires that private schools "offer instruction in the several branches of study required to be taught in the public schools" – including English, mathematics, social sciences, science, art, health, and physical education. Not a single one of these subjects is covered during the religious studies component of the school day at schools like Yeshiva Rav Isacsohn and Emek. Instead, they are taught exclusively during the secular studies part of the school day.

Religious studies in these types of Orthodox Jewish schools are purely and precisely that: religious studies. They lead to no formal or informal degree; they have no standing or stature in the eyes of secular law; their teachers are not governed by standards applicable to teachers of state-required secular subjects; their students emerge from eight or twelve years of learning with nothing tangible to show for their efforts other than a strong grounding in their religious heritage and faith. EOR at 58. The issue before this Court is whether tuition payments that are clearly earmarked for this solely religious instruction are tax deductible.

SUMMARY OF ARGUMENT

In holding for the respondent that the Internal Revenue Code does not support the deductibility of tuition payments attributable to the religious studies programs at Yeshiva Rav Isacsohn and Emek, the lower court principally relied on *Hernandez v. Commissioner*, 490 U.S. 680 (1989). In *Hernandez,* the Supreme Court held that payments made to the Church of Scientology in exchange for individualized programs of spiritual mentoring and religious instruction (referred to as "auditing" and "training" sessions) were not deductible as charitable contributions because the donor received goods or services in return for the payments, in the form of religious training.

The court below further rejected petitioners' argument that the First Amendment's Establishment Clause requires the IRS to treat the tuition payments for their children's religious studies no differently than it has been treating payments within the Church of Scientology for auditing and training sessions – which, pursuant to a post-*Hernandez* agreement between the IRS and the Church of Scientology that petitioners sought to introduce in the record below, the IRS now deems deductible. In so doing, the court baldly asserted, with little or no

explanation, that the record does not establish any basis for comparing petitioners' religious studies tuition payments with Scientologists' auditing and training payments. Accordingly, reasoned the court, petitioners' evidence about the Internal Revenue Service's current treatment of the Church of Scientology had no bearing on this case and was thus inadmissible.

This brief responds to both of these points. First, we contend that the lower court's reliance on *Hernandez* is misplaced in view of federal legislation enacted subsequent to *Hernandez* which codified the concept that an "intangible religious benefit" received by a charitable donor has no value for purposes of determining whether and to what extent he has received a "quid pro quo" for his donation. It is clear, we submit, that these more recent "intangible religious benefit" rules would have provided a clear basis for sustaining the deductions claimed by the taxpayer in *Hernandez,* and that the Supreme Court would allow the deductions in question were a similar case to arise today – both with respect to the facts in *Hernandez* and with respect to the facts in the instant case. Indeed, it seems apparent from the evidence the court below refused to allow into the record that the IRS itself has reached the very same conclusion – else it could not have entered into an agreement with the Church of Scientology to allow

the deductibility of the very auditing payments the *Hernandez* Court had ruled non-deductible.

The second argument for overturning the lower court's decision is that the religious studies tuition payments at issue in this case are for all relevant tax code purposes identical to auditing and training payments within the Church of Scientology. Thus, if the IRS has indeed entered into an agreement with the Church of Scientology to allow adherents of Scientology to deduct payments for religious training, as petitioners' proferred but rejected evidence would have shown, it must similarly allow petitioners a deduction for their similar payments. The Establishment Clause, as well as the more general doctrine of administrative consistency, demand that a governmental agency apply the law in a religiously neutral manner, and refrain from extending preferential treatment to one religion over another in the application or enforcement of the law.

ARGUMENT

I.

UNDER CURRENT STATUTORY LAW REGARDING CHARITABLE DEDUCTIONS, THE EXPENSES INCURRED BY APPELLANT ARE DEDUCTIBLE CHARITABLE CONTRIBUTIONS

A. Under Legislation Enacted Subsequent to *Hernandez*, the Receipt of an "Intangible Religious Benefit" Does Not Constitute a *Quid Pro Quo* as a Matter of Law.

1. Background: The *Quid Pro Quo* Concept

Section 170 of the Internal Revenue Code of 1986 allows as a deduction any charitable "contribution or gift" to a qualified charitable organization. It has always been necessary in this regard to distinguish between "unrequited payments to qualified recipients and payments made to such recipients in return for goods and services." *Hernandez*, 490 U.S. at 690. Thus, when a taxpayer makes a charitable contribution that is partly in consideration for goods and services furnished by the recipient, a charitable contribution deduction is allowed in an amount not to exceed the excess of (a) the amount of any cash paid and the fair market value of any property transferred by the taxpayer to the organization, over (b) the fair market value of the goods and services the organization provides in return. 26 C.F.R. §1.170A-1(h)(2). See also *United States v. American Bar Endowment,* 477 U.S. 105 (1986); Rev. Rul. 67-246, 1967-2 C.B. 104, 105-106 (payments intended to be in part a gift and in part the purchase price of an admission to an event are partly deductible; charity must specify in advance the amount properly attributable to the purchase of admissions or other privileges and the amount solicited as a gift).

2. The *Hernandez* Decision

The Court in *Hernandez* considered whether payments to the Church of Scientology for auditing and training sessions are deductible by the payor. The Court noted that the term "charitable contribution" in 26 U.S.C. §170 is synonymous with the word "gift", which case law has defined as "a voluntary transfer of property by the owner to another without consideration therefor." *Hernandez* at 680, quoting *DeJong v. Commissioner*, 36 T.C. 896, 899 (1961), *aff'd*., 309 F. 2d 373 (9th Cir. 1962). In *Hernandez*, the payments to the Church were "part of a quintessential *quid pro quo* exchange: in return for their money, petitioners received an identifiable benefit, namely, auditing and training sessions." *Id.,* at 691. The Court found that the fair market value of these sessions reasonably approximated the amounts charged by the Church for such sessions. Therefore, the net charitable contribution to which the taxpayer was entitled was zero.

The Court then addressed the taxpayer's main argument: that a *quid pro quo* analysis is inappropriate under §170 when the benefit a taxpayer receives is purely religious in nature. Taxpayer argued that "the IRS' ordinary inquiry into whether the taxpayer received consideration for his payment should not apply to

the return of a commensurate *religious* benefit, as opposed to an *economic* or *financial* benefit". *Id.,* at 687 (emphasis in original), citing *Hernandez v. Commissioner*, 819 F.2d 1212, 1217 (1st Cir. 1987). The Court declined to accept this argument for three reasons.

First, the Court sought, but could not find, evidence that "Congress intended to distinguish the religious benefits sought by Hernandez from the medical, educational, scientific, literary or other benefits that could likewise provide the *quid* for the *quo* of a nondeductible payment to a charitable organization." *Id.,* at 692. The Court found that the "[Internal Revenue] Code makes no special preference for payments made in the expectation of gaining religious benefits or access to a religious service." *Id.*

Second, the Court reasoned that allowing a deduction for the payments in question would expand the charitable deduction to include various other forms of payments that could be categorized as being made to secure a religious benefit, including, *inter alia*, tuition payments to parochial schools. While such a result was not *per se* offensive to the Court, it was "loath to effect this result in the absence of supportive congressional intent." *Id.,* at 693.

Finally, the Court was concerned that the petitioner's argument would "inexorably force the IRS and the judiciary into differentiating 'religious' services [i.e., benefits] from 'secular' ones, leading to the type of excessive entanglement between church and state generally proscribed by the Establishment Clause." *Id. at 694*.

3. The Post-*Hernandez* Codification of the "Intangible Religious Benefit" Concept

In 1993, Congress made certain significant changes to the charitable contribution rules as part of the Omnibus Budget Reconciliation Act of 1993 ("OBRA '93"), P.L. No. 103-66, 107 Stat. 312 (codified as amended in scattered sections of 26 U.S.C.). With respect to charitable contributions of $250 or more, OBRA '93 imposed a set of substantiation requirements (applicable to donors) and a parallel set of disclosure requirements (applicable to donee organizations). Both sets of rules are intended to ensure that charitable contributions made partly in exchange for a *quid pro quo* are deducted in an amount not exceeding the excess of the amount contributed over the fair market value of the *quid pro quo*. Significantly, however, in determining the value of a *quid pro quo*, OBRA '93 makes clear that an "intangible religious benefit" is considered to have no value, as explained below.

Code Section 170(f)(8)(B) (relating to substantiation requirements) requires a donor to obtain from the recipient charity a written acknowledgement of the amount contributed and a statement as to whether the donee organization provided any goods or services in exchange for the donation. The donee organization is required to provide a good faith estimate of the value of any goods or services provided to the donor. However, if the goods or services provided consist solely of "intangible religious benefits", the donee organization is merely required to provide a statement to that effect, but is not required to place any value whatsoever on such good and services. For this purpose, 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. Section 170(f)(8)(B)(iii).

Similarly, Code Section 6115, which requires a donee charity to disclose the value of the goods or services it is providing to a donor who makes a "quid pro quo contribution" in excess of $75, defines "quid pro quo contribution" as:

> 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.* (Emphasis added.)

The legislative history to OBRA provides some detail as to what types of benefits should or should not qualify as intangible religious benefits:

> 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 /34/), then such a religious benefit may be disregarded for purposes of the substantiation requirement.

H.R. Conf. Rep. No. 213, 103d Cong. 1ST Sess. 566 (1993), *reprinted in* 1993 USCCAN 1088, 1255. And in footnote 34, the Conference Report elaborates that:

> This exception does not apply, for example, *to tuition for education leading to a recognized degree* [emphasis added], travel services, or consumer goods. However, it is intended that *de minimis* tangible benefits furnished to contributors that are incidental to a religious ceremony (such as wine) generally may be disregarded.

The inference is inescapable that tuition for religious education purely for the sake of religious education, not leading to any recognized degree, was understood by Congress as precisely the type of intangible religious benefit that OBRA '93 was designed to exclude from the substantiation and disclosure quid pro quo calculus.

4. The Intangible Religious Benefit Doctrine Would Have Dictated a Contrary Conclusion in *Hernandez*.

The codification of the intangible religious benefit concept addresses each of the three concerns that led the Supreme Court to reject the petitioner's argument in *Hernandez*.

First, Code Sections 170(f)(8) and 6115 provide explicit evidence of Congressional intent that a purely religious benefit be treated as having no value for purposes of the charitable contribution rules. (It is true that Sections 170(f)(8) and 6115 relate to substantiation and disclosure requirements, rather than the substantive rules governing the deductibility of charitable contributions. However, we can conceive of no rational basis for interpreting the statutory scheme in a manner treating intangible religious benefits as having value for purposes of determining deductibility, while being treated as having no value for substantiation and disclosure purposes.) The treatment of intangible religious benefits in these two sections satisfies the Court's search for evidence that Congress did not intend that religious benefits be taken into account as a *quid pro quo*.

Second, enactment of the intangible religious benefit doctrine provides the requisite expression of Congressional intent that the Court sought as a precondition to accepting an interpretation of Section 170 that would potentially expand the scope of the charitable donation deduction.

Finally, with respect to the Court's concerns about unconstitutional religious entanglement, the Code currently requires the Service to differentiate "religious" benefits from "secular" ones in order to properly apply the substantiation and disclosure rules. To conclude that tuition paid to obtain a religious education is a deductible expense would not increase whatever entanglement is already implicit in the substantiation and disclosure rules. Indeed, the intangible religious benefit rules actually avoid the entanglement problem by ascribing no value to such benefits for purposes of the charitable contribution rules, thus freeing the Service from having to evaluate religious benefits that are not bought and sold in the commercial marketplace.

Since all of the *Hernandez* Court's concerns about the deductibility of payments to secure religious benefits are addressed under current law, it is clear that the *Hernandez* majority would now rule that payments made solely in exchange for "intangible religious benefits" are fully deductible. Furthermore, payments made in part for a material benefit and in part for an intangible

religious benefit are deductible to the extent that the taxpayer, with the assistance of the donee organization, can reasonably allocate a value to the nondeductible portion of the contribution. *United States v American Bar Endowment*, 477 U.S. 105, 117, citing Rev. Rul. 67-241, 1967-2 C.B. 104; Section 170(f)(8).

5. The IRS Itself Recognized that Congress Had Changed the Law Subsequent to *Hernandez*.

In 1978, when the IRS first addressed the issue, it determined that donations to the Church of Scientology for auditing and training sessions were not to be regarded as charitable contributions under Section 170 of the Code. Rev. Rul. 78-189, 1978-1 C.B. 68. In 1989, the Supreme Court in *Hernandez* made the same determination. Yet on August 23, 1993, in Rev. Rul. 93-73, I.R.B. 1993-34, 7, the IRS declared Rev. Rul. 78-189 "obsolete". One week later, on October 1, 1993 – in evidence the court below refused to allow into the record – the IRS reportedly entered into a closing agreement with the Church of Scientology that payments for auditing and training sessions were now to be regarded as charitable contributions. EOR pages 111-114.

The questions raised by this startling about-face are obvious: Why did the IRS give up the victory it had achieved in *Hernandez*? Even more importantly, *how* could the IRS, an executive branch agency charged with enforcing the nation's tax laws, have allowed a deduction for payments the Supreme Court had held non-deductible?

The only rational explanation is that the IRS must have understood that the tax laws had changed subsequent to *Hernandez*, and the only possible source of such a change was OBRA '93. Clearly, the IRS understood OBRA '93 as authorizing the deductibility of Scientology payments for auditing and training sessions, which is why it rescinded Rev. Rul. 78-189 less than two weeks after OBRA '93 became law. The IRS was absolutely correct, we submit, in this understanding.

B. A Religious Education Constitutes an "Intangible Religious Benefit"

In the instant case, petitioners have reasonably allocated the total payments to Yeshiva Rav Isacsohn and Emek between expenses for the schools' respective secular education programs, which are clearly non-deductible, and the expenses of the schools' religious education programs, based upon written estimates provided by the schools. Respondent has not challenged the

reasonableness of this allocation. Therefore, if the religious education furnished by these schools constitutes an intangible religious benefit within the meaning of the Code, appellants should be entitled under 26 C.F.R. §1.170A-1(b)(2) to deduct the excess of amounts paid to the schools over the fair market value of the secular education provided by the schools.

As noted above, the legislative history to OBRA '93 cites "tuition for education leading to a recognized degree" as an example of a benefit that does not qualify as an intangible religious benefit; by clear inference, tuition for education *not* leading to a recognized degree qualifies as an intangible religious benefit. This legislative history simply reinforces what is obvious from the Code itself: that religious education such as that provided by Orthodox Jewish schools like Yeshiva Rav Isacsohn and Emek fits squarely within the statutory definition of an intangible religious benefit.

That definition includes three components: (1) any intangible religious benefit which (2) is provided by an organization organized exclusively for religious purposes, and (3) which generally is not sold in a commercial transaction outside the donative context. 26 U.S.C. §170(f)8)(B)(iii) and 6115(b). We review these *seriatim*.

1. Intangible Religious Benefit

The Code, with some circularity, defines an intangible religious benefit as "any intangible religious benefit" that meets other criteria. It is important to establish that an Orthodox Jewish religious education is indeed a "religious benefit" unlike other forms of education. In general, the purpose of the religious education provided by an Orthodox Jewish day school or yeshiva is to inculcate in students the religious thought and duties of the Jewish faith. The Torah is studied to accomplish two broad objectives: to fulfill the religious commandment of Torah study, which occupies a central place in Jewish tradition, see Talmud *Shabbat* 127a; and to facilitate the practice of Judaism through increasing the student's knowledge of Jewish law governing such practice. This perspective on religious study is amply supported by expert testimony in the record. See EOR pages 58-61.

Furthermore, Jewish education serves the additional communal religious goal of promoting Jewish continuity. Thus, as Peter Beinart observed in "The Rise of Jewish Schools", in the October 1999 *Atlantic Monthly*:

> …[T]he supplementary [after school or Sunday] schools were supposed to inculcate sufficient Jewish identity to prevent intermarriage. Yet in 1990 the highly publicized National Jewish Population Survey made it abundantly clear that they had not. According to the NJPS, more than half of all Jews married between 1985 and 1990 married gentiles, and subsequent research has shown that graduates of supplementary schools are more than twice as likely as graduates of full-time Jewish schools to marry outside their faith."

Similarly, a major study by the Louis Guttman Israel Institute of Applied Social Research, *Jewish Involvement of the Baby Boom Generation: Interrogating the 1990 National Jewish Population Survey*, concluded in 1993 that "Jewish day schools are the best vehicle for implementing Jewish involvement and are the only type of Jewish education that stands against the very rapidly growing rate of intermarriage" in the United States.

One commentator has distinguished the religious education provided in sectarian schools from the study of religion that takes place in secular institutions as follows:

> For all congregations, educating the next generation and thus preserving the religious heritage is an integral part of the exempt function… Those attending religious school do not learn ABOUT religion; they learn their religion – its history, values, practices, beliefs, rituals, customs and language (emphasis in original).

Aprill, *Letter to Treasury*, available on LEXIS at 95 TNT 77-30 (April 20, 1995). That description is certainly apt to the religious education programs in Orthodox Jewish elementary and secondary schools.

As explained in the Preliminary Statement above, the religious education provided by Yeshiva Rav Isacsohn and Emek does not satisfy any applicable educational requirements imposed on students or schools under California law, and therefore cannot be viewed as "education leading to a recognized degree"

(which would clearly not qualify as an intangible religious benefit). Indeed, it leads to no degree whatsoever, and confers no benefit upon its students other than a purely religious one. See EOR page 58. It is, unmistakably, an "intangible religious benefit."

2. Organization Operated Exclusively for Religious Purposes

In its brief filed with the Tax Court, the Service argued that petitioners should not be entitled to a deduction because Yeshiva Rav Isacsohn and Emek are not organized exclusively for religious purposes, since they provide both a secular and religious education. *Memorandum of Law in Support of Respondent's Motion for Summary Judgment* at page 11, fn. 4. This argument, however, misconceives the essence of the requirement that the donee organization be organized exclusively for religious purposes.

It has long been recognized that, in order to decide whether an organization is operated exclusively for religious purposes, the *activities* in which the group engages must be distinguished from the *purpose* behind those activities. See, e.g., *B.S.W. Group, Inc. v. Commissioner*, 70 T.C. 352, 356-357 ("the purpose towards which an organization's activities are directed, and not the nature of the activities themselves, is ultimately dispositive of the organization's right to be classified as a

Section 501(c)(3) organization"). Activities take on their coloration by reason of the purposes for which they are undertaken.

Both Yeshiva Rav Isacsohn and Emek have been recognized by the Service as organizations exempt from tax under 26 U.S.C. §501(c)(3). Stip. of Facts Nos. 27 and 34 at EOR pages 20-21. As such, the articles of the Schools "may not expressly empower the organization to engage, other than as an insubstantial part of its activities, in activities which themselves are not in furtherance of one or more exempt purposes." Treas. Reg. §1.501(c)(3)-1(b)(1)(i)(*b*).

Part of the *religious* mission of Orthodox Jewish schools like Yeshiva Rav Isacsohn and Emek is to provide a *secular* education *within a religious environment* so that students will absorb their secular studies as one facet of a unified religious lifestyle. As Rabbi Yakov Krause, Principal of Yeshiva Rav Isacsohn, explained to the lower court, full day schools were established because of the "concerns of maintaining religious values in a secular setting"; the founders of these schools and the parents who send their children to them "felt it was important . . . to provide [students] with an all-encompassing setting and to provide them with a secular education as well to allow them to remain within the environment of the synagogue [so] that the values that the families were very concerned about would be maintained and promoted." EOR page 56.

Secular studies in Orthodox Jewish day schools are *not* identical to secular studies in public schools or non-denominational private schools; rather, they are taught in harmony with Jewish religious beliefs. To the extent that science courses focus on the origins of the universe, for example, Orthodox Jewish schools teach this subject from the creationist perspective that underlies the Jewish faith. Or, to take another example, Orthodox Jewish schools typically approach health education relating to sexually transmitted diseases from the Jewish religious perspective that abstinence is the only acceptable approach; "safe sex" as an alternative to pre-marital abstinence is not part of the lesson plan in Orthodox Jewish schools. Indeed, courts in certain contexts have explicitly recognized that secular studies teachers in Jewish religious schools are deemed to be carrying out the religious mission of the school. *E.g.*, *Matter of Klein*, 164 A.D. 2d 9, 563 N.Y.S. 2d 132 (N.Y. App. Div., 1990 *aff'd*, 78 N.Y. 2d 662, 578 N.Y.S. 2d 498 (N.Y. 1991) (English teacher at Orthodox Jewish school denied unemployment insurance benefits under statutory exemption for religious employees because she was regarded as performing duties of a religious nature).

An analogous situation was present in *San Francisco Infant School v. Commissioner*, 69 T.C. 957 (1978). In that case, the Service argued that the Infant School was not operated exclusively for educational purposes, because the school also supplied custodial day care services to its students. The Tax Court rejected

the Service's argument, finding that "the custodial care was a necessary concomitant of the education. Without its custodial services, education could not have been furnished to its students." *Id.* At 964. Similarly, the furnishing of a general secular education informed by the values and teachings of the Jewish faith is an essential component of an Orthodox Jewish school's purpose. See EOR pages 73-74.

Of course, petitioners claim no deduction for tuition payments allocable to the secular education received by their children. But that does not detract from the fact that even secular studies in Yeshiva Rav Isacsohn and Emek are subsumed within the overall religious mission of these schools. The schools are organized exclusively for religious purposes.

3. Generally Not Sold in a Commercial Transaction Outside the Donative Context

A commercial transaction may be distinguished from the purchase of a religious benefit in two respects. First, a commercial transaction is negotiated at arm's length and the goods or services being transferred are sold for their fair market value. Second, the consumer market for goods or services offered in a commercial transaction is not defined by a particular religious group. The distinction drawn by the Conference Committee Report between education leading to a recognized degree and other forms of religious education exemplifies this

distinction. Any student might be interested in a course of study leading to a recognized degree, but only adherents of a particular faith will seek to be indoctrinated in the religious practices and teachings of that faith.

The education provided by Orthodox Jewish schools like Yeshiva Rav Isacsohn and Emek, in contrast, is not an item sold in a commercial transaction. A religious education of this sort is viewed as a vehicle for being indoctrinated in the Orthodox Jewish faith and is not an item that attracts interest outside that community. In addition, as fully developed in Tax Court testimony, tuition at these schools is hardly an "arm's length" transaction; it is determined based upon the ability of a student's family to pay. See EOR page 18. Accordingly, the tuition payments in question are not being made in the course of a normal commercial transaction.

C. Allowing a Deduction for Tuition Paid to Obtain a Religious Education is Consistent with the Legislative Intent Behind the Charitable Deduction

Congress was addressing two principal concerns when it limited Section 170 charitable deductions to "contributions." First, Congress feared charitable organizations offering products and services in competition with those offered by business would gain an unfair competitive advantage. Second, Congress recognized that when a contributor would receive a material *quid pro quo*, the amount of the donation available for the support of the charitable organization

would be reduced by the cost of providing the tangible benefit. See *Haak v. United States*, 451 F. Supp. 1087, 1091 (W.D. Mich. 1978). Neither of these concerns is implicated when a contributor seeks only to participate in religious practice, regardless of whether payments are voluntary or mandatory, or of a set amount or discretionary. See *Staples v. Commissioner,* 821 F. 2d 1324, 1327 (8th Cir. 1987). As to the first concern, commercial businesses do not sell religious benefits. As to the second concern, the cost to a church or synagogue of providing religious benefits does not *detract* from the organization's mission; rather, the provision of such benefits *is* the organization's mission.

Allowing petitioners to deduct tuition payments for their children's Jewish education is thus consistent with the legislative language, the legislative history and the legislative intent of the Internal Revenue Code. The decision below should be reversed.

II.

THE COURT BELOW ERRED IN NOT ALLOWING INTO THE RECORD EVIDENCE OF THE IRS'S POST-*HERNANDEZ* AGREEMENT PERMITTING SCIENTOLOGISTS TO DEDUCT THE COST OF AUDITING AND TRAINING SESSIONS

"A principle at the heart of the Establishment Clause," said the Supreme Court in *Board of Education of Kiryas Joel School District* v. *Grumet*, 512 U.S. 687, 703 (1994), is "that government should not prefer one religion to another." Petitioners sought to introduce evidence in the court below that the IRS had entered into an agreement with the Church of Scientology to allow a charitable contribution deduction for the cost of auditing and training sessions. Petitioners contended that allowing the Scientologists that deduction while at the same time disallowing a deduction for the cost of the religious education program at Yeshiva Rav Isacsohn and Emek represents an unconstitutional preference of one religion over another.

The court below rejected this argument, and refused to admit evidence of the IRS's policy vis-à-vis the Scientology deductions. The court – for reasons that frankly escape us – began its brief treatment of petitioners' argument by citing Justice O'Connor's dissent in *Hernandez*, 490 U.S. at 705, that "the denial of a

deduction in these [Scientology] cases bears no resemblance to the denial of a deduction for a religious-school tuition up to the market value of the secularly useful education received." (In fact, as should be apparent, Justice O'Connor's formulation is precisely supportive of petitioners' contention that a deduction should be allowed for that portion of their children's religious school tuition that exceeds "the market value of the secularly useful education received" – i.e., the tuition attributable to the schools' religious studies programs.) The court below then reasoned as follows:

> There is nothing in the record to show that petitioners' situation is analogous to that of the members of the Church of Scientology. The Church of Scientology and the schools involved in this case are not identical in their organization, structure or purpose. Auditing, as defined in *Hernandez* v. *Commissioner*, supra, is not the same as a general education, which may include some percentage for religious education. Thus we perceive no denominational preference to require any inquiry into a purported violation of the Establishment Clause. As stated earlier, deductions have been generally disallowed for payments made in exchange for educational benefits, regardless of faith. [Citations omitted.] The taxpayers in those cases were similarly situated with petitioners, and petitioners have not established that they are similarly situated with the members of the Church of Scientology who make payments for auditing. Petitioners' reliance on Hernandez and the concept of consistent interpretation and enforcement is rejected.

This is back-of-the-hand *ipse dixit*, not reasoned constitutional analysis; and it is wrong.

Of course the Church of Scientology and the Orthodox Jewish schools are dissimilar in their organization and structure. But charitable deduction tax policy does not turn on a charitable entity's organization or structure; so long as the entity meets the criteria of 26 U.S.C. § 501(c) (3), as Yeshiva Rav Isacsohn and Emek both do, its organization and structure are entirely irrelevant. What *is* relevant is the nature of the service being provided in exchange for the contribution. And on that score, the religious services provided by the Church through its auditing and training sessions and the religious services provided by the schools through their Jewish studies programs are in fact identical in every material respect. The fact that one is directed at adults and the other at children, or that one takes place in a church setting and the other in a school setting, or that one is accomplished through "one-on-one" sessions and the other through group lessons, or that one makes use of an electronic device to "identify…areas of spiritual difficulty by measuring skin responses during a question and answer session" (*Hernandez*, 490 U.S. at 685) and the other resorts to more traditional pedagogic devices – all of these are distinctions without tax policy differences.

The bottom line is that the "preclear" who pays a "fixed donation" to the Church of Scientology for "auditing" and "training" sessions seeks no benefit other than to grow in spirituality and study the tenets of Scientology (see *Hernandez*, 490 U.S. at 684-85); and that the parents who pay tuition to enroll their child in an Orthodox Jewish school – and specifically allocate a portion of that tuition for the religious education component of the school – seek no benefit other than that their child grow in spirituality and study the tenets of Judaism. No matter how dissimilar the two forms of religious service may be, there is no basis in tax law to treat them differently – and thus no *right* under constitutional law to treat them differently.

The Supreme Court foresaw this very point in *Hernandez*. "Petitioners' deductibility proposal," said the Court,

> would expand the charitable contribution deduction far beyond what Congress has provided. Numerous forms of payments to eligible donees plausibly could be categorized as providing a religious benefit or as securing access to a religious service. 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 contribution under §170. [490 U.S. at 693.]

Indeed, the IRS itself, addressing the deductibility of Jewish school tuition payments in a Field Service Memorandum dated April 27, 1999, took the position that "[t]here seems to be no relevant distinction between [Scientology] training and the intensive study of Jewish writing and tenets" in Jewish schools; "we can find no relevant distinction between the auditing and training sessions at issue in *Hernandez* and the transactions at issue here." IRS F.S.A. at 4,5; see EOR at 41,42. Putting aside the breathtaking Alice-in-Wonderland-like quality of the IRS issuing a 1999 memo denying the deductibility of Jewish school tuition payments because of the analytic identity of such payments and Scientology auditing and training payments, when the IRS's policy since 1993 has been to *allow* the deductibility of the Scientology payments – Through the Looking Glass, indeed! – the bottom line is clear that the two types of payments are for all relevant tax policy purposes identical, and thus must be treated identically.

This case is four-square with *Powell* v. *U.S*, 945 F.2d 374 (11th Cir. 1991).. Petitioner, a Scientologist, challenged the IRS' rejection of his claimed deduction for auditing and training payments, on the ground that such payments were analytically identical to certain payments for religious services in other religious faiths that the IRS did deem deductible. The lower court granted the IRS's motion to dismiss for failure to state a claim upon which relief could be granted. The Eleventh Circuit reversed, holding that "[t]he IRS is not allowed to treat two

similarly situated taxpayers differently" and that "Powell's claim for administrative inconsistency is a valid claim upon which relief can be granted, especially since the claim is a result of Powell's religious affiliation." 945 F.2d at 378. The same is true here.

By entering into a post-*Hernandez* agreement with the Church of Scientology to accept the deductibility of the costs of auditing and training sessions – justified, presumably, under the OBRA '93 intangible religious benefit doctrine – the IRS unavoidably called into question the constitutional validity of treating those payments differently than the analytically identical religious school tuition payments involved in a case like this. The court below erred in not allowing evidence of that post-*Hernandez* agreement into the record.

The September 4 edition of *Forbes* carried a story on the *Sklar* case, entitled "Mysterious Ways". "What makes tuition paid for classes in one religion more deductible than tuition for classes in another?", queried the article's subhead. "Is your family's religious education deductible? It depends on your religion.", asserted the article's teaser. This appeal affords this Court the opportunity to assert, firmly and clearly, that the First Amendment to the United States Constitution takes exception to that response.

CONCLUSION

We conclude by emphasizing the limited scope of our argument. Yeshiva Rav Isacsohn and Emek, like other Orthodox Jewish schools – though not necessarily like other parochial schools – have entirely separable religious and secular studies programs. The total cost of tuition at these schools is readily allocable between the morning religious studies program and the afternoon secular studies program. That portion of the schools' tuition cost that relates to the religious education program fits comfortably within the statutory definition of an "intangible religious benefit"; and is for all relevant tax policy purposes identical to the cost of the auditing and training programs sponsored by the Church of Scientology, which are now deemed deductible by the IRS.

Whether the same analysis would apply in the context of other types of parochial school tuition, in schools where the religious studies program may not be clearly separable from the secular studies program and tuition not so easily allocable between the two, is not before the Court at this time. As the Supreme Court held in *Hernandez,* it is impossible to evaluate deductibility claims or Establishment Clause contentions without a full factual record. 490 U.S. at 700-

02. What is before the Court now, though, is a clear record of the educational programs offered by Yeshiva Rav Isacsohn and Emek; and what *should* be before the Court is evidence that would establish a clear record of the IRS's disparate treatment of the analytically identical religious studies tuition payments at issue here and the religious service payments now deemed deductible in the context of the Church of Scientology.

For the reasons stated above, *amicus curiae* Agudath Israel of America submits that the Tax Court decision should be reversed on the ground that the payments at issue here are clearly tax deductible under the OBRA '93 amendments to the Internal Revenue Code; or, in the alternative, that the case be remanded to the court below for a clarification of the Internal Revenue Service's current policy with regard to payments by members of the Church of Scientology for auditing and training sessions, so as to determine whether the Service's denial of the deductions claimed herein is consistent with the demands of the Establishment Clause and the doctrine of administrative consistency.

Dated: New York, New York

October 13, 2000

Respectfully submitted,

JAY A. FRIEDMAN
10 Hanover Square
New York, NY 10005
(212) 357-9050

DAVID ZWIEBEL
MORDECHAI BISER
AGUDATH ISRAEL OF AMERICA
84 William Street
New York, NY 10038
(212) 797-9000

Attorneys for the Amicus Curiae

CERTIFICATE OF COMPLIANCE

David Zwiebel states as follows:

1. I am an attorney employed by Agudath Israel of America, and one of the counsel on the Agudath Israel of America's *amicus curiae* brief submitted herewith.

2. The amicus brief to which this certificate is attached is in compliance with the type volume limitation of Fed. R. App. P. 32(a)(7)(B). According to the word count of the word-processing system used to prepare the brief, the brief contains 6,867 words, excluding the Table of Contents and Table of Authorities.

Executed this 13th day of October, 2000, at New York, New York.

_____

David Zwiebel