Full Text: Petitioner's Brief On The Merits In Garrison.

JAN. 19, 1993

Christopher L. Garrison, et ux., et al. v. Commissioner

====== CASE NAME ======

CHRISTOPHER L. AND ELLEN L. GARRISON ET AL.

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

====== SUMMARY ======

The full text is available of the petitioner's brief on the merits in Garrison. In Garrison, the Tax Court will address whether the Service's policy of disallowing deductions for certain contributions to the Church of Scientology violates Equal Protection and the First Amendment's Establishment Clause.

====== FULL TEXT ======

Docket Nos. 11707-89, 11708-89, 17184-89, 21331-89

7201-91 and 28715-91

BRIEF FOR PETITIONERS

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Dated: January 19, 1993

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QUESTIONS PRESENTED

These consolidated cases raise the following issues left open by the United States Supreme Court's 1989 decision in Hernandez v. Commissioner, 490 U.S. 680.

1. ADMINISTRATIVE INCONSISTENCY

a. Whether petitioners have established that the Service has administered section 170 inconsistently by systematically disallowing deductions for contributions by Scientologists, including petitioners, for participation in religious services, while systematically allowing deductions for payments that are indistinguishable in any material way made by members of other religions.

b. Whether the Service's systematically unequal administration of section 170 on the basis of religion creates an "independent ground of decision" entitling petitioners to protection from the collection of taxes on their payments, irrespective of whether the legal position that respondent has applied to them alone is correct.

c. Whether petitioners' payments are deductible under section 170 because, upon the fuller record developed in this case, they are not quid pro quo under the analysis required by Hernandez v. Commissioner, 490 U.S. 680 (1989), and by longstanding law holding that personal benefits from payments for access to religious services are deemed incidental to public benefits derived from religious observances.

2. DUAL PAYMENT

Alternatively, whether petitioners are entitled to deduct the portion of their contributions to churches of Scientology in connection with their participation in religious services under the "dual payment doctrine."

a. Whether, under the dual payment doctrine, the measure of the nondeductible return benefit of participation in the religious services of a church is the value of those services based on comparable prices charged by other churches or by the donee-church's own prices, or the cost to the donee-church of providing those services;

b. If cost is the relevant measure, whether only the church's direct costs are considered or whether its indirect costs must be taken into account as well;

c. If indirect costs must be taken into account, what is a reasonable method of allocating Church of Scientology indirect costs to the ministry of religious services;

d. What are the direct costs (and, if includible, the indirect costs), incurred by the donee churches of Scientology in ministering the religious services of auditing and training to their parishioners; and

e. Whether petitioners intended the excess of their payments over the costs of ministering religious services as gifts to their churches.

PETITIONERS' RESPONSES TO

RESPONDENT'S REQUESTS FOR FINDINGS OF FACT

1. No objection.

2. No objection.

3. No objection.

4. No objection.

5. No objection.

6. Objection. Only three of the donees involved here -- the Church of Scientology of Los Angeles, the Church of Scientology of Orlando and the Church of Scientology Celebrity Centre International -- are not specifically recognized as charitable donees under section 170(c)(2), and it is only with respect to these three donees that respondent's stipulation of charitable donee status is restricted "[s]olely for purposes of this litigation." (Stip. paragraph 91). The remaining donees involved here are now and were at all times relevant to this litigation specifically recognized by respondent as qualified section 170(c)(2) donees, and have been so recognized since at least 1980. (Stip. paragraphs 87, 90). The charitable donee status of these churches is not a concession by respondent "[s]olely for purposes of this litigation" but is a determination binding on the IRS both in this litigation and with respect to other taxpayers. section 1.509(a)-7(a), Income Tax Regs.; Statement of Procedural Rules (26 C.F.R.) section 601.201(n)(3)(iii).

7. Objection -- accurate but incomplete and misleading. The requested finding is based on a statement in expert Michael Rinder's report and omits the fact that Scientology is a religion. (Ex. 79, p. 1, paragraph 8). Respondent has stipulated that Scientology is a religion. (Stip. paragraph 55).

8. Objection -- accurate but misleading. The requested finding is based on a statement in expert Michael Rinder's report and omits the fact that Scientology is a religion. (Ex. 79, p. 2, paragraph 10). Respondent has stipulated that Scientology is a religion. (Stip. paragraph 55).

9. No objection.

10. No objection. Petitioners note the requested finding is based on a statement in expert Michael Rinder's report which is more complete. (Ex. 79, p. 2, paragraph 13).

11. No objection.

12. Objection -- incomplete and misleading. The requested finding is based on but distorts a statement in the expert report of Michael Rinder, which begins, "A central religious practice of the Scientology religion is 'auditing,'. . . ." (Ex. 79, p. 3, paragraph 18). Respondent has stipulated that auditing is a religious practice (Stip. paragraph 56), and the religious nature of auditing should be included in the finding.

13. Objection -- incomplete and misleading. The requested finding is based on a statement in the expert report of Michael Rinder, but omits the references in the statement to the fact that auditing levels mirror Scientology Scripture, which is studied in conjunction with participation in auditing. (Ex. 79, p. 4, paragraph 23). The requested finding also substitutes the word "doctrine" for "Scripture." The requested finding attempts to separate auditing from its Scriptural basis, and the language of the report should be included.

14. Objection. The requested finding is based on a statement in the expert report of Michael Rinder, but distorts it. (Ex. 79, p. 5, paragraph 29). Training is not just "[a]nother practice of Scientology," but "[t]he other central practice of the Scientology faith. . . ." Respondent has stipulated that Scientology training is a religious practice. (Stip. paragraph 57). The requested finding improperly seeks to ignore the religious nature of training.

15. Objection. There are a number of ways in which individuals can participate in auditing and training without payment. These methods are detailed in the expert report and testimony of Michael Rinder (Ex. 79, pp. 7,10, paragraphs 42, 60-66; Tr. 74-75, 78, 83-84, 94-96, l0s, 10708), and the testimony of petitioners Garrison (Tr. 120-22), Teagarden (Tr. 135, 137-38), and McKenna. (Tr. 150, 155). (See Petitioners' Proposed Findings of Fact ("PPF") 341-347).

Some of the ways a person can participate in auditing and training without payment are referred to in the exhibits cited by respondent in the requested finding. One refers to the free services available to staff members. (Jt. Ex. 16-P). Another refers to co- auditing, in which individuals training as auditors audit each other. (Jt. Ex. 18-R, pp. 2, 9 and 12). Mr. Rinder testified that Joint Exhibit 19-5 relates to the criteria used for setting contribution rates. (Tr. 89-90). Mr. Rinder also specifically testified that Joint Exhibit 16-P was written for a specific purpose at a specific time and that, when read in context with all Scientology policy, it does not prohibit churches of Scientology from providing auditing without monetary contribution. (Tr. 86-88). As discussed above, both his report and testimony set out many of the methods services can be obtained without making a monetary contribution.

16. Objection. The requested finding distorts statements in the expert report of Michael Rinder regarding the system of fixed contributions. (Ex. 79, pp. 6-7, paragraphs 39-43). The Church of Scientology International establishes "contribution rates" not "charges," which are designed to promote specified religious objectives. (Ex. 79, p. 7, paragraph 41).

17. Objection. The evidence does not state that those who use the resources of the Church must pay their fair share. Mr. Rinder's report and testimony state that churches of Scientology look to those who are actively using the Church's resources for their major support. (Ex. 79, p. 6, paragraph 39; Tr. 81, 97-98, 106). There is also evidence that a person may participate in services without making a monetary contribution or through other forms of exchange than money. (See response to requested finding No. 15, supra).

As to the concepts and doctrines that relate to exchange, this requested finding both is incomplete and distorts Mr. Rinder's expert report, which states that the fixed contribution system is consistent with the "principles of existence concerning exchange." (Ex. 79, p. 7, paragraph 44). The requested finding's change is significant because the concept of exchange in Scientology is integrally related to the fundamental Scientology principles of existence, the Eight Dynamics. (See Ex. 79, p. 3, paragraph 17; Tr. 75-78). Reference to these principles is omitted altogether from respondent's requested findings concerning the Scientology religion. The concept of exchange in Scientology is a balancing of inflow and outflow over a broad period of time (id,), and nothing in Scientology Scripture requires exchange to be monetary or to be contemporaneous. (PPF 339).

Also omitted is that Scientology doctrine holds that the benefits derived from services are not just personal and individual in nature, but redound across the "dynamics," to one's family, one's community and society at large. (PPF 353).

18. Objection. There is nothing in Scientology doctrine or Scripture called the "doctrine of exchange." (Tr. 96). The record shows that refunds are governed by religious doctrine and are not premised on some commercial notion of "exchange." Refunds of money contributed in connection with auditing and training are rarely given in Scientology and only for religious reasons. Individuals who are no longer committed to the religious beliefs and goals of Scientology may receive refunds on condition that they no longer participate in auditing or training until their spiritual differences with the Church are resolved. (PPF 337).

19. Objection. The petitioners testified that they each had participated in auditing or training for which there was no charge, in addition to the auditing or training for which they made contributions. (Tr. 120-22, 128; Tr. 135-38; Tr. 150, 155). Respondent stipulated that virtually all of the petitioners herein have participated in religious services without paying the contribution amount requested for those services. (Stip. paragraphs 64, 68, 72, 76, 77, 81, 85). The petitioners were thus aware that there were methods by which they could participate in services for which they made no contributions.

20. Objection. The evidence in the record demonstrates that it is not necessary to pay for auditing and training in order to progress up the Bridge. (See objection to respondent's requested finding of fact No. 15, and Tr. 94-95, where Mr. Rinder specifically refutes the assertion contained in this requested finding.)

21. Objection -- incomplete and misleading. The record shows that auditor training is provided without charge ("awarded") to individuals who "contribute to the expansion and well being of the Church by proselytizing and attracting new members to the religion." Training awards are provided to these individuals because they "are clearly concerned with the well being and expansion of the Church." (Ex. 79, p. 7, paragraph 43; Tr. 83).

22. Objection. The cited record reference states that individuals who join church staff receive free auditing and training, but makes no mention of the concept or term "freeloader debt." (Ex. 79, p. 10, paragraph 65). Expert Michael Rinder testified that the term "freeloader" referred to a staff member who reneged on his or her commitment to the church and who is under a "moral obligation" to pay for the services received. (Tr. 102-03). Mr. Rinder testified that there is no real consequence of being a "freeloader" in terms of a legal obligation to pay. (Id.). There is no evidence in the record of the Church making any effort to legally enforce a former staff person's moral obligation to make repayment. Compare Ex. CE, p. 4, discussing an incident in which a synagogue sued a member for failure to fulfill a financial commitment. In that case, a committee charged with interpretation of Jewish law and tradition concluded that a pledge to the building fund of a synagogue was "valid and enforceable." (Id.; Tr. 1233).

23. Objection -- incomplete and misleading. There is no evidence that legal notes referred to in Joint Exhibit 16-P, a 22 year old policy letter, are actually created. To the contrary, the evidence in the record shows that freeloader billings are not enforced, but are treated as moral obligations. (Tr. 102-03).

24. Objection. See response to requested findings Nos. 22 and 23.

25. Objection. Contribution rates for auditing and training are designed to assist in the achievement of the religious mission of the Church, and discounts must be viewed in the context of the overall religious mission. (Ex. 79, p. 7, paragraph 41; Tr. 81-82, 89-90; Jt. Ex. 19-S). Petitioners also note that some synagogues provide discounts in membership dues for early payment and to first-time members. (PPF 122).

26. Objection. Package discounts usually apply to training rather than auditing. (See Jt. Ex. 19-5, p. 3). See also response to requested finding No. 25.

27. Objection. While it is true that each of the five documents referred to in this requested finding was in effect during the years in issue, as stipulated, this does not mean that all statements of policy and doctrine in these documents were in effect or applied in the case of the petitioners. Mr. Rinder testified, for example, that Exhibit 16-P was written for a specific purpose at a specific time and that when read in the context of all Scientology policy, does not prohibit churches of Scientology from providing auditing without donations, as it would appear to when read in isolation. Mr. Rinder also pointed out that other parts of the Scripture, namely the Free Scientology Center policy letter and policy on review auditing, allow for free services. (Tr. 86-88, 94). There is also abundant, other evidence of auditing being provided at no cost. (See Petitioners' Response to Requested finding 15).

Thus, to the extent Exhibit 16-P is read as stating a policy or doctrine that auditing may not be provided without charge, this was not the effective policy or doctrine in the taxable years in issue. The Scientology Scripture consists of a vast amount of material (Ex. 79, pp. 1-2, paragraph 8), and one cannot determine the policy or doctrine concerning any subject or issue by taking any particular document out of context. (Tr. 104).

28. No objection.

29. Objection -- incomplete and misleading. The requested finding fails to state that provincial authorities of the Catholic Church set the customary rate for the celebration of Masses for Special intentions in the province. (PPF 228). The provincial rate for stipends in many parts of the United States is now ten dollars ($10) (PPF 231), and a conservative estimate of 1984 income to the U.S. Catholic Churches from stipends was over $105 million. (PPF 237).

It is misleading to refer to the priest's "thinking" of a special intention. The priest celebrates a Mass for the special intention (PPF 207), an act that gives the payor a special relationship to that Mass. (PPF 240-242).

In addition, in many parishes, specific evidence of the special relationship is given in the form of printing the intention in the weekly bulletin of the church, or announcing the intention at the Mass or prior to the Mass. (PPF 243).

30. Objection. The person who has paid a Mass stipend for the celebration of a Mass for a special intention has a relationship with that Mass that is different from those who did not pay the stipend. According to a 1974 Apostolic letter, the donor "experiences more abundant effects" of the Mass than do others. (PPF 240-243).

In addition, some Masses are private, and would not be celebrated but for the donor's payment of a Mass stipend. (PPF 225- 226). Finally, under Canon law, a priest may accept only one offering for each Mass he celebrates. (PPF 216).

31. Objection. In some instances, a Mass would not be celebrated in the absence of the donor's request and payment of a stipend. (PPF 226).

32. Objection -- incomplete and misleading. The donor receives the benefit of his or her special relationship with the Mass celebrated for his or her special intention whether or not the donor is present at the Mass. (PPF 227).

33. Objection -- incomplete. A Catholic who pays no Mass stipend and who does not have a Mass celebrated for a special intention will not have a special relationship with the Mass and will not experience the "more abundant effects," of the Mass referred to in the 1974 Apostolic letter. (See response to requested finding No. 30). Such a Catholic also has failed to avail himself or herself of the possibility of gaining a spiritual or temporal benefit that the special intention could have been celebrated for. (PPF 207, 238, 240- 241).

34. Objection. The donor of the Mass stipend, on account of the stipend, has a special relationship to the Mass. The donor does have a special status in relationship to the Mass, "experienc[ing] more abundant effects" from it. (Ex. 107 (Apostolic Letter)). (PPF 240- 241).

35. No objection.

36. No objection.

37. Objection. In the 1974 Apostolic Letter, Pope Paul stated that Mass offerings allow the faithful to "provide in this way for the needs of the Church, above all for the support of the Church's ministers. . . . The laborer is worthy of his hire." (Ex. 107; Tr. 851). In many areas the salaries of priests are fixed based on the expectation that the salaries will be supplemented by Mass stipends. (Tr. 391-92; 845; see also Ex. 85, p. 6, paragraph 10). Thus there is a relationship between the amount of Mass stipends and the salaries of priests, whose labor is involved in performing those Masses.

38. Objection. It is very rare for priests to receive requests to celebrate Masses for special intentions without payment of the customary fee. Rarely, maybe once or twice a month, a priest will receive a request from a poor parishioner who is unable to pay the normal stipend offering fee." (Ex. 85, p. 6, paragraph 11; Tr. 440). The expectation, both on the part of the parishioner and the priest, is that a parishioner who wants a Mass celebrated for a special intention and is able to pay, will pay the customary stipend. (Tr. 387; Tr. 441-42; Ex. 83, p. 7, paragraph 19; Ex. 85, p. 6, paragraph 11). The expectation of payment, both by the parishioner and the priest, is very strong. (Ex. 85, pp. 4-7, paragraphs 9, 11-12; Ex. 83, p. 7, paragraph 19, p. 8, paragraph 24).

39. Objection -- incomplete. Individuals who pay Mass stipends are also understood to receive (1) the priest's services in celebrating the Mass for their special intentions (Ex. 107 ("the laborer is worthy of his hire . . ."); Tr. 389, 391-92; Tr. 407; Tr. 829-31), (2) "more abundant effects" of the Mass, (Ex. 107), and (3) the possibility, though no assurance, of the fulfillment of their special intention. (Tr. 389).

40. Objection -- incomplete and misleading. The law of Tithing is viewed both as a test of faithfulness, in that it is a means of ascertaining an individual's loyalty to the Church and a requirement for obtaining the benefits Mormonism offers, and as a duty, in that it is the principal source of income to the Church. (Ex. 94, p. 15, paragraph 21; Ex. CA, p. 3, paragraph 7, 8; Tr. 599-600; Tr. 782-83).

41. Objection -- incomplete and misleading. The law of Tithing does require payment of a full tithe in all cases except in two narrow categories. The General Handbook of Instructions, which is the book of instruction issued by the highest authority in the Church to Church leaders outlining the procedures for administering the Church (Tr. 601-02; Ex. 94(b); Ex. 105), defines the only two exceptions to the requirement that "all Church members who have income should pay tithing": (1) "members entirely dependent upon Church welfare assistance" and (2) "full-time missionaries." (Ex. 105, p. 9-1; Ex. 94(b), p. 68). The exception for missionaries is subject to the limitation that, "missionaries should pay tithing on personal income beyond the amounts they receive for their support." (Ex. 105, p. 9- 1). If the missionary receives any income beyond living expenses, such as income from investments or from family, then the missionary is expected to tithe on that income. (Tr. 600, 602-03; Tr. 787-88; Ex. 105, p. 9-1; Ex. 94(b), p. 68). Those who meet one of the narrow exceptions are regarded as complying with the law of Tithing. (Tr. 603).

42. Objection. While it may well be true that one can be a member of the Mormon Church without tithing, it is not true that one can be a fully practicing member of the Church and participate in the most sacred and important rituals and practices, performed only in the temple, unless one is a full tithe payer. (Ex. 94, pp. 32-33, paragraphs 50-51, pp. 36-39, paragraphs 56-59). Nor can one derive the blessings from having the priesthood within the family (Ex. 94, pp. 31-32, paragraphs 48-49), which also are contingent on adherence to the law of Tithing. (Exhibit 94, pp. 2-3, paragraph 5).

Respondent has omitted altogether any mention of the section of Prof. White's expert report, under the subtitle "Tithing `Voluntary Yet Required'" which addresses this point fully. The phrase "voluntary yet required," quoted from Mormon Apostle James E. Talmage in The Lord's Tenth, published by the Mormon Church, makes the point that one who does not tithe deprives him or herself of the real benefits of Mormonism. (Ex. 94, p. 25, paragraph 39). Thus, to characterize tithing as "voluntary" is misleading, as it is absolutely necessary if one wishes to fully participate in the Mormon faith.

While members are never presented with a bill per se, they are confronted with a record of their tithing payments for the year at tithing settlement, are asked if there is more they intend to pay, and are asked by the bishop to declare if they have paid a full tithe. (PPF 175-185).

43. Objection. While it is true that the LDS Church does not publish a comprehensive definition of what constitutes income, officials of the Church periodically speak on the subject of tithes at priesthood and sacrament meetings and explain specifically what income should be tithed on. (Tr. 979-80). Mormons know they are to pay tithes on gross income from salaries and investment income and on net income if self-employed. (Tr. 978-79; Tr. 788-89.) Mr. Oaks' testimony reflects no doubt about what he understood to be included in income. (Tr. 788-89).

44. No Objection.

45. Objection -- incomplete and misleading. While membership is not conditioned on full tithe paying, a Mormon must be a full tithe payer to gain access to the temple and participate in the rituals necessary for exaltation that are performed only there. (PPF 162- 174). Full tithe paying is also necessary for participation and advancement in Mormonism's lay priesthood. (PPF 151).

46. Objection. Participation in weekly worship services in the warehouse and SOME other religious activities is not conditioned on full tithing, but participation in the most important religious services, those essential for exaltation, IS conditioned on full tithe paying. (See petitioners' response to requested finding No. 45).

The assertion that it would be impractical, if not impossible, to exclude members from participation in weekly worship services for failure to pay tithing is demonstrably false. All that would be necessary would be to require members to show valid temple recommends at the door, just as they are required to show valid temple recommends at the door of the temple in order to be admitted there. (PPF 162,173-174).

The Church obviously could impose the same requirements on admission to the warehouse, where less crucial religious activities occur, but has chosen to require full tithe paying only for access to its more important religious activities, occurring only in the temple.

47. Objection. This requested finding acknowledges that full tithing is one of the Church's criteria for determining "worthiness." But tithing has a very direct, not an "indirect" bearing on a member's ability to attend the temple. Worthiness with regard to ALL the matters covered in the temple recommend interview is required in order to obtain a temple recommend. (PPF 167-169). As Mr. Oaks himself acknowledged, applicants do not receive a temple recommend if they do not declare that they are full tithe payers, even if they meet all the other criteria. (Tr. 787).

48. Objection -- incomplete. The requested finding fails to specify the rituals bearing on one's chances for "exaltation." These include the personal endowment, the celestial marriage, AND the rituals for the dead, which members are enjoined to return to the temple to perform throughout their lifetimes. (PPF 186-188, 192-197).

49. Objection -- accurate but misleading. By stating that full tithing is "only one" of fourteen factors determining worthiness, this requested finding implies that one could be found worthy without being a full tithe payer if one were found worthy in other respects. This is not true. An applicant worthy in all other respects who was not a full tithe payer cannot receive a temple recommend. (See response to requested finding No. 47).

50. Objection -- accurate but misleading. This requested finding fails to recognize that there are only two narrow exceptions from payment of Tithing, see response to requested finding No. 41, and only someone fitting one of these narrow exceptions would be eligible for a temple recommend if found worthy in all other respects.

51. Objection -- incomplete and misleading. While the bishop does not consult the tithing settlement records in connection with the member's temple recommend interview, the fact remains that the bishop to whom a Mormon must declare himself to be a full tithe payer is the SAME official by whom one is interviewed for a temple recommend. (PPF 172). A bishop is responsible for a ward, which includes only about 200-500 people, including children. (Ex. 94, pp. 30-31, paragraph 47). Thus, a bishop usually knows many of the members of his ward. (Ex. 94 p. 20, paragraph 31). Each bishop sees each members' tithing settlement and is likely to be familiar with the financial situation of many members of his ward as a result of his own contacts with members and those of home and visiting teachers, who visit each Mormon household at least twice a month, assess the situation, including financial health, of each family and report back to the bishop. (PPF 184).

Moreover, the requested finding is insignificant. The apparent implication of the requested finding is that the bishop does not check on the honesty of the members' declaration. Surely, Mr. Oaks, from whose report and testimony this requested finding is derived, was not suggesting that members of the LDS Church are dishonestly declaring themselves to be full tithe payers because their bishops are not consulting the tithing settlement records. There is no reason to assume dishonesty on the part of members and every reason to believe otherwise: honesty is a fundamental Mormon principle, which the Church specifically raises in connection with the full tithing declaration. (PPF 170). Indeed, honesty is one of the conditions of "worthiness" for receiving a temple recommend. (Ex. 94, pp. 37-38, paragraph 58; Ex. 104, Question 8). That the bishop's questions during the temple recommend interview regarding honesty and status as a full tithe payer appear consecutively can hardly be a coincidence. (PPF 170).

52. Objection -- incomplete and misleading. It is true that if a member has paid a full tithe and received a temple recommend, the member is not limited in the number of times he or she may attend the temple during the year for which the recommend is valid. But the significant point is that unless the member reaches the threshold by paying a full tithe he or she cannot attend the temple at all. (See response to requested finding No. 47).

53. Objection -- incomplete. Mormons are very strongly encouraged to return regularly to the Temple and are taught that returning is important to religious understanding and to their chances for exaltation. (PPF 192-199).

54. Objection -- incomplete. Omitted is the fact that a bishop will usually know all or a majority of those he interviews for tithing settlement and will have a good idea beforehand of at least the range of the person's income. (PPF 179, 184). He will have personal access to the record of payments over the year which would reveal a period when the amount appears particularly low, and will usually have the income of past years as well to compare to. (Ex. 92; Ex. 94(f); Ex. 115; Tr. 613-15). Mormons are also encouraged to bring their families (PPF 178), so that the tithing declaration is often made in front of the person's family members who may know if it is not truthful. (Tr. 617; Ex. CA, paragraph 13; Ex. 94(b), p. 69; Ex. 105, p. 9-1).

55. Objection -- accurate but misleading. It may be that a person who pays a large sum may neglect to declare him or herself a full tithe payer or may not do so because the sum, however large, is not a full tithe. The significant point is that a person must pay a full ten percent of income to be a full tithe payer. The fact that a person who pays a large sum but is not a full tithe payer is ineligible for a temple recommend only reinforces the point that the LDS Church has very set financial requirements for access to its most sacred rituals.

56. Objection -- incomplete. Prof. Beveridge's study makes clear that there was near uniformity in synagogues' requiring payment in the form of membership dues or ticket purchases as a condition for access to High Holy Day services. (PPF 104).

57. Objection -- incomplete. While there is some diversity of practice among synagogues, Prof. Beveridge's study demonstrates that the vast majority of synagogues' practices fit within a relatively narrow range, which has been described in Prof. Beveridge's report and testimony. There are certain common values and norms that are generally adhered to by most synagogues, as the requested finding states, but the norms most relevant to this case are not stated in the record references cited in the finding. The relevant norms relating to requirements of payment for all who can pay, the scarcity of free services, and the requirements and obstacles to obtaining poverty waivers are set out in Prof. Beveridge's report and testimony and in the comprehensive synagogue material supporting his findings. (PPF 104, 116-117, 124-131, 135-136).

58. Objection. The range of practices regarding synagogue dues is not wide. As respondent admits, dues structures of most synagogues fit within the three basic categories she describes. (See PPF 106).

59. Objection. The clear evidence in the record demonstrates that those who do not pay but have the means to pay do not and cannot gain access to High Holy Day services at the vast majority of synagogues, and, in some cases, do not get access to other benefits. (PPF 104, 116.e, 116.f, 129, 130).

60. No objection.

61. Objection -- incomplete and misleading. In some cases benefits that members are entitled to differ based on the price and level of membership purchased. (PPF 112.b, 112.f). Most importantly, the requested finding fails to state that access to the most important religious services of the year is conditioned on payment. If the basic threshold of payment of membership dues or ticket prices is not met, Jews will not gain access to High Holy Day services in the vast majority of cases. (PPF 99, 104).

62. Objection. The record shows that at the overwhelming majority of synagogues attendance at High Holy Day services clearly is tied to the payment of membership dues (or payment of ticket prices). (PPF 104). In addition, in some synagogues certain religious services such as Bar or Bas Mitzvah services for one's children are available only to members. (PPF 118).

63. Objection. The majority of synagogues do not refer to or explain any exceptions policy in their membership solicitation materials. The evidence shows that many Jews are unaware of exceptions policies. (Ex. 80 D, p. 1). Omitted from the requested finding is the fact that exceptions are given only for financial inability to pay. (PPF 124, 125).

64. Objection. The synagogue materials in the record demonstrate the individual generally must undergo some procedure by which officials of the synagogue can assess the person's claim. These procedures usually require a meeting with an official and may require the official to investigate the request. (PPF 126).

Moreover, respondent's requested finding of "customary synagogue practice" is based on the testimony of two witnesses who were referring only to practices in their own synagogues. (Tr. 1102; Tr. 1258). In fact, with regard to one of these witnesses, the practice in his synagogue was quite different as recently as 1988, when a committee was required to "investigate" the request. (Tr. 1222-24).

65. No objection.

66. Objection. The documentary evidence in the record demonstrates that many synagogues provide that members who have not paid part or all of their membership dues will be denied access to High Holy Day services. The record also shows that some synagogues will suspend or expel a member from membership for nonpayment of dues. (PPF 116.e, 116.f).

67. Objection. The testimony relied on for this requested finding merely states that the witnesses were unaware of any refund practices. That testimony was not credible or conclusive given that witness Mark Greenstein was unaware that one of the synagogues for which he is the representative of the National Association of Temple Administrators has a refund policy for High Holy Day tickets. (Tr. 1256-57; Ex. 120). In fact, Mr. Greenstein specifically admitted he had no knowledge of how many synagogues have refund policies on High Holy Day tickets. (Tr. 1257).

68. Objection -- incomplete. The requested finding fails to mention that there is often a charge for admission to synagogue programs. (Tr. 1148-49). The documentary record shows that rabbinic counseling is often a benefit of membership. (See e.g., Ex. 80 H 13, p. 2; H 31, p. 2).

69. Objection. The documentary evidence shows that seventeen percent of synagogues admit ONLY members, absent special circumstances, to their High Holy Day services. (PPF 120). In addition, in the vast majority of synagogues membership includes tickets to High Holy Day services at no ADDITIONAL cost (PPF 119), whereas nonmembers must pay for High Holy Day tickets. (PPF 134-135). There are other benefits available only to members not listed in respondent's requested finding, such as Bar and Bas Mitzvah services for one's children. (PPF 118).

70. Objection. This requested findings simply tries to confuse the clear findings of Prof. Beveridge's study. The crucial point is that by requiring either payment of membership dues or purchase of tickets or both, 86 percent of synagogues, serving 91 percent of synagogue members require a payment for an individual to obtain admission to High Holy Day services. (PPF 104).

71. Objection -- incomplete. As witness Mark Greenstein admitted, "conditioning access to . . . . High Holiday services [on payment] is a particularly good way of raising revenues for a synagogue." (Tr. 1234-35).

72. Objection -- incomplete. In some synagogues, tickets are checked at the door. (Tr. 949). Some synagogues' materials specify that tickets must be presented. (See, e.g., Ex. 80 H 68, p. 1). Other methods are also used to check whether an individual is entitled to a seat, such as the checking of lists of names or the marking of seats. (Tr. 949-50). In any synagogue where seats are reserved a person not entitled to a seat could only take one with the risk of being displaced from it by the rightful occupant. (Tr. 950; Tr. 200, 210- 11, 1226-28; Ex. 80 I, Vol. 6, R 145, p. 8).

The requested finding is irrelevant in any case. There is no evidence that Jews attempt to gain entrance to High Holy Day Services by improperly entering without tickets.

73. Objection -- incomplete. See response to requested finding No. 72.

74. Objection -- incomplete. The price of the ticket is calculated with a view to raising funds for the religious program of the synagogue including conducting High Holy Day services. (See PPF 105).

75. Objection -- incomplete. The record establishes that there is very high demand for seats at High Holy Day services (PPF 100), space is often very limited (PPF 121), and some people are turned away. (PPF 134, 136).

76. Objection -- incomplete. Exceptions for those who are financially unable to pay have no bearing on the requirement that those with the ability to pay do so. See response to requested finding No. 63.

77. Objection. The documentary record clearly shows that very few synagogues offer free High Holy Day Services. (PPF 134-136).

78. Objection -- incomplete. Given that very few synagogues have free High Holy Day Services, the practice of having tickets but no fees charged necessarily is uncommon. See response to requested finding No. 77.

79. Objection -- incomplete. While the sale of religious or spiritual benefits is not permitted, the vast majority of synagogues do sell ACCESS to religious services. See response to requested finding No. 59.

80. Objection -- incomplete. According to respondent's own witness, the "best" level of prayer is "prayer with a prayer quorum (minyan) IN A SYNAGOGUE." (Ex. CD, p. 2) (emphasis added). In addition, "synagogue service attendance" has some significance in determining who is "a good Jew." (PPF 101). Thus, Jews have reason to wish to attend services even if they can satisfy their minimum religious obligations elsewhere. The fact also remains that far greater percentages of Jews attend High Holy Day services than attend other synagogue services. (PPF 99-100).

81. Objection -- incomplete. While Jews may have no expectation of a spiritual benefit from their payment, they do have hope of a spiritual benefit and, more importantly, they do have an expectation of access to the service. (See PPF 101, 104).

82. Objection -- incomplete. Certain benefits, such as High Holy Day seats with better locations, can be and are reserved for those with the means to pay for them. (PPF 112.d). Some synagogues provide memberships at different prices and provide different levels of benefits accordingly. (PPF 112.f). In addition, those able but unwilling to pay can be denied access to services. (PPF 129, 130).

83. Objection -- incomplete and misleading. The requested finding fails to discuss the Worldwide Church of God, a Protestant denomination of one hundred thousand members, in which payment of a full tithe, which is defined in detail by the Church, is required in all events for continued membership in the Church and participation in its services. (PPF 304-305, 307, 310-312). The finding also fails to mention that other fundamentalist Protestant denominations, some of them offshoots of the Worldwide Church of God, also make full tithing a condition of membership. (PPF 316).

84. Objection. The evidence in the record clearly demonstrates that where the donee is a religious organization other than a Scientology church, the IRS only asks the taxpayer for substantiation that the payment was made, and does not inquire whether the taxpayer received religious benefits or access to religious services in exchange for their payments. (PPF 362-367, 370).

85. Objection -- incomplete. While IRS employees "may," as respondent suggests, ask whether payments secured goods or services in exchange, the record shows that IRS employees do not inquire into the return benefit from participating in the religious services of a church except with respect to Scientology taxpayers. (PPF 361-366).

86. No objection. With respect to the referenced authority for point "d," relating to indirect costs, the finding is adequately supported by the referenced portion of Mr. Clark's report. The additional reference to petitioners' June 17, 1991 memorandum of law, thus, is unnecessary; more importantly, this reference is inappropriate, because statements in briefs and pleadings do not constitute evidence before the Court. Rule 143(b).

87. No objection. Petitioners would add by way of clarification that what was substantiated under the heading "Total" were the total receipts and disbursements of each relevant church of Scientology. (Stip. paragraphs 101-102).

88. Objection. Professor Swenson's treatment of certain bookstore expenses and Inter-org transfers as indirect is erroneous. (See infra at 284-85). Mr. Clark's original dual payment exhibits categorize all disbursement items under the conservative assumptions Mr. Clark employed in his original methodology in seeking to measure only direct costs. If indirect costs are to be included as well, then several of the disbursement items Mr. Clark originally categorized as directly related to the ministry of religious services are more properly treated as indirect costs to be allocated among all Church activity segments, rather than only to ministry of religious services. (See infra at 275-81).

89. No objection. As discussed infra at 259-64, however, the principal legal question in connection with the dual payment alternative is whether governing case law and First Amendment entanglement principles permit ordinary "standard financial, cost and tax accounting principles" to apply to measure Church of Scientology costs.

90. Objection. This requested finding is contrary to the record. (See infra at 268-96).

91. Objection. This requested finding is contrary to the record (see infra at 268-96), and respondent's Appendix A is not properly before the Court. (See infra at 292-94).

92. Objection. This requested finding is contrary to the record.

PETITIONERS' PROPOSED FINDINGS OF FACT

For completeness, and because of petitioners' numerous objections to respondent's requested findings, a few of petitioners' proposed findings duplicate respondent's requested findings to which petitioners did not object. Petitioners' proposed findings are cited as "PPF."

Petitioners' proposed findings of fact use headings and subheadings for convenience of the Court and respondent. In addition, as suggested by the Court, petitioners have prepared a table comparing the various religious fundraising practices placed in evidence. The proposed comparative findings referenced in the chart contain cross-references to petitioners' specific underlying proposed findings of fact supporting each point. The table and accompanying discussion may be found after petitioners' proposed specific findings of fact and before their proposed findings of ultimate fact.

Petitioners respectfully request the Court to find the following evidentiary facts:

INTRODUCTION TO THE PETITIONERS

1. The petitioners in Docket No. 18956-88, Christopher L. Garrison and Ellen L. Garrison, are husband and wife and reside at 16 Southview Street, Dorchester, Massachusetts 01225. Mr. Garrison's social security number is 033-36-6296, and Mrs. Garrison's social security number is 017-38-4424. (Stip. paragraph 1).

2. The petitioner in Docket No. 11707-89, Susan L. Lazar, resides at 302 West 105th Street, Apartment 4C, New York, New York 10025. Her social security number is 058-48-7072. (Stip. paragraph 9).

3. The petitioners in Docket No. 11708-89, Roger Teagarden and Leslie Silton Teagarden, are husband and wife and reside at 1234 North Edgemont Street, Apartment 204, Los Angeles, California 90029. Mr. Teagarden's social security number is 311-56-5807, and Mrs. Teagarden's social security number is 028-34-5642. (Stip. paragraph 15, Tr. 130-31).

4. The petitioner in Docket No. 17184-89, David Charles Killmon, resides at 396A Allaire Road, Wall, New Jersey 07719. His social security number is 142-52-6183. (Stip. paragraph 24).

5. The petitioners in Docket No. 21331-89, Brion R. McKenna and Nancy Pearce McKenna, are husband and wife and reside at 11457 East Colorado Drive, Aurora, Colorado 80012. Mr. McKenna's social security number is 548-70-7556, and Mrs. McKenna's social security number is 045-52-9717. (Stip. paragraph 31; Tr. 144).

6. The petitioner in Docket No. 7201-91, Donald E. Pickerill, resides at 4422 Oleatha, St. Louis, Missouri 63166. His social security number is 495-62-8646. (Stip. paragraph 39).

7. The petitioners in Docket No. 28715-91, Nelson Betancourt and Barbara J. Betancourt, are husband and wife and reside at 629 Cleveland Street, Clearwater, Florida 34815. Mr. Betancourt's social security number is 574-22-8948, and Mrs. Betancourt's social security number is 262-35-2898. (Stip. paragraph 45).

INTRODUCTION TO SCIENTOLOGY

8. Each of the petitioners herein is a member of the Church of Scientology, whose members are called Scientologists. (Stip. paragraph 94; Tr. 110, 131, 145; entire record).

9. At issue in these cases is the deductibility as charitable contributions of amounts paid by the various parishioners to various churches of Scientology in connection with their participation in religious services -- auditing and training -- provided by their churches. (Stip. paragraphs 2-4, 10-12, 16-19, 25-27, 32-34, 40-42, 47-49).

10. Scientology is a religion based upon the research, writings, and recorded lectures of its Founder, L. Ron Hubbard, which collectively constitute the Scripture of the religion. This Scripture is the sole source of all the doctrines, tenets, philosophy, practices, rituals and fundamental policies of the Scientology faith. (Ex. 79. pp. 1-2).

11. The aims of Scientology are: "A civilization without insanity, without criminals and without war, where the able can prosper and honest beings can have rights, and where man is free to rise to greater heights." Scientologists are those who recognize the Scientology Scripture as providing the fundamental key to an understanding of their existence and the means for accomplishing Scientology's aims, and who apply Scientology religious philosophy and spiritual technologies to better conditions in themselves and others. (Ex. 79, p. 2)

12. The Scientology religion is propagated through an international ecclesiastical hierarchy of over 1,000 churches, missions and associations of Scientology located throughout the United States and abroad. Individual churches within the hierarchy either minister Scientology religious services to their parishioners or provide ecclesiastical support to other churches. (Ex. 79, p. 2).

13. The basic tenet of Scientology is that man is an immortal spirit who has lived through a great many lifetimes and who has the potential of infinite survival. Although one has a mind and a body, he or she is a spiritual being called a "thetan" in Scientology. (Ex. 79, p. 2).

14. According to Scientology Scripture, the thetan is an inherently good being of infinite capability. However, as a result of becoming enmeshed with the material universe over the ages, thetans have lost their true spiritual identity and operate at a small fraction of their natural ability. (Ex. 79, p. 2).

15. Scientology doctrine holds that every individual exists and seeks to survive on eight interacting planes or "dynamics" ranging from self, to the family and to groups and on up to infinity and the Supreme Being. The eight dynamics are:

The first dynamic is the urge toward survival and existence as

one's self.

The second dynamic is the urge toward existence of or as the

family unit.

The third dynamic is the urge toward existence in groups of

individuals. A club, school, church, business, town, nation, society and race are each part of the third dynamic.

The fourth dynamic is the urge toward existence as all mankind.

The fifth dynamic is the urge toward existence of the animal

kingdom. This includes all living things, whether vegetable or animal.

The sixth dynamic is the urge toward existence of the physical

universe.

The seventh dynamic is the urge toward existence as or of the

spiritual universe.

The eighth dynamic is the urge toward existence as infinity or

the Supreme Being.

(Ex. 79, p. 3, paragraph 17).

16. Scientology is a very exact faith, and a fundamental doctrine of the religion is that spiritual freedom can be attained only by following the path outlined in the Scripture. Scientologists refer to this path as the "Bridge to Total Freedom" (the "Bridge"). (Ex. 79, pp. 2-3).

17. Scientology has a code of social conduct by which mankind can accomplish Scientology's goal of a new civilization. This code, generally referred to as Scientology's system of ethics, is enunciated throughout Scientology Scripture both in general principle and actual application. The guidelines and rules of Scientology ethical conduct influence all aspects of a Scientologist's existence. (Ex. 79, p. 3).

18. One central religious practice of Scientology is "auditing," which consists of ascending levels of religious services addressing the thetan. The other central practice of the Scientology faith is intensive, supervised study of Scientology Scripture (called "training"). (Ex. 79, pp. 3-6). Auditing and training make up the two sides of Scientology's "Bridge to Total Freedom." The practices of auditing and training are discussed in greater detail below. (PPF 319-321).

19. Petitioners' religious beliefs as Scientologists are deeply and sincerely held and fill their spiritual needs in the same manner that traditional religions fill the spiritual needs of their adherents. (Stip. paragraph 94; Ex. 79; Tr. 67-157).

20. For purposes of these cases, respondent agrees that Scientology is, and was at all times relevant to these cases, a religion, that auditing is, and was at all times relevant to these cases, a religious practice of the Scientology religion, and that the training courses received by the individual petitioners at issue in these cases are, and were at all times relevant to these cases, religious practices of the Scientology religion. (Stip. paragraphs 55-57).

PUBLIC BENEFIT AND SOCIAL BETTERMENT ACTIVITIES

OF CHURCHES OF SCIENTOLOGY

21. Although auditing and training are the central religious practices at churches of Scientology, these are only a part of the overall religious and charitable activities that those churches engage in. (Ex. 79, p. 11, paragraph 77).

22. Churches of Scientology also engage in community betterment activities, locally and nationally, as well as internationally. (Ex. 79, pp. 11-13, paragraphs 75-91; Tr. 84-85).

LOCAL CHURCH ACTIVITIES

23. Local churches work closely with their community leaders to identify social ills to which the churches can contribute in remedying. (Tr. 84).

24. Volunteers working for the Church of Scientology's Community Outreach Group in Los Angeles, in close cooperation with the County of Los Angeles, /1/ have donated thousands of hours on many different projects, from entertaining the elderly, to donating gifts to foster children and painting murals to brighten the atmosphere in buildings that shelter abused children. (Ex. 79, p. 12, paragraph 78).

25. Scientologists work hand-in-hand with law enforcement officials to help make their communities safer places to live and work by organizing neighborhood crime watches. (Ex. 79, p. 12). For example, in Los Angeles, members of local Churches formed the East Hollywood People Against Crime, which has helped to reduce gang- related violence, to clean up graffiti, and to provide general assistance to underprivileged children. (Ex. 79, p. 12, paragraph 81; Tr. 84).

26. The Church has won a number of awards as the community outreach group of the year in Los Angeles for these efforts. (Tr. 84).

27. In Orlando by comparison the local community's priority concern is the environment, and the local churches are engaged in an environmental cleanup program. (Tr. 84).

28. In Boston the local church has involved itself in the "Boston Rocks Against Drugs" program in conjunction with community leaders and Boston radio stations. (Tr. 84-85; Tr. 125).

29. All of these local church public benefit and social betterment activities are funded from the contributions received from parishioners (Ex. 79, p. 11, paragraph 75; Tr. 82, 84-85), the largest part of which are received in connection with their ministry of religious services to their parishioners. (Stip. paragraph 101; Ex. 98(4)-98(32); Ex. 99(A)).

NATIONAL AND INTERNATIONAL ACTIVITIES

30. The national and international public benefit and social betterment activities conducted by churches of Scientology fall under six general categories -- drug abuse, rehabilitation of criminals, literacy, general morality, psychiatric abuses, and law enforcement reform. (See PPF 33-43, below). All but the last two are conducted under the auspices of a separate organization sponsored by the Church of Scientology, the Association for Better Living and Education ("ABLE"), formed to help accomplish the Church's goals in society at large. The secular activities ABLE supports directly involve the use of Mr. Hubbard's writings in drug rehabilitation, education, morality, rehabilitation of criminals and other areas of social betterment. (Ex. 79, pp. 12-13, paragraphs 85-90).

31. These national and international public benefit and social betterment activities are funded principally from amounts that subordinate churches pay to the "Mother" Church, Church of Scientology International. (Ex. 79, p. 11, paragraphs 75-76).

32. All of the public benefit and social betterment activities of the Churches of Scientology can be subsumed under the Church's goals of freeing man from spiritual bondage and creating a new civilization without insanity, without criminals and without war, where the able can prosper and man is free to rise to greater heights. (Ex. 79, p. 13, paragraph 91).

GENERAL MORALITY

33. The Church of Scientology's principal campaign against declining moral values revolves around The Way To Happiness Foundation, a charitable organization under the auspices of ABLE that disseminates the book The Way To Happiness throughout the world. This book, written by Mr. Hubbard, articulates a basic moral code of fundamental principles and values for living an ethical and happy life. Since it was first published in 1981, tens of millions of copies of The Way To Happiness have been distributed and it has served as the genesis of thousands of community and school programs to combat moral decline and juvenile delinquency. (Ex. 79, p. 13, paragraph 90).

ILLITERACY

34. Applied Scholastics is a charitable and educational institution supported by the Church that encourages educators to use the study technology of L. Ron Hubbard contained in the book: The Basic Study Manual. Through the efforts of Applied Scholastics, Mr. Hubbard's study technology is used by thousands and thousands of educators, schools and other educational programs throughout the world. In Africa alone, 22,000 teachers and approximately 22.2 million students have learned Mr. Hubbard's study methods and use them with remarkable results. (Ex. 79, p. 13, paragraphs 88-89).

DRUG ABUSE

35. In the United States, the Church sponsors a major anti-drug campaign called "Lead The Way to a Drug-Free USA" to encourage loosely organized anti-drug groups to join forces and move in a coordinated fashion to end the drug problem once and for all. (Ex. 79, p. 12, paragraph 79).

36. Members of the Church in Canada founded a nationwide "Say No to Drugs, Say Yes to Life" campaign. By obtaining the support of entertainment and sports stars such as the Toronto Blue Jays baseball team and the Saskatchewan Roughriders football team, they educate young people on the real danger of drugs and work to eliminate peer pressure to get started on drugs. (Ex. 79, p. 12, paragraph 80).

37. One of the ABLE groups is Narconon, a charitable organization formed to combat drug abuse. Narconon provides a highly successful drug rehabilitation program based on the works of Mr. Hubbard. (Ex. 79, p. 13, paragraph 86; Tr. 85).

REHABILITATION OF CRIMINALS

38. Another Church-sponsored social reform program under the auspices of ABLE is Criminon, which uses Mr. Hubbard's technology of ethics and his non-religious moral code, "The Way To Happiness," to rehabilitate criminals and juvenile delinquents. (Ex. 79, p. 14, paragraph 87; Tr. 85).

39. "The Way To Happiness" booklets were distributed to gang members in Los Angeles. (Ex. 79, p. 14, paragraph 87).

40. Inspired by the precepts in the booklet they subsequently conducted a campaign to paint out graffiti in Los Angeles neighborhoods. (Ex. 79, p. 14, paragraph 87).

PSYCHIATRIC ABUSES

41. Churches of Scientology work to educate the public about and to stop abusive and life-threatening psychiatric practices. (Ex. 79, p. 12, paragraph 82).

42. In 1969, the Church of Scientology established the Citizens Commission on Human Rights ("CCHR") for the purpose of correcting these abuses. In the years since it was formed, CCHR has become known as a powerful international human rights advocacy group, and today has chapters in 18 nations and most major cities in the United States. (Ex. 79, p. 12, paragraph 82).

LAW ENFORCEMENT REFORM

43. In 1974, the Church formed the National Commission on Law Enforcement and Social Justice (NCLE) to reform the secret dossier system of Interpol, the International Criminal Police Organization. (Ex. 79, p. 12, paragraph 83).

RELIGIOUS SERVICES IN WHICH PETITIONERS PARTICIPATED

44. During the taxable years in issue, all of the respective petitioners participated in the religious services of auditing and/or training at churches of Scientology. (Stip. paragraphs 59, 62, 66, 70, 74, 79, 83).

45. The respective petitioners generally contributed the fixed donation amounts requested for the services in which they participated at the various donee churches of Scientology. (Stip. paragraphs 60, 63, 67, 71, 75, 80, 84; Ex. 79, pp. 6-8, paragraphs 38-46; entire record). However, virtually all of the petitioners herein have received significant religious services from their churches in many cases by contributing less than the full requested contribution (Stip. paragraphs 64, 68, 72, 76, 77, 81, 85) and in some cases without making any financial contribution. (Stip. paragraphs 76, 81; Tr. 120-22, 128, 135, 137-38, 155).

46. All of the respective petitioners were made aware of these requested amounts by donation lists published from time to time for the various churches and by church counselors who assisted them in selecting the appropriate religious services. (Stip. paragraphs 60, 63, 67, 71, 75, 80, 84, 94; entire record).

47. Except as noted below in paragraphs 48-49, no church of Scientology requested donations for the religious services in which the various petitioners participated that were lower than the donations requested by the specific donee churches. (Stip. paragraph 61, 69, 73, 78, 82, 86).

48. During 1985 and 1986, there were approximately 45 Class IV churches of Scientology in the United States alone, including the fourteen churches recognized by the IRS as exempt (See Stip. paragraphs 87-89), at which petitioners Roger and Leslie Teagarden could have participated in two of the specific religious services they participated in at the Church of Scientology Advanced Organization Los Angeles ("AOLA"). (Stip. paragraph 69). Requested donations to Class IV churches for these courses would have been only 82.64 percent of the fixed donation amount requested by AOLA. (Stip. paragraph 58; Jt. Ex. 19-S, p. 1; Jt. Ex. 20-P, p. 1). /2/

49. Ms. Lazar could have participated in many of the specific religious services she participated in at the Church of Scientology Advanced Organization Los Angeles ("AOLA") at the American Saint Hill Organization ("ASHO"), part of Church of Scientology Western United States. (Stip. paragraph 65). Requested donations to ASHO for these courses would have been only 90.91 percent of the fixed donation amounts requested by AOLA. (Stip. paragraph 58; Jt. Ex. 19-S, 20-T).

RETURNS, SETTLED ISSUES, AND AMOUNTS IN DISPUTE

CHRISTOPHER L. AND ELLEN L. GARRISON

50. The Garrisons filed Forms 1040 individual income tax returns for the taxable years 1983, 1984, and 1985 with the IRS Service Center at Andover, Massachusetts. On these returns, the Garrisons claimed deductions for contributions to churches of Scientology in the respective amounts of $8,675.60, $2,288.14, and $8,532.68. (Stip. paragraph 2; Jt. Exs. 1-A, 2-B, 3-C).

51. The deficiencies at issue in these cases with respect to the Garrisons are based on respondent's disallowance of the Garrisons's claimed deduction for charitable contributions of $8,675.60 in 1983, $2,288.14 in 1984, and $8,532.68 in 1985. (Stip. paragraphs 3-4).

52. During the taxable years in issue, the Garrisons made donations to churches of Scientology in connection with their participation in religious services, as follows:

YEAR	AMOUNT	DONEE

1983	$8,038.72	Church of Scientology of Boston ("Boston Church")
1984	$1,016.75	Boston Church
1984	$2,096.88	American Saint Hill Organization ("ASHO"), Church of Scientology of California
1985	$1,289.68	ASHO (Church of Scientology of California)
1985	$4,500.00	ASHO, Church of Scientology Western United States ("CSWUS")

(Stip. paragraph 6).

53. The parties agree that for 1983, the Garrisons are entitled to deduct donations to the Boston Church not involving their participation in religious services in the amount of $899.50. The parties further agree that for 1983, the Garrisons are entitled to deduct donations of $59.00 to donees other than churches of Scientology (The Apple School and Amnesty International). (Stip. paragraph 114).

54. The parties agree that for 1985, the Garrisons are entitled to deduct donations of $15.00 to non-Scientology charitable organizations (Greenpeace and Amnesty International), $411.00 for cash donations to Church of Scientology organizations not involving their participation of religious services, and $55.00 which was mischaracterized as a charitable contribution for the preparation of the Garrisons' tax return and which is deductible as a miscellaneous itemized deduction. (Stip. paragraph 115).

55. The parties agree that the Garrisons are not entitled to deduct amounts c1aimed as charitable contributions in 1985 in the amount of $2,262.00. (Stip. paragraph 7).

56. The parties have agreed to defer, and the Court has severed, resolution of the Garrisons' entitlement to deduct as charitable contributions their donations of $2,096.99 in 1984 and $1,289.68 in 1985 to the Church of Scientology of California ("CSC"). (Stip. paragraph 8).

SUSAN L. LAZAR

57. On August 10, 1987, Ms. Lazar timely filed a Form 1040 Federal Income Tax Return for 1986 with the IRS Service Center at Holtsville, New York on which she reported 1986 charitable contributions to churches of Scientology in the amount of $32,077.00, plus a charitable contribution carryover in the amount of $4,118.00. Because of the 50 percent limitation, Ms. Lazar's charitable contribution was limited to $23,870.00. (Stip. paragraph 10; Jt. Ex. 4-D).

58. The deficiency at issue in these cases with respect to Ms. Lazar is based on the respondent's disallowance of Ms. Lazar's claimed deduction for charitable contributions in the amount of $23,870.00. (Stip. paragraphs 11-12).

59. In 1986, Ms. Lazar made donations to $24,702.00 to AOLA, a part of CSWUS, in connection with religious services. (Stip. paragraph 14).

ROGER AND LESLIE SILTON TEAGARDEN

60. The Teagardens timely filed Forms 1040 individual income tax returns for the taxable years 1985 and 1986 with the IRS Service Center at Fresno, California. On their 1985 return, the Teagardens claimed deductions for contributions in the amount of $6,369.00, reflecting a carryover from 1984 of $2,727.00 and 1985 cash and noncash contributions of $5,316.00; of this total $1674.00 was carried over to 1986. On their 1986 return, the Teagardens claimed deductions for contributions in the amount of $9,011.00, reflecting a carryover from 1984 of $1,674.00 and 1986 cash and noncash contributions of $7,337.00. (Stip. paragraphs 16-18; Exs. 5-E, 6-F).

61. The deficiencies at issue in these cases with respect to the Teagardens were based in part on respondent's disallowance of the Teagardens' claimed deduction for charitable contributions of $6,369.00 in 1985 and $9,011.00 in 1986. The remaining portion of these deficiencies was based on respondent's disallowance of various business expenses in the respective amounts of $2,484.00 and $7,161.00, as well as a determination of additional 1986 Schedule C gross receipts of $188.00, none of which the Teagardens are contesting here. (Stip. paragraphs 19-20).

62. The Teagardens donated to AOLA (CSWUS) $1,580.12 in connection with their participation in religious services in 1985 and $14,354.64 in 1986. (Stip. paragraph 22).

63. The parties agree that for 1985, the Teagardens are entitled to deduct cash donations of $591.00, noncash donations to AOLA (CSWUS) not involving their participation in religious services in the amount of $400.00, and a noncash donation to Cape Cod Hospital in the amount of $125.00. (Stip. paragraph 116).

64. The parties agree that for 1986, the Teagardens are entitled to deduct cash donations to $310.00 and noncash donations to AOLA (CSWUS) not involving their participation in religious services in the amount of $946.00. (Stip. paragraph 117).

65. The parties have agreed to defer resolution of the Teagardens' entitlement to deduct as charitable contributions their donations to the Church of Scientology of California ("CSC") claimed on their 1985 return, in part paid in 1985 and in part carried forward from 1984. (Stip. paragraph 23).

DAVID CHARLES KILLMON

66. Mr. Killmon timely filed Forms 1040 Federal Income Tax Returns for 1986 and 1987 with the IRS Service Center at Holtsville, New York on which he claimed charitable contributions to churches of Scientology in the respective amounts of $9,921.00 and $20,653.00. (Stip. paragraph 25; Jt. Exs. 7-G, 8-H).

67. The deficiencies at issue in these cases with respect to Mr. Killmon were based on respondent's disallowance of Mr. Killmon's claimed deductions for charitable contributions of $9,976.00 in 1986 and $20,653.00 in 1987. (Stip. paragraphs 26-27).

68. Mr. Killmon donated to the Church of Scientology of New York ("New York Church") $10,082.20 in connection with his participation in religious services in 1986 and $20,544.00 in 1987. Of these donations, $9,905.00 were made during the New York Church's fiscal year ending September 30, 1986, $14,558.80 were made during its fiscal year ending September 30, 1987, and $6,091.20 during its fiscal year ending September 30, 1988. (Stip. paragraph 29).

69. The parties agree that Mr. Killmon is not entitled to deduct the amount of $109.00 claimed as charitable contributions in 1987. (Stip. paragraph 30).

BRION R. AND NANCY PEARCE MCKENNA

70. The McKennas timely filed Forms 1040 individual income tax returns for the taxable years 1986 and 1987 with the IRS Service Center at Fresno, California on which they claimed deductions for contributions to churches of Scientology in the respective amounts of $19,439.00 and $3,477.46. (Stip. paragraph 32; Jt. Exs. 9-I, 10-J).

71. The deficiencies at issue in these cases with respect to the McKennas were based on respondent's disallowance of the McKennas' claimed deductions for charitable contributions of $19,319.00 in 1986 and $3,002.00 in 1987. (Stip. paragraphs 33-34).

72. During the taxable years in issue, the McKennas made donations to churches of Scientology in connection with their participation in religious services, as follows:

YEAR	AMOUNT	DONEE
1986	$ 4,660.00	ASHO (Church of Scientology Western United States)
1986	$11,660.00	Church of Scientology of Los Angeles
1986	$ 1,600.00	Church of Scientology South Bay Mission
1987	$ 887.40	Church of Scientology Celebrity Centre International

All of the McKennas' donations to Church of Scientology Celebrity

Centre International were made during its fiscal year ending June 30, 1987. (Stip. paragraph 36).

73. The parties agree that for 1986, the McKennas are entitled to deduct a donation of $100.00 to CSWUS for a campaign that did not involve their participation in religious services. (Stip. paragraph 118).

74. The parties agree that for 1987, the McKennas are entitled to deduct $100.11 to ASHO for a campaign that did not involve their participation in religious Services. (Stip. paragraph 119).

75. The McKennas previously agreed to disallowance of $2,015.00 of their claimed 1987 charitable contributions and paid the resulting deficiency attributable thereto. The 1987 deficiency before the Court is based solely on respondent's disallowance of the remaining $987 of charitable contribution deductions. (Stip. paragraph 37).

76. The parties agree that for 1986, the McKennas are not entitled to deduct any amount paid to the Church of Scientology South Bay Mission. (Stip. paragraph 38).

DONALD E. PICKERILL

77. Mr. Pickerill timely filed Forms 1040 Federal Income Tax Returns for 1987 and 1988 with the IRS Service Center at Kansas City. On his 1987 return, Mr. Pickerill claimed charitable contributions to the Church of Scientology of Missouri (the "Missouri Church") of $14,120.00, reflecting 1987 payments of $4,526.00 and a carryover of $9,594.00. On his 1988 return, Mr. Pickerill claimed charitable contributions to the Church of Scientology of $14,445.00, reflecting a carryover from a prior year or years and showing no 1988 payments. (Stip. paragraph 40; Jt. Exs. 11-K, 12-L).

78. The deficiencies at issue in these cases with respect to Mr. Pickerill were based on respondent's disallowance of Mr. Pickerill's claimed deductions for charitable contributions of $14,180.00 in 1987 and $14,445.00 in 1988. (Stip. paragraph 42).

79. In connection with his participation in religious services, Mr. Pickerill made donations of $28,801.81 to the Missouri Church in 1987 and $5,239.88 in 1988, and $4,833.00 in 1988 to ASHO in connection with religious services. (Stip. paragraph 44).

NELSON AND BARBARA J. BETANCOURT

80. The Betancourts timely filed Forms 1040 individual income tax returns for the taxable years 1987, 1988 and 1989 with the IRS Service Center at Atlanta, Georgia. On their 1987 return, the Betancourts claimed deductions for contributions to churches of Scientology in the amount of $2,305.00. On their 1988 return, the Betancourts reported contributions to churches of Scientology in the amount of $21,515, but deducted only $18,374.00 due to the 50 percent limitation. On their 1989 return, the Betancourts reported contributions to churches of Scientology in the amount of $2,000.00 plus a carryover of $3,141.00 for a total of $5,141.00. (Stip. paragraphs 46-47; Jt. Exs. 13-M, 14-N, 15-O).

81. The deficiencies at issue in these cases with respect to the Betancourts were based on respondent's disallowance of the Betancourts' claimed deductions for charitable contributions of $2,305.00 in 1987, $18,374.00 in 1988, and $5,141.00 in 1989. (Stip. paragraphs 48-49).

82. In connection with their participation in religious services, the Betancourts made donations of $500.00 to the Church of Scientology of Orlando ("Orlando Church") in 1987 and $24,185.80 to AOLA (CSWUS) in 1988. (Stip. paragraph 51).

83. The parties agree that the Betancourts are not entitled to deduct $1,805.00 of charitable contributions claimed on their 1987 Form 1040. (Stip. paragraph 52).

ADDITIONS TO TAX

84. The parties agree that no additions to tax under sections 6653, 6659, 6661, or 6662 are due from any of the petitioners for any of the taxable years in issue. (Stip. paragraph 53).

85. The parties agree that no addition to tax under section 6651 is due from petitioner Susan Lazar for the taxable year 1986. (Stip. paragraph 54).

DONEE ELIGIBILITY UNDER SECTION 170

86. The following churches of Scientology presently are recognized by the IRS as exempt under section 501(c)(3) and as qualified charitable donees under section 170(c)(2):

Church of Scientology New Buffalo Organization

Church of Scientology of Boston, Inc.

Church of Scientology of Florida, Inc.

Church of Scientology of Hawaii

Church of Scientology of Michigan

Church of Scientology of Minnesota

Church of Scientology of Missouri

Church of Scientology of Nevada

Church of Scientology of New York

Church of Scientology of Portland

Church of Scientology of Sacramento

Church of Scientology of Texas

Church of Scientology of Washington State

Church of Scientology Western United States

IRS Pub. 78 at 317 (Sept. 1991 ed.). The Church of Scientology of New

York has been so recognized by the IRS since 1957, the Church of Scientology Western United States was so recognized in 1980 under its prior name, Church of Scientology of San Diego, and the remaining churches have been so recognized since 1975. (Stip. paragraph 87).

87. All but one of these churches recognized as exempt are Class IV (what are now called Class V) churches of Scientology. There are approximately 35 other Class IV churches of Scientology which have never applied for recognition of exemption. (Stip. paragraph 88).

88. The Church of Scientology Western United States ("CSWUS"), in addition to housing a Class IV Church, the Church of Scientology of San Diego, also houses Church divisions which minister higher levels of religious services, the American Saint Hill Organization ("ASHO") and the Advanced Organization Los Angeles ("AOLA"). ASHO and AOLA became a part of CSWUS in May of 1985. (Stip. paragraph 89).

89. During all times relevant to these cases, the Boston Church, the New York Church, the Missouri Church, and both AOLA and ASHO (as part of Church of Scientology Western United States) were recognized by the respondent as charitable organizations within the meaning of section 170 and were listed in the Cumulative List of Organizations described in Section 170(c) of the Internal Revenue Code of 1986 published by the Internal Revenue Service ("Publication 78"). (Stip. paragraph 90).

90. Solely for purposes of these cases, the respondent agrees that the Los Angeles Church, the Orlando Church, and CCI are also organizations described in section 170(c)(2). (Stip. paragraph 91).

DONATIVE INTENT

91. At the time they made their donations to the various churches of Scientology, each of the petitioners was aware that only a portion covered the cost to the churches of delivering the subject religious services, and each of the petitioners believed that the balance of their donations was used to carry out other important church activities. (Stip. paragraph 93; Jt. Ex. 21-U; Tr. 115-16; 134-35; 151-53; Stip. paragraph 94).

92. The petitioners' knowledge and beliefs were derived from church publications provided to them from time to time, such as the Church of Scientology publication entitled "What Your Donations Buy," and from the petitioners' own awareness of and participation in various public benefit activities of their churches. (Stip. paragraph 93; Jt. Ex. 21-U; Tr. 125, 139, 152; Stip. paragraph 94).

93. The Church sponsors periodic public events throughout the year celebrating the major holidays of the Scientology religion. These events are attended by thousands of Scientologists locally, and thousands upon thousands more across the planet through satellite television transmission. These events also provide opportunities for Church leaders to inform their congregations what the Church is accomplishing in its social betterment activities such as drug rehabilitation and education and the many charitable activities and projects that their contributions support. (Ex. 79, p. 11).

94. At the time they made their donations to the various Churches of Scientology, each of the petitioners subjectively intended their donations for two purposes -- to participate in specific religious services and rituals of the Scientology religion and to support the religious, charitable, educational and other public benefit and social welfare activities that churches of Scientology carry on separate and apart from the ministry of religious services to their parishioners. (Stip. paragraph 94; Ex. 79, p. 7; Tr. 115-16, 121-22, 128, 134, 151, 154).

RELIGIOUS AND FINANCIAL PRACTICES

OF RELIGIONS IN THE UNITED STATES

PAYMENTS TO SYNAGOGUES

NATIONWIDE SURVEY OF SYNAGOGUES

95. On behalf of petitioners, Andrew A. Beveridge, a professor at Queens College and Graduate Center and director of the Queens College M.A. Program in Applied Social Research, The City University of New York, conducted a survey to ascertain the practices of synagogues in the United States with respect to their requirements for membership and, specifically, their requirements for permitting attendance at High Holy Day services. (Ex. 80, p. 1, paragraphs 1-2).

96. Professor Beveridge contacted nearly half of the synagogues in the United States (Ex. 80, p. 3, paragraph 6) and received written responses from over 70% of these synagogues, an extremely high percentage for a social science survey. (Ex. 80, pp. 3-5, paragraphs 6-8). The responSe rate from synagogues affiliated with the Union of American Hebrew Congregations (Reform) and the United Synagogue of America (Conservative), which together include the synagogues serving approximately 78% of American Jews affiliated with synagogues was about 80% (77% for USA synagogues and 82% for UAHC synagogues). (Ex. 80, pp. 4-5, paragraphs 7-8). Additional information was ascertained through completed follow-up phone calls to 558 of these synagogues (Ex. 80, pp. 5-6, paragraph 9) and through a non-response analysis in which information was obtained through phone calls completed to 86 of the synagogues which had not sent written responses to Professor Beveridge's inquiry. (Ex. 80, p. 6-7, paragraph 10 & n.6).

97. The parties stipulated that Professor Beveridge is qualified as an expert in sociological research and methodology and in statistics and that he was qualified to provide expert testimony, based on the study he directed, about the practices of synagogues in the United States regarding their requirements for granting access to High Holy Day Services. (Stip. paragraph 105; Tr. 169).

98. Professor Beveridge conducted a valid and reliable survey of the practices of American synagogues regarding membership and regarding requirements for attendance at High Holy Day services. (See generally Ex. 80 and Tr. 168-318).

IMPORTANCE AND SIGNIFICANCE OF HIGH HOLY DAY SERVICE ATTENDANCE

99. The High Holy Days (Rosh Hashanah and Yom Kippur) are the most important part of the religious year for Jews. (Ex. 116, p. 17, paragraph 30; Tr. 1107).

100. There is high interest among Jews in attending High Holy Day Services. Many Jews who are not active in a synagogue during the year make a point of attending High Holy Day services. Attending High Holy Day services is the synagogue related activity in which most Jews participate. The Council of Jewish Federations' 1990 National Jewish Population Survey found that 59 percent of Jews attend High Holy Day services, while only 12 percent attend weekly synagogue services. (Tr. 1233-34; Ex. 116, p. 18, paragraph 30; Ex. 80, p. 7-8, paragraph 11; Ex. 80 B, p. 63).

101. Synagogue Service attendance has some significance in determining who is "a good Jew." (Ex. CD, p. 3).

102. A Jew may derive a spiritual benefit from attendance at High Holy Day services, but receives no guarantee of doing so by purchasing a High Holy Day Service ticket. (Tr. 1157). Spiritual benefit accrues to the individual and community from making contributions to one's synagogue. (Ex. CD, pp. 2-3).

CONCLUSIONS OF THE SURVEY: PAYMENT IS REQUIRED TO GAIN ACCESS TO HIGH

HOLY DAY SERVICES

103. About 2.15 million Jews attend High Holy Day Services each year. Of these about 1 million are members of a synagogue and the others are not. (Ex. 80, p. 7, paragraph 11).

104. Eighty-six percent of all synagogues in the United States, serving 91 percent of synagogue members, require a payment for an individual to obtain admission to High Holy Day services. (Tr. 173- 74; Ex. 80, pp. 14-15, paragraph 25). Only those few synagogues that (1) do not charge dues (serving about one percent of all members) or (2) that allow nonmembers to attend High Holy Day Services without charge (serving about eight percent of all members) fail to follow the overwhelming pattern of requiring payment as a condition of High Holy Day service admission. (Ex. 80, p. 15, paragraph 26).

105. Membership dues are a structured way to raise funds for a synagogue. (Ex. CE, p. 3). Conditioning access to High Holy Day services on a payment is a particularly good way of raising revenues for a synagogue. (Tr. 1234-35).

106. There are three types of required payments by which individuals can obtain admission to High Holy Day services:

a. Membership dues payments entitling members to admission;

b. Membership dues payments plus an additional payment entitling

members to admission;

c. Payments by or for nonmembers entitling nonmembers to

admission. (Tr. 174-75, 246-47).

ADMISSION TO HIGH HOLY DAY SERVICES SECURED THROUGH PAYMENT OF

SYNAGOGUE MEMBERSHIP DUES

107. Ninety-eight percent of synagogues charge members membership dues. (Tr. 186; Ex. 80. p. 9, paragraph 14 and n.8).

108. Only about 1-2% of synagogues indicate in their membership materials that they do not have membership dues. No synagogues affiliated with either the Union of American Hebrew Congregations (the organized arm of Reform Judaism) or the United Synagogue of America (the organized arm of Conservative Judaism) indicate in their membership materials that they do not have membership dues. (Tr. 186; Ex. 80, p. 9, paragraph 14). Nearly 80% of synagogue members are affiliated with the Reform or Conservative movements. (Ex. 80, p. 4, paragraph 7).

109. The average membership dues for a family of four is $545.00 (Tr. 200; Ex. 80, p. 9, paragraph 15). When synagogues' varied membership size is taken into consideration, the average membership dues for a family of four is $666.00. (Ex. 80, p. 10, paragraph 15; see also Tr. 964).

110. Synagogue membership dues are fixed payments. (Tr. 200-01, 1205-13; Ex. 80, p. 9-10, paragraphs 15, 16; Ex. CE, pp. 2-3; Ex. 122, p. 9-10.3).

111. The vast majority of synagogues that have membership dues (which is virtually all synagogues) provide a dues schedule in their membership application materials (Ex. 80, p. 9-10, paragraph 15; Tr. 272), and send the schedule to any person merely inquiring about membership. (See id., pp. 3-4, n.2).

112. Synagogue membership dues are fixed in a variety of ways:

a. Some synagogues have fixed minimum dues, a system in which every member is obligated to contribute, as a minimum, a set amount of annual dues, regardless of family composition or financial status. (Ex. 122, p. 9).

b. Sixty-one percent of synagogues use a family dues system, in which dues are fixed in relation to marital and family status. Payments are pegged to whether membership is being purchased for a single person, a coup1e, or a family with children. (Ex. 80, p. 10, paragraph 16; see, e.g., Ex. 80 H 1, 2, 3, 4, 5). Generally, the price of membership is directly related to the number of seats at High Holy Day services provided to the family. (See, e.g., Ex. 80 H 2, 27, 35, 36, 82). As in the fixed minimum dues system, in the family dues system, dues are fixed without regard to financial ability to pay. (Tr. 201; Ex. 80, p. 10, paragraph 16).

c. Slightly less than 20% of synagogues fix membership dues based on members' income. Most commonly, in income based dues systems, dues are fixed by the synagogue as a percentage of income and minimum and maximum dues amounts are set. (Tr. 204-08; Ex. 80, p. 10, paragraph 16). Under income based dues systems, members are obligated to pay dues according to the plan. (Tr. 1209; Ex. 122, p. 10.2). Many synagogues set standards defining the income on which income-based dues must be paid. Two of the standards used are: (a) adjusted gross income as defined on an IRS Form 1040 and (b) income from all sources. (Ex. 122, p. 10.2; Ex. 80 H 23). Some synagogues require members to prove their income in establishing the appropriate dues level. (Ex. 121, p. 14). A major reason that some synagogues use income based dues systems is that they generate higher dues revenues than do other dues systems. (Tr. 1207; Ex. 121, pp. 14, 17).

d. Some synagogues set dues by the location of members' seats for High Holy Day Services. (Tr. 200). There are three methods of Setting dues by seat location. Price may be determined by: (1) the room in which the member attends the Service, (2) whether the member Selects a reserved seat, and (3) by the row or section of the room for which the member buys a seat. (Tr. 204-05, 210-12, 1226-29; Ex. 80 I, Vol. 6, R 145, p. 8). Some set prices based on whether the member sits in the synagogue's sanctuary or in a less expensive auditorium. (See, e.g., Ex. 80 H 18, 35, 38, 50, 54, 77, 78). Some set prices based on whether the member pays for a reserved or open seat at High Holy Day services. (Tr. 1227-28; Ex. 80 H 2, 75). Others set prices based on the row or section the member pays for. (Ex. 128; Ex. 80 H 54, 78, 89). Some synagogues publish seating charts that show the prices charged for the various sections or rows of the sanctuary or auditorium. (Ex. 128).

e. Some of the other bases for setting membership dues are age (Tr. 200), both for younger people (Tr. 208-10) and for senior citizens (Tr. 210), first year discounts (Tr. 200, 212-14), and seasonal discounts. (Ex. 80, p. 10, paragraph 16).

f. Some synagogues provide different levels of benefits based on the price of the membership. For example, members pay more in some synagogues for the benefit of religious instruction or Bar and Bas Mitzvah instructions for their children. (See, e.g., Ex. 80 H 3, 29).

g. Some synagogues charge different prices depending on the time of year a member joins. (Ex. 80 H 25).

113. Most synagogues' membership dues rates do not take into account members' ability to pay. Slightly less than 20% set dues by income (Ex. 80, p. 10, paragraph 15), and a study of the high cost of affiliation with Jewish organizations commissioned by the American Jewish Committee has found that "[t]he fee structures of most Jewish institutions are out of touch with current demographic realities; i.e., they do not consider the family's ability to pay." (Ex. 80, p. 12, paragraph 19; Ex. 80 D, p. 1).

114. Thirty-six percent of all synagogues, serving 47 percent of all synagogue members, make payments to the synagogues' capital or building fund a condition of membership. The typical amount required is $1,000.00, payable over a period of years. The average annual capital fund payment, for those required to make one, is $308.00. (Ex. 80, p. 11, paragraph 18; Tr. 226-30).

115. A conservative estimate of the revenue garnered in dues from synagogue members, not including revenues from building fund contributions required as a condition of membership, is on the order of $350 million per year. (Ex. 80, p. 12, paragraph 20).

THE FINANCIAL RELATIONSHIP BETWEEN MEMBER AND SYNAGOGUE IS

CONTRACTUAL

116. The membership application materials of many synagogues characterize the members' obligation to pay dues in contractual terms. (Tr. 215-17, 1231-33):

a. Some synagogues refer to dues pledges as legally binding contracts. (Ex. 80 H 1; see also, e.g., Ex. 80 H 7; 34; 51; 53; 57; Ex. 80 I Vol. 5, O 41; Vol. 6, R 133; Vol. 7, R 146; Vol. 10, R 183; Vol. 27, R 289; Vol. 29, R 308; Vol. 33, C 376; Vol. 33, C 400; Vol. 37, R 370; Vol. 44, R 58; Vol. 48, R 373).

b. Some synagogues refer to the obligation to pay the building fund assessment as contractual. (Tr. 229-30, 1231; see, e.g., Ex. 80 H 14; 15; 51; 66; 85; Ex. 80 I, Vol. 27, R 289).

c. Many synagogues bill their members for dues and specify that dues are payable as required by the synagogue, e.g., annually, Semiannually, quarterly or monthly. (Tr. 221-223; Ex. 80 H 8; 10; 11; 13; 17; 23).

d. Many synagogues require all or part of the annual membership dues to be remitted with the application for membership. (Tr. 1232; 302; Ex. 80 H 8; 11; 23; 58; 83; 94; 102; 105; Ex. 80 I Vol. 6, R 133; Vol. 8, R 167; Vol. 13, C 167; Vol. 17, R 254; Vol. 32, C 369; Vol. 34, C 376; Vol. 52, R 402; Vol. 57, R 450).

e. Many synagogues provide that members who have not paid part or all of their membership dues will be denied access to High Holy Day services. (Tr. 221-23; 1232; Ex. 80 H 3; 4; 5; 7; 12; 13; 43; 49; 52; 56; 68; 76; 81; 91; 92; Ex. 80 I Vol. 4, C 70; Vol. 5, R 125; Vol. 12, R 187; Vol. 14, R 196; Vol. 19, R 228; Vol. 26, R 284; Vol. 32, C 338; Vol. 50, C 631).

f. Some synagogues will suspend or expel a member from membership for nonpayment of dues. (Tr. 222; 1266-67; Ex. 80 H 17; 52; 74; 96; 103; 107; 109; Ex. 80 I Vol. 44, R 58; Ex. 128).

117. Many Jews view their dues simply as payment for the specific services they receive. (Ex. 121, p. 16; Tr. 1229-30).

BENEFITS OF MEMBERSHIP

118. Some synagogues provide to members and prospective members a list of benefits or privileges of membership. These lists include such religious and secular benefits as High Holy Day Service admission, reserved seats at High Holy Day services, access to religious school for children, reduced tuition to religious school, discounted or free use of synagogue facilities, Bar or Bas Mitzvahs, discounted cemetery plots, newsletter subscriptions, membership in UAHC or USA, the right to vote in congregational meetings, and participation in social events or organizations. (Tr. 230; Ex. 80 H 2; 13; 31; 58; 74; 85; 101; Ex. 80 I Vol. 2, C 79; Vol. 6, R 145; Vol. 9, R 170; Vol. 19, R 231; Vol. 21, C 256; Vol. 42, O 363; Vol. 44, R 58; Vol. 45, R 65; Vol. 51, C 655; Vol. 56, C 681).

119. Eighty-two percent of synagogues with membership dues include at least some seats at High Holy Day Services as a benefit of membership. Seventy percent include as a benefit of membership admission to High Holy Day Services for the member's entire household. Twelve percent include a fixed number of seats for High Ho1y Day Services --usually two to four -- as a benefit of membership. (Tr. 235-36; Ex. 80, p. 13, paragraph 21).

120. Seventeen percent of all synagogues will not admit nonmembers to High Holy Day Services, except under special circumstances, e.g., being a guest or relative of a member. In most such cases, a seat must be purchased. (Ex. 80, p. 14, paragraph 24; Tr. 237-38). In some cases, nonmembers are excluded from High Holy Day services because of space considerations. The High Holy Days are the time of greatest demand on synagogues (Tr. 1194) and the supply of seats is often very limited, so some congregations restrict attendance at Services to members of their own synagogue. (Ex. CE, p. 5; Tr. 1235).

121. Given the space limitations on synagogues at the High Holy Days, some members view membership dues as the payment required to ensure access to their synagogue's High Holy Day Services. (Tr. 1235).

122. Synagogues offer a variety of discounts: for ear1y payment of dues, (see, e.g., Ex. 80 H 29, p. 3), for first-year members (see, e.g., Ex. 80 H 20, p. 1), and for members joining at different times of the year. (See, e.g., Ex. 80 H 25, p. 2).

METHOD OF FACILITATING PAYMENT

123. Some synagogues provide for payment of membership dues with credit cards. (Tr. 225; Ex. 80, p. 11, paragraph 17; Ex. 80 H 29). Use of credit cards permits some synagogues to automatically collect membership dues without the necessity of any action by the member. (Ex. 80 H 85, p.4; H 29, p. 1).

EXCEPTIONS ARE FOR INABILITY TO PAY AND NO OTHER REASON

124. Some synagogues provide exceptions to or reductions in membership dues, but only for reason of financial inability to pay. (Tr. 218-21; 1216-18; Ex. 80, p. 10, paragraph 1.

125. The fact that one member of a synagogue might be entitled to a reduction of dues by reason of financial inability to pay would have no effect on the obligation of another member, who has the means to pay, to pay full membership dues. (Tr. 1219). Where a member has the means to pay, he or she is obligated to pay the full membership dues. (Tr. 1209). There is no case in which exceptions are not based on ability to pay. (Tr. 284-85).

126. Some synagogues have established procedures by which members or prospective members may apply for a waiver or reduction in membership dues. These procedures usually require a meeting or conversation with an official or committee of the synagogue. Some synagogues mandate that the official or committee responsible investigate the request for a reduction or waiver. In most cases where synagogues provide for exceptions, their membership application materials request information regarding the applicant's (and spouse's) occupation and employer. In reviewing the application for an exception, the official or committee would have access to this information. In some cases, the person seeking a reduction is required to fill out a form to be submitted to the synagogue's finance or other committee. (Tr. 218-221; Ex. 80, p. 10, paragraph 17; Tr. 1222-24; see, e.g., Ex. 80 H 95).

127. Some synagogues do not mention the possibility of reductions or waivers of membership dues in order to get more people to pay full membership dues and to derive more income for the synagogue. (Tr. 1220).

128. Many Jews are unaware that exceptions to membership dues may be available. A study on the cost of affiliation to Jewish institutions commissioned by the American Jewish Committee has found that, "[o]ften, the availability of aid is not well publicized so that many in need remain unaware. Those who could be reached are not." (Ex. 80 D, p. 1).

129. A person known to have the financial ability to pay the applicable level of dues but who simply did not want to pay dues may be denied membership in a congregation. (Tr. 1218).

130. A person who abused the exceptions process by refusing to pay full dues or seeking a reduction in dues despite having the means to pay would be denied a reduction. (Tr. 1264-65).

131. A study commissioned by the American Jewish Committee has found that many Jews who are aware of the high cost of synagogue membership and who are aware of problems of getting assistance, including that the exceptions process may not be fair, equitable or confidential, "vote with their feet" and choose not to apply for synagogue membership. (Ex. 80, pp. 11-12, paragraph 19; Ex. 80 D, p. 1; Tr. 289-90; 1226).

PAYMENTS BY MEMBERS FOR ADMISSION TO HIGH HOLY DAY SERVICES SEPARATE

FROM MEMBERSHIP DUES

132. Some synagogues sell tickets to High Holy Day services, rather than include the right to attend as a benefit of membership. Eighteen percent of synagogues include no High Holy Day admission in membership. Altogether some thirty percent of synagogues sell tickets to members either in addition to or instead of providing some seats to High Holy Day Services as a benefit of membership. (Ex. 80, p. 13, paragraph 21; Tr. 236-37).

133. Revenues from sales of High Holy Day service tickets to members are at least $10 million. (Ex. 80, p. 14, paragraph 23).

PAYMENTS BY NONMEMBERS FOR ADMISSION TO HIGH HOLY DAY SERVICES

134. Eighty-three percent of synagogues will allow nonmembers to attend High Holy Day services, if space is available (Ex. 80, p. 14, paragraph 24). If space is not available, nonmembers may be turned away. (Tr. 1236).

135. Of those synagogues that allow nonmembers to attend, seventy-seven percent charge a fee, 7 percent require a donation, and only 16 percent allow free admission. The relatively few synagogues that allow nonmembers to attend without charge are atypical in that they lack high demand for admission to High Holy Day services. Most of these are outside of major centers of Jewish population (defined as areas that have more than 50,000 Jews). The very few that are in major centers of Jewish population and that allow free admission appear to be in poor financial shape. (Ex. 80, p. 14, paragraph 24; Tr. 239-45).

136. The vast majority of synagogues in major centers of Jewish population do not permit free admission to High Holy Day services to nonmembers. For example, in the Greater Washington, D.C. area, the local Jewish press lists and carries advertisements of synagogues that hold High Holy Day services that nonmembers may attend. Nonmembers are charged a fixed fee to attend the vast majority of the listed and advertised Services. (Ex. 126, p. 71; Ex. 127, p. 38; Tr. 1241-55). The introductory note to the listing of services. open to nonmembers states, "Space is limited at most locations, therefore tickets should be purchased early." (Ex. 126, p. 71; Ex. 127, p. 38).

137. For those synagogues that sell tickets to members and nonmembers, usually the cost of a seat to a nonmember is substantially higher. The average cost for a High Holy Day service ticket is about $109 for nonmembers and $66 for members. (Ex. 80, p. 14, paragraph 24). In addition to these price differences and the exclusion of nonmembers from some services, in some synagogues members receive other preferences over nonmembers in connection with High Holy Day services, for example, in the location of seats, the location of the Service they may attend, and in the personnel performing the Service they may attend. (Ex. 80, p. 15, paragraph 28). Prices for High Holy Day tickets often vary based on the location of seats by row, section, or room. (See, e.g., Ex. 80 H 18, 34, 40, 50, 107).

138. Some synagogues give refunds for unused High Holy Day service tickets. (See, e.g., Ex. 120).

139. Jews buy High Holy Day Service tickets because they want to attend the services and to support the synagogue. (See, e.g., Tr. 1161-62).

140. An estimate of revenues from nonmembers' purchase of High Holy Day service tickets (based on a conservative estimate of one million nonmembers attending services) is about $109 million annually. (Ex. 80, p. 14, paragraph 24). Revenues from sale of High Holy Day service tickets to members are estimated to be at least $10 million annually. (Ex. 80, p. 14, paragraph 23).

141. Information about ticket prices for High Holy Day services for members and nonmembers are provided in synagogues' membership application materials and over the telephone. (See, e.g., Ex. 80 H 5, 6, 11, 13; Ex. 80 pp. 5-6, paragraph 9; Tr. 307-09).

MORMON TITHING

INTRODUCTION

142. Within the Mormon religion, obedience to the Law of Tithing -- payment of a full tithe -- is a necessary (though not sufficient) condition for gaining access to the Mormon temples and participating in the most sacred rituals of the religion, the personal endowment, celestial marriage, and proxy temple work to link the living with the dead. Participation in these rituals, which are performed only in the temple, are necessary to achieve exaltation, the ultimate religious goal of Mormonism. (Tr. 597, 603; 772, 800-2; Ex. 94, pp. 3-10, paragraphs 6-13; Ex. CA, paragraph 25). Participation and advancement in the priesthood (which is not a vocational status, but rather the status of active, "worthy" male members of the Church), calls to serve as missionaries and calls to serve in positions of ecclesiastical leadership similarly require full tithing. (Ex. 94, pp. 32-33, paragraphs 50-51; CA. paragraph 19).

143. In connection with gaining access to these central religious rituals and callings, the full tithing requirement is rigorously enforced through worthiness interviews, backed up by tithing settlement interviews and comprehensive recordkeeping by the Church. (Ex. 94, pp. 36-39, paragraphs 56-60, pp. 32-33, paragraph 51, pp. 19-24, paragraphs 30-38; Tr. 793; Tr. 976).

144. In addition to conditioning spiritual services and benefits on tithing, the Mormon Church teaches its members that many temporal blessings are contingent upon adherence to the Law of Tithing. Mormon prophets and Church publications extol obedience to the Law of Tithing as the foundation for material prosperity (Ex. 94, pp. 16-17, paragraphs 25-26), protection from "burning" at Jesus' Second Coming (id., p. 16, paragraph 24), and psychological well-being. (Id. p. 13, paragraph 17).

THE LAW OF TITHING

145. In Mormonism, tithing is viewed as a Commandment of the Lord (Tr. 767) and is established as a religious requirement by the scriptures of the religion. (Tr. 785; Ex. CA, p. 2 paragraph 5).

146. The Law of Tithing requires that each member of the Church pay 10 percent of his or her income to the Church. (Tr. 597-98; 768; Ex. CA, p. 3, paragraph 6). The Church defines a tithe in the general Handbook of Instructions, which is the book of instruction issued by the highest authority in the Church to Church leaders outlining the procedures for administering the Church. (Tr. 601-02; Ex. 94(b); Ex. 105).

147. Leaders of the Church periodically speak on the subject of tithes at priesthood and sacrament meetings and explain specifically what income should be tithed. (Tr. 979-80). Mormons know they are to pay tithes on gross income from salaries and investment income and on net income if self-employed. (Tr. 979; Tr. 788-89.)

148. The Mormon Church does not refund tithes. (Ex. CA, p. 5).

149. The Law of Tithing is viewed both as a test of faithfulness, in that it is a means of ascertaining an individual's loyalty to the Church and a requirement for obtaining the benefits Mormonism offers, and as a duty, in that it is the principal source of income to the Church. (Ex. 94, p. 15, paragraph 21; Ex. CA, p. 3, paragraph 7, 8; Tr. 599-600; Tr. 782-83).

150. Mormons are taught that in order to enjoy the spiritual and temporal blessings of Mormonism, they must obey the Law of Tithing. (Ex. 94, pp. 15-18, paragraphs 21-27).

151. A Mormon must be a full tithe payer to gain access to the temple, (Ex. 94, pp. 36-39, paragraphs 56-59), and participate in the rituals necessary for salvation that are performed only there. (Ex. 94, p. 34, paragraph 53; pp. 3-10, paragraphs 6-13). Full tithe paying is also necessary for participation and advancement in Mormonism's lay priesthood. (Ex. 94, pp. 32-33 paragraphs 50-51).

152. In addition to promising spiritual benefits contingent on tithing, the Mormon Church promises a better life on earth (Ex. 94, pp. 10-13, paragraphs 14-17) if members obey the Law of Tithing. (Ex. 94, pp. 16-17 paragraphs 25-26).

153. The Mormon Church teaches that paying a full tithe will bring material well being, economic prosperity, better management and control of one's finances, and psychological satisfaction. (Ex. 94, pp. 16-17, paragraphs 25-26).

154. A specific promise to those who remain obedient to the Law of Tithing states that they will not be burned at the Second Coming of Christ. (Ex. 94, p. 16, paragraph 24).

155. The commandment to pay tithing is fully applicable to all members of the Church. (Tr. 785; Ex. CA, p. 3, paragraph 8).

156. The General Handbook of Instructions defines the only two exceptions to the requirement that "all Church members who have income should pay tithing": (1) "members entirely dependent upon Church we1fare assistance" and (2) "full-time missionaries." (Ex. 105, p. 9-1; Ex. 94(b), p. 68). The exception for missionaries is subject to the limitation that, "missionaries should pay tithing on personal income beyond the amounts they receive for their support." (Ex. 105, p. 9-1). If the missionary receives any income beyond living expenses, such as income from investments or from family, then the missionary is expected to tithe on that income. (Tr. 600, 602-03; Tr. 787-88; Ex. 105, p. 9-1; Ex. 94(b), p. 68). Those who meet one of these narrow exceptions are regarded as complying with the Law of Tithing. (Tr. 603).

157. Tithing is voluntary in the sense that one can be a member of the Church without being a full tithe payer. (Ex. CA, p. 5). But tithing is not voluntary in the sense that one cannot enter the temple, advance in the priesthood, or receive exaltation without being a full tithe payer. Tithing is also not voluntary in that no one can decide what he or she is capable of giving and have this be sufficient to meet the requirement of the Law of Tithing. (Ex. 94, pp. 24-25, paragraph 39).

158. Research on the financial resources of the Mormon Church suggest high levels of compliance with the Law of Tithing. (Ex. 94, pp. 27-28, paragraph 42). Published scholarly and journalistic estimates of the annual tithing income range from the high hundreds of millions of dollars to 1.5 billion dollars for 1983, and from 2.5 and 4.3 billion dollars for 1988. (Ex. 94, pp. 25-26, paragraphs 40- 41; see also Tr. 782-84).

159. Since a tithe is 10% of income, many Mormons pay substantial amounts to the Church annually. (See, e.g., Ex. 92 (tithe of $5,500) and Tr. 508-11).

ADMITTANCE TO THE TEMPLE IS CONDITIONED ON OBEDIENCE TO THE LAW OF

TITHING

160. The temple, defined by Mormon scripture as the House of the Lord, is an especially sacred structure in Mormonism and constitutes the only place where the faithful can participate in rituals ESSENTIAL for their exaltation, including the personal endowment, a celestial marriage, and the proxy work for the deceased that is required to integrate the various generations into the exalted family of God. (Ex. 94, p. 34, paragraph 53; Tr. 603).

161. Mormons differentiate between the wardhouse or chapel, which are comparable to a meeting place of the congregation, and the temple. While an individual may participate in some levels of Mormon experience at wardhouses and chapels, he or she cannot be exalted without receiving the ordinances performed only in the temple. (Tr. 603; Tr. 641-42; Ex. 94, pp. 33-34, paragraph 52).

162. Only faithful -- "worthy" -- Latter-day Saints can enter a Mormon temple (Ex. 94, p. 36, paragraph 56). To enter a temple, a candidate must present a card, known as a "temple recommend," assuring his or her worthiness. (Tr. 603-04; Tr. 793; Ex. 94, pp. 38- 39, paragraph 59; Ex. CA, p. 10, paragraph 32).

163. A Mormon obtains a temple recommend through an annual set of interviews, called temple recommend interviews, designed to verify his or her "worthiness" to enter a temple. (Ex. 94, p. 36, paragraph 56; Ex. CA, p. 10, paragraph 32).

164. A Mormon's "worthiness" requires annual recertification. (Ex. 94, p. 36, paragraph 56).

165. Each year, the applicant first has a private interview with his or her bishop /3/ to ascertain compliance with many principles, including the Law of Tithing. The applicant then proceeds to the second level for an interview with a member of the stake presidency (roughly equivalent to a diocese), who will ask the same questions as did the bishop. (Ex. 94, p. 36, paragraph 56; Ex. 94(b), pp. 34-35; Ex. 105, p. 6-1; Tr. 604, 613).

166. The task of both the bishop and stake president is to ascertain the candidate's "worthiness." (Ex. 105, p. 6-1; Ex. CA, paragraph 32). Instructions from Church authorities exhort the officials conducting the interviews to take "great care and attention" since they are "representing the Lord in determining worthiness to enter his holy house." Prior worthiness does not justify "a subsequent casual interview." All interviews require "searching inquiry of the worthiness of the applicant in relation to the standards and principles of the Church." (Ex. 94(d); see also Ex. 104; Tr. 605-07).

167. The interviewers ask a set of specific questions, prescribed by the highest Church authorities, designed to ascertain the member's worthiness to enter the temple. The worthiness criteria include such matters as: support of Church leadership and adherence to Church principles regarding doctrine, sexual conduct, abstinence from drugs and alcohol, honesty and morality. (Ex. 104; Ex. 94(d)).

168. One of the required questions is: "Are you a full tithe payer?" (Ex. 104, Question 9; Ex. 94(d), Question 6).

169. According to Church instructions, "no person should receive a temple recommend unless found to be worthy." (Ex. 94(d); Tr. 607; Tr. 786). Compliance with ALL the matters covered by the interview questions is required in order to obtain a temple recommend. (Tr. 606, 608, 609; Ex. 94, pp. 37-38, paragraph 58; Ex. 94(d); Ex. 104). Applicants do not receive a recommend if they do not declare that they are full tithe payers even if they meet all the other criteria. (Tr. 787).

170. In the current instructions for Temple Recommend interviews, the question regarding full tithing is immediately preceded by the question, "Are you honest in your dealings with your fellowmen?" (Ex. 104, question 8). To affirm falsely that one paid a full tithe would require a violation of the Mormon principle of honesty. (Tr. 647-48). The honesty question intensifies pressure to comply with the Law of Tithing. (Ex. 94, pp. 37-38, paragraph 58; Tr. 608-09).

171. If a bishop judges a member who has a valid recommend to be unworthy, the bishop should take the recommend from the member immediately. (Ex. 94(b), p. 37; Ex. 105, p. 6-3). A bishop who discovers that a member lied in a temple recommend interview about his or her tithing status is to take the temple recommend from the member. (Tr. 649-50).

172. The bishop who conducts the member's temple recommend interview is usually the same person who interviewed the candidate during his or her previous "tithing settlement" interview (see infra), and therefore has independent reason to know whether the member has paid a full tithe. (Tr. 615-16; Ex. 94, p. 20, paragraph 31).

173. The validated temple recommend itself is a printed card which identifies the member, has the signatures of the member's bishop and stake presidency official, and has dates of issuance and expiration. The expiration date is stamped in large red, bold letters and numbers at the top of the recommend. (Ex. 95; Ex. 94(e); Tr. 611; Tr. 794).

174. The Church requires that every member attempting to enter the temple must present a valid temple recommend. (Tr. 610; Tr. 793). The official instructions for issuing temple recommends order officials to "[i]nform all applicants plainly that they will not be admitted to a temple without presenting a valid recommend." (Ex. 104, p. 1; see also Ex. 94(d), p. 3). Upon arrival at the temple, the recommend is presented to an attendant, the expiration date is checked, and the signatures are verified. (Ex. 94, pp. 38-39, paragraph 59).

CHURCH MONITORING AND RECORDING OF MEMBERS' TITHING

175. The Church maintains meticulous records and employs personal interviews to ascertain the tithing status of members. These records are used in part to determine access to institutionally controlled benefits. (Ex. 94, p. 19, paragraph 30).

176. In 1983, the Church created a computerized system for greater control of tithing records. (Ex. 94, p. 19, paragraph 30). In November 1991, the Church Finance and Record Department distributed new computer software which included changes designed "to make it easier to input tithing status information." (Ex. 101, p. 1).

177. A Latter-day Saint's status as a tithe payer is ascertained through an annual, year-end interview with the member's bishop. Known as "tithing settlement," the interview is both a means of obtaining tithing information for Church records and a context that can be expected to influence the member to pay the full tithe. (Ex. 94, p. 20, paragraph 31).

178. The tithing settlement interview is a private and confidential meeting between the bishop, who is "the Lord's agent for receiving" the tithe (Tr. 768), and the tithe payer. Each member is strongly encouraged to bring to the interview his or her family, including small children (Tr. 617; Ex. CA, paragraph 13; Ex. 94(b), p. 69; Ex. 105, p. 9-1), who themselves are expected to tithe on whatever income they have. (Tr. 984; Ex. CA, paragraph 42).

179. Every year, for each member of his ward, every Mormon bishop keeps a continuous record of the tithes and other payments made by the member to the Church. In these records, now called a Tithing and Other Offerings Statement, the bishop or his ward financial clerk records the dates and amounts paid, in columns for tithing and for various other payments. (Ex. 92; Ex. 94(f); Ex. 115; Tr. 613-15). The end of each Tithing Statement contains a line or box labeled "Declaration," in which are marked four categories: "full," "part," "exempt," or "non," to identify the individual's tithing status. (Ex. 92; Ex. 94(f); Ex. 115; Tr. 986; Tr. 990).

180. Tithing settlement commonly begins with a meeting between the member and either the ward financial clerk or the bishop. The purpose of this part of the meeting is to verify the accuracy of the Church's records of the member's prior payments and to ascertain if there is any further payment the member intends to make. If further payment is to be made to bring the member up to a full tithe, it is made at this time. (Tr. 985-90; Tr. 618-19). Any new payments are entered on the Tithing Statement and the totals for the year are entered. (Tr. 986).

181. The second part of tithing settlement is always conducted with the bishop. As required by the General Handbook of Instruction, the bishop asks the member to declare whether he or she has been a full tithe payer for that year. (Tr. 619; Ex. 105, p. 9-1). After ascertaining the member's tithing status, the bishop checks the appropriate declaration category, and then signs and dates the Tithing Statement. (Tr. 619; 990).

182. On a "need to know" basis, the bishop may tell quorum presidents or group leaders if members under their jurisdiction are full tithe payers. (Ex. 105, p. 9-2; Ex. 94(b), p. 71).

183. Upon the conclusion of tithing settlement for the ward, the bishop sends the receipts for the year to the Church. The bishop and clerk then prepare the Annual Tithing and Donations Status Report, which reflects members' tithing status, and send it to the stake president who, with his clerk, prepare a report for the stake that is forwarded to Church headquarters. (Ex. 94(b), pp. 69-70; Ex. 105, p. 9-1).

184. The pressure to pay a full tithe and the importance of doing so is intensified by the knowledge that a declaration that one is a full tithe payer will have to be made to one's bishop, by whom one is also interviewed to obtain a temple recommend. (Ex. 94, pp. 22-23, paragraph 36). Each bishop sees each member's tithing payment and is likely to be familiar with the financial situation of many members of his ward as a result of his own contacts with members and those of home and visiting teachers, who visit each Mormon household at least twice a month to assess the situation, including financial health, of each family and report back to the bishop. (Tr. 616-17).

185. Tithing settlement is both a means of ascertaining compliance and also a technique for obtaining compliance with the Law of Tithing. (Ex. 94, pp. 23-24, paragraph 37).

ULTIMATE GOALS OF MORMONISM CAN BE ACHIEVED ONLY THROUGH RITUALS

AVAILABLE ONLY TO FULL TITHE PAYERS

186. The ultimate goal of Mormonism is exaltation, which is conceived of as the realization of a state of godhood or perfection. (Ex. 94, p. 3, paragraph 6; Tr. 621). Exaltation is the highest blessing in the afterlife. (Ex. CA, paragraph 25).

187. According to Mormon doctrine and scripture, a Mormon cannot achieve exaltation without participating in certain religious rituals that are performed only in the temple. (Tr. 597, 621, 635-36; Ex. 94, pp. 2-7, paragraphs 4, 7-10, 61; Ex. CA, paragraph 25).

188. Without a "celestial" or "eternal marriage," which is only performed in a Mormon temple, exaltation cannot occur. Celestial marriage enables the family to survive death, to exist in both "time and eternity" and to enjoy the possibility of exaltation through linkage or "sealing" to the rest of humanity. (Ex. 94, pp. 3-4, 6, paragraphs 7, 9; Ex. CA, paragraph 25).

189. The participants in a celestial marriage are the couple being married and their immediate family. The couple and any offspring they subsequently have derive the spiritual benefit of a celestial marriage. (Tr. 625).

190. Before a couple can experience their celestial marriage, they must receive their "personal endowments" (Tr. 624), another ritual that occurs only in the temple. (Ex. 94, pp. 4-6, paragraph 8; Ex. CA, paragraph 25). The rituals of the endowment entail a member's taking oaths and making covenants with God. The endowment is essential for one's exaltation. (Ex. 94, pp. 4-6, paragraph 8).

191. The individual who participates in the rituals of the endowment derives the primary spiritual benefit from them. (Tr. 623).

192. In Mormon theology, families must be integrated into larger social units until all exalted beings constitute one extended family. Consequently, the church teaches living members to perform "temple work" -- the same rituals and ordinances they perform on their own behalves (Tr. 626; Tr. 981-82) -- by proxy for the dead. The purpoSe of this work is to link the living and the dead to one another until the "family of God" is "welded together." (Ex. 94, pp. 6-7, paragraph 10).

193. Temple work can be performed only in a temple. (Tr. 625- 26).

194. Performance of rituals for the dead is an act of worship by the living member. (Tr. 800).

195. The rituals of temple work provide the deceased with the OPPORTUNITY for exaltation but they do not guarantee it. In contrast, the living are obligated to perform the ordinances for the deceased, and derive spiritual benefit from performance of the ordinance, whether the deceased accepts the gospel offered them or not. (Ex. 94, pp. 9-10, paragraph 12; Tr. 633-34).

196. It is only by performing these rituals for the dead that the living can enjoy the spiritual blessings and the exaltation promised by Mormonism. Mormons are often reminded of the statement of the Prophet Joseph Smith that "if we neglect the salvation of our dead, we do it at the peril of our own salvation!" (Ex. 94, pp. 6-7, paragraph 10).

197. Mormon scripture, official history and current statements by Church leaders teach that a member's neglect of temple work on behalf of the dead places the member's own exaltation in peril. (Ex. 94(h), Doctrine and Covenants section 128:15; Ex. 94(i), p. 426; Ex. 94(j); Ex. 94(k); Ex. 94, pp. 6-10, paragraphs 10-13; Tr. 625-36; Tr. 800-02).

198. No living member can ever finish his or her temple work. Temple work will be completed only during the millennial reign of Jesus following his Second Coming. (Ex. 94, p. 10, paragraph 13; Tr. 640-41).

199. The Church strongly encourages members to return to the temple regularly. (Tr. 802-04). Mormons are taught that continued and repeated participation in temple work is important to grasping the religious significance of the rituals. (Tr. 623; Tr. 982-83; Tr. 802- 04; Ex. 102, paragraph 18).

200. Since the rituals of temple work for the dead take place only in the temple, members' opportunity to perform them (like the opportunity to perform celestial marriages and personal endowments) is contingent on obedience to the Law of Tithing. (Ex. 94, pp. 6-7, paragraph 10; Tr. 625-26).

MEMBERSHIP AND ADVANCEMENT IN THE MORMON PRIESTHOOD IS CONTINGENT ON

TITHING

201. By priesthood, Mormons mean (a) the authority to act in the name of God and (b) the structure of positions, offices, and callings required to govern the Church. (Ex. 94, p. 29, paragraph 45).

202. The Mormon priesthood is not a professional vocation. The Church is governed by a nonprofessional, lay priesthood, including thousands of men and boys holding priesthood offices. Divided into the Aaronic ("lesser") and Melchizedek ("higher") priesthoods, all worthy males can enter the Aaronic Priesthood at twelve years of age. (Ex. 94, pp. 29-30, paragraph 46).

203. Not only is ordination to the priesthood accessible to all worthy males over twelve years of age, but it is ESSENTIAL for exaltation and to enjoy fully the spiritual and temporal blessings provided by the Mormon way of life. Through the "exercise of his priesthood," the Mormon husband or father can perform religious functions and rites as the spiritual and temporal head of the family. (Ex. 94, pp. 31-32, paragraphs 48-49).

204. With its nonvocational, lay priesthood, a ward (local congregation) requires numerous offices and callings for its operation, and these positions are filled by members of the ward. Few active adults would be without at least one office or calling in the ward. (Ex. 94, pp. 30-31, paragraph 47; Tr. 616).

205. Access to the priesthood -- to the "offices and callings" identified above -- is directly dependent upon an individual's obedience to the Law of Tithing. To obtain each office or calling, men are expected to be "worthy" in all respects, including being full tithe payers and for each office or calling must go through a "worthiness" interview. (Ex. 94, pp. 32-33, paragraphs 50-51; Ex. 94(d); Tr. 793).

ROMAN CATHOLIC MASS OFFERINGS

DEFINITION OF MASS STIPEND

206. A Mass stipend or offering is a monetary payment which a donor, even including a non Catholic, gives in advance of a Mass in order that the Mass will be celebrated for the donor's special intention. (Tr. 372-73; Ex. 83, p. 3, paragraph 5; Ex. CB, p. 1; Tr. 839-40).

207. A special intention is the specific goal that the donor has in mind. (Tr. 373; Ex. 83, p. 4, paragraph 10). A special intention can be either a spiritual or temporal benefit, and can be for the donor or for third parties. (Tr. 373; Ex. 83, p. 4, paragraph 10, p. 6, paragraph 17; Ex. CB, p. 3; Tr. 436; Ex. 85, pp. 9-10, paragraph 14).

208. Mass stipends are in accordance with Canon law and with longstanding practice in the Catholic Church. (Ex. 106 (Canon 945 section 1 of the Code of Canon law); Tr. 376; Ex. 107 ("Not only has the practice been approved by the Church, it has been promoted . . ."); Ex. 83, p. 3, paragraph 7; Ex. 85, p. 4, paragraph 9, pp. 11-12, paragraph 17; Ex. CB, p. 1).

209. The Code of Canon law regulates Mass stipends but does not purport to contain any theological explanation or rationale for them. (Tr. 849; Ex. CB, p. 4).

MASS REQUESTS AND MASS CARDS

210. Mass bequests are testamentary provisions in which the testator provides that specified sums of money, sometimes large, are to be given to a Catholic church or shrine so that Masses will be celebrated for specific intentions, often for the repose of the testator's own soul. (Ex. 83, p. 9, paragraph 26; Ex. CB, p. 6; Ex. 85, p. 11, paragraph 16).

211. A "Mass card" is a form of remembrance card available at funeral homes or religious shrines on which one can request that a Mass be celebrated for a specific intention. A sum of money is given for the card or enclosed in the envelope. The money and the intention are transferred to a parish, religious shrine, monastery or mission where the Mass is celebrated by a priest for the intention. The practice is quite common and well accepted. (Ex. 83, p. 9, paragraph 28; Ex. CB, p. 7; Ex. 85, p. 5, paragraph 10).

CHANGE IN CANON LAW

212. Although the Canon law relating to Mass stipends was revised in 1983 as part of the general revision of Canon law, the practice of Mass stipends remains the same as prior to the Code revisions. (Tr. 376; Tr. 842-43; Ex. 83, pp. 3-4, paragraphs 7-8).

CONTRACTUAL OBLIGATION

213. Under the Code of Canon Law, a priest who accepts a Mass stipend is under a religious and contractual obligation to celebrate a Mass for the specific intention of the donor or to see that the Mass is celebrated. (Tr. 373-75; Ex. 83, p. 3-4, paragraph 8; Ex. 106 (Canon 948); Ex. CB, p. 5, Tr. 840).

214. The priest's obligation is an obligation in justice known as a do ut facias (in Latin "I give that you may do") contract. (Tr. 374; Ex. 83, p. 4, paragraph 8; Tr. 840; Ex. 85, p. 4, paragraph 9).

215. A person who pays a Mass stipend has a right to have a separate Mass celebrated for each offering accepted. (Ex. 83, p. 4, paragraph 9; Tr. 375; Ex. 106 (Canon 948)).

216. A priest may receive only one stipend for each Mass that he celebrates. (Tr. 386; Ex. 83, p. 4, paragraph 9; Ex. 106 (Canon 948 of the Code of Canon law)).

217. Canon law requires that as many Masses be celebrated as offerings accepted. (Ex. 106 (Canon 948); Ex. 83, p. 4, paragraph 9; Tr. 375; Tr. 841).

218. If a donor places conditions on the Mass, and the priest accepts the conditions, the priest is bound to fulfill the obligations. (Tr. 377; Tr. 842; Ex. CB, p. 5; Ex. 83, p. 7, paragraph 21).

219. The stipend is paid in advance of the celebration of the Mass. (Tr. 839).

220. Canon law requires priests to offer Masses for designated intentions within one year from acceptance of the Mass stipends. (Ex. 83, p. 7, paragraph 20; Tr. 841; Ex. CB, p. 5; Ex. 106 (Canon 953)).

221. Canon law provides that the priest is obligated to celebrate the Mass even if the stipend is lost or spent. (Tr. 378; Ex. 106 (Canon 949); Tr. 841; Ex. CB, p. 5; Ex. 83, p. 4, paragraph 9).

222. The pastor of a parish has the responsibility to say a Mass for the entire congregation every Sunday and Holy Day. (Tr. 383; Ex. 85, p. 5, paragraph 10). The pastor is not allowed to accept a stipend for those Masses. (Tr. 383; Ex. 85, p. 5, paragraph 10). The Masses said on Sundays and Holy Days are for the benefit of the people of the parish or diocese. (Tr. 383; Ex. 85, p. 5, paragraph 10).

223. The majority of other Masses said in any parish, and the majority of Masses said in any monastery or shrine are stipended and said for special intentions. (Tr. 383; Ex. 85, p. 5, paragraph 10).

224. If there are more stipends accepted than there are priests available to say Masses for special intentions, the excess stipends must be sent elsewhere. (Tr. 383-84, 386; Ex. 106 (Canons 955, 959); Tr. 843; Tr. 434).

225. Although some Masses which are stipended are Masses to which the public is admitted, many other stipended Masses are private. (Tr. 386, 390; Tr. 824, 852; Ex. CB, p. 2).

226. In some instances, a Mass would not be said in the absence of the donor's request and payment of a stipend. (Tr. 386, 390; Ex. 83, pp. 4-5, paragraph 11).

227. The donor receives the benefit of a special relationship with the Mass celebrated for his or her special intention even if the donor is not present at the Mass. (Tr. 381).

FIXED CUSTOMARY FEES FOR MASS STIPENDS

228. The standard rate of the fee for a Mass stipend is Set by each provincial (archdiocesan) authority. Canon Law states that the provincial authorities "determine by decree for the whole province what offering is to be made for the celebration and application of a Mass. . . ." (Ex. 106 (Canon 952); Tr. 379; Tr. 848-49; Ex. 83, p. 8, Ex. CB, p. 5). This method of fixing the standard rate is used to establish greater uniformity between local churches. (Tr. 379; Tr. 848-49; Ex. 83, p. 8, paragraph 22). Greater uniformity was desirable to avoid the perception of inequality from different stipend amounts in different dioceses. (Tr. 379).

229. If a sum of money is offered for celebration of Masses without an indication of the number of Masses to be celebrated (as is frequently the case with Mass bequests), the number is to be computed in view of the offering established in the place where the donor resides unless the donor's intention must lawfully be presumed to have been different. (Ex. 106 (Canon 950); Ex. 83, p. 9, paragraph 27; Ex. CB, p. 6).

230. Priests and other Catholic authorities inform Catholics of the figure decreed by the provincial authorities. (See Ex. 83, p. 8, paragraph 24; see also Tr. 441-42), and Catholics are aware of the rate set by the Church. (See Ex. 85, pp. 6-7, paragraph 11).

231. The offering for Masses in many parts of the United States is now ten dollars ($10), but in some areas the offering is five dollars ($5). (Ex. 83, p. 8, paragraph 23). Catholics often pay numerous stipends annually, including stipends for series of Masses to be celebrated. Annual payments may be $50.00 or $100.00 and up. (Tr. 454). Some Catholics pay stipends on a weekly basis. (Tr. 419).

RECORDKEEPING REQUIREMENTS FOR MASS STIPENDS

232. Catholic priests are required by Canon Law to keep accurate records of Mass obligations that they have accepted and those that have been satisfied. (Ex. 106 (Canons 953 and 955 section 4); Ex. 83, p. 7, paragraph 20; Tr. 841-42; Ex. CB, p. 5.)

233. Other church officials are required to maintain a "special book in which they list accurately the number of Masses to be celebrated, the intention, the stipend given and their celebration." An official of the church "is obliged to examine these books each year . . ." (Ex. 106 (Canon 958 sections 1 and 2)).

REFUNDS

234. Church teaching is that a priest who fails to say the stipulated Mass must refund the stipend. The payor has the right to demand the celebration of a Mass for a designated intention or the return of the payment. (Ex. CB, p. 5).

FUNDS COLLECTED

235. Income collected from Mass stipends is not available for the general uses of a parish. (Tr. 382; Ex. 83, p. 3, paragraph 6). The income from Mass stipends is a critical source of income on which the Church relies for the remuneration of priests. (Tr. 378, 382, 392; Ex. 83, p. 10, paragraph 30; Ex. 85, p. 6, paragraph 10).

236. Mass offerings represent a significant part of the financial support of Catholic priests in the United States. (Ex. 83, p. 8, paragraph 25). In many areas, salaries of priests are fixed based on the expectation that the salaries will be supplemented by Mass stipends. (Tr. 844-845; Ex. 85, p. 6, paragraph 10).

237. A conservative estimate is that income to priests in the United States from Mass stipends for 1984 was more than $105 million. (Ex. 83, p. 8, paragraph 25).

A STIPEND IS PAID FOR A PRIEST'S SERVICES IN CELEBRATING MASS FOR THE

DONOR'S SPECIAL INTENTION

238. Because, in Catholic theology, it is the sin of simony to sell spiritual or material benefits, Mass stipends are not paid to achieve such a benefit. (Tr. 388-89; Tr. 844; Ex. CB, p. 4). There is hope but no guarantee that the purpose of the special intention will be achieved. (Tr 389).

239. A Mass stipend is compensation to the priest for his services in celebrating the Mass for the donor's special intention. (Tr. 389, Tr. 392, Tr. 407; Tr. 829; Ex. 107 ("the laborer is worthy of his hire. . . .")).

BENEFITS OF A MASS CELEBRATED FOR A SPECIAL INTENTION

240. The person who has paid a Mass stipend has a relationship with the Mass celebrated for his or her special intention that is different from those who did not pay the stipend. (Tr. 380; Ex. 83, pp. 5-6, paragraphs 13-15; Tr. 851-52; Ex. 107 (Apostolic letter)).

241. Pope Paul VI in an Apostolic letter on the subject of Mass stipends in 1974 said:

It has been a strong tradition in the Church that the

faithful, moved by a religious and ecclesial consciousness,
should join a kind of self-sacrifice of their own to the

eucharistic sacrifice, so as to share in the latter more effectively, and should provide in this way for the needs of the Church, above all for the support of the Church's ministers . . . . The laborer is worthy of his hire. . . .

Thus the faithful associate themselves more closely with

Christ, who offers himself as victim, and then experience more abundant effects. (Acta Apostolicae Sedis, v. 66 (1974) p. 308; trans. The Jurist, v. 34, (1974) p. 414.)

(Ex. 107). The official teaching of the Church here states that the

donor is a beneficiary of the Mass by virtue of the offering. (Ex. 107; Tr. 380-81; Tr. 399; Ex. 83, p. 5, paragraph 13; Tr. 851-52).

242. Whether or not the special intention is referred to aloud during or before the Mass, the priest's obligation is to celebrate the Mass with the special intention in mind. (Tr. 373-74; Tr. 407; Tr. 412-13). Whether the intention is remembered or stated out loud by the priest, the donor derives the same special relationship with the Mass being celebrated for his or her intention. (See Tr. 381-82).

243. In many parishes, specific evidence of the special relationship is given in the form of printing the intention in the weekly bulletin of the church, or announcing the intention at the Mass or prior to the Mass. (Tr. 381-82; Tr. 412-13; Tr. 426-30; 445- 46; Tr. 853, 856; Ex. 83, p. 6, paragraphs 15-16; Ex. 85, p. 7-8, paragraph 12; Ex. 86(c), 86(d), 86(e), 86(f)).

CALIBRATION OF STIPENDS

244. The stipend for the celebration of Masses may be calibrated to the type of Mass said, particularly for Masses celebrated at religious shrines and similar institutions. For example, the price may vary based on whether the payor seeks a regular low Mass or a special low Mass. (Tr. 432-34; Ex. 86(g)). A higher price is paid if the payor wishes to have the Mass celebrated on a specific date, id., such as the anniversary of a relative's death, for which one must reserve the date as much as a year in advance. (Tr. 384).

245. The price of a Mass is sometimes calibrated according to where the Mass is celebrated. In some cases, Masses celebrated at the main altar will cost more than those celebrated elsewhere, and Masses farmed out to be celebrated -- for example, to missionaries in Brazil -- will be less expensive than Masses celebrated at one's church or shrine. (Tr. 447).

246. The price for more elaborate Masses is often calibrated differently than are the prices for simple Masses. For example, the price of a Gregorian Mass, which is a cycle of Masses celebrated for 30 days consecutively, is more expensive than the price for 30 individual regular low Masses. (Ex. 86(g); Tr. 433-34).

VOLUNTARY NATURE OF STIPENDS

247. Mass stipends are voluntary in that there is no obligation on the part of a Catholic to pay Mass stipends in order to remain a Catholic. (Tr. 407; Tr. 838).

PAYMENT EXPECTED BY BOTH PARISHIONERS AND PRIESTS

248. Although Canon 945 section 2 recommends that a priest celebrate a Mass for a special intention, especially for the needy, even if no stipend is offered, a priest has a right to request a stipend (Tr. 386-87, 407; Ex. 106 (Canons 945 section 1 and section 2 and Canon 952 section 1), has no obligation to celebrate a Mass for a special intention without receiving a stipend, and normally does not do so. (Tr. 386-88, 440-42; Tr. 857; Ex. 83, p. 7, paragraph 18).

249. The expectation, both on the part of the parishioner and the priest, is that a parishioner who wants a Mass celebrated for a special intention and is able to will pay a stipend in exchange for the celebration of that Mass. (Tr. 387-88; Tr. 442; Ex. 83, p. 7, paragraph 19; Ex. 85, pp. 6-7, paragraph 11). The expectation of payment, both by the parishioner and the priest, is very strong. Catholics having the means to pay would not consider asking for the customary fee to be waived. (Ex. 85, pp. 4-7, paragraphs 9, 11-12; Ex. 83, p. 7, paragraph 19, p. 8, paragraph 24).

250. It is very rare for priests to receive requests to celebrate Masses for special intentions without payment of the customary fee. It is only in the case of the poor (or perhaps a friend or relative) that a priest will waive his right to a stipend. (Ex. 85, p. 6, paragraph 11; Tr. 440-42).

SOLICITATION OF STIPENDS BY SHRINES AND OTHER INSTITUTIONS

251. Some Catholic religious orders and shrines send out mailings with price lists to solicit donations. In exchange for payment, these mailings promise to include the donors' intentions in the celebration of Masses (sometimes in nine-day sequences called "novenas"), Gregorian Masses (cycles of 30 masses), or in other prayers or religious observances, such as lighting of votive candles. These practices are distinct from but similar to Mass stipends or offerings. (Ex. 83, p. 9, paragraph 29; Ex. CB, pp. 7-8; Ex. 85, p. 12, paragraph 18; Ex. 86(g), 86(h); Tr. 433, 437).

CATHOLIC ORDERS

252. Members of numerous Catholic religious Orders in the United States are required to have paid employment outside the Order and to pay their entire income to their order as a condition of membership. (Ex. 116, pp. 10-11, paragraph 19).

253. Members of such Catholic religious Orders are required to take vows of poverty and obedience. (Ex. 116, pp. 9-10, paragraph 18; Tr. 1037-38).

254. In many of these Orders, members are required to obtain employment outside the Order for which they are paid salaries. Such employment is often consistent with the purposes of the Order and the member is obligated to take the employment pursuant to his or her vow of obedience. (Ex. 116, p. 10, paragraph 18; Tr. 1038).

255. Pursuant to their vows of poverty, members who earn salaries in the employment outside their Order are required to immediately turn over that salary in its entirety to the Order. (Ex. 116, pp. 10-11, paragraphs 18, 19; Tr. 1038).

256. In combination, the vows of obedience and poverty make it a condition of membership in many Orders that members earn income and pay it over to the Order. (Ex. 116, pp. 9-10, paragraph 18; Tr. 1039).

257. The failure to turn over one's income to the Order would be seen as a violation of membership requirements and lead ultimately to expulsion from the Order. (Ex. 116, p. 11, paragraph 19).

258. Among the Orders in which these requirements operate are the Jesuits and the Dominicans, two of the largest Orders in the United States. The Josephites, the Paulists, and many others of the hundreds of orders in the United States similarly have these requirements. (Ex. 116, pp. 11-12, paragraph 20; Tr. 1039A0).

HINDU PRACTICES

259. In Hinduism, worship (puja) is performed individually, not congregationally. (Tr. 1007; Ex. 116, p. 30, paragraph 49).

260. Hindu priests perform puja in the presence of the individual paying for the puja, and, in some cases, in the presence of his or her family. (Tr. 1011-12).

261. Individual Hindus seek out a priest, who will perform specific pujas for the individual. (Id.)

262. Pujas cannot be performed without the services of Hindu priests. (Tr. 1011).

263. Hindu temples set fixed payments required for the priest to perform the specific rituals requested by the individual. (Tr. 1008; Ex. 116, p. 30, paragraph 50).

264. Payment of the fixed fee is required in order to have the priest perform the ritual. (Tr. 1012, 1077).

265. Some exceptions may be made to the requirement that Hindus pay for the performance of pujas, but no exceptions are mentioned in Hindu temple literature setting out price lists and policies for the performance of pujas. There is no real tradition of charity in Hinduism as there is in Western religious traditions. In fact, giving charity interferes with the Hindu concept of karma, in which an individual works out the consequences of his or her own actions. (Tr. 1018, 1051-52, 1054).

266. There is a wide range of pujas that Hindu priests perform. (Ex. 116, pp. 30-31, paragraphs 50, 51; Ex. 116(g), (h), (i); Tr. 1009-10,1017).

267. Different fees are set for the various pujas that an individual can request to have performed. (Ex. 116, p. 30, paragraph 50; Ex. 116(g), (h), (i); Tr. 1009).

268. Hindu temples publish prices lists specifying the prices for the various pujas available. (Ex. 116(g), (h), (i); Tr. 1008-09, 1015-16).

269. Prices of pujas range from $5.00 to at least $350.00. Most pujas are in the range of $25.00 to $100.00. (Ex. 116(g), (h), (i)).

270. Typically, an individual wishing to have a priest perform a puja will make arrangements in advance and arrange an appointment. (Tr. 1011; Ex. 116(g)).

271. Some pujas can be performed only at a temple, some only at home, and some in either place. (Tr. 1014-15; Ex. 116(g), (h); Ex. 116, p. 30, paragraphs 49-50).

272. Higher rates are charged for pujas that a priest performs at an individual's home rather than at a temple. (Tr. 1015; Ex. 116(g); Ex. 116, paragraph 50).

273. Some pujas seek spiritual blessings, while others seek temporal blessings (such as the "blessing of a new ear"). (Tr. 1010, 1016-17; Ex. 116(g)).

274. Some pujas seek blessings for the person paying the fee, while others seek blessings for third persons. (Ex. 116(g)).

275. By making the required payment an individual is contractually entitled to have the puja performed by the priest. (Tr. 1077).

276. While it is voluntary to have a puja performed, it is required to make the fixed payment if one desires to have it performed. (Tr. 1012).

277. It is important to engage in pujas to be a Hindu in good standing. (Tr. 1011).

278. On average, Hindus engage in pujas a couple of times a month, and some engage in pujas more frequently. (Tr. 1010-11).

279. By paying for a puja, Hindus hope to derive the benefit of the puja. (Tr. 1077).

280. Making the payment and having the puja performed does not necessarily obtain the spiritual benefit sought. (Tr. 1077).

281. Fees for pujas are a critical source of income to Hindu temples for paying the salaries of Hindu priests. (Tr. 1013).

282. There is no evidence in Hindu temple literature setting out price lists and policies for the performance of pujas of any requirements for obtaining performance of the puja other than the payment of the set fee. (See Ex. 116(g), (h)).

283. There is no evidence in Hindu temple literature setting out price lists and policies for the performance of pujas that refunds are not given. (See Ex. 116(g), (h)).

284. Over a million Hindus are estimated to participate in pujas performed by priests associated with Hindu temples in the United States. (Tr. 1018-19; see also Ex. 116, pp. 29-30, paragraph 48).

ZEN BUDDHIST PRACTICES

285. There are several hundred Japanese Zen Buddhist organizations operating in the United States. (Ex. 116, p. 35, paragraph 59).

286. There are two basic types of worship practices among Zen Buddhist groups, Zen meditation and personal encounters with a Zen master. (Ex. 116, pp. 35-36, paragraphs 59-60; Tr. 1019-22).

287. There are generally three settings in which Zen Buddhism is performed. Meditation is performed at a zendo, a local center for Zen practice. (Ex. 116, p. 35, paragraph 59; Tr. 1022). Meditation and individual daily meetings with a Zen master are performed in two types of retreats: sesshins, which generally last from three to ten days, and kesseis, which last for more extended periods of time. (Ex. 116, p. 36, paragraph 60; Tr. 1022, 1023-27; Ex. 116(m), (n)).

288. Participation in sesshins and kesseis is regarded as important for progress in the faith once the basics of meditation have been mastered at the zendo. (Ex. 116, p. 36, paragraph 60; Tr. 1025). Participation in meditation and consultation with a Zen master are necessary for advancement in Zen Buddhism. (Tr. 1046, 1054-55).

289. Zen Buddhists believe that the benefit derived from participation in these rituals is spiritual enlightenment. (Tr. 1055).

290. A Zen Buddhist does not necessarily gain the spiritual benefit sought by participation in the service. (Tr. 1078).

291. A Zen Buddhist who does not participate in sesshins and kesseis can remain a member of the community. (Tr. 1055).

292. Zen Buddhist organizations require payments for participation in all of these religious activities, and publish materials listing prices for them. (Ex. 116, pp. 35-36, paragraphs 59, 61; Ex. 116(m), (n); Tr. 1022-23, 1025-27, 1077-78).

293. Zen organizations charge set annual fees for membership in a zendo. (Ex. 116, p. 35, paragraph 59; Ex. 116(k); Tr. 1022-23).

294. Different levels of membership are offered. Progressively higher membership dues are charged for memberships offering access to religious services beyond the basic practices. Memberships typically range from $150.00 to $600.00 per year. (Ex. 116, p. 35, paragraph 59; Ex. 116(k); Tr. 1022-23).

295. Nonmembers may be admitted, but are charged fixed fees for the specific practices they attend. (Ex. 116, p. 35, paragraph 59).

296. Set charges over and above membership dues are required to be paid for participation in sesshins and kesseis. The rates charged for these more advanced rituals are higher than those charged for participation in meditation at the zendo and the price charged for sesshins and kesseis increase in relation to their length. Typical prices for a sesshin are $180.00 to $400.00 and for a kessei $600.00 to $1,500.00. (Ex. 116, p. 36, paragraph 61; Tr. 1025-27; Ex. 116(m) and (n)).

297. Reservations for participation in these religious retreats must be made in advance. (Ex. 116(m), p. 11).

298. Deposits for participation are nonrefundable but can be transferred to other zendo programs. (Id.)

299. The payments charged are specifically for participation in the religious aspects of the retreats. There are separate charges for room and board. (Ex. 116, p. 36, paragraph 61; Tr. 1026-27; Ex. 116(n), p. 1, col. 2).

300. Various sesshins and kesseis appear to be directed toward people of different levels of advancement in Zen Buddhism and access to certain sesshins or kesseis may be limited to those having achieved a certain level of advancement within Zen Buddhism. (See, e.g., Ex. 116(m), p. 2).

301. In Zen Buddhism, the practice of paying in exchange for access to religious services has religious importance. The membership price list for the International Zen Institute of Florida states, "The practice of giving is a complementary path leading to the realization of our deep bond with one another and with all living beings. Giving eliminates the craving that is dominant within ourselves." (Ex. 116(1)).

302. The payments required for zendo membership, sesshins and kesseis ensure access to the meditation space and the services of the master. The payments do not ensure the spiritual benefit that the individual seeks through participation in the services. (Tr. 1078).

303. Zen Buddhist organizations represent to their members that payments are tax deductible. (Ex. 116(1)).

WORLDWIDE CHURCH OF GOD TITHING

304. Within conservative Protestantism, there are several groups in which payment of a tithe is a condition of membership, the most prominent of which is the one hundred thousand member Worldwide Church of God. (Tr. 1033, 1034, 1037, 1062; Ex. 116, p. 15, paragraph 26).

305. All members of the Church are expected to tithe a tenth of their income, monthly or on a more frequent basis, and personally send it to the Church's national headquarters. (Ex. 116, p. 15, paragraph 26; Ex. 116(a), pp. 38-39; Tr. 1034-35).

306. The Church's headquarters distributes money to local churches for ministers' salaries and local expenses. (Tr. 1035).

307. Church literature provides very detailed instruction regarding what income must be tithed and states that tithing is a religious obligation. (Ex. 116, p. 16, paragraph 27; Ex. 116(a), pp. 35-40; Tr. 1035-36).

308. Church literature differentiates tithing from "voluntary offerings." (Ex. 116(b), p. 19).

309. The Church keeps meticulous, computerized records of the funds received at it headquarters, and sends out monthly receipts and year end statements to all members. (Ex. 116, pp. 16-17, paragraph 27; Ex. 116(2), p. 19; Tr. 1037).

310. If a member ceases tithing, the Church sends out a monthly statement notifying the member that it has not yet received the member's monthly tithe payment. If nonpayment continues for a period of about five or six months, the member is excommunicated or disfellowshipped. The only exception is if it has been communicated to the Church that the member has failed to pay because he or she no longer had any income on which to tithe. (Ex. 116, p. 17, paragraph 28; Tr. 1037, 1059-61).

311. The Church's system for monitoring and enforcing tithing is formal and operates with little flexibility. A person who is five or six months behind in tithing is mechanically cut off. (Tr. 1059-60).

312. One cannot remain a member of the Church without being a tithe payer. (Tr. 1079).

313. Paying the tithe is required to obtain access to the Church's religious services. (Tr. 1079).

314. Payment of the tithe ensures access to services, but does not ensure a spiritual benefit. (Tr. 1079).

315. Church literature represents to members that their tithes are tax deductible in the United States. (Ex. 116(a), p. 36).

OTHER FUNDAMENTALIST PROTESTANT DENOMINATIONS

316. Other fundamentalist Protestant denominations, some of them offshoots of the Worldwide Church of God, similarly require tithe paying as a condition of membership and participation in religious services. (Tr. 1033, 1037, 1062).

OTHER RELIGIOUS GROUPS

317. Many religious groups in the United States in addition to those listed above require payments for access to their religious services. (Ex. 116; Tr. 1006).

CHURCH OF SCIENTOLOGY

318. Scientology is a religion based upon the research, writings, and recorded lectures of its Founder, L. Ron Hubbard, which collectively constitute the Scripture of the religion. (Ex. 79, pp. 1-2, paragraph 8; Tr. 111). Scientologists are those who recognize the Scientology Scripture as providing the fundamental key to an understanding of their existence. (Ex. 79, p. 2, paragraph 9).

THE PRACTICES OF SCIENTOLOGY

319. A central religious practice of the Scientology religion is "auditing," which consists of ascending levels of religious services addressing the thetan, or spiritual being. (Ex. 79, p. 3, paragraph 18; Tr. 71-73; Tr. 113; Tr. 132). In the practice of auditing, a specially-trained individual called an "auditor" (usually an ordained minister or minister in training of the Scientology religion), asks specific questions or patterns of questions as set forth in Scientology Scripture. (Ex. 79, p. 4, paragraph 21; Tr. 72-74; Tr. 113-14).

320. Auditing is generally conducted in confidential one-to-one sessions between a Scientologist who is qualified to deliver the specific level of auditing being addressed and the person being audited. (Ex. 79, p. 4, paragraph 20). Auditing ranges from simple and basic to more searching and intensive religious experiences as one progresses higher on the Scientology Classification, Gradation and Awareness Chart, called the "Bridge." (Ex. 79, p. 3, paragraph 15, p. 4, paragraph 23).

321. Another central practice of the Scientology faith is intensive supervised study of Scientology Scripture (called "training"). Auditing and trailing make up the two sides of Scientology's "Bridge." (Ex. 79, p. 5, paragraph 29). Training consists of courses of exclusive study of writings, lectures and films concerning the Scientology religion. Many courses offer both training in auditing procedures and an in-depth analysis of the religious doctrines and tenets that pertain to auditing. (Ex. 79, p. 5, paragraph 31; Tr. 77-78). The religious service of training is generally delivered congregationally. (Ex. 79, p. 7, paragraph 42).

322. While auditing and training are the central religious practices in Scientology, there are also many other ways in which Church members can participate in their religion that do not involve auditing and training. (Ex. 79, p. 10, paragraph 67; Tr. 84-85; Tr. 122).

323. Most churches have weekly Sunday Services. (Ex. 79, p. 10, paragraph 68; Tr. 122; Tr. 140; Tr. 148). At these services a Scientology minister or other speaker addresses the congregation concerning some aspect of Scientology religious doctrine. (Ex. 79, p. 10, paragraph 68). Churches also sponsor congregational gatherings on Friday nights. (Ex. 79, p. 10, paragraph 69).

324. Churches also sponsor gatherings where parishioners listen to L. Ron Hubbard's taped lectures. (Ex. 79, p. 11, paragraph 70; Tr. 148).

325. The Church sponsors periodic public events throughout the year celebrating the major holidays of the Scientology religion. (Ex. 79, p. 11, paragraph 71; Tr. 122; Tr. 148). Many churches of Scientology sponsor seminars and workshops on specific subjects such as marriage, family or Scientology ethics. (Ex. 79, p. 11, paragraph 73).

326. Scientologists also contribute money to their churches without participating in auditing or training. (Tr. 105-06; Tr. 151).

CONTRIBUTIONS FOR RELIGIOUS SERVICES

327. Parishioners of Scientology contribute financially to the support and expansion of the religion through their contributions for auditing and training. (Ex. 79, p. 6, paragraph 38; Tr. 115-17; Tr. 134; Tr. 151-52).

328. Churches of Scientology set fixed contribution amounts for auditing and training. (Jt. Ex. 19-5).

329. Churches of Scientology publish contribution rates for auditing and training. (See stip. paragraphs 60, 63, 67, 71, 75 and 84).

330. Contribution rates for churches of Scientology are established by the Mother Church, Church of Scientology International ("CSI"), and are designed to: (1) provide funds for further dissemination of the technology and growth of the religion as a whole; (2) assure that the churches and missions that minister to the public remain viable and capable of expanding; (3) encourage parishioners to train as auditors in order to increase the dissemination of the religion; and (4) make the entirety of Scientology's religious technology available to the average person. (Ex. 79, p. 7, paragraph 41; Tr. 81-82).

331. Contributions received by churches of Scientology from parishioners of the Church are commingled in Church accounts with the general operating funds of the Church. A portion of these funds are paid by the various churches of Scientology to the Mother Church, Church of Scientology International, and the remainder -- the majority of each Church's receipts -- are used for the activities of that Church. (Ex. 79, p. 11, paragraph 75). Funds received in connection with auditing and training maintain and expand the religion of Scientology and its charitable programs. (Ex. 79, pp. 11- 13, paragraphs 75-91). Income for auditing and training is substantial. (See, e.g., Ex. 98).

332. The funds received by CSI are used by CSI to fund projects and activities that are of benefit to the entire Church of Scientology hierarchy. This includes activities such as dissemination campaigns, defense of the religion, purchasing property or buildings or upgrading existing property to expand Church programs, and the operational expenses for ecclesiastical management and support. These funds also help support the Church's social welfare and social reform activities. (Ex. 79, p. 11, paragraph 76).

333. The Church maintains records of amounts that parishioners have donated for auditing and training. (Tr. 100).

334. While auditing is generally provided at an hourly rate, the contribution rate for some auditing is not calibrated according to its length. (Tr. 137, 142). Different parishioners may spend widely varying amounts of time completing these services but with no difference in contribution. Training, however, is generally not calibrated against its length, in that different parishioners may spend widely varying amounts of time completing these services with no difference in cost. (See, e.g., Tr. 152).

335. Contributions for auditing and training range from nothing to substantial amounts. (Stip. paragraphs 60, 63-64, 67-68, 71-72, 75-77, 80-81, 83-84).

336. For many Scientologists, the primary motivation for contributing is to support the Church and its expansion rather than- to participate in auditing and training. (Ex. 79, p. 7, paragraph 45). Desire to support and advance their religion is a primary motivation for most Scientologists, including petitioners. (Tr. 114- 15; 134; 151, 154).

337. Refunds of contributions made in connection with auditing and training are infrequently given in Scientology and only for religious reasons. Individuals who are no longer committed to the religious beliefs and goals of Scientology may receive refunds on condition that they no longer receive any auditing or training until their spiritual differences with the Church are resolved. (Ex. 79, pp. 7-8, paragraph 46; Tr. 103, 106).

PARTICIPATION IN AUDITING AND TRAINING WITHOUT MONETARY CONTRIBUTION

338. Scientology doctrine holds that to achieve and maintain spiritual health an individual should maintain a balance over time between inflow and outflow -- between what he or she gives and receives. (Tr. 96-99). The system of contributions for auditing and training is consistent with Church principles of existence concerning exchange. (Ex. 79, p. 7, paragraph 44). But what is exchanged for participation in these religious services need not be money. (Tr. 105; Tr. 135-37;. Tr. 142; Tr. 155-56).

339. There is no bar in Scientology to obtaining access to auditing and training without making a financial contribution. (Tr. 86-88, 94; Ex. 79, p. 10, paragraphs 60-65).

340. There are a number of ways a Scientologist can participate in auditing and training without making a fixed contribution. (Ex. 79, pp. 7, 10, paragraphs 42, 60; Tr. 83; Tr. 120-22; Tr. 133-35; Tr. 137-38).

341. Churches provide free introductory auditing to people new to Scientology. (Tr. 83). This auditing will last as long as necessary to complete the particular auditing action that is started. (Ex. 79, p. 10, paragraph 61; Tr. 83).

342. Churches provide charity auditing for free to assist people in need. (Tr. 95-96; Tr. 122, Tr. 137-138, Tr. 155; Ex. 79, p. 10, paragraph 64).

343. Parishioners who are undertaking training in order to become an auditor must audit others as part of their training, and the majority of that auditing is provided free of any contribution or charge. In many cases parishioners co-audit each other, and a person can receive the majority of his own auditing through such co- auditing. (Ex. 79, p. 10, paragraph 62).

344. In addition to co-auditing, as part of their training, parishioners also audit Church staff members, other parishioners and members of the general public at no charge. Free Scientology centers are established in Scientology churches for this purpose. (Ex. 79, p. 10, paragraph 63; Tr. 83, 88, 105; Tr. 120-21).

345. The Church also provides "training awards," which is training given free of charge in recognition of members' concern for and contributions to the religion. (Tr. 105, 121-22, 128; Ex. 79, p. 7, paragraph 43).

346. Individuals who have joined the staff of the Church receive free auditing and training up to the level provided by their church. (Ex. 79, p. 10, paragraph 65; Tr. 83-84, 105; Tr. 120-21).

347. Scientologists who do not live near a church or who cannot participate in religious services at a particular time, for whatever reason, still can participate and advance in the religion. Scientologists living in remote areas may, for example, read Scientology books and apply the auditing technology contained in the books. (Ex. 79, p. 10, paragraph 66). A Scientologist may audit with another Scientologist at home. (Tr. 74; Tr. 121). There is no restriction that one may audit only within the premises of a church. In fact, the Church encourages Scientologists to practice their religion as often as they can, anywhere they can. (Tr. 74). The Church requests no donations from persons who practice auditing on their own. (Tr. 74-75).

348. Churches also offer religious services by correspondence for nominal donations that help an individual learn Scientology doctrine and practice. (Ex. 79, p. 10, paragraph 66).

349. There are many other ways in which Church members can participate in their religion that do not involve making a monetary contribution. Weekly Sunday Services, congregational gatherings on Friday nights, periodic gatherings and public events, all provide opportunities for participation without donation. (Ex. 79, pp. 10-11, paragraphs 67-73).

350. Scientologists remain members in good standing even if they do not participate in auditing or training for an extended period of time. (Tr. 82-83).

351. Neither membership in any church of Scientology nor access to the facilities of any church is conditioned upon whether a person has contributed money to the Church or continues to contribute. (Tr. 82; Tr. 123; Tr. 136-37). Nor are they conditioned on whether the person has participated in auditing or continues to participate in auditing. (Ex. 79, p. 11, paragraph 74; Tr. 82; Tr. 123).

BENEFITS OF SCIENTOLOGY RELIGIOUS SERVICES

352. Scientologists believe that the spiritual benefits a person receives by participating in Scientology religious services affect eight different "dynamics" ranging from the self, to the family, to groups and on up to the spiritual universe and, finally, to infinity or the Supreme Being. (Tr. 75; Tr. 139; Tr. 146-51, 154-57; Ex. 79, p. 3, paragraph 17).

353. Scientology doctrine holds that the spiritual benefits a person can receive by participating in Scientology religious services affect all of the dynamics, not just the individual. Thus, Scientologists believe that auditing and training are of benefit to the individual's family, associates, all spiritual beings and all of the world. (Tr. 75-79; Tr. 117-18; Ex. 79, p. 8, paragraph 47).

354. In Scientology, there is no guarantee that participation in auditing and training will result in spiritual benefit. (See Ex. 79, pp. 7-8, paragraph 46).

SCIENTOLOGY ELIGIBILITY CRITERIA FOR SERVICES

355. The Scientology Scripture includes a system of ethics for both the individual and the group. (Ex. 79, p. 8, paragraph 49; Tr. 79; Tr. 123). Violation of ethical guidelines may result in loss of church membership and ineligibility to participate in religious services at a church. (Ex. 79, p. 8, paragraphs 49-50).

356. Every new member of a Scientology church is asked a series of questions to ensure that he or she meets certain fundamental rules of ethical conduct. The new member is asked, for, example, if he or she is taking services out of a sincere desire to improve his or her spiritual condition. The new member is also informed of the ethical rules of conduct that must be met as a condition to participating in Scientology religious services. (Ex. 79, p. 8, paragraph 51; Tr. 80; Tr. 155).

357. Criteria required to be met for participation include abstinence from drug use (Ex. 79, p. 8, paragraph 52; Tr. 155), abstinence from alcohol (Ex. 79, p. 9, paragraph 53), abstinence from any unethical or disruptive sexual activity (Ex. 79, p. 9, paragraph 54), providing for one's personal well-being so that one is prepared to engage in religious rituals (Ex. 79, p. 9, paragraph 55), and observance of the ethical and moral codes of the Church. (Ex. 79, p. 9, paragraph 56). (See also Tr. 155-56).

358. Scientologists believe that every Scientologist has a duty to contribute to his or her Church, which may or may not be in the form of money. Whether or not one contributes is only one factor considered in determining whether the person's ethics are sufficiently "in" to participate in religious services, particularly with respect to the advanced levels. Eligibility turns on the level of an individual's participation in and contribution to the broader goals of the religion -- which include whether one is leading an exemplary and ethical life, using Scientology to help others, and attracting new members to the religion. (Ex. 79, p. 9, paragraph 57).

359. Scientologists who are ready to begin advanced auditing levels must pass an in-depth eligibility interview as a condition of gaining access to the confidential Scriptural material relating to these levels. The eligibility interview is a searching inquiry by an auditor into the moral and ethical values and conduct of the individual, including whether the person is active in and contributing to his church. The mere contribution of money is not enough to satisfy these criteria if that is all the person has done. (Ex. 79, p. 9, paragraph 59; Tr. 79-80).

IRS INCONSISTENT ADMINISTRATION

THE INTERNAL REVENUE SERVICE HAS ENGAGED IN ONGOING INCONSISTENT

APPLICATION OF SECTION 170 BY SYSTEMATICALLY DISALLOWING DEDUCTIONS FOR SCIENTOLOGISTS' CONTRIBUTIONS FOR ACCESS TO RELIGIOUS SERVICES WHILE SYSTEMATICALLY ALLOWING DEDUCTIONS FOR PAYMENTS BY MEMBERS OF OTHER RELIGIONS FOR ACCESS TO RELIGIOUS SERVICES

360. Taxpayers who are members of religions other than Scientology routinely claim deductions under section 170 for payments they make to religious organizations in order to participate in or gain access to religious services or benefits.

a. Catholic taxpayers routinely claim deductions for payments they make to Catholic organizations for Mass stipends and Mass cards. (Tr. 452, 454; Tr. 495). Members of Catholic religious orders take tax deductions for the payment to their orders of their income from employment outside the orders. See, e.g., Schuster v. Commissioner, 800 F.2d 672 (7th Cir. 1986); Fogarty v. United States, 780 F.2d 1005 (Fed. Cir. 1986).

b. Jewish taxpayers routinely claim deductions for payments they make to Jewish organizations for membership dues, High Holy Day tickets and building fund assessments. (Ex. 81, paragraph 6, paragraphs 16-17; Ex. 81, p. 10, paragraph 20; Ex. 81, p. 10, paragraph 22; Tr. 327, 336-37, 339-40, 342-4; Tr. 456; Tr. 495).

c. Mormon taxpayers routinely claim deductions for payments they make for tithes paid to the Church of Jesus Christ of Latter Day Saints. (Tr. 495; Tr. 511; Tr. 784; Tr. 990-91).

d. Taxpayers of other religions, including Hindus, Zen Buddhists and members of the Worldwide Church of God also claim deductions for payments they make in order to participate in or gain access to religious services and benefits of their churches. (Ex. 116(a), pp. 34, 36; Ex. 116(d); Ex. 116(l); see also Tr. 547, 579-80).

361. In audits or examinations of taxpayers claiming such deductions, the Internal Revenue Service does not inquire into the nature of a payment to a religious organization, except in the case of a donation to a church of Scientology. (Tr. 547-54).

362. When the donee is a religious organization other than a Scientology church, the IRS only asks the taxpayer for substantiation that the payment was made and sometimes verification that the donee is exempt. If the taxpayer supplies substantiation in the form of a canceled check or receipt, the deduction is allowed. (Tr. 543-47; Tr. 459-60; Tr. 966; Tr. 511; Ex. 87 (initial audit letter); Ex. 88 (initial audit letter)).

a. For Jewish taxpayers, the IRS only requests substantiation that the payment is to a synagogue. (Tr. 460; Tr. 968-69).

b. For Catholic taxpayers, the IRS only requests substantiation that the payment is to a Catholic Church. (Tr. 459; Tr. 512).

c. For Mormon taxpayers, the IRS only requests substantiation that the payment is to a Mormon Church. (Tr. 511).

363. The Internal Revenue Service does not inquire of non- Scientology taxpayers whether they received religious benefits in exchange for a payment made to a church or synagogue. (Tr. 460; Tr. 512, 513; Tr. 547; Tr. 966).

364. The Internal Revenue Service does not inquire of non- Scientology taxpayers whether a payment made to a synagogue or church resulted in the taxpayer advancing in their synagogue or church. (Tr. 578-79; Tr. 969; Tr. 515; Tr. 469).

365. The Internal Revenue Service does not inquire of non- Scientology taxpayers whether a payment they made to a synagogue or church gave them access to a religious Service. (Tr. 578-79; Tr. 514- 15).

366. The Internal Revenue Service does not inquire into the nature of religious services received by non-Scientology taxpayers from their churches or synagogues. (Tr. 578-79; Tr. 514-15; Tr. 968; Tr. 469).

367. With the exception of taxpayers who are members of churches of Scientology, the IRS directs auditors and examiners to ascertain only whether the taxpayer received a financial benefit in exchange for a payment to a religious organization. (Ex. 22-V; Tr. 548-49; Jt. Ex. 23-W; Tr. 551; Jt. Ex. 24-X; Tr. 554; Jt. Ex. 25-Y; Tr. 556; Jt. Ex. 26-Z; Tr. 558-59; Jt. Ex. 27-AA; Tr. 560; Jt. Ex. 31-AE; Tr. 561; Jt. Ex. 37-AK; Tr. 562; Jt. Ex. 39-AM; Tr. 563-64; Jt. Ex. 40-AN; Tr. 565).

368. Even in the period since the Supreme Court decided Hernandez v. Commissioner in June 1989, the Internal Revenue Service has not changed its practice of not inquiring into the nature of a payment to a religious organization, except in the case of a payment to a church of Scientology. (Tr. 516; Tr. 517-18).

369. As long as the taxpayer provides substantiation that a payment was made and the donee is exempt, the Internal Revenue Service routinely allows deductions claimed under 26 U.S.C. section 170 for payments to religious organizations, other than churches of Scientology, made to obtain access to religious services or benefits. (E.g., Tr. 544; Tr. 546; Tr. 548-49; 549-50; 551-52, 552-53, 553-54, 558-59, 560; 561, 562, 564, 565, 566).

a. Revenue rulings establish that respondent's policy is to allow deductions for payments to various religions for building fund assessments, dues and Mass bequests. Rev. Rul. 70-47, 1970 C.B. 49, Rev. Rul. 78-366, 1978-2 C.B. 241.

b. The Internal Revenue Service routinely allows deductions for Jews' payments for access to High Holy Day Services, both where the payment is for a ticket to the service or where it is for membership dues entitling the member to attend the Services. (Tr. 456; Tr. 965; Tr. 495; Tr. 327, 338-39, 340, 344; Ex. 81, p. 7, paragraph 18; Ex. 81, p. 11, paragraphs 21, 23).

c. The Internal Revenue Service routinely allows deductions for Catholics' payments for Mass stipends and Mass cards. (Tr. 452, 454; Tr. 495). The Service allows deductions for payments by members of Catholic religious orders to their orders when the members are required to secure outside employment and pay their entire salary to the order. Rev. Rul. 76-323, 1976-2 C.B. 18.

d. The Internal Revenue Service routinely allows deductions for Mormon's payments for tithes. (Tr. 495, 507, 511; Tr. 991).

e. The Internal Revenue Service routinely allows deductions claimed by members of other religions, including Hindu temples, for payments they make in order to gain access to religious services and benefits of their religion. (Jt. Ex. 42-AP, p. J.3, Q and A 10; See PPF 370).

370. Public statements of the Internal Revenue Service corroborate that the IRS' practice is to treat payments that are solicited by religious organizations for participation in religious observances as fully deductible. (Jt. Ex. 42-AP). In September 1988, Robert I. Brauer, then Assistant Commissioner for Employee Plans and Exempt Organizations, was interviewed by the Bureau of National Affairs in Daily Tax Report, and provided the BNA with a question and answer guidance package, prepared by the IRS and an ABA tax committee, on issues relating to charitable deductions. The guidance package poses the question whether a taxpayer may deduct payments that are solicited by religious organizations, and gives the answer that "religious observances generally are not regarded as yielding private benefits to the donor." The answer concludes that payments for saying Masses, pew rents, tithes and other payments involving "fixed donations for similar religious services" are "fully deductible as charitable contributions." (Id. at J.3, Q and A 10). The IRS question and answer package is the type of document that is relied on by accountants and other tax professionals as a reliable indication of IRS policy and practice. (Ex. 93, p. 10, paragraph 18; Tr. 470-71; Tr. 497-98; Tr. 970-71).

371. The IRS has not applied a quid pro quo analysis to a payment to any church, other than a church of Scientology, in evaluating a payment that generates a purely religious benefit or that is necessary to gain access to a religious service. (Tr. 566; Tr. 459-62; Tr. 512-13; Tr. 972).

372. If the IRS had decided to apply a quid pro quo analysis to contributions to churches and religious organizations other than churches of Scientology, the IRS could have made changes in training programs, issued instructions to agents, initiated a project, etc. (Tr. 566-67). The IRS has not done so. (Id.).

373. The Internal Revenue Service has established different procedures for examining deductions claimed for donations to a church of Scientology than for donations to other religions. (Tr. 565-66; Tr. 969-70; Jt. Ex. 30-AD).

a. The Internal Revenue Service audits a far higher percentage of returns of taxpayers who claim deductions to churches of Scientology than of taxpayers claiming charitable contributions to other churches. (Compare Tr. 524 with Tr. 494).

b. The Internal Revenue Service uses special audit procedures when a taxpayer c1aims a deduction for a donation to a church of Scientology, including questionnaires devised solely for use when agents audit returns claiming such deductions. (Jt. Ex. 30-AD; Tr. 525-26; Jt. Ex. 33-AG; Tr. 528-30; Jt. Ex. 29-AC; Tr. 534-36; Tr. 969-70).

c. In audits and examinations of taxpayers claiming a deduction for a donation to a church of Scientology, the Internal Revenue Service inquires into the specific religious activity engaged in by the taxpayer (Tr. 526; Jt. Ex. 30-AD), and into the person(s) who conducted the religious activity, where it took place, and the nature of the activity. (Tr. 526; Jt. Ex. 30-AD).

d. The Internal Revenue Service requests extensive records, including financial records and non-financial records, related to the activity for which the taxpayer made the payment, from taxpayers claiming a deduction for a donation to a church of Scientology. (Jt. Exs. 30-AD; 33-AG; 59-BG; Tr. 530-32).

e. Agents of the Internal Revenue Service have stated to taxpayers who made donations to churches of Scientology their personal views about Scientology and suggested to taxpayers that they should not make donations to any church of Scientology. (Tr. 536-37).

f. Return preparer penalties have been asserted against accountants who represent taxpayers who claim deductions for donations to churches of Scientology. (Tr. 537-38).

g. In approximately 90% of audited cases, the Internal Revenue Service asserts substantial understatement, negligence and accuracy- related penalties against taxpayers who claim deductions for donations to churches of Scientology. (Tr. 539; Jt. Ex. 60-BH).

374. Documentary evidence confirms that the Internal Revenue Service has pursued a longstanding policy and practice of administering section 170 inconsistently as between members of the Church of Scientology and to members of all other religions.

a. For over 20 years, the IRS has pursued a policy of denying section 170 deductions for donations made to churches of Scientology in order to obtain access to Scientology religious services. (Jt. Ex. 44-AR; Jt. Ex. 45-AS). The justification for this policy has changed numerous times over that 20 year period. (Jt. Exs. 46-AT; 47-AU; 48- AV; 55-BC; 58-BF).

b. Beginning in the mid-1970's, the Internal Revenue Service searched for a rationale for disallowing the deduction. (Jt. Ex. 49- AW). In the 1970's, the IRS considered amending treasury regulations to redefine the term "church" as "one method of attacking Scientology." (Jt. Ex. 46-AT; Jt. Ex. 47-AU).

c. Later, from January 1977 through May 1978, the IRS worked on drafts of Rev. Rul. 78-189, a ruling that disallowed deductions for donations made to a church of Scientology for auditing and training. The IRS was well aware, while drafting and reviewing the proposed "Scientology" ruling, that the benefits received by adherents of Scientology from auditing and training are religious and spiritual. (Jt. Ex. 49-AW). The description of the Scientology services in the initial drafts of the ruling and its Background Information Note so indicate. (Jt. Ex. 50-AX; 54-BB).

d. IRS personnel involved in the drafting and review of Rev. Rul. 78-189 also knew that members of other religions receive services and religious benefits in exchange for their contributions. In drafting Rev. Rul. 78-189, IRS personnel considered Rev. Rul. 70- 47, which allows a charitable contribution deduction for pew rents, periodic dues, and building fund assessments. Several drafts of Rev. Rul. 78-189 attempted to distinguish Revenue Ruling 70-47 (Jt. Exs. 50-AX; 55-BC); the final version or 78-189 simply ignored it. (Jt. Ex. 56-BD).

e. Other documents indicate that IRS personnel found it difficult to distinguish Rev. Rul. 71-580, which ruled that a genealogical organization doing genealogical research for a Mormon family qualified as tax exempt because any personal benefit the family derived from the research was considered incidental to the public benefit. (Jt. Exs. 50-AX; 52-AZ).

f. Several documents establish that the IRS considered donations for auditing a "close case" and had difficulty distinguishing these donations from pew rents and dues. (Jt. Exs. 50-AX; 54-BB; 55-BC).

375. Despite the Hernandez decision, adherents of no other religion have been subjected to routine inquiry of the sort to which Scientologists have been subjected. In January of 1990, following the Hernandez decision, IRS officials attended a meeting with representatives of various religions, through the National Council of Churches, and are reported in a memorandum written by a participant in the meeting to have stated that, with respect to those non- Scientology religions, "solely religious benefits are `not of interest' to the IRS." (Jt. Ex. 43-AQ at 2).

376. Shortly after this meeting, the IRS National Office issued guidance to Regional and District Offices to implement the Service's "Charitable Solicitations Compliance Improvement Study" ("CSCI"). This study was conducted jointly by the Examination Division and the Employee Plans/Exempt Organizations Division. (Jt. Ex. 38-AL).

COMPARATIVE RELIGIOUS PRACTICES:

THERE IS NO MATERIAL DIFFERENCE BETWEEN PAYMENTS FOR ACCESS TO

RELIGIOUS SERVICES OR BENEFITS IN SCIENTOLOGY AND IN NUMEROUS OTHER RELIGIONS

377. In Scientology and other religions, adherents receive access

to an identifiable religious service or benefit in exchange for their contributions.

a. Jews receive access to High Holy Day services (as well as other benefits and services) in return for their membership dues and/or payments for High Holy Day service tickets. (PPF 104, 106, 118-119,132, 134, 135).

b. Mormons receive access to Mormon temples (and the sacred rituals that occur therein) and the opportunity for participation and advancement in the Mormon lay priesthood in return for their payment of full tithes. (PPF 142, 151-153).

c. Catholics receive the celebration of their special intentions in a Mass and a special relationship to the Mass and, in some cases, the celebration of a Mass that would not otherwise have been celebrated in return for their payment of Mass stipends and Mass bequests. (PPF 206, 226, 239-242).

d. Hindus receive the performance of pujas in return for their payments to Hindu temples. (PPF 263, 275).

e. Zen Buddhists receive access to meditation sessions and spiritual consultations with Zen masters in return for their payments. (PPF 293-296, 302).

f. Members of the Worldwide Church of God maintain membership in the Church and the right to participate in its religious services in return for their payment of full tithes. (PPF 304, 314).

g. Scientologists receive access to auditing and training in return for their contributions. (PPF 327).

378. The Church of Scientology and other religions establish fixed payments or contribution rates for religious services and benefits.

a. Synagogues establish fixed membership dues and fixed prices for High Holy Day service tickets. (PPF 107-110, 112-114, 132-133, 137).

b. The Mormon Church sets a fixed rate of ten percent of income as the definition of a "full tithe." (PPF 146, 147).

c. The Catholic Church sets fixed rates for Mass stipends and Mass bequests. These rates are set by the provincial (archdiocesan) authorities. (PPF 228, 229).

d. Hindu temples set fixed payments for each of the pujas that can be requested. (PPF 263, 267, 269).

e. Zen Buddhist organizations set fixed rates for membership, for participation in meditation at zendos, and for participation in religious retreats (sesshins and kesseis). (PPF 293-296).

f. The Worldwide Church of God sets a fixed rate of ten percent of income as the definition of a full tithe. (PPF 305).

g. Churches of Scientology set fixed contribution amounts for auditing and training. (PPF 328).

379. Scientology and other religions publish contribution schedules for religious services offered. In every case, religions make known to their adherents the fixed price or contribution rate for access to specified services.

a. Synagogues publish price lists for membership and price lists for tickets to High Holy Day services. (PPF 111). Where applicable, the membership price lists specify the variation of price depending on a range of factors, including the number of seats for High Holy Day services, the location of seats for High Holy Day services (by room, row, or whether the seat is reserved); the family status of the member; the age of the member; or the income of the member. (PPF 112). Many synagogues send their price list to any person merely inquiring about synagogue membership. (PPF 111). Synagogues provide information about ticket prices for High Holy Day services in membership materials and over the telephone. (PPF 141).

b. The Mormon Church in its official publications and in numerous statements by its officials to its members, states that a tithe is 10% of the members' income. In numerous fora, including priesthood meetings and sacrament meetings, Church elders and officials repeatedly inform members of the obligation to pay 10% of income as the member's tithe, and provide instruction on the definition of "income." (PPF 146, 147).

c. Priests and other Catholic authorities inform Catholics of the figure deemed by the provincial authorities. (PPF 230). Numerous Catholic institutions that perform Masses publish and distribute to the public price lists for the celebration of special intentions in Masses, novenas (cycles of nine Masses), Gregorian Masses (cycles of 30 Masses), and the like. (PPF 251).

d. Hindu temples publish and distribute price lists setting the prices for the performance of various pujas (blessings) to be performed by Hindu priests. Where applicable, these price lists specify the additional cost of the blessing if it is performed at the adherent's home rather than at the temple. (PPF 268, 272).

e. Zen Buddhist organizations publish and distribute price lists for membership and for participation in meditation at zendos, sesshins and kesseis. (PPF 292).

f. Worldwide Church of God publications provide detailed instruction on what income must be tithed. (PPF 307).

g. Churches of Scientology publish and distribute lists of contribution rates for auditing and training sessions. (PPF 329).

380. Although they all provide exceptions (see infra), Scientology and other religions generally require payment of set fees or rates.

a. Synagogues condition access to High holy Day services on payment of membership dues and/or ticket prices. (PPF 104, 106, 116, 129, 132, 135, 136).

b. The Mormon Church conditions access to its temples (and the rituals occurring only therein) and participation and advancement in the priesthood on payment of a full tithe. (PPF 151, 162-169, 173-174, 205).

c. Under Canon Law, Catholic priests have the right to and do condition celebration of Masses for special intentions on the payment of the customary Mass stipend fee. (PPF 248-250).

d. Hindu priests and temples condition performance of pujas on the payment of the fee Set for the requested puja. (PPF 263, 264).

e. Zen Buddhist organizations condition participation in meditation sessions and retreats on the payment of the set fees. (PPF 292).

f. Membership and participation in the religious services of the Worldwide Church of God is conditioned on paying tithes. (PPF 304, 308, 310-313).

g. Churches of Scientology, subject to a number of exceptions, require payment of fixed contributions for participation in auditing and training. (PPF 328).

381. Many religions represent to their members that payment of fees for religious services or benefits is a contractual and/or religious obligation.

a. In their membership application materials and elsewhere, many synagogues' characterize the members' obligation to pay dues and building fund assessments in contractual terms and treat the members' relationship to the synagogue as contractual. (PPF 116).

b. Mormon doctrine, reflected in the Law of Tithing, teaches Mormons that payment of a full tithe is both a religious duty and a test of faithfulness to the Church. (PPF 149).

c. Canon Law treats the relationship between the payor of a Mass stipend and the priest who accepts the stipend as contractual. (PPF 213-221, 224).

d. Hindu temples, through the use of price lists and the requirement that members make advance arrangements for the performance of pujas, indicate to Hindus that payment for performance of pujas is a contractual arrangement. (PPF 268, 270, 275).

e. Zen Buddhist organizations communicate through their literature that payments for zendo membership and participation in religious retreats are contractual relationships. (PPF 292, 298). Zen Buddhist literature indicates to adherents that there is a religious basis for making their payments. (PPF 301).

f. Literature of the Worldwide Church of God conveys to members that full tithe paying is a religious obligation. (PPF 307).

g. Scientologists believe that every Scientologist has a duty to contribute to the Church, whether in the form of money or through other means. As a matter of religious doctrine, Scientologists believe that in order to maintain spiritual health an individual should maintain a balance over time between what he or she gives and receives. What is given, however, may take various forms other than money, and equivalence is not required. (PPF 338, 358).

382. Scientology and other religions have exceptions to their requirements that adherents make fixed contributions for access to religious services.

a. Synagogues reduce or waive membership dues for those financially unable to pay the fixed rates. Financial inability is the only basis for exceptions to the requirement to pay fixed membership dues. (PPF 124-131). In the vast majority of synagogues, those who are not members or who have not paid for a ticket are not allowed access to High Holy Day services. (PPF 104). Synagogues require individuals to apply for dues waivers or reductions. (PPF 126).

b. The Mormon Church has only two narrow exceptions to the requirement that members pay a full tithe. There are exceptions for (1) members entire1y dependent on Church welfare assistance and (2) full-time missionaries, but only for income going to their living expenses. (PPF 156).

c. Canon Law encourages but does not require Catholic priests to celebrate Masses for the special intentions of Catholics, especially those of the needy, without requiring the payment of the customary fee. (PPF 248). With insignificant exceptions, it is only in the case of a request from the needy that priests will waive their right to a stipend. (PPF 250).

d. No exceptions to the requirement that Hindus pay for the performance of pujas are mentioned in Hindu temple literature setting out the prices for pujas. While some exceptions may be made, there is no real tradition of charity in Hinduism as there is in Western religious traditions. (PPF 265).

e. There is no evidence in the record of exceptions in Zen Buddhism to requirements of payment for participation. Literature cites religious basis for payment. (PPF 301).

f. The only exception to the tithing requirement in the Worldwide Church of God is if the member no longer has any income on which to tithe. (PPF 310).

g. Churches of Scientology have a number of exceptions to the requirement to make set contributions for auditing and training. The Churches provide free introductory auditing and free charity auditing for those in need. Auditing is provided free in free Scientology centers, which are established by the Churches. As part of their training, Church auditors provide free auditing to their fellow auditors, Church staff members, other parishioners and the general public. Individuals who have joined the staff of the church receive free auditing and training. Reductions and waivers in contributions are provided to members and through training awards. (PPF 340-346).

383. Payment is a necessary but not sufficient condition for gaining access to religious services or benefits in some but not all religions. In other religions, payment is a necessary and sufficient condition for receiving access to religious services or benefits.

a. Some synagogues admit only members to High Holy Day services. (PPF 120). Where nonmembers are permitted to attend High Holy Day services, there are generally no requirements for attendance other than payment.

b. In addition to obeying the Law of Tithing, Mormons must meet other "worthiness" requirements to obtain a temple recommend permitting them to enter the temple or to participate and advance in the priesthood. (PPF 167, 169).

c. Payment of a Mass stipend is all that is necessary for a Catholic to have a priest celebrate a Mass for a special intention. (PPF 206).

d. Payment appears to be the only requirement for having a Hindu priest perform a puja. (PPF 282).

e. In addition to payment, achievement of certain levels of advancement within Zen Buddhism appears to be a requirement for participation in some religious activities. (PPF 300).

f. There is no indication in the record whether there are requirements other than tithing for membership and participation in the Worldwide Church of God.

g. Scientologists who wish to participate in auditing or trading must meet other conditions, including: adherence to the ethical and moral codes of the Church, abstinence from drug and alcohol use, abstinence from unethical sexual activity, and commitment to the spiritual goals of the Church. (PPF 355-359).

384. Most religions utilize methods of monitoring and enforcing their requirement of a contribution for access to religious services or benefits.

a. Most synagogues require those who wish to become members to remit part or all of their membership dues with their membership application and/or prior to receiving tickets or admission to High Holy Day services. Many emphasize in their literature and their payment policies that membership is a contractual relationship. Many synagogues regularly bill their members for their membership dues and use order forms, invoices and bills for High Holy Day service tickets. Synagogues require those who wish to receive reductions or waivers of membership dues to apply for an exception and investigate the financial circumstances of the applicant. Those who abuse the exceptions process will be denied reductions or waivers. In some synagogues, those who fail to meet their dues obligations may be suspended from membership. (PPF 116).

b. The Mormon Church has an elaborate set of mechanisms for ascertaining, monitoring and encouraging Mormons to be full tithe payers through temple recommend interviews, issuance of temple recommends, cheeks of temple recommends at the temple entrance, the tithing settlement process (including the tithing settlement interview), the monitoring of members by their local bishop and by home and visiting teachers, and by the maintenance of comprehensive records on each member's tithing status. (PPF 162-185).

c. Any Catholic wishing a priest to celebrate a Mass for a special intention must make a request to the priest or a Church or other religious institution. Any Catholic making such a request would be to1d of the customary fee. Catholics having the means to pay would not consider asking for the customary fee to be waived. (PPF 230, 248-250).

d. Hindus who wish to obtain performance of a puja must make arrangements with the priest or with the temple administrator to pay for and schedule the puja. (PPF 268-270).

e. There is no evidence in the record regarding what monitoring and/or enforcement methods are used by Zen Buddhist organizations.

f. The Worldwide Church of God's system for monitoring and enforcing tithing is formal and operates with little flexibility. The Church keeps meticulous, computerized records of the funds received at its headquarters, and sends out monthly receipts and year end statements to all members. If a member ceases tithing, the Church sends out a monthly statement notifying the member that it has not yet received the member's monthly tithe payment. If nonpayment continues for a period of about five or six months, the member is mechanically excommunicated or disfellowshipped. (PPF 309-311).

g. Churches of Scientology maintain records of the amounts their parishioners donate for auditing and training. (PPF 333).

385. Most religions keep records which inform the members and/or the religion what contributions the member has made and what services they are entitled to attend or have performed.

a. Synagogues keep records of the membership dues payments and building fund assessment payments that members make, and send members bills for unpaid portions of membership dues. Many synagogues require that members remit all or a specified portion of their dues in order to have their membership applications processed or in order to receive particular benefits of membership. Many synagogues inform their members that all or a specified portion of dues must be remitted by a specified date for the member to be permitted to attend High Holy Day services. (PPF 116).

b. The Mormon Church keeps a current Tithing and Other Offerings Statement (previously called Year-to-date Tithing and Donations Statement) for each member which reflects the member's tithing and other payments to the Church. At the end of the year, each member has the opportunity at a tithing settlement interview to review the accuracy of the statement and to make any additional payments needed to bring his or her contribution up to a "full tithe," which is the necessary contribution required for access to the temple and the rituals that occur only in the temple. The Church keeps annual records of each member's tithing status, which are retained by the member's bishop and forwarded to Church headquarters. The Church utilizes specialized computer software to facilitate the maintenance and transfer up through the hierarchy of information on the payments and tithing status of each member of the Church. The information on members' tithing status is available on a need-to-know basis to local Church leaders. (PPF 175-182).

c. The Catholic Church requires that accurate records be kept of Mass stipends that parishioners have paid and the Masses that the parishioners are entitled to have celebrated. Canon Law requires that "[e]very priest must accurately note Masses which he has accepted to celebrate and which have been satisfied." Church officials are required by Canon Law to maintain a special book in which they list the number of Masses to be celebrated, the intention, the stipend given and the Masses' celebration. (PPF 232-233).

d. Since Hindu temples require fixed payments for different pujas and advance arrangements for the performance of pujas, it is apparent that records of payments and dates for performance of pujas must be kept. (PPF 263, 264, 270).

e. The charging of fees for membership in zendos and for participation in religious retreats and the fact that deposits for retreats may be transferred to other zendo practices indicate that records of payment and entitlement to services must be kept. (PPF 292, 298; see also PPF 297, 299).

f. The Worldwide Church of God keeps computerized records of funds received and sends out receipts and year end statements to members that inform members if they are current in their tithing, and, consequently, if they are entitled to continued participation in religious services. (PPF 309-310).

g. Churches of Scientology keep accurate records of contributions members have made entitling them to participate in the religious services of auditing and training. (PPF 333).

386. Many religious organizations calibrate prices to the length or level of religious services provided.

a. The vast majority of synagogues calibrate prices according to the level of services provided. Sixty-one percent of synagogues use the family dues system, under which membership payments are pegged to whether the membership purchased is for a single person, a couple or for a family. In most synagogues, the price of membership is directly related to the number of seats at High Holy Day services provided. (PPF 112.b). Some memberships are more expensive for individuals with children based on the assumption they will use the benefit of religious instruction for their children. (PPF 112.b, 112.f).

In addition to these pervasive methods of calibration, many synagogues have other methods of setting prices according to the level of services offered. Synagogues set membership dues based on the location of members' seats for High Holy Day services, based on whether the member sits in the synagogue's sanctuary or in a less expensive auditorium, based on whether the member pays for a reserved or open seat at High Holy Day services, or based on the row or section the member pays for. (PPF 112.d).

Similarly, prices for High Holy Day tickets often vary based on the location of the seats, either by row or section or whether the service attended is in the main sanctuary or another location. (PPF 137).

b. In the Mormon Church, tithing is calibrated according to the income of the member. (PPF 146).

c. In the Catholic religion, prices for the celebration of Masses may be calibrated to the type of Mass said, particularly for Masses celebrated at religious shrines and similar institutions. The price may vary based on whether the payor seeks a regular low Mass or a special low Mass. A higher price is paid if the payor wishes to have the Mass celebrated on a specific date. (PPF 244).

The cost of a Mass is sometimes calibrated according to where the Mass is celebrated. In some cases, Masses celebrated at the main altar will cost more than those celebrated elsewhere, and Masses farmed out to be celebrated will be less expensive than Masses celebrated at one's church or shrine. (PPF 245).

The price for more elaborate Masses is often calibrated differently than are the prices for simple Masses. For example, the price of a Gregorian Mass, which is a cycle of Masses celebrated for 30 days consecutively, is more expensive than the price for 30 individual regular low Masses. (PPF 246).

d. In the Hindu religion, prices are strictly calibrated according to the specific puja or blessing that the payor Seeks. Each Hindu temple publishes a price list specifying the cost for the various pujas. In addition, prices are calibrated according to whether the puja is performed at the temple or at the payor's home. (PPF 267, 268, 272).

e. Prices in Zen Buddhism are calibrated according to the length and level of services received. Membership prices vary according to the level of services paid for. Prices for the religious component of retreats called sesshins and kessei vary according to their length. (PPF 294, 296).

f. In the Worldwide Church of God prices are calibrated according to the income of the member. (PPF 305).

g. In Scientology, auditing generally is provided at an hourly contribution rate, although contributions for some auditing are not calibrated. Contributions for training are usually not calibrated, in that different parishioners may spend widely varying amounts of time completing these services with no difference in contribution. (PPF 334).

387. Many religious organizations provide refunds in some situations for religious services that members do not receive.

a. Some synagogues provide refunds for High Holy Day service tickets that are not used. (PPF 138).

b. The Mormon Church does not refund tithes. (PPF 148).

c. Under Canon Law, a priest who has accepted a stipend and fails to celebrate a Mass for a special intention must refund the stipend. (PPF 234).

d. Nothing in the record indicates the Hindu religion prohibits refunds of payments for pujas. (PPF 283).

e. Zen Buddhist organizations provide that deposits required to be paid in advance for religious retreats may be transferred to other Zendo programs. (PPF 297, 298).

f. There is no evidence in the record whether or not the Worldwide Church of God provides refunds.

g. Infrequently, churches of Scientology provide refunds where members are no longer interested in pursuing the spiritual objectives of Scientology and wish to disaffiliate with the religion. (PPF 337).

388. The benefits of the services that Scientologists and members of other religions contribute in order to participate in are believed to accrue both to the individual and to the larger community.

a. Jews believe that benefit accrues to both the individual and the community from attendance at synagogue services, including High Holy Day services. (PPF 101, 102).

b. Mormon doctrine teaches that an individual member's exaltation -- the ultimate spiritual goal of Mormonism -- cannot be achieved without participation in the rituals of their personal endowment and celestial marriage, performed exclusively in the temple, which Mormons cannot enter without being full tithe payers. The individual performing these rituals derives the primary benefit from them. (PPF 186-191). Mormon doctrine also teaches that performance of rituals for the dead, which members also perform only in the temple, is important to the member's personal exaltation and to the exaltation of the larger community. The living individual performing temple work derives a more certain benefit from it than do the deceased. (PPF 192-199).

c. Catholic doctrine teaches that the celebration of Mass for a special intention benefits both the individual requesting the special intention and the entire community. The papacy, through a 1974 apostolic letter, has reiterated that the payor of the Mass stipend for a special intention derives "more abundant effects" from the celebration of the Mass than do others. (PPF 240-243).

d. Hindu pujas may be for the benefit of the person paying for them or for others. (PPF 274).

e. Zen Buddhists hope to derive personal spiritual benefit from participation in the meditation for which they pay. (PPF 289).

f. There is no evidence in the record of what benefits are thought to accrue from Services of the Worldwide Church of God.

g. Scientology doctrine teaches that spiritual benefit accrues to the individual and to the larger community from the individual's participation in auditing and training. (PPF 352, 353).

389. The motivation of members of the Church of Scientology and other religions in making contributions is both to gain access to services and support the survival and objectives of their religion.

a. Jews' payments entitling them to admission to High Holy Day services are motivated both by desire to attend the service and to serve their community. (PPF 101, 102, 117, 121).

b. Mormons' payment of full tithes are motivated both by desire to enjoy the temporal and spiritual blessings of Mormonism (including participation in the priesthood and the rituals of the temple) and to further the general purpose of the Church. (PPF 149-151).

c. Catholics' payment of Mass stipends for the celebration of Masses for special intentions is motivated by desire to have a special relationship to the Mass, in hope of having the special intention fulfilled and to contribute to the maintenance of the priests and to provide for the needs of the Church. (PPF 240-243, 235-236).

d. Hindus' payments for performance of pujas are motivated by desire to have the puja performed and obtain the blessing requested. (PPF 275, 279).

e. Zen Buddhists' payments are motivated by a desire to gain access to meditation and retreats and to obtain spiritual enlightenment. (PPF 289).

f. Members of the Worldwide Church of God ensure access to services by their tithe payments. (PPF 314). There is no evidence in the record regarding the spiritual benefits they hope to obtain.

g. Scientologists' contributions for auditing and training are motivated by their desire to participate in religious services and to contribute to the survival and expansion of the Church. (PPF 336).

390. Scientology and most other religions do not promise that individuals will definitively derive a spiritual benefit from participation in the services that they pay to attend, but the contribution does provide access to the service from which spiritual benefit MAY be derived.

a. In Judaism, a person may derive a spiritual benefit from attendance at High Holy Day services, but whether a benefit has been derived is unverifiable. Spiritual benefit accrues from making contributions to one's synagogue. (PPF 102). Payment of membership dues or a ticket price, however, gives an individual access to the High Holy Day service from which he or she may derive a spiritual benefit. (PPF 104).

b. Mormon doctrine teaches that performance of the rituals associated with the personal endowment and celestial marriage are essential to receive exaltation. (PPF 186-188, 190). It also teaches that a member places his or her exaltation in peril by failing to perform "temple work" on behalf of the dead. (PPF 192-197).

c. In Catholicism, there is no guarantee that the special intention that the payor of a Mass stipend requests will be granted. (PPF 238). Payment of the Mass stipend, however, ensures the donor celebration of a Mass for his or her special intention (PPF 206) and a special relationship with the Mass. (PPF 240-242).

d. In Hinduism, there is no guarantee that the puja (blessing) that an individual pays for will be obtained. (PPF 280). Payment, however, guarantees the performance of the puja, from which the blessing may be achieved. (PPF 264, 275).

e. Participation in Zen meditation does not guarantee the spiritual benefit sought. But payment of the required fee does ensure access to the meditation session and to the master from whom spiritual benefit may be derived. (PPF 290, 302).

f. Within the Worldwide Church of God, one does not necessarily obtain a spiritual benefit sought by paying the tithe and participating in services. (PPF 314).

g. In Scientology, there is no guarantee that participation in auditing and training will result in spiritual benefit. (PPF 354). But, provided other religious and ethical requirements are met, payment does ensure access to these religious services from which spiritual benefit may be derived. (PPF 327, 355-359).

391. Many religions teach that obedience to their doctrines (including requirements of payment) and participation in their religious practices will give members temporal as well as spiritual benefits.

a. There is no evidence in the record regarding any Jewish teaching that temporal benefits will be derived from participation in services.

b. The Mormon Church teaches that paying a full tithe will bring material well being, economic prosperity, better management and control of one's finances, and psychological satisfaction. (PPF 150, 152, 153).

c. Catholics often pay Mass stipends so that Masses will be celebrated for special intentions that seek temporal benefits for the payor of the stipend or for others. (PPF 207).

d. Many Hindu pujas seek blessings for temporal objectives. (PPF 273).

e. There is no evidence in the record regarding any Zen Buddhist teaching that temporal benefits will be derived from participation.

f. There is no evidence in the record regarding any Worldwide Church of God teaching that temporal benefits will be derived from participation.

g. Scientologists believe that temporal benefits can accrue from the spiritual enlightenment an individual derives from participation in auditing and training. (PPF 352, 353).

392. Participation in the services for which a contribution is required is not necessary to remain a member in good standing in Scientology or most other religions.

a. Synagogue service attendance has some being in determining who is a "good Jew" than is synagogue membership. (PPF 101). Attending High Holy Day services, for which one must pay, therefore has some bearing on being a "good Jew." (PPF 101).

b. Membership in the Mormon Church is not conditioned on paying a full tithe. Achieving exaltation, however, is contingent on being a full tithe payer. (PPF 151, 157, 162-169, 173-174, 186-200).

c. It is not necessary to pay Mass stipends for the celebration of special intentions in order to be a Catholic in good standing. (PPF 247).

d. It is important to pay for pujas to be a Hindu in good standing. (PPF 277).

e. One can be a member of the Zendo without engaging in retreats. (PPF 291). There is no evidence in the record whether or not participating in religious services at Zendo is necessary to remain a Zen Buddhist in good standing.

f. It is necessary to pay one's tithe to remain a member of the Worldwide Church of God. (PPF 312).

g. It is not necessary to pay for auditing or training to be a Scientologist in good standing. (PPF 350, 351).

393. In most religions, including Scientology, there are religious activities in which one can participate without making a contribution.

a. In most synagogues, Jews are permitted to participate in many religious Services without having to make a payment. In the vast majority of synagogues, however, access to the most important religious services of the year -- the High Holy Day services, which are the services attended by the greatest number of Jews -- is conditioned on payment. (PPF 99, 100, 104).

b. In the Mormon Church, members can participate in weekly worship services at ward houses or chapels and in other religious activities without being a full tithe payer. (PPF 161). A member cannot participate in the crucial rituals necessary for one's exaltation, however, without being a full tithe payer. (PPF 160, 162).

c. Catholics generally can attend Masses without making any payment. Some Masses would not be held, however, without the request for the celebration of a special intention for which a Mass stipend has been paid. (PPF 225, 226). Catholics generally must pay a stipend to have a Mass celebrated for their special intention. (PPF 228, 249- 250).

d. There is no evidence in the record of Hindu Services that one can have religious services performed without payment. The performance of pujas is contingent on paying the fixed price. (PPF 264).

e. There is no evidence in the record of Zen Buddhist Services that one can participate in without payment. (PPF 292-296).

f. One cannot participate in Worldwide Church of God Services without paying one's tithe. (PPF 313).

g. In Scientology, members can participate in a variety of religious activities, including but not limited to auditing and training, without making any contribution. (PPF 334-349). Although members often make contributions to participate in auditing and training, there are methods of participating in these services without paying a fee. (PPF 339-346).

394. Religious practices for which payment is required are conducted congregationally in some religions and individually in others.

a. High Holy Day services, which Jews pay dues or fees to attend, are conducted congregationally. (PPF 100).

b. Mormons perform rituals necessary for their exaltation for themselves or, in the case of the celestial marriage, with their spouse and immediate family. (PPF 188-191).

c. Many Masses for which a Mass stipend has been paid are celebrated with a congregation present. Some Masses, including those that would not be celebrated but for the request of the payor of the stipend, are celebrated privately. (PPF 225). In some such cases, the payor of the stipend is present; in others not even the payor is present. (PPF 227).

d. Hindu pujas are performed by the Hindu priest in the presence of the person paying for the puja, and, where appropriate, members of the payor's family. (PPF 259-261).

e. Zen meditation is performed both individually and in a group setting. An essential part of Zen meditation is individual sessions with the Zen master. (PPF 287-288).

f. There is no evidence in the record regarding the form of services in the Worldwide Church of God.

g. Most, but not all, auditing is conducted on an individual basis. (PPF 320). Training is usually performed congregationally. (PPF 321).

395. Scientology and other religions use fixed contributions for their religious services to raise funds necessary to maintain and expand the operations of their religious institutions and pay their personnel.

a. Membership dues are a structured method to raise funds to create, maintain and operate synagogues and their programs. Conditioning access to High Holy Day services is a particularly good method of raising funds. (PPF 105).

b. Tithes are used in furtherance of all the general purposes of the Church. (PPF 149).

c. Mass stipends, set by each provincial authority of the Catholic Church, are a critical source of income to the Catholic Church for the maintenance of Catholic priests. Priests salaries are calculated with the income from stipends in mind. (PPF 235, 236).

d. Fees for pujas are a critical source of income to Hindu temples for paying the salaries of Hindu priests. (PPF 281).

e. There is no direct evidence in the record regarding the uses to which payments to Zen Buddhist organizations are put.

f. In the Worldwide Church of God, tithing payments are sent to Church headquarters, which distributes funds to local churches for ministers' salaries and local expenses. (PPF 305, 306).

g. Contributions for Scientology auditing and training go into the general accounts of churches of Scientology and are used to pay for operational expenses and for the maintenance and expansion of the religious and charitable institutions and activities of the Church. (PPF 327, 331-332).

396. Virtually every religion receives very substantial amounts of money in the form of payments from members required for access to religious services or benefits.

a. A conservative estimate of revenue garnered in dues from synagogue members, not including revenues from building fund contributions required as a condition of membership, is on the order of $350 million per year. (PPF 115). A conservative estimate of annual revenues from purchase of tickets to High Holy Day services is about $109 million for nonmembers and $10 million for members. (PPF 133, 140). Most of this money -- both from dues and for ticket sales -- is received from payments that are required for access to High Holy Day services. Eighty-six percent of all synagogues (serving 91% of all synagogue members) require payment for access to High Holy Days services, either in the form of dues, tickets or both. (PPF 104).

b. Tithes are the major source of income for the Mormon Church. Estimates published by academics and the press of income to the Mormon Church from tithes range from the high hundreds of millions of dollars to between 2.5 and 4.3 billion dollars a year. (PPF 158).

c. A conservative estimate of income to the Catholic Church in the United States from Mass stipends for 1984 by a noted Catholic scholar is $105 million. (PPF 237).

d. Income to Hindu temples from payments for pujas is very substantial, as there are estimated to be about a million Hindus engaging in pujas on the average of a couple of times a month, paying prices ranging from $5.00 to at least $350.00 (most pujas are in the range of $25.00 to $100.00). (PPF 284, 278, 269).

e. While there is no figure in the record for income to Zen Buddhist organizations from required payments, the total must be significant given the substantial prices of both membership and retreats. (PPF 294, 296).

f. Income to the Worldwide Church in the form of the basic tithe of 10% of income from 100,000 members is substantial. (PPF 304, 305).

g. The Church of Scientology derives sufficient income from contributions made in connection with auditing and training to maintain and expand the religion of Scientology. (PPF 331).

397. Individual members of a number of religions pay substantial amounts of money annually for access to religious services and benefits.

a. When synagogues' varied membership size is taken into consideration, the average synagogue membership dues for a family of four is $666.00. Nonmember High Holy Day ticket prices average $109.00. (PPF 109, 137).

b. Since a tithe is 10% of their income, many members of the Mormon Church pay very substantial amounts of money to their Church. (PPF 159).

c. Individual members of the Catholic Church pay anywhere from $5.00 or $10.00 for the celebration of a single Mass to very large amounts of money for the celebration of multiple Masses. Catholics may pay numerous stipends for Masses over the course of a year, and their payments can be $50.00 or $100.00 and up. (PPF 231, 251).

d. Individual Hindus pay anywhere from $5.00 to $350.00 for the performance of pujas. Most pujas are in the range of $25.00 to $100.00. (PPF 269). Hindus request an average of a couple of pujas a month and some make more frequent payments for the performance of pujas during the course of a year. (PPF 278).

e. Zen Buddhists may typically pay between $150.00 and $600.00 for membership in a zendo. (PPF 294). They may typically pay $180.00 to $400.00 to participate in a sesshin and $600.00 to $1,500.00 to participate in a kessei. (PPF 296). These fees are for access to the religious services and benefits provided, and not for room and board, which are charged separately. (PPF 299).

f. Since a tithe is 10% of their income, many members of the Worldwide Church of God pay very substantial amounts to their Church. (PPF 305).

g. Members of the Church of Scientology may pay anywhere from nothing to substantial amounts to participate in auditing and training. (PPF 335).

[Chart omitted]

ULTIMATE FINDINGS OF FACT

1. There is no material difference between payments for access to religious services or benefits in Scientology and in numerous other religions.

2. The Internal Revenue Service has engaged in ongoing inconsistent application of section 170 by systematically disallowing deductions for Scientologists' payments for access to religious services while systematically allowing deductions for payments by members of other religions for access to religious services.

3. Other than referring to published revenue rulings, the respondent has articulated no justification for distinguishing payments to churches of Scientology to gain access to religious services and payments to other religious organizations made for the same reason.

4. If only direct costs are to be taken into account under the dual payment doctrine, the petitioners herein are entitled to deduct the percentages of their payments to the donee churches of Scientology as determined in the original and supplemental reports of Richard. D. Clark (Ex. 98, 99), as follows:

Donee	Taxable Year	Contribution Percentage
Church of Scientology of Boston	1983	51.66%
Church of Scientology of Boston	1984	48.26%
Church of Scientology of Orlando	1987	56.66%
Church of Scientology of Los Angeles	1986	39.06%
Church of Scientology of New York	1985	54.58%
Church of Scientology of New York	1986	50.09%
Church of Scientology of New York	1987	56.85%
Church of Scientology of Missouri	1987	64.94%
Church of Scientology of Missouri	1988	57.14%
Church of Scientology, Advanced Organization Los Angeles ("AOLA")	1985	60.49%
AOLA	1986	61.30%
AOLA	1988	67.22%
Church of Scientology American Saint Hill Organization ("ASHO")	1985	33.14%
ASHO	1986	53.20%
ASHO	1988	71.09%
Church of Scientology Celebrity Center International ("CCI")	1986	44.77%

CCI	1987	47.22%

5. If indirect costs also are to be taken into account under the dual payment doctrine, the petitioners herein are entitled to deduct the percentages of their payments to the donee churches of Scientology as determined in the rebuttal report of Richard. D. Clark (Ex. 129), as follows:

Donee Church of Scientology	Taxable Year	Contribution Percentage
Church of Scientology of Boston	1983	48.55%
Church of Scientology of Boston	1984	53.95%
Church of Scientology of Orlando	1987	61.42%
Church of Scientology of Los Angeles	1986	56.44%
Church of Scientology of New York	1985	52.95%
Church of Scientology of New York	1986	35.96%
Church of Scientology of New York	1987	53.57%
Church of Scientology of Missouri	1987	61.05%
Church of Scientology of Missouri	1988	58.38%
Church of Scientology, Advanced Organization Los Angeles ("AOLA")	1985	51.76%
AOLA	1986	56.36%
AOLA	1988	56.69%
Church of Scientology American Saint	1985	45.62%

Hill Organization ("ASHO")		
ASHO	1986	62.51%
ASHO	1988	72.67%
Church of Scientology Celebrity Center	1986	56.32%
International ("CCI")		
CCI	1987	55.67%

SUMMARY OF ARGUMENT (POINTS RELIED UPON)

1. ADMINISTRATIVE INCONSISTENCY

In Hernandez v. Commissioner, 490 U.S. 680, 700-03 (1989), the United States Supreme Court recognized that a valid claim of administrative inconsistency is stated by allegations that the Service has maintained a consistent policy and practice of disallowing charitable contribution deductions for payments by members of the Church of Scientology for access to Scientology religious services while systematically allowing deductions for similar payments to other religions. See also Powell v. United States, 945 F.2d 374 (11th Cir. 1991).

At trial in this case, petitioners demonstrated that there is no material difference between the structure of payments for access to religious Services in Scientology and in a number of other religions. Petitioners presented the testimony and reports of Seven expert witnesses, as well as comprehensive documentary evidence, to establish unequivocally that the Mormon, Catholic and Jewish religions, as well as numerous other religious organizations in the United States (including Hindu temples, Zen Buddhist organizations and certain fundamentalist Protestant denominations -- most notably the Worldwide Church of God) all require fixed, mandatory payments for access to identified religious services.

The record adduced at trial demonstrates that members of other religions regularly claim deductions for their payments for access to religious services and that the Service as a matter of policy and practice has systematically allowed those deductions. The record also shows that, in contrast, respondent rigorously scrutinizes Scientologists' payments and uniformly denies deductions for contributions to Scientology churches that are indistinguishable on any material basis from payments in other religions.

Because the Service has administered section 170 by drawing lines and engaging in differential treatment based on religion, any purported justification must be subjected to strict scrutiny. Respondent's unequal treatment is clearly indefensible under this standard. Even if the treatment were reviewed under a rational basis test, the differential treatment cannot be justified.

Respondent has offered no serious justification for the Service's inconsistent administration of the law. In her post trial brief, respondent has not argued that there is a rational basis for distinguishing petitioners' payments and has even refrained from expressing an opinion regarding the deductibility of payments to other religions that the Service has consistently and systematically allowed. She relies on certain revenue rulings even though the Supreme Court has stated that they provide no factual basis for distinction between Scientologists' and others' payments. Hernandez, 490 U.S. at 702. Having proven both that their payments are not distinguishable from those of members of other religions and that the Service systematically disallows Scientologists' charitable contribution deductions on the basis of irrelevant, constitutionally impermissible and factually unsupportable criteria, petitioners here are entitled to relief.

Assuming the Court determines, after review of the complete facts, that petitioners' payments at issue here are quid pro quo transactions, petitioners are entitled to protection from the collection of taxes on the amounts they paid for access to religious services. As taxpayers who, on account of their religion, have been victimized by respondent's unrepudiated and systematically unequal application of the law, petitioners are entitled to the benefit of what has been extended to others, even if the Service's isolated application of the law to them is technically correct. See United States v. Kaiser, 363 U.S. 299, 308 (1960) (Frankfurter, J., concurring); Powell v. United States, 945 F.2d at 377-78.

The fact that religion is the basis for the differential treatment is a powerful reason why the Service must be prohibited from collecting taxes on petitioners' payments here. Fowler v. Rhode Island, 345 U.S. 67 (1953); Powell, 945 F.2d at 377. To deny petitioners this relief would leave petitioners without remedy for respondents' systematic violation of the constitutional right of equal protection of the laws and neutral treatment as between different religions. See Welsh v. United States, 398 U.S. 333, 362 (1970) (Harlan, J., concurring).

It is petitioners' alternative position, however, that their contributions to their churches were deductible under the standards of Hernandez for two reasons. First, not all of the relevant facts were before the Court in Hernandez. Through the fuller testimony and evidence about the structure of donations in their religion presented in this case, petitioners have demonstrated that, under the standards set forth in Hernandez, petitioners' donations were not mandatory. Second, the benefits derived from the services in which petitioners participated factually and legally cannot be considered more personal and less public than the benefits derived from the services in a wide variety of other religions. Respondent has uniformly treated the individual benefit of participation in non-Scientology religious services as incidental to the public benefit rendered and therefore has consistently held the individual benefit insubstantial under section 170's quid pro quo standard. Consequently, under long established principles of tax law, petitioners' payments cannot be held to be nondeductible quid pro quo transactions.

2. DUAL PAYMENT

Alternatively, if petitioners are denied relief for respondent's administrative inconsistency, they are entitled to deduct the amount by which their contributions exceeded the costs incurred by their churches in providing religious services. The "dual payment" doctrine simply requires the taxpayer to prove that he or she has paid to charity an amount exceeding the value of the benefit received and that he or she intended to make a gift of the excess.

The controversy here pertains mainly to valuation concerns. In cases like these where the return benefit -- access to religious services -- is "purchased" only in a donative context, that benefit can be measured only by the cost to the donee churches of providing those services. Use of fair market value to measure the nondeductible return is appropriate only where the service or property is traded in a commercial market.

The governing law and First Amendment considerations indicate that in the case of a church, only direct costs may be taken into account in measuring the nondeductible return benefit that arises from participation in religious services of that church. The original and supplemental reports of petitioners' expert accounting witness, Richard D. Clark, set forth a reasonable (and indeed overly conservative) measure of the direct costs to the donee churches of providing religious services.

Alternatively, if indirect costs may be taken into account, the rebuttal report and testimony of petitioners' expert accounting witness, Richard D. Clark, sets forth a reasonable method for allocating the indirect costs to the donee churches of providing religious services to the petitioners herein. His rebuttal report also appropriately recharacterizes certain disbursement items to eliminate the excessive conservatism in his original methodology in identifying direct costs of the donee churches. The method proposed by respondent's expert accounting witness, Professor Charles W. Swenson, is not a reasonable method for allocating the indirect costs to the donee churches of providing religious services. Professor Swenson's cost allocation methodology is inappropriate for tax-xempt nonprofit churches such as the donees here.

ARGUMENT

I. THE IRS HAS VIOLATED PETITIONERS' RIGHTS TO EQUAL PROTECTION OF

THE LAWS AND TO EQUALITY OF TREATMENT AMONG RELIGIONS BY ITS INCONSISTENT APPLICATION OF THE TAX LAW

Respondent's systematic disallowance of charitable contribution deductions under section 170 claimed by Scientologists for their payments for access to religious Service's coupled with her systematic and ongoing allowance of such deductions to members of other religions violates constitutional and administrative law guarantees of equal protection. Since respondent's unequal treatment differentiates among taxpayers on the basis of their religious affiliation, it also violates the prohibition against denominational preferences embodied in the Establishment Clause of the First Amendment. See Point I A, infra.

Because respondent's differential treatment is based on the constitutionally suspect classification of religion, strict scrutiny must be applied to any purported justification respondent's unequal treatment. Even if a rational basis test were applied, however, the Service's attempts to justify the inconsistent treatment of petitioners fails. See Point I B, infra.

Indeed, respondent has not seriously argued that there is a rational basis for distinguishing petitioners' payments from others. Rather, she has refrained from "expressing an opinion" regarding whether others' payments are deductible and instead has weakly suggested that there "could be" a basis for distinction. (Resp. Br. at 54-55). See Point I D 1, infra. In fact, respondent had no rational basis for distinguishing petitioners' payments when she disallowed the claimed deductions and she has none now.

The record documents a clear pattern of inconsistent administrative treatment by the IRS, see Point I C, infra, and demonstrates that, in all relevant respects, contributions for access to religious services by members of numerous religions -- including Mormons, Jews, Catholics, Hindus, Zen Buddhists, and certain Protestant fundamentalists -- are structured similarly to Scientologists' contributions. See Point I D 2-3, infra.

In a vain attempt to distinguish her treatment of members of petitioners' religion, respondent invokes only factually and legally insignificant factors, revenue rulings dismissed by the Supreme Court in Hernandez as lacking sufficient factual context to be instructive, and the belated excuse that the IRS had reason to target Scientology (an excuse that does not even purport to justify unequal treatment). See Point I D 4-6, infra.

A. PETITIONERS HAVE A RIGHT TO EQUAL APPLICATION OF THE TAX

LAWS, PARTICULARLY WHERE THE DIFFERENTIAL TREATMENT IS BASED
ON DISTINCTIONS DRAWN BETWEEN RELIGIONS

Petitioners have a right to the same tax treatment as similarly- situated taxpayers. Taxpayers may not be singled out for adverse tax treatment where a taxing authority has systematically adhered to a pattern or policy of treating similarly situated taxpayers in a more favorable manner. In her brief, respondent does not seriously dispute that a violation of law occurs in these circumstances. /4/

The right to equal tax treatment, succinctly stated in United States v. Kaiser, 363 U.S. 299, 308 (1960) ("Respondent cannot tax one and not tax another without some rational basis for the difference.") (Frankfurter, J., concurring), has been applied by the Supreme Court and lower courts on numerous occasions in varied circumstances, including the very circumstance presented by this case. That an equal protection violation is created by the pattern of preferential tax treatment alleged in this case was implicitly recognized in the Supreme Court's decision in Hernandez v. Commissioner, 490 U.S. 680 (1989), and explicitly recognized by the Court of Appeals for the Eleventh Circuit in Powell v. United States, 945 F.2d 374 (11th Cir. 1991).

In section IV of its opinion in Hernandez, the United States Supreme Court considered but did not decide precisely the claim raised in this case. 490 U.S. at 700-03. The Hernandez majority acknowledged that IRS revenue rulings state "rather clearly" that the IRS does allow deductions for a variety of payments made for religious Services in other denominations. Id. at 701. Yet it held that "[t]he development of the present litigation . . . makes it impossible for us to resolve petitioners' claim that they have received unjustifiably harsh treatment compared to adherents of other religions." Id. The Court believed that the critical question was "not whether the payment secures religious benefits or access to religious Services, but whether the transaction . . . is structured as a quid pro quo exchange." Id. at 701-02. The Court believed that a record reflecting whether or not the transactions in other religions were quid pro quo exchanges simply had not been developed. Id. at 702. /5/ Given the dearth of evidence in the record, the Court could not determine whether "[t]he IRS' application of the 'contribution or gift' standard may be right or wrong with respect to these other faiths." Id. It therefore concluded:

Only upon a proper factual record could we make these

determinations. Absent such a record, we must reject
petitioners' administrative consistency argument.

Id. at 703.

Section IV of the Hernandez majority's opinion contains an implicit but clear holding that petitioners' claim of religiously- based inconsistent administration of section 170, if proven, is a violation of law. Otherwise, if the basic claim failed to state a cause of action, there would have been no reason for the Court to have meticulously considered, as it did, 490 U.S. at 700-03, whether there was an adequate record of the quid pro quo characteristics of payments to other religions. The Hernandez dissenters shared the majority's assumption. 490 U.S. at 704, 707-13 (O'Connor, J., dissenting).

What was implicit in the Hernandez opinion was made explicit in Powell, a case raising precisely the issue of inconsistent administrative treatment of payments by Scientologists for auditing and training raised in this ease. In Powell, the Eleventh Circuit reversed a dismissal for failure to state a claim upon which relief could be granted, holding that:

The IRS is not allowed to treat two similarly situated taxpayers

differently. There is no question 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 Powell court understood that the Hernandez

opinion firmly recognized the viability of the claim of administrative inconsistency:

The Supreme Court rejected Hernandez's administrative

inconsistency argument, not because it wasn't viable, but because there wasn't a proper factual record to establish the IRS's discordant treatment of religious contributions. Hernandez, 490 U.S. at 703, 109 S. Ct. at 2151. Hence, if anything, Hernandez alerts us to the fact that there is a claim for administrative inconsistency.

Id.

A number of other courts have also recognized the viability of a claim challenging the IRS' failure to carry out its duty to treat similarly situated taxpayers consistently. /6/ The Court of Appeals for the Fifth Circuit, in reviewing a challenge to transition rules in the Tax Reform Act of 1986 which granted favorable tax treatment to only some taxpayers, recently held that:

[w]hen a plaintiff alleges that he has been "PERSONALLY denied

equal treatment," Mathews [v. Heckler], [465 U.S. 728, 739-40,] 104 S. Ct. at 1395 [1984](emphasis added) -- that he has been denied a particular benefit accorded to others who are similarly situated -- he has alleged an equal protection injury.

Apache Bend Apartments, Ltd. v. United States of America, 964 F.2d

1556, 1561 (citations omitted), reh'g en banc granted, 974 F.2d 588 (5th Cir. 1992). /7/

The Supreme Court has repeatedly held, both prior to and after its decision in Kaiser, that state taxing schemes that discriminate between similarly situated taxpayers violate equal protection guarantees. The Court has specifically done so where, as here, the discrimination is in the statute's administration. See, e.g., Allegheny Pittsburgh Coal Co. v. Webster County, 488 U.S. 336 (1989); Hillsborough Township v. Cromwell, 326 U.S. 620 (1946); Iowa Des- Moines National Bank v. Bennett, 284 U.S. 239 (1931).

"Administrative inconsistency becomes more odious when it entails an inconsistent action based upon religion." Powell v. United States, 945 F.2d at 377. The unequal treatment to which respondent has subjected petitioners therefore is not only an equal protection violation but also a denominational preference in violation of the Establishment Clause of the First Amendment, since the differential treatment was based on the petitioners' religion.

As stated in the Supreme Court cases cited in Powell, the principle of denominational neutrality mandates "governmental neutrality between religion and religion" and prohibits the adoption of "programs or practices . . . which 'aid or oppose' any religion. . . . This prohibition is absolute." Powell v. United States, 945 F.2d at 377, quoting Epperson v. Arkansas, 393 U.S. 97, 104, 106 (1968). See also Zorach v. Clauson, 343 U.S. 306, 314 (1952), and Engel v. Vitale, 370 U.S. 421, 431 (1962), quoted in Powell, 945 F.2d at 377-78.

The constitutional prohibition applies as fully to unequal governmental practices as it does to unequal laws. As the Powell court stated, "[t]he Establishment Clause of the First Amendment prohibits denominational preferences, including those created by discriminatory or selective application of a facially neutral statute against a particular denomination. The government may not discriminate among religions by applying or enforcing a statute against a particular denomination." 945 F.2d at 378. /8/ See also Fowler v. Rhode Island, 345 U.S. 67 (1953), and Niemotko v. Maryland, 340 U.S. 268, 271-73 (1951) (equal protection guarantees of the Fifth and Fourteenth Amendments also prohibit discriminatory administrative applications of the law on a religious basis).

Petitioners emphasize that their claim here is one of administrative inconsistency, not selective enforcement. Their claim requires the showing of a difference in treatment, based on distinctions or lines drawn between religions. while petitioners must show the line drawing has the effect of imposing harsher treatment on their religion that is not justified by a compelling governmental interest, see Point I B, infra, they need not prove a discriminatory motive. See Hernandez, 490 U.S. at 700-01 (distinguishing Selective enforcement and administrative inconsistency); see also Powell, 945 F.2d at 376-78. As shown below, petitioners have proved conclusively that the Service has intentionally treated Scientology differently than it has treated members of other religions, whether or not the Service did so out of a discriminatory motive. /9/

B. BECAUSE THE IRS HAS ADMINISTERED SECTION 170 UNEQUALLY ON

THE BASIS OF RELIGION, ANY CLAIMED JUSTIFICATION OR THE
UNEQUAL TREATMENT MUST BE SUBJECTED TO HEIGHTENED SCRUTINY

Where, as here, a governmental practice discriminates on the basis of religion, it must be subjected to strict scrutiny; this means the practice "must be invalidated unless it is justified by a compelling governmental interest, cf. Widmar v. Vincent, 454 U.S. 263, 269-270 (1981), and unless it is closely fitted to further that interest, Murdock v. Pennsylvania, 319 U.S. 105, 116-117 (1943)." Larson v. Valente, 456 U.S. 228, 246, 247 (1982).

Strict scrutiny applies to review of tax classifications based on religion. As the Fifth Circuit recently stated, in reviewing an equal protection challenge to a tax scheme:

When a fundamental right is at stake, or the classification at

issue is inherently suspect -- classification based on race, national origin, and alienage -- the courts evaluate the legislation under the most exacting standard: strict scrutiny. Town of Ball v. Rapides Parish Police Jury, 746 F.2d 1049, 1059 (5th Cir. 1984). Such a classification "will almost never be based on legitimate governmental reasons," and to survive judicial review, "must further a compelling governmental interest which cannot be served by alternative means less burdensome to the suspect class or fundamental right or interest." Id.

Apache Bend Apartments, Ltd. v. United States, 964 F.2d 1556, 1562-63

(footnotes omitted). Of course, religion, like race, national origin and alienage, is a suspect classification requiring strict scrutiny. See Larsen v. Valente, supra. /10/

Respondent, of course, argues that her differentiation between payments by members of petitioners' religion and payments by members of other religions must have been based on nonreligious criteria. As is demonstrated below, the record shows that respondent had no legitimate secular criteria for distinguishing between the payments of Scientologists and of members of other religions. The evidence in the record on the Service's administrative practice shows that payments by Scientologists have been vigorously scrutinized and uniformly disallowed. For 20 years, respondent has made no effort to investigate whether members of other religions were claiming deductions for payments required for access to religious Services, while at the same time respondent implemented a systematic program to interrogate virtually every Scientologist about his or her payments to the Church.

There is little documentary evidence in the record of any attempt by respondent to articulate a distinction between Scientologists' and others' payments. The principal attempt was made in a document entitled "Church of Scientology Cases," Ex. 41-AO, /11/ which distinguishes Scientologists' payments based on impermissible religious criteria:

First, note some important differences between traditional

religious groups and the Church of Scientology. The traditional group typically solicits, and usually gets, contributions for the spiritual services held for its members or participants in its meeting place -- church, synagogue, or temple. These contributions make group worship possible and as such are clearly charitable contributions.

Any attempt by respondent to distinguish between payments on the

basis of whether they are made to participate in group or individual worship is itself a denominational preference. See Point I D 4 (d), pp. 203-06. The point here, however, is that the IRS has drawn lines along religious rather than secular bases, and its action must be subjected to strict scrutiny.

While strict scrutiny is the proper standard in this case, even if a rational relationship test were applied, the evidence shows that there is no rational basis for concluding that Scientologists' and others' payments are different in any material way. As demonstrated below, under either test, respondent has violated petitioners' rights.

C. THE IRS HAS ENGAGED IN A SYSTEMATIC PRACTICE AND POLICY OF

INCONSISTENT TREATMENT OF PAYMENTS BY SCIENTOLOGISTS AND OTHERS FOR ACCESS TO RELIGIOUS SERVICES

1. THE IRS APPLIES DIFFERENT INVESTIGATIVE PROCEDURES AND

LEGAL STANDARDS TO SCIENTOLOGISTS' CONTRIBUTIONS

At trial, petitioners demonstrated that respondent has applied section 170 with an uneven hand, to the detriment of adherents of Scientology.

First, the unrebutted evidence demonstrates that taxpayers of religions other than Scientology routinely claim deductions under section 170 for payments they make to participate in or gain access to religious services or benefits. Catholic, Jewish, and Mormon taxpayers regularly claim deductions for mass stipends and mass cards, membership dues, High Holy Day tickets, building fund assessments and tithes. (PPF 360.a, b, c). Worldwide Church of God and Zen Buddhist organization represent to members that payments entitling them to access to religious services are tax deductible. (PPF 360.d).

Second, the unrebutted evidence demonstrates that respondent has never even considered whether these payments are quid pro quo transactions. (PPF 371). The evidence shows that where the benefit received is religious, only in the case of Scientology has respondent applied the rule that quid pro quo transactions are not deductible. (Id.). In audits or examinations of taxpayers claiming such deductions, respondent does not inquire into the nature of a payment to a religious organization, except in the ease of a payment to a Church of Scientology. (PPF 361).

As Messrs. Smith, Hughes, Rosen and Malone each testified, where the donee is a religious organization other than a Church of Scientology, respondent asks the taxpayer only to substantiate that the payment was made, generally through a canceled check or other receipt. (PPF 362). Respondent does not inquire of non-Scientology taxpayers whether they received religious benefits in exchange for their payments to their Churches. (PPF 361, 366). Nor does respondent inquire of non-Scientology taxpayers whether a payment made to a synagogue or church gave the taxpayer access to a Service or resulted in the taxpayer's advancing in the synagogue or church. (PPF 364, 365). Indeed, with the exception of taxpayers who are members of Churches of Scientology, respondent directs auditors and examiners to ascertain only whether the taxpayer received a financial benefit in exchange for payment to a religious organization. (PPF 367). Even since the Supreme Court decided Hernandez in June of 1989, respondent has not altered her practice of requiring only substantiation of non- Scientology taxpayers. (PPF 368).

Respondent has maintained this approach toward non-Scientology taxpayers through trial and post trial briefing in this case. Instead of shouldering her obligation to properly apply the law to all, she took the position at trial that she is merely a "stakeholder," who is giving the other religions the opportunity, through their witnesses, to state facts relevant to whether their parishioners' payments for access to services are quid pro quo transactions. (See, e.g., Tr. 1342-43). In her post trial brief, respondent continues to abdicate her responsibilities, specifically refraining from expressing any opinion about the nature of payments in other religions. Id. Point I D 1, infra.

The evidence shows that respondent's practice is markedly different with respect to members of the Church of Scientology. When the taxpayer is a Scientologist, respondent uses special audit procedures, including questionnaires devised solely for use by agents auditing returns of Scientologists. When the taxpayer is a Scientologist, respondent inquires into the specific religious activity engaged in, the person who conducted the religious activity, where it took place and the nature of the activity. Respondent requests extensive records from Scientologists, including financial and non-financial records, related to the activity for which the Scientologist made the payment. Respondent audits a far higher percentage of returns of taxpayers who claim deductions to Churches of Scientology, and frequently asserts return preparer, substantial understatement, negligence and accuracy related penalties. (PPF 373).

As a factual matter, the IRS had no basis to focus its resources on members of the churches of Scientology. The record in this case reflects wide scale claiming of deductions for quid pro quo payments in religions other than Scientology (a) resulting in very substantial loss of revenue to the IRS and (b) involving significant sums of money per individual for large numbers of individuals. (PPF 396-397). For example, very significant amounts of money are lost to the Service from deductions claimed by Mormons for their tithes. The evidence in the record shows that income to the Mormon Church from tithes may be as much as 4.3 billion dollars a year. In addition, each tax return of a Mormon claiming a deduction for a tithe is likely to involve a significant amount of potential income to the Service since the tithe represents ten percent of the taxpayers' income. Similarly, a conservative estimate of income to synagogues from membership dues necessary for access to High Holy Day Services is on the order of $350 million dollars a year and from High Holy Day tickets sales to nonmembers is about $109 million. The payments that individual Jews claim as deductions for their membership dues are quite significant, AVERAGING $660.00.

Third, the unrebutted evidence demonstrates that respondent routinely allows deductions under section 170 for payments to religious organizations, other than Churches of Scientology, made to obtain access to religious services and benefits. Indeed, the evidence demonstrates that it is both respondent's policy to allow such deductions, except to Scientologists, and respondent's consistent administrative practice to do so. Rev. Rul. 70-47, 1970 C.B. 49, and Rev. Rul. 78-366, 1978-2 C.B. 241, explicitly state that building fund assessments, dues and mass bequests are deductible, without limitation. No analysis of the quid pro quo issue is suggested in those revenue rulings.

Respondent's administrative practice is entirely consistent with her statements of policy. Messrs. Hughes, Rosen, Malone, Schulman, and Smith each testified that members of religions other than Scientology are allowed as a matter of routine to deduct payments they make to gain access to services or benefits of their religion. (See PPF 369). The evidence from Dr. Schulman's survey corroborated that many Jews take deductions for memberships and High Holy Day service tickets, which are allowed by the IRS. (Ex. 81, pp. 7, 11, paragraphs 18, 21, 23). Mr. Oaks' testimony corroborated that Mormons deduct their tithing payments. (Tr. 784). In a guidance package of the type relied on by accountants as a reliable indication of IRS policy and practice (Tr. 497-98; Tr. 470-71; Tr. 970-71), the Assistant Commissioner for Employee Plans and Exempt Organizations has stated that payments for the saying of Masses, pew rents, tithes and other payments involving "fixed donations for similar religious services" are "fully deductible as charitable contributions." (PPF 370). This announcement accurately characterizes respondent's treatment of contributions to churches other than Scientology.

2. THE PAROCHIAL SCHOOL TUITION CASES ARE NOT EVIDENCE OF

EQUAL TREATMENT

Respondent's attempt to analogize the purely religious Scientology services at issue in this case to parochial school tuition payments, rather than to the religious services of other religions (Resp. Br. at 79), is wholly inappropriate. In the parochial school cases, the taxpayers were provided with a state- mandated secular education. The denial of deductions in those cases rested on the fact that the payments at issue were in the nature of the tuition payments for the secular, economic (not religious) value of educational services -- and that those payments could be assigned a monetary value based on the economic cost of educating the taxpayer's children, whether in parochial or secular schools. /12/

In fact, it was specifically on the basis that a parochial school education is an ECONOMIC BENEFIT that the government argued against deductibility in the cases cited above. /13/ Thus, the government itself has recognized that the secular component of the benefit received from the payment to a parochial school is predominant.

The disallowance of the deductions in the parochial school cases clearly was not based on the receipt of religious benefits. The court in DeJong v. C.I.R., 309 F.2d 373, 374-75 (9th Cir. 1962), for example, acknowledged that the taxpayers were entitled to a deduction for the portion of their payments exceeding the economic cost of educating their children. /14/ The deductible portion of the payment was the portion paid to support the religious orientation of the school, from which the taxpayers intended their children to benefit spiritually.

Perhaps recognizing the weakness of the point, respondent relies only in passing on Rev. Rul. 78-189, 1978-1 C.B. 68, to support her analogy to the parochial school tuition cases. (Resp. Br. at 50). As reflected in the stipulation and record in this case and in the Hernandez decision, the characterization of Scientology auditing and training as being analogous to education courses is without foundation.

Rev. Rul. 78-189 purported to divide auditing and training in three broad categories: (1)general education courses dealing with subjects of general education such as grammar; (2) religious education courses directed to the training of individuals who intend to be Scientology ministers; and (3) auditing and processing courses intended to acquaint members or prospective members of the church with the history and tenets of the church. The record in this case demonstrates the inaccuracy of the revenue ruling's description of Scientology religious services.

First, respondent stipulated that the religious services of auditing and training are religious. (Stip. paragraph 56-57). This stipulation alone precludes respondent's reliance on Rev. Rul. 78-189 as a basis for distinguishing payments in Scientology from payments in other religious.

Second, the testimony of numerous witnesses exposed the revenue ruling's factual inaccuracy. Prof. Lonnie Kuever, who was qualified as an expert in comparative religion (Tr. 683), and who had studied Church of Scientology doctrine and practices extensively (Ex. 96, pp. 2-3, paragraph 5), testified that the descriptions of Scientology services in Rev. Rul. 78-189 were "totally inaccurate." (Tr. 704-05). /15/

The dissent in Hernandez explicitly found the parochial school tuition cases and Rev. Rul. 78-189 to be irrelevant to the administrative inconsistency issue. 490 U.S. at 705-06, 710 (O'Connor, J., dissenting). Nothing in the majority opinion contradicted the dissent's view; significantly, the Court made no mention of the tuition cases or Rev. Rul. 78-189 in its discussion of administrative inconsistency, but merely concluded that the administrative inconsistency claim could not be decided on the record in the case. See id. at 700-03. Quite clearly, the majority in Hernandez did not adopt the views of the First Circuit that respondent cites. (See Resp. Br. at 79). /16/

Respondent also misinterprets Feistman v. Commissioner, 30 T.C.M. (CCH) 590 (1971), a case disallowing deductions for payments made for the social function connected to a Bas Mitzvah. Respondent contends that Feistman held a payment made for religious services to be nondeductible. (Resp. Br. at 79). But, in fact, the Feistman Court held that the payment was for a primarily SOCIAL rather than religious, function:

This is not a charitable contribution, just as the cost of a

wedding is not a charitable contribution. Although each occasion
has religious significance, it is primarily a social event.

Id. at 592. /17/

D. THERE ARE NO MATERIAL DIFFERENCES BETWEEN PAYMENTS FOR ACCESS

TO RELIGIOUS SERVICES MADE BY MEMBERS OF PETITIONERS'
RELIGION AND BY MEMBERS OF NUMEROUS OTHER RELIGIONS AND
THEREFORE THERE IS NO RATIONAL BASIS FOR AFFORDING THEM
DIFFERENT TAX TREATMENT

1. RESPONDENT HAS FAILED TO PROFFER A COMPELLING OR EVEN A

RATIONAL BASIS FOR DISTINGUISHING PETITIONERS' PAYMENTS

At several points in her brief, respondent comes perilously close to admitting there is no basis, compelling /18/ or rational, for distinguishing petitioners' payments. Respondent repeatedly states that she is "not taking a position" whether payments for Mormon tithes, synagogue membership dues and High Holy Day tickets, and Catholic masses are quid pro quo transactions, nor "expressing an opinion on whether such payments are deductible under section 170." (Resp. Br. at 54, 78). She also broadly implies that these payments in other religions are not distinguishable, since she repeatedly refers to the possibility that it may be "ultimately determined that no rational basis exists for distinguishing" Scientologists' payments from others. (Resp. Br. at 51, 52, 39).

More importantly, respondent utterly fails to advance any rational basis for the distinction and does not identify any basis on which she claims to have relied in the past. Instead, respondent merely states that there may be a rational basis on which "it could be concluded" that there is a material difference between Scientologists' and others' payments, (Resp. Br. at 56), and erroneously asserts that it is petitioners' burden to show that "a rational basis does not exist upon which it COULD BE CONCLUDED" that petitioners' payments are distinguishable from others'. (Resp. Br. at 61). See also Resp. Br. at 68 (". . . petitioners have failed to establish that there is no rational basis upon which it could be concluded . . .") and at 73, 75 and 77.

It is not petitioners' burden to disprove the possibility of any rational basis on which "it could be concluded" that their payments are distinguishable. It is well established that unless an agency articulates a rational basis on which it relied, the court cannot uphold its action. See, e.g., Bowen v. American Hospital Association, 476 U.S. 610, 626-27 (1986).

In American Hospital, the Supreme Court emphasized that an agency may not defend its action in the manner respondent has attempted here:

It is an axiom of administrative law that an agency's

explanation of the basis for its decision must include "a 'rational connection between the facts found and the choice made.' " . . . Agency deference has not come so far that we will uphold regulations whenever it is possible to "conceive a basis" for administrative action. . . . Thus, the mere fact that there is "some rational basis within the knowledge and experience of

the [regulators]" . . . under which they "might have concluded" that the regulation was necessary to discharge their statutorily authorized mission . . . will not suffice to validate agency decision making.

476 U.S. at 626-27 (citations omitted). Here, respondent is saying no more than that it is possible to "conceive a basis" for her action and that there may be some rational basis under which Service personnel "might have concluded" their unequal treatment was defensible. Respondent's failure to articulate a rational basis on which she relies in treating petitioners differently from the members of other religions whose payments have been shown at trial to be quid pro quo transactions requires this Court to rule in petitioners' favor.

It is instructive that, despite this Court's repeated suggestion that the parties create tables in their briefs comparing the ways in which the practices of the various religions are similar or dissimilar, Tr. 479, /19/ 484, 1348, respondent has not done so. In fact, respondents' brief is scrupulous in discussing the practices of each religion separately and in never comparing them to Scientology practices in the factor by factor manner that the Court requested. Petitioners submit that respondent's failure to undertake the rigorous comparison of the practices of Scientology and of the other religions is an implicit recognition that there is no rational, let alone compelling, basis on which to draw material distinctions between them.

2. UNDER THE CORE TEST SET OUT IN HERNANDEZ, THERE ARE NO MATERIAL DIFFERENCES BETWEEN THE PRACTICES OF SCIENTOLOGY AND OTHER RELIGIONS IN REQUIRING FIXED PAYMENTS FOR ACCESS TO RELIGIOUS SERVICES

As stated in Hernandez, analysis of whether a transaction is a quid pro quo should focus on the transaction's external features. 490 U.S. at 690-91. The essential core of this objective test, as set out in Hernandez, id. at 691-92, 702, may be stated as follows: (1) Is the payment made in return for an identifiable benefit?; (2) Is the payment fixed?; and (3) Is the payment mandatory? /20/ On these essential factors, no rational or compelling basis exists for distinguishing between Scientologists' and others' payments for access to religious services. /21/ The evidence submitted at trial established that there are no material differences between payments made for access to religious services in Scientology and in numerous other religions, including Judaism, Mormonism, Catholicism, Hinduism, Zen Buddhism and certain sects within fundamentalist Protestantism. /22/

(a) IN RETURN FOR PAYMENT, MEMBERS OF MANY RELIGIONS

RECEIVE AN IDENTIFIABLE BENEFIT: ACCESS TO
SPECIFIED RELIGIOUS SERVICES

In Scientology and other religions, adherents receive access to an identifiable religious service or benefit in exchange for their payments.

(i) Judaism

Jews receive access to High Holy Day services (as well as other benefits and services) in return for their membership dues and/or payments for High Holy Day service tickets. (PPF 104, 106). Eighty-two percent of synagogues with membership dues include at least some seats at High Holy Day services as a benefit of membership. (PPF 119). Of the synagogues that allow nonmembers to attend High Holy Day services, 84 percent allow attendance in exchange for a payment. (PPF 134, 135). /23/

(ii) Mormonism

Mormons receive access to Mormon temples (and the sacred rituals that occur only therein) and the opportunity for participation and advancement in the Mormon priesthood in return for their payment of full tithes. Mormons who are found "worthy" in every way -- including being full tithe payers -- receive "temple recommends," which entitle them to gain access to Mormon temples and their sacred rituals. (PPF 142, 151, 162, 169).

(iii) Catholicism

In return for their payment of Mass stipends and Mass bequests, Catholics receive the celebration of Masses for their special intentions, a special relationship to the Mass and, in some cases, the celebration of a Mass that would not otherwise have been celebrated. (PPF 206, 240-242, 226). /24/

(iv) Hinduism

Hindus receive the performance of pujas in return for their payments to Hindu temples. (PPF 263).

(v) Zen Buddhism

Zen Buddhists receive access to meditation sessions at zendos and at religious retreats and to spiritual consultations with Zen masters in return for their payments. (PPF 293-296, 302).

(vi) The Worldwide Church of God

Members of the Worldwide Church of God receive access to the services of their religion and continued membership in the religion in return for their tithes. (PPF 304, 314).

(vii) Scientology

Scientologists receive access to auditing and training in return for their payments. (PPF 327).

(b) SCIENTOLOGY AND OTHER RELIGIONS ESTABLISH FIXED

FEES OR CONTRIBUTION RATES FOR ACCESS TO RELIGIOUS
SERVICES AND ENSURE COMMUNICATION OF THESE PRICES
OR RATES TO MEMBERS

Many religions establish fixed prices or contribution rates for religious services and benefits. Many religions publish price lists for religious services offered. In every case, religions make known to their adherents, through written materials and/or oral communications, the price or rate fixed for access to specified services.

(i) VIRTUALLY ALL SYNAGOGUES SET FIXED PRICES AND

RATES FOR MEMBERSHIP DUES AND FOR TICKETS FOR
HIGH HOLY DAY SERVICES, WHICH ARE

COMMUNICATED TO MEMBERS AND PROSPECTIVE

MEMBERS

Virtually all synagogues establish fixed membership dues schedules and fixed prices for High Holy Day service tickets. Synagogue membership dues are fixed payments. (PPF 107-110,112-114). Over 60% of synagogues use a family dues system, in which set fees are fixed as membership dues for individuals, married couples and families with children. (PPF 112.b). Some synagogues have fixed minimum dues, under which every member is obligated to pay a set minimum amount of annual dues, regardless of family composition. (PPF 112.a). Slightly under 20% of synagogues fix membership dues based on members' income, usually fixing the payment required as a specified percentage of income and setting minimums and maximums. (PPF 112.c). Some synagogues set dues by the location of members' seats for High Holy Day services, (PPF 112.d), and by the members' age. (PPF 112.e). Synagogues also set fixed prices for tickets to High Holy Day services. Different prices are sometimes set for members and for nonmembers. (PPF 132-133, 137).

The vast majority of synagogues that have membership dues (which is virtually all synagogues) publish price lists for membership dues and provide that price list in the membership materials that they send to members and prospective members. (PPF 111). Where applicable, the membership price lists specify the variation of price depending on a range of factors, including the location of seats for High Holy Day services (by room, row, or whether the seat is reserved); the family status of the member; the age of the member; or the income of the member. (PPF 112.d). Where applicable, these materials also set out the price lists for tickets to High Holy Day services. In other cases, synagogues stated prices for nonmember attendance at High Holy Day services over the telephone. (PPF 141). Most synagogues send their price list to anyone merely inquiring about synagogue membership. (PPF 111).

(ii) THE MORMON CHURCH, AS A MATTER OF RELIGIOUS

LAW, SETS A FIXED RATE OF TEN PERCENT OF

INCOME AS A FULL TITHE AND COMMUNICATES TO

MEMBERS WHAT IS MEANT BY THE TERM INCOME

The Mormon Church sets a fixed rate of ten percent of income as the definition of a "full tithe", payment of which is necessary for access to the rituals performed only in the temple. Tithing is religious law in the Mormon Church, and is defined in the scriptures of the religion and in the authoritative Church publication instructing Church leaders on the administration of the Church. (PPF 145-146). Church leaders, speaking at priesthood and sacrament meetings, repeatedly inform members what income should be tithed on. Mormons know they are to pay tithes on gross income on salaries, on net income if selfemployed, and on investment income. (PPF 147).

(iii) The Provincial Authorities Of The Catholic

Church Set Fixed Prices For Mass Stipends
And Mass Bequests

The Catholic Church sets fixed rates for Mass stipends and Mass bequests. Pursuant to the dictates of Canon law, these rates are set by each provincial (archdiocesan) authority. Canon law states that the provincial authorities "determine by decree for the whole province what offering is to be made for the celebration and application of a Mass. . . ." (PPF 228). Priests and other Catholic authorities inform Catholics of the figure decreed by the provincial authorities, and Catholics are aware of the rate set by the authorities. (PPF 230). According to Canon law, if a sum of money is given for the celebration of Masses without indication of the number of Masses to be celebrated, the number of Masses is computed according to the rate set by the authority in the province where the donor resides. (PPF 229).

Numerous Catholic institutions that perform Masses publish and distribute to the public price lists for the celebration of special intentions in Masses, novenas (cycles of nine masses), rosaries (cycles of 30 Masses), and the like. (PPF 251). /25/

(iv) HINDU TEMPLES SET FIXED PRICES FOR PUJAS,

AND COMMUNICATE THESE PRICES TO ADHERENTS
THROUGH THE PUBLICATION OF PRICE LISTS

Hindu temples set fixed payments for each of the different pujas that adherents can request priests to perform. (PPF 267). Hindu temples publish and distribute price lists setting the prices for the performance of various pujas to be performed by Hindu priests. (PPF 268). Where applicable, these price lists specify the additional cost of the blessing if it is performed at the adherent's home rather than at the temple. (PPF 272).

(v) ZEN BUDDHIST ORGANIZATIONS SET FIXED PRICES

FOR MEMBERSHIP AND PARTICIPATION IN
MEDITATION SESSIONS AND RELIGIOUS
CONSULTATION WITH ZEN MASTERS

Zen Buddhist organizations set fixed rates for membership, for participation in meditation at zendos, and for participation in sesshins and kesseis. (PPF 293-296). They publish and distribute price lists for membership and for participation in religious practices at zendos, sesshins and kesseis. (PPF 292).

(vi) THE WORLDWIDE CHURCH OF GOD SETS A FIXED

RATE OF TEN PERCENT OF INCOME AS A FULL
TITHE

The Worldwide Church of God sets a fixed rate of ten percent of income as the full tithe necessary for membership and participation in the services of the religion. (PPF 305). Church literature specifically defines what income must be tithed on. (PPF 307).

(vii) THE CHURCH OF SCIENTOLOGY SETS CUSTOMARY

DONATIONS FOR AUDITING AND TRAINING
SESSIONS AND DISTRIBUTES LISTS OF THESE
AMOUNTS

Churches of Scientology set fixed contribution amounts for auditing and training. (PPF 328). Churches of Scientology publish and distribute contribution rates for auditing and training sessions. (PPF 329).

In summary, it is evident from the record that fixed prices and rates are used by numerous religions within the United States and information relating to the prices and rates set are effectively conveyed to members by written and oral means.

(c) IN MANY RELIGIONS, THE FIXED PAYMENTS ARE TRULY

MANDATORY IN ORDER TO SECURE ACCESS TO A SPECIFIED
RELIGIOUS BENEFIT; BARRIERS TO THE PROVISION OF
SERVICES FOR FREE ARE NO GREATER IN SCIENTOLOGY
THAN THEY ARE IN OTHER RELIGIONS

Many religious organizations require payment of set fees or rates as a mandatory condition for obtaining access to their religious services. Many religions provide exceptions for those who cannot afford to pay. But the provision of free or reduced price services to the poor does not change the mandatory nature of the payment for those who can and therefore must pay. As reflected in the Service's own rulings, poverty exceptions do not affect the quid pro quo nature of transactions in which the payor can and must pay. See, e.g., Rev. Rul. 83-104, 1983-2. C.B. 46, 48, Situation 2 (no charitable deduction is allowed in parochial education case where "[w]ith the exception of a few parents, every parent WHO IS FINANCIALLY ABLE makes a contribution. . . .) (emphasis added.)

In Scientology, exceptions are provided in addition to the poverty exception found in other religions. (PPF 340-346). Thus there is a less categorical bar to the provision of free services in Scientology than there is in other religions.

(i) IT IS MANDATORY FOR JEWS TO PAY FIXED FEES IN

THE FORM OF MEMBERSHIP DUES OR TICKETS TO
ATTEND HIGH HOLY DAY SERVICES AND SECURE
OTHER BENEFITS

The overwhelming majority of synagogues condition access to High Holy Day services on payment of membership dues and/or the purchase of tickets. Eighty-six percent of all synagogues in the United States, serving 91 percent of synagogue members, require a payment for an individual to obtain admission to High Holy Day services. (PPF 104). Only those few synagogues that (1) do not charge dues (serving about one percent of all members) or (2) that allow nonmembers to attend High Holy Day services without charge (serving about eight percent of all members) fail to follow the overwhelming pattern of requiring payment as a condition of High Holy Day service admission. (PPF 104). /26/ For the vast majority of Jews, it is necessary to make a fixed payment of one of these types in order to gain admission to High Holy Day services.

Synagogues make clear to members and prospective members that payment of dues is mandatory. Some synagogues refer to dues pledges as legally binding contracts. Some synagogues refer to the obligation to pay building fund assessments, which is often required of members as contractual. Many synagogues bill their members for dues and specify that dues are payable as required by the synagogue, e.g., annually, semiannually, quarterly or monthly. Many synagogues require all or part of the annual membership dues to be remitted with the application for membership. Some synagogues will suspend or expel a member from membership for nonpayment of dues. (PPF 116.a, b, c, d and f). A person known to have the financial ability to pay the applicable level of dues but who simply did not want to pay dues may be denied membership in a congregation. (PPF 129).

In virally all synagogues that do not sell tickets to nonmembers, being a member (and, therefore, paying the membership dues) is mandatory to gaining admittance to High Holy Day services. /27/ Attending High Holy Day services is the synagogue related activity in which the highest numbers of Jews participate. The Council of Jewish Federations' 1990 National Jewish Population Survey found that 59 percent of Jews attend High Holy Day services, while only 12 percent attend weekly synagogue services. (PPF 100). Because the High Holy Days are the time of greatest demand on synagogues (Tr. 1194), and the supply of seats is often very limited, some congregations restrict attendance at services to members of their own synagogue. Seventeen percent of all synagogues will not admit non- members to High Holy Day services, except under special circumstances, e.g., being a guest or relative of a member. (PPF 120). In most such cases, a seat must be purchased. (PPF 134-135). Given the space limitations on synagogues at the High Holy Days, some members view membership dues as the payment required to ensure access to their synagogue's High Holy Day services. (PPF 121). /28/

This perception accurately reflects the necessity of paying membership dues to obtain access to High Holy Day services. Many synagogues provide that members who have not paid part or all of their membership dues will be denied access to High Holy Day services. (PPF 116.e). /29/ Some synagogues will suspend or expel a member from membership for nonpayment of dues, (PPF 116.f), thereby precluding them from attending the synagogue's High Holy Day services unless they purchase High Holy Day service tickets. See infra.

The connection between membership dues and access to High Holy Day services is explicit. Eighty-two percent of synagogues with membership dues include at least some seats at High Holy Day services as a benefit of membership. /30/ Seventy percent include as a benefit of membership admission to High Holy Days services for the member's entire household. Twelve percent include a fixed number of seats for High Holy Day services -- usually two to four -- as a benefit of membership. (PPF 119). Some synagogues provide to members and prospective members a list of benefits or privileges of membership. High Holy Day service admission is the most common benefit listed. (PPF 118).

Some synagogues provide for waivers of or reductions in membership dues, but only for reason of financial inability to pay. (PPF 124). No basis other than financial hardship could be found in the massive set of membership application materials collected by Prof. Beveridge. (PPF 125).

The policy of granting waivers or reductions only for those unable to pay the full rate underscores the mandatory nature of membership dues payments for most Jews. The fact that one member of a synagogue might be entitled to a reduction of dues by reason of financial inability to pay has no effect on the obligation of other members, having sufficient means to pay full membership dues. Where a member has the means to pay, he or she is obligated to pay the full membership dues. (PPF 125).

The mandatory nature of membership dues is also reflected in the fact that those seeking waivers must apply for them. Synagogues with exceptions policies have established procedures by which members or prospective members must apply for a waiver or reduction in membership dues. These procedures usually require a meeting or conversation with an official or committee of the synagogue. Some synagogues mandate that the official or committee responsible investigate the request for a reduction or waiver. In most cases where synagogues provide for exceptions, their membership application materials request information regarding the applicant's (and spouse's) occupation and employer. In reviewing the application for an exception, the official or committee would have access to this information. In some cases, the person seeking a reduction is required to fill out a form to be submitted to the synagogue's finance or other committee. (PPF 126). /31/ A person who abused the exceptions process by refusing to pay full dues or seeking a reduction in dues despite having the means to pay would be denied a reduction. (PPF 130).

The mandatory nature of payment for admission to High Holy Day services is also reflected in the policy on the admission of nonmembers to these services. In the overwhelming percentage of synagogues, those who have not purchased memberships entitling them to attend High Holy Day services must purchase tickets in order to attend these services. Eighty-three percent of synagogues will allow nonmembers to attend High Holy Day services, if space is available. (PPF 134). Of these synagogues, only 16 percent allow free admission. The relatively few synagogues that allow nonmembers to attend without charge are atypical in that they lack high demand for admission to High Holy Day services. (PPF 135). /32/

The vast majority of synagogues in major centers of Jewish population do not permit free admission to High Holy Day services to nonmembers. (PPF 136). For example, in the Greater Washington, D.C. area, the local Jewish press lists and carries advertisements of synagogues that hold High Holy Day services that nonmembers may attend. Nonmembers are charged a fixed fee to attend the vast majority of the listed and advertised services. (Ex. 126; Ex. 127; Tr. 1241-55). The introductory note to the listing of services open to non members states, "Space is limited at most locations, therefore tickets should be purchased early." (Ex. 126, p. 71; Ex. 127, p. 38). /33/

In summary, these facts collectively show that it is truly mandatory for Jews to pay a fixed fee of one kind or another in order to attend High Holy Day services. Nonmembers must pay fixed ticket prices to attend. Some synagogue members must also buy tickets. Most synagogue members are entitled to attend by virtue of their membership, but their membership is conditioned on their payment of fixed membership dues. Membership materials for the vast majority of synagogues reflect a categorical bar to the provision of free membership (and the services contingent on membership, such as High Holy Day admission), except in poverty cases. The synagogue materials and information derived from Prof. Beveridge's telephone follow-ups similarly reflect a pervasive bar to the provision of free tickets to High Holy Day services. (Ex. 80, p. 14, paragraph 24; Tr. 239-45). In fact, there is no documentary evidence of an exception policy on ticket sales. Even if a poverty exception were generally provided for tickets, it would not negate the categorical bar on provision of free tickets to those who can pay.

(ii) It Is Mandatory For Monnons To Pay Full Tithes To Be

Admitted To Temples And To Participate And Advance In The
Lay Priesthood

The Mormon Church has established a comprehensive system designed to ensure that only full tithe payers gain admission to Mormon temples. Only faithful -- "worthy" -- Latterday Saints can enter a Mormon temple. To enter a temple, a candidate must present a card, a "temple recommend," assuring his or her worthiness. (PPF 162). A Mormon obtains a temple recommend through annual interviews designed to verify his or her "worthiness," called temple recommend interviews. (PPF 163).

Each year, the applicant has private interviews with his or her bishop /34/ and then with a member of the stake presidency (roughly equivalent to a diocese) to ascertain compliance with a series of Mormon principles, including the Law of Tithing. (PPF 165). The task of both the bishop and stake president is to ascertain the candidate's "worthiness." (PPF 166). Instructions from Church authorities exhort the officials conducting the interviews to take "great care and attention" when "issuing recommends to the temple" since they are "representing the Lord in determining worthiness to enter his holy house." Prior worthiness does not justify "a subsequent casual interview." All interviews, whether they be the initial one or for recertification, require "searching inquiry of the worthiness of the applicant in relation to the standards and principles of the Church." (Ex. 94(d); see also Ex. 104; Tr. 605-07).

The interviewers ask a series of specific questions designed to ascertain loyalty to the Church, its teachings, leaders, and basic principles, and to elicit judgments from the candidate about his or her worthiness for entering or returning to the temple. One of the required questions is: "Are you a full tithe payer?" (Ex. 104, Question 9; Ex. 94(d), Question 6). (PPF 167-168).

The instructions command that, "no person should receive a temple recommend unless found to be worthy." (Ex. 94(d); Tr. 607; Tr. 786). Compliance with ALL the matters covered by the interview questions is required in order to obtain a temple recommend and to be able to enter a temple. (Tr. 606, 608, 609; Ex. 94, pp. 37-38, paragraph 58; Ex. 94(d); Ex. 104). Applicants do not receive a recommend if they do not declare that they are full tithe payers even if they meet all the other criteria. (Tr. 787). (PPF 169) /35/

If a bishop judges a member holding a valid recommend to be unworthy, he should take the recommend from the member immediately. A bishop who discovers that a member lied in a temple recommend interview about his or her tithing status is to take the temple recommend from the member. (PPF 171). The bishop who conducts the member's temple recommend interview is the same person who interviewed the candidate during his or her previous "tithing settlement" interview, and therefore has independent reason to know whether the member has paid a full tithe. (PPF 172).

The validated temple recommend itself is a printed card which identifies the member, has the signatures of the member's bishop and stake presidency official, and has dates of issuance and expiration. The expiration date is stamped in large red, bold letters and numbers at the top of the recommend. (PPF 173).

The Church requires that every member attempting to enter the temple must present a valid temple recommend. The official instructions for issuing temple recommends orders officials to "[i]nform all applicants plainly that they will not be admitted to a temple without presenting a valid recommend." (Ex. 104, p. 1; see also Ex. 94(d), p. 3). Upon arrival at the temple, the recommend is presented to an attendant, the expiration date is checked, and the signatures are verified. (PPF 174). Thus, a Mormon who was not a full tithe payor would not be issued a temple recommend and would be turned away from the temple.

The existence of only very limited exceptions to the requirement to pay a full tithe is further evidence of the mandatory nature of the requirement. The General Handbook of Instructions /36/ defines the only two exceptions to the requirement that "all Church members who have income should pay tithing": (1) "members entirely dependent upon Church welfare assistance" and (2) "full-time missionaries". (Ex. 105, p. 9-1; Ex. 94(b), p. 68). The exception for missionaries is subject to the limitation that, "missionaries should pay tithing on personal income beyond the amounts they receive for their support." (Ex. 105, p. 9-1). If the missionary receives any income beyond living expenses, such as income from investments or from family, then the missionary is expected to tithe on that income. (Ex. 94(b), p. 68). (PPF 156).

Those who meet one of the two narrow exceptions are regarded as complying with the Law of Tithing although they pay no tithes, (Tr. 603), would be issued a temple recommend if found worthy in all other respects, and would be admitted to a temple. But the fact that individuals meeting one of these narrow exceptions can enter a temple without paying in no way changes the fact that payment of a full tithe is a mandatory requirement for all other Mormons to enter a temple.

For those who do not meet one of the narrow exceptions, receipt of a temple recommend and admission to the temple is categorically barred if they have not paid a full tithe. As noted above, Church officials are instructed to "[i]nform all applicants plainly that they will not be admitted to a temple without presenting a valid recommend." (Ex. 104, p. 1; see also Ex. 94(d), p. 3).

(iii) Under Canon Law, Catholic Priests May And Do Condition

Celebration Of Masses For Special Intentions On The
Payment Of The Customary Mass Stipend Fee

A Mass stipend is compensation to the priest for his services in celebrating the Mass for the donor's special intention. (PPF 239). The notion that Mass stipends are compensation to priests is grounded in official Church pronouncements; Pope Paul VI in an Apostolic otter in 1974 stated that mass stipends "should provide . . . for the needs of the Church, above all for the support of the Church's ministers. . . . The laborer is worthy of his hire." (Ex. 107). (PPF 239, 241).

Although Canon 945 section 2 recommends that a priest celebrate a Mass for a special intention, especially for the needy, even if no stipend is offered, a priest has a right to request a stipend, and has no obligation to celebrate a Mass for a special intention where he has not received a stipend, and normally does not do so. (PPF 248). The priest has the right to insist on receiving the full offering that has been set by the provincial authority. (Tr. 386-87, 407; Tr. 857; Ex. 106, Canons 952 section 1 and 945 section 1).

The evidence in the record is that priests rarely waive their right to the full stipend permitted by the provincial authorities, and receive stipends for most Masses they celebrate. (PPF 223, 250). The fact that priests may on occasion choose to waive their right to the customary fee when requested by the needy in no way alters the mandatory nature of the payment in the usual circumstance, where parishioners make a request and the priest does not waive his right to the fee.

The clear expectation of both the parishioner and the priest is that a parishioner who wants a Mass celebrated for a special intention and who has the means to pay must pay the standard stipend set by the province in exchange for the celebration of that Mass. The expectation of payment, both by the parishioner and the priest, is very strong. (PPF 249).

The perception that mass offerings are mandatory is reinforced by the fact that, under the Code of Canon Law, a priest who accepts a Mass stipend is under a religious and contractual obligation to celebrate a Mass for the specific intention of the donor or to ensure that the Mass is celebrated. (PPF 213). The priest's obligation is an obligation in justice known as a do ut facias ("I give that you may do") contract. (PPF 214).

The contractual nature of the transaction is reflected in many provisions of Canon Law. A person who pays a Mass stipend has a right to have a separate Mass celebrated for each offering accepted. (PPF 215). Canon Law requires that as many Masses be celebrated as offerings accepted. (PPF 217). If a donor places conditions on the Mass, and the priest accepts the conditions, the priest is bound to fulfill the obligations. (PPF 218). Canon Law requires priests to offer Masses for designated intentions within one year from acceptance of the Mass stipends, and to keep accurate records of Mass obligations that they have accepted and those that have been satisfied. (PPF 220, 232). Canon Law provides that the priest is obligated to celebrate the Mass even if the stipend is lost or spent. (PPF 221). These contractual features of the mass offering are evidence of the "inherently reciprocal nature of the exchange." Hernandez v. Commissioner, 490 U.S. at 692. /37/

(iv) Hindu Priests Condition Performance Of Pujas On the Payment

of the Fee Set For the Requested Puja

Hindus are required to pay set fees to Hindu priests to perform blessings (pujas) on their behalves. A Hindu who wants a priest to perform a puja must pay the fee set for that particular puja. (PPF 264). While exceptions may be made, there is no policy for granting exceptions to these mandatory payments. Literature from Hindu temples around the country, which sets out the fees for pujas, makes no mention of exceptions to the requirement to pay for the performance of pujas. See, e.g., Ex. 116(g), (h) and (i). There is no tradition of charity in Hinduism as there is in Western religion. (PPF 265).

(v) Zen Buddhist Organizations Condition Participation in

Meditation Sessions and Retreats on the Payment of the Set
Fees

Zen Buddhist organizations charge set annual fees for membership in a zendo. (PPF 293). Nonmembers may be admitted, but are charged fixed fees for the specific practices in which they participate. (PPF 295). Set charges over and above membership dues are required for participation in sesshins and kesseis. (PPF 296). Zen Buddhist literature does not refer to exceptions to the requirement of payment for participation, but instead indicates a religious basis for adherents to make their payments. (PPF 301).

(vi) The Worldwide Church of God Conditions Membership and

Participation in Religious Services on the Payment of
Tithes

All members of the Worldwide Church of God are required to pay tithes as a condition of membership and in order to participate in the Church's religious services. If a member ceases to tithe for a period of five or six months, he or she will be disfellowshipped or excommunicated. (PPF 304, 308, 310-313). Other fundamentalist Protestant denominations, some of them offshoots of the Worldwide Church of God, function similarly. (PPF 316).

(vii) Churches of Scientology, Subject to A Number Of

Exceptions, Require Payment of Set Amounts for

Participation in Auditing and Training

The Church of Scientology maintains a fixed contribution system for auditing and training. (PPF 328). There are, however, a number of ways in which an adherent may participate in auditing and training without making fixed contributions. There is no categorical bar to the provision of free auditing and training. (PPF 339).

Churches of Scientology have a number of exceptions to the requirement to pay set fees for auditing and training. The Churches provide free introductory auditing. Charity auditing is provided free to those in need. As part of their training, Church auditors provide a great deal of free auditing to their fellow auditors, Church staff members, other parishioners, and the general public. Individuals who have joined the staff of the church receive free auditing and training. Reductions and waivers in fees also are provided to members through training awards. (PPF 340-346).

3. The Other Factors Listed In Hernandez Do Not Distinguish

Scientology Payments From Those In Other Religions

In Hernandez, the Court referred to several additional factors as relevant to the Tax Court's determination whether the payments in issue were part of a quid pro quo exchange: calibration of prices to lengths and levels of services, refunds, and use of "account cards." 490 U.S. at 691-92. Unlike the critical factors discussed above, these are not universal factors, but rather factors specific to the factual record in Hernandez.

To a significant degree, these factors are present in the transactions of the other religions involved in this case, and thus do not provide a factual basis for distinguishing other religions' practices. There is no necessity, however, to find these case- specific factors uniformly present in the practices of the other religions. Rather, what is important is that the practices of other religions are quid pro quo exchanges. In fact, there are factors analogous to those discussed in Hernandez present in practices in Mormonism, Judaism, Catholicism, Hinduism, Zen Buddhism, and certain fundamentalist Protestant sects that demonstrate the quid pro quo character of those practices.

(a) Calibration of Prices To Lengths and Levels of Services

Payments for access to religious services may be quid pro quo transactions whether or not prices are calibrated to the levels and lengths of services provided. For example, if a single fixed price were required for every puja, High Holy Day ticket or mass, that fact would not make payment for these benefits any less a quid pro quo transaction. Because this factor is mentioned in Hernandez as an external feature of transactions in Scientology, petitioners discuss it here to demonstrate both that there are some Scientology services for which payment is not calibrated and that there are many religions other than Scientology that do calibrate prices to the length or level of services paid for.

While payments for Scientology auditing are generally set by the hour, some are not calibrated. As petitioner Roger Teagarden testified, members of the church may take widely varying amounts of time to complete particular auditing services with no difference in cost. (Tr. 137, 142). The payments for training generally are NOT calibrated, in that no additional payment is required from individuals who take longer than others to complete a particular course of training. (See, e.g., Tr. 152).

The vast majority of synagogues calibrate prices according to the level or quantity of services provided. Sixty-one percent of synagogues use the family dues system, under which membership payments are pegged to whether the membership purchased is for a single person, a couple or for a family. In most synagogues, the price of membership is directly related to the number of seats at High Holy Days services provided. (PPF 112.b).

In addition to these pervasive methods of calibration, many synagogues have other methods of setting prices according to the level of benefits offered. Some synagogues set membership dues by the location of members' seats for High Holy Day services. (PPF 112.d). Similarly, prices for High Holy Day tickets often vary based on the location of the seats, either by row or section, or by whether the service attended is in the main sanctuary or another location. (PPF 137). Some permit members to trade up for more comfortable seats by paying a supplemental fee. (Ex. 80 H 6, p. 3). Securing one's choice among these options has value to many Jews. (See Tr. 1143-49: [T]here is some level of desire on the part of some people to get a specific seat in specific hall with a specific rabbi. "[T]here is also calibration of membership dues in that some synagogues provide discounts for those joining part way through the year. (See, e.g., Ex. 80 H 25, p. 2).

Some synagogues also price their memberships based on different levels of benefits, other than High Holy Day seating that they provide. For example, members pay more in some synagogues for the benefit of religious instruction or Bar and Bat Mitzvah instruction for their children. (PPF 112.f).

Prices for the celebration of Catholic Masses for special intentions may be calibrated according to the type of Mass said, particularly for Masses celebrated at religious shrines and similar institutions. For example, the price may vary based on whether the payor seeks a regular low Mass or a special low Mass. A higher price is paid if the payor wishes to have the Mass celebrated on a specific date, such as the anniversary of a relative's death. (PPF 244).

The price of a Mass is sometimes calibrated according to where the Mass is celebrated. In some cases, Masses celebrated at the main altar will cost more than those celebrated elsewhere, and Masses farmed out to be celebrated -- for example, to missionaries in Brazil -- will be less expensive than Masses celebrated at one's own church or shrine. (PPF 245).

The price for more elaborate Masses is often calibrated differently than are the prices for simple Masses. For example, the price of a Gregorian mass, which is a cycle of Masses celebrated for 30 days consecutively, is more expensive than the price for 30 individual regular low Masses. (PPF 246).

In the Hindu religion, prices are strictly calibrated according to the specific puja or blessing that the payor seeks. Each Hindu temple publishes a price list specifying the cost for the various pujas. (PPF 268). In addition, prices are calibrated according to whether the puja is performed at the temple or at the payor's home. (PPF 272).

Prices in Zen Buddhism are also calibrated according to the length and level of services received. Membership prices vary according to the level of services paid for. (PPF 294). Prices for the religious component of retreats called sesshins and kesseis vary according to their length. (PPF 296).

In summary, while calibration of prices is unnecessary to finding a quid pro quo transaction, many of the religions whose practices are before the Court in these cases do calibrate prices, at least for some services, and cannot be differentiated from Scientology on this ground, which also calibrates some services, but not others.

(b) Refunds

Refunds, like calibration of prices, are not necessary to finding a quid pro quo transaction. Even if refunds are appropriately viewed as one indicium of the reciprocal nature of an exchange, there are many other factors that can prove a quid pro quid transaction and that have been proven in this case with respect to Mormonism, Catholicism, Judaism and other religions.

The Hernandez Court apparently viewed refunds as one external indicium of the reciprocal nature of an exchange. A fuller record on the nature of Scientology refunds has been made in this case, demonstrating that refunds are quite uncommon in churches of Scientology. Refunds are given only in the limited circumstance in which a member is no longer in agreement with the aims and objectives of the Church and seeks to separate completely from the Church. Members who receive refunds may not participate in further auditing or training (unless they reconcile with the Church) and, consequently, cannot make further contributions to it. The policy simply reflects religious doctrine that those who are not in accordance with the religion's teachings and who are not deriving spiritual benefit from the religion should not be participating in it or contributing to it. (Tr. 103-04, 106; Ex. 79, pp. 7-8, paragraph 46.). Petitioners submit that the limited refund policy in Scientology should not be viewed as evidence of the quid pro quo nature of the transaction.

To the extent the Court views refunds as significant, however, the evidence in the record demonstrates that refunds are provided in a number of religions. Catholic Church teaching is that a priest who fails to celebrate a Mass for a special intention must refund the stipend. As respondent's witness Rev. Kennedy stated, "The donor has the right to demand the celebration of a Mass for the designated intention or the return of the offering." (Ex. CB, p. 5). Synagogues also offer refunds in some circumstances. Some synagogues specifically state in their membership information materials that unused High Holiday service tickets are refundable. (PPF 138). Deposits for participation in Zen Buddhist religious retreats can be transferred to other zendo programs. (PPF 297-298). As a factual matter, therefore, refunds do not provide a basis for distinguishing Scientologists' payments from others'.

(c) Account Cards And Analogous Records

The Hernandez Court found relevant the fact that the Church of Scientology distributed "account cards" to some members reflecting what services they were entitled to participate in. Hernandez, 490 U.S. at 691-92. While calling their records by other names, the Mormon Church and many synagogues provide their members with similar records, which let members know what they have paid and inform them of what they must still pay to be entitled to participate in services. The Catholic Church also keeps meticulous records of stipend payments and of whether obligations to celebrate masses for special intentions have been or remain to be fulfilled.

Since many synagogues provide that members who have not paid a specified part or all of their membership dues by a specified time will be denied access to High Holy Day services or will be suspended or expelled, the bills for membership dues that many synagogues send to members allow them to monitor what services they are entitled to participate in. (See PPF 116.e and f). Thus periodic synagogue bills are the functional equivalent of "account cards."

The Mormon Church maintains an elaborate set of records and meetings with members designed, in significant part, to enable members to monitor whether they have made the payments required in order to be entitled to participate in specified rituals and religious activities. (PPF 175-182). The tithing settlement process is designed to present each member with an official record of his payments to date and give the member an opportunity to pay any additional amounts needed to bring the annual payment up to the 10% required for the member to be eligible to enter the temple and participate in the rituals conducted only there. (PPF 180). The process therefore serves a similar function to an "account card" by letting the member determine and pay the amount necessary to be entitled to claim religious benefits.

The Mormon temple recommend is also analogous to an account card. Each Mormon must go through a temple recommend interview annually, declaring him or herself to have paid a full tithe, in order to obtain a recommend valid for the FOLLOWING YEAR. /39/ Thus, the temple recommend reflects full tithe paying in the prior year and serves as an account card, as well as an admission pass, informing the member that he or she has the right to attend the temple up to the expiration date stamped in red on the recommend. (PPF 173-174).

Catholic priests and other officials are required by Canon Law to keep accurate records of Mass obligations that they have accepted and those that have been satisfied. (PPF 232-233). While these records' primary purpose appears to be to ensure that priests fulfill their contractual duties rather than to notify stipend payers of their contractual entitlements, the records are just as significant evidence of the quid pro quo nature of the exchange as are account cards. The fact that all priests and other church officials are required to keep these records reflects the contractual nature of the priest's duty under Canon Law to celebrate a Mass for the special intention of the stipend payor. An "account card" for the payor is unnecessary, since the stipend is paid in advance of the celebration of the Mass (PPF 219), and once it has been paid, there is nothing more for the payor to do to claim or obtain the service paid for. Rather, it is only necessary for the priest to perform his side of the bargain, and the required records help ensure his performance.

The Worldwide Church of God keeps meticulous records of members' tithing payments and sends out monthly receipts and year-end statements to members letting them know the status of their payments. (PPF 309-10). The records sent to members inform the members of their continued eligibility for membership and to participate in the Church's services.

In summary, in Mormonism, Judaism, Catholicism and the Worldwide Church of God there is either the functional equivalent of an account card, or other record requirements which are no less evidence of the reciprocal nature of the exchange. The same appears to be true in Hinduism. /40/ The existence of account cards provides no factual basis for distinguishing Scientologists' payments from the payments by members of these religions.

4. Several Purported Factors Adverted To By Respondent (1)

Provide No Basis For Distinction, (2) Are Irrelevant As A
Matter Of Tax Law And/Or (3) Are Impermissible As A Matter Of
Constitutional Law

While never explicitly relying on any particular factor as the basis for distinguishing between petitioners' and others' payments, respondent implies, in the course of characterizing the various religions' payments, that certain factors provide a rational basis for distinction. Each of these purported factors either (1) provides no factual basis for distinction, as the record reveals, (2) is irrelevant as a matter of tax law, and/or (3) is an impermissible distinction as a matter of constitutional law.

(a) That Payments Are Necessary But Not Sufficient To Gain

Access To Religious Services In Some Religions Neither Negates Their Mandatory Nature Nor Differentiates Them From Petitioners' Payments

Respondent makes the illogical argument that because payment of a full tithe is only one of a number of worthiness criteria a Mormon must meet to be eligible to attend the temple (and to advance in the priesthood) it is somehow not mandatory. (Resp. Br. at 65-66). Petitioners have conclusively proven, and respondent does not really dispute, that payment of a full tithe is a necessary though not sufficient condition for gaining access to the temple and advancement in the priesthood. If a Mormon is not a full tithe payer, he or she will be found unworthy, denied a temple recommend, and excluded from the temple, even if he or she has met all the other worthiness requirements. (PPF 169). The notion that full timing has only an "indirect bearing" on access, (Resp. Br. at 65), is plainly untrue.

In addition, the fact that full timing is necessary but not sufficient to gain access does not differentiate it from payments made by petitioners for access to auditing and training. Aside from making payments, Scientologists who wish to participate in auditing and training must meet other conditions, including: adherence to the ethical and moral codes of the Church, abstinence from drug and alcohol use, abstinence from unethical sexual activity, and commitment to the spiritual goals of the Church. (PPF 355-359). Thus, Scientology and Mormonism are similar in that adherence to religious beliefs and ethical codes, as well as the making of specified payments, are necessary for an adherent to gain access to specific religious services. (Ex. 96, pp. 31-35, paragraphs 40-43).

In many other religions, unlike Mormonism and Scientology, payment of the required fee is sufficient, as well as necessary to gaining access to a religious service. Payment of a Mass stipend is all that is necessary for a Catholic (or even a non-Catholic) to have a priest celebrate a Mass for a special intention. (PPF 206). Payment is the only requirement for having a Hindu priest perform a puja. (PPF 282). While some synagogues require individuals to be Jews as well as pay membership dues in order to be members, /41/ where nonmembers are permitted to attend High Holy Day services, there are generally no requirements for attendance other than payment. Thus, payments in Scientology have a more "indirect bearing" on access to religious services than do payments in Catholicism, Hinduism, and Judaism.

(b) Under Hernandez, The Appropriate Inquiry Is Into The

External Features Of The Transaction, Not The Taxpayers'

Motivation

The Supreme Court in Hernandez made clear that the appropriate analysis in ascertaining whether a given payment was made as part of a quid pro quo transaction is to examine "the external features of the transaction in question." 490 U.S. at 690. As the Court explained, focus on external features has the advantage of obviating the need to conduct "imprecise inquiries into the motivations of individual taxpayers." Id. at 690-91. But respondent, despite the Court's clear direction, focuses on the alleged motivations of members of various religions, as characterized by officials of those religions, in a legally misdirected attempt to distinguish these motivations from the motivations of Scientologists. (Resp. Br. at 58, 67, and 71.)

Respondent's analysis is also factually inaccurate. The record refutes respondent's witnesses' contentions of what these individuals' motivations are. The evidence reflects that motivations of Jews, Mormons, Catholics, Scientologists and members of other religions in making their payments are the same: to contribute to the well-being of their religion and to secure access to a religious service or benefit.

Respondent suggests that Jewish fundraising structured around the High Holy Days is motivated to "serve the generic needs of the entire community" (Resp. Br. at 70-71.) This characterization, which incorrectly approaches the question from the institution's rather than the payor's point of view, ignores the overwhelming, objective, documentary evidence that the vast majority of synagogues structure their fundraising so that an individual cannot gain access to High Holy Day services unless he or she makes a payment in the form of membership dues or a ticket purchase. Moreover, the characterization ignores the documentary evidence published in a temple administrator's journal with which respondent witness Mark Greenstein is affiliated that many Jews view their membership dues simply as payment for the specific services they receive (Ex. 121, p. 6; Tr. 1229-30), or as the payment required to ensure access to their synagogue's High Holy Day services. (Tr. 1235.) (See PPF 117, 121).

Similarly, respondent blindly repeats witness Oaks' "opinion that members of the LDS Church are not primarily motivated to pay tithing in order to attend the temple." (Resp. Br. at 67). Ascertaining an individual's "primary" motivation is, as the Hernandez Court stated, an imprecise inquiry to be avoided. Hernandez, 490 U.S. at 690-91. /42/ In contrast, the objective, external features of Mormon tithing practices provide powerful evidence that the transaction is quid pro quo and is understood as such by Mormons: full tithing is required for admission to the temple, payment of full tithing is carefully monitored in several types of interviews, and admission to the temple is highly desired as essential to one's salvation and as rendering access to important religious rituals.

Respondent appears to contend that the motivation of people paying Mass stipends is "contributing to the good of the Church." (Resp. Br. at 58). Respondent's argument here again ignores the external features of the transaction, in which a person makes a specified payment in order to ensure that a Mass for his or her special intention will be celebrated.

Of course, contributing to the welfare of their religious institutions is one of the motivations that Jews, Mormons and Catholics have, in conjunction with the motive of securing their own personal access to a religious service or benefit. /43/ But in having these mixed motives, they are no different from Scientologists, as the record reflects. (See Ex. 79, p. 7, paragraph 45: for "many Scientologists the primary motivation for contributing is to support the Church and its expansion rather than to receive auditing or training"). The petitioners all testified that a primary motivation for their payments was desire to support and advance the religion of Scientology. (Tr. 114-15; 134; 151, 154).

(c) THE DEGREE AND TIMING OF USE OF THE RELIGIOUS BENEFIT

PAID FOR IS LEGALLY IRRELEVANT

Respondent contends that, in religions other than Scientology, there is no correlation between the amount of money paid to the religion and the quantity of services in which the member participates, thereby implying that this is a factor legally significant for purposes of section 170. For example, respondent notes that there is no correlation between the amount of money paid as tithing and the number of times a member of the Mormon church attends the temple and that the "requirement that a temple recommend holder observe the law of tithing is the same whether the temple recommend holder attends the temple frequently, infrequently, or not at all." (Resp. Br. at 18-19, paragraph 52). Respondent's use of this factor is incorrect as a matter of law and is directly contrary to prior revenue rulings holding that it is the right of access that determines whether a payment is a quid pro quo, not whether the right is actually exercised.

Rev. Rul. 54-565, 1954-2 C.B. 95, considered whether membership dues paid to a tax exempt organization are deductible. The ruling holds that if the payment of membership dues to an organization bestows upon members certain benefits and/or privileges, the dues do not constitute a contribution or gift. Rev. Rul. 54-565 was modified by Rev. Rul. 68-432, 1968-2 C.B. 104, to make clear that the part of the membership fee or dues to an organization which entitles the member to any privileges or benefits is not deductible. Rev. Rul. 68- 432 considered the deductibility of membership dues paid to a museum where the payments of dues was necessary to acquire "a right to utilize the privileges of . . . basic memberships." In determining whether any valuable return benefits were associated with such a membership, the revenue ruling held that "the test to be applied is WHETHER SUCH PRIVILEGES ARE AVAILABLE AND NOT WHETHER THEY ARE IN FACT UTILIZED." (Emphasis added.)

Similarly, it is legally irrelevant whether or how often a Mormon actually takes advantage of the right of access to the temple which the Mormon enjoys by virtue of meeting the worthiness requirements, including tithing. What is relevant is that the privilege is available only to the full tithe payer. See also Rev. Rul. 67-246, 1967-2 C.B. 104, 108, example 3, quoted by respondent in Publication 1391 (Rev. 1-90). /44/

(d) THE COST OF PROVIDING THE RELIGIOUS SERVICE PAID FOR IS

NOT LEGALLY RELEVANT TO THE DETERMINATION OF THE QUID
PRO QUO NATURE OF THE TRANSACTION

Respondent implies that a payment required to obtain access to a religious service is not a quid pro quo transaction if the price is not calculated in relation to the cost of providing the service. (See Resp. Br. at 72). To the contrary, while the cost of providing services may be relevant to a dual payment analysis, see infra, it has no bearing on whether a transaction is a quid pro quo.

First, it is clear from the Service's own revenue rulings that the cost of providing the service paid for is not relevant to whether the payment was part of a quid pro quo. Rather, the crucial question is whether the payment is required to entitle the payor to access to the service. In the situation where a taxpayer makes a membership payment to a museum in exchange for the right of access to the museum, there is no consideration of the actual cost of providing what the taxpayer has paid for (the museum buildings, administration, artwork, lectures, etc.) See Rev. Rul. 54-565, 1954-2 C.B. 95, and Rev. Rul. 68-432, 1968-2 C.B. 104. The cost of providing these services, of course, is far greater than the membership fee paid by the individual, and is supported by funds from a variety of sources in addition to members' dues payments. Yet the only relevant analysis in the museum revenue rulings is whether payment is necessary to secure access; cost is irrelevant. So, too, in the case of a taxpayer who has paid for access to a religious service, either in the form of tithing to the Mormon Church, membership dues in a Jewish synagogue, a stipend for a Mass said for a special intention, or a fixed contribution to a church of Scientology for auditing, the actual cost of providing a particular service cannot be a factor in determining whether the payment is deductible.

During the trial, the Court suggested that, in paying $10 for the celebration of a Mass, a Catholic was paying little for something that costs considerably more to deliver. (Tr. 479). As a preliminary matter, as petitioners' counsel stated, the payment is for the celebration of the special intention in the Mass, (Tr. 485) /45/, so the Court's suggestion of a significant difference between price and cost is not borne out by the record. In addition, the payment is compensation to the priest for his Services in celebrating the Mass for the payor's special intention (Tr. 389, 392, 407 Tr. 829; Ex. 107 ("the laborer is worthy of his hire")), and priests' compensation is set based on the expectation that they will receive Mass stipends. (Tr. 845; Ex. 85, p. 6, paragraph 10). /46/ Thus, in fact, there is a relationship between the payment and the labor cost of providing the service.

More importantly, the relationship between the price charged and the cost of delivering the service is not a relevant inquiry to the quid pro quo analysis, for the reasons stated above. (See also Tr. 483-84). As the court acknowledged, were this a relevant factor, petitioners would have had to subpoena records and testimony from other religions regarding the costs of providing their services, a step that the Court agreed was not necessary or appropriate. (Tr. 483-83, 486).

After considerable discussion of the issue, the Court hypothesized, without taking a position, that the cost of providing a religious service could be a relevant factor to petitioners' administrative inconsistency claim if there were a difference for the IRS in the administrative feasibility of determining the cost of providing services within different religions. (Tr. 487). Petitioners submit that it would be possible to calculate the cost to any religion of providing its services, and the Supreme Court in Hernandez specifically stated that doing so normally should not entail excessive entanglement in violation of the Establishment Clause. 490 U.S. at 698-99 & n. 12. There is, therefore, no basis to conclude that it is more feasible for the respondent to calculate the costs of providing Scientology services than to calculate the costs to other religions of providing their services. Nor, consequently, is there a valid argument that respondent had a justification for pursuing Scientologists and not others on such a ground. /47/

Finally, a distinction based on the relative cost of providing a service and the price an individual pays to attend it would lead to denominational preferences between congregational and individual religious services. For example, to hold the payment for access to the congregational synagogue service deductible because the service costs much more than the payment, while holding the payment for access to the puja nondeductible because that service does not cost much more than the payment would simply be a denominational preference in violation of the Establishment Clause. See Larsen v. Valente, 456 U.S. 228, 244 1982). /48/ Allowing deductions for payments necessary for access to group worship while disallowing deductions for payments necessary for individual worship would breach the requirement that the government maintain neutrality as between and among different religions. Epperson v. Arkansas, 393 U.S. 97, 107 (1968).

(e) AS A MATTER OF FACT AND LAW, THE BENEFITS FROM ACCESS

TO SCIENTOLOGY AUDITING CANNOT BE CONSIDERED MORE SUBSTANTIAL OR LESS INCIDENTAL THAN THE BENEFITS FROM ACCESS TO OTHER RELIGIOUS SERVICES AND BENEFITS

At various points in her brief, respondent erroneously implies that a basis for distinction between the religious practices of Scientologists and members of other religions is that Scientologists derive a substantial benefit from access to their religion's services, while others derive from access to their religion's services a personal benefit that is only incidental to the public benefit conferred by the service. (See, e.g., Resp. Br. 58, 67, 71). First, as this Court noted, the critical legal issue is whether the payments to other religions are necessary to obtain access to a religious service or benefit, not whether the payments buy or ensure a spiritual benefit. Second, for a court to distinguish among religious services based on an assessment of the relative individual or public benefit derived from them would effect a denominational preference, and the very effort to do so would excessively entangle the courts in the internal affairs of religious institutions. Finally, as a factual matter, this purported distinction is not well- founded. The record provides no basis for a court to conclude that participation in Scientology practices renders greater personal religious benefits and lesser religious benefits to the public than do practices that members of other religions pay to participate in.

Immediately following the conclusion of respondent's case in chief, counsel for petitioners engaged in a colloquy with the Court concerning whether to call a rebuttal witness in response to respondent's apparent position that there is no guarantee of spiritual benefit from non-Scientology religious services. (Tr. 1269- 70). Given respondent's apparent emphasis on this point, petitioners stood prepared to call such a witness, /49/ but stated their view that such testimony was unnecessary because the questions of whether and to what degree spiritual benefits are received are legally irrelevant and constitutionally impermissible. (Tr. 1270). The Court apparently concurred in petitioners' view, stating that rebuttal regarding whether spiritual benefits were received was neither appropriate nor necessary. (Tr. 1271, 1273). /50/ Longstanding law supports the Court's conclusion.

The IRS and the courts have consistently taken the position that, by law, the benefit to an individual from payments for access to religious services is deemed incidental to the benefit conferred on the public. This view has been adhered to even in situations in which the benefit to the individual payor is, in truth, substantial:

The law of charity generally recognizes that the saying of mass

or the conduct of similar religious observances under the tenets
of a particular religion are of a spiritual benefit to all the

members of that faith and to the general public. Any private benefit to a given family or individual that may result is regarded as merely incidental to the general public benefit that is served.

Rev. Rul. 71-580, 1971-2 C.B. 235, 236. That the benefit is regarded

as incidental, whether or not it is substantial, is reflected in the IRS's statement in the same ruling, in the context of a Mass payment, that "[n]or would it seem important whether the masses must be said publicly, or might be said wholly or in part in private. This would merely affect the amount of public spiritual benefit." Id. (emphasis added).

The IRS's consistent position that benefits to the individual making a payment to a religious organization are to be viewed as incidental is as old as the charitable deduction itself. See A.R.M. 2, 1 C.B. 150 (1919) (stating that from "a technical angle, the pew rents" may not be contributions or gifts, but holding that "the so-called 'personal accommodation' they may afford is conjectural"); see also Rev. Rul. 76-323,1976-2 C.B. 18 (payments to religious order in which members required to secure employment and pay entire remuneration to the order held deductible).

The Tax Court has likewise recognized that the individual's receipt of religious benefits is by law incidental. "[T]he benefits [of contributions to churches] are merely incidental to making the organization function according to its charitable purposes. . . ." Murphy v. Commissioner, 54 T.C. 249, 253 (1970). /51/

IRS Chief Counsel has articulated the reason why religious benefits to the individual are deemed incidental and deductible under section 170. The motivation for government encouragement of religious giving is the belief:

* * * that an organization which promotes religious purposes is

generally viewed to be of benefit to the public although the persons who are directly benefitted are limited in number.

G.C.M. 38827 (Dec. 7,1981), reprinted in IRS Positions Reported (CCH)

paragraph 1014 at 3048-49 (1982).

Even if it were the case that the degree of individual spiritual benefit to Scientologists from their services could somehow be determined to be greater than the degree of spiritual benefit derived by others from their services, the law simply does not permit distinctions to be drawn for purposes of the tax law on this basis. While the amount of personal and public benefit may vary, the law is clear that such variation does not change the incidental character of the benefit to the individual. Rev. Rul 71-580.

Constitutional principles stand behind the tax rulings and cases declining to inquire into the degree of personal spiritual benefit derived from religious services. To distinguish among religious practices on the basis of their relative amounts of public and personal spiritual benefits would create two distinct violations of the Establishment Clause. Were the IRS to review the religious practices and doctrine of every denomination and disallow deductions for this purpose, such scrutiny would violate the prohibition on excessive intrusion into the religious doctrine and internal affairs of churches. See Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 721(1976).

Such scrutiny would also violate the principle that one religious denomination cannot be preferred or disfavored in relation to others. Larson v. Valente, 456 U.S. 228, 244 (1982). Purported differences in the representations made by churches in their doctrine or to their members concerning the relative degrees of personal and public spiritual benefit derived from their services (or, worse, the IRS' own assessment of purported differences) provide no compelling or rational governmental interest for treating denominations differently for tax purposes. Larson v. Valente, 456 U.S. at 247. It would violate the Establishment Clause to determine, as respondent appears to do (Resp. Br. at 71), that Scientologists derive a more substantial spiritual benefit from participation in auditing than a Jew does from participation in a congregationally-held High Holy Day Service.

Even the respondent should hurdle these legal and constitutional obstacles, her contention fails as a factual matter. The evidence in the record demonstrates that all religions believe that spiritual benefits may be derived from participation in that religion's services and that these benefits can accrue both to the individual payor who has made a payment for access to the service and to the general public. Yet, as the Court succinctly stated (Tr. 1272), no religion presumes to guarantee that spiritual benefit will be derived from participation in the services or to quantify the personal or public spiritual benefit obtained. (PPF 390).

The evidence showed that the doctrines of many denominations emphasize the personal benefit to be obtained by participation in the religious services for which payment must be made. Mormon doctrine teaches that an individual member's exaltation cannot be achieved without participation in the rituals of the personal endowment and celestial marriage, performed exclusively in the temple. (PPF 390.b). Thus, in Mormonism, a rather close connection is drawn between paying a full tithe, participating in these essential rituals and deriving a personal spiritual benefit.

Notwithstanding the contentions of respondent's witnesses, there are SOME spiritual benefits in Catholicism that appear to follow automatically from the payment of a Mass stipend. A 1974 Apostolic letter proclaims that the donor of a mass stipend derives a special if undefined spiritual benefit from the Mass celebrated for his or her special intention. (Ex. 107) (the donor "experience[s] more abundant effects"). (PPF 390.c). /52/

Petitioners do not wish to engage in a comparison of the personal spiritual benefits derived from various religious practices. The implied distinction suggested by respondent forces them, however, to present the examples above, which demonstrate the factual (and constitutional) problems that would face any Court seeking to draw the conclusion that personal benefits from Scientology practices are greater than those in other religions. Further, petitioners believe that the uncomfortable comparison of perceived spiritual benefits indulged in above illustrates the dangers of excessive entanglement and denominational preference that would result from reliance on this criterion as a basis for determining entitlement to tax deductions.

5. THE REVENUE RULINGS CITED BY THE IRS PROVIDE NO

JUSTIFICATION FOR THE INCONSISTENCY IN ITS

ADMINISTRATIVE PRACTICE

In her post-trial brief, respondent alleges that she has "clearly stated her position in her revenue rulings" and that "published revenue rulings . . . present a rational basis on which to distinguish payments such as periodic dues and Mass bequests from payments made to the Church of Scientology." (Resp. Br. at 27-28). The rational basis upon which respondent claims to rely is that " [a]mounts paid to an organization in exchange for identifiable goods or services . . . are not contributions or gifts within the meaning of section 170." (Resp. Br. at 28).

The principle stated by respondent -- that quid pro quo payments to secure religious services are not deductible -- is, after Hernandez, a correct statement of the law. The revenue rulings upon which respondent relies, (Resp. Br. at 45), however, neither necessarily reflect this principle nor address the central issue in this case, to wit, whether respondent has inconsistently administered section 170.

The two revenue rulings relied on by respondent, Rev. Rul. 70- 47, 1970-1 C.B. 49, and Rev. Rul. 78-366, 1978-2 C.B. 241, have already been examined by the Supreme Court and found to contain insufficient facts to explain the difference in treatment. Indeed, the revenue rulings contain no explanation and offer no facts that provide any basis upon which to distinguish practices of Scientology from practices of other religions. To the contrary, the record here shows that practices covered in the rulings (and many practices not covered in them) are, in fact, quid pro quo transactions under Hernandez. The very absence in these rulings of inquiry into facts that might have revealed the quid pro quo nature of the transactions is further evidence of inconsistent administration of the law. Although the revenue rulings have never bean subjected to judicial review, several Courts of Appeal have expressed doubt as to their continuing validity. Petitioners submit that the revenue rulings are inconsistent with Hernandez and its quid pro quo analysis.

(a) THE SUPREME COURT HAS ALREADY DETERMINED THAT THE

REVENUE RULINGS DO NOT CONTAIN SUFFICIENT FACTS TO
PROVIDE A JUSTIFICATION FOR DIFFERENTIAL TREATMENT

In Hernandez, the Supreme Court considered whether IRS revenue rulings -- including Rev. Rul. 70-47 and Rev. Rul. 78-366 /53/ -- provide specific facts about transactions in faiths other than Scientology, or any explanation for the apparently inconsistent treatment of deductibility of payments to Churches of Scientology and to churches of other faiths. The Supreme Court emphatically concluded that they do not:

The IRS' revenue rulings, which merely state the agency's

conclusions as to deductibility and which have apparently never been reviewed by the Tax Court or any other judicial body, also provide no specific facts about the nature of these other faiths' transactions. In the absence of such facts, we simply have no way (other than the wholly illegitimate one of relying on our personal experiences and observations) to appraise accurately whether the IRS' revenue rulings have correctly applied a quid pro quo analysis with respect to any or all of the religious practices in question.

490 U.S. at 702. Thus, as a matter of law, the revenue rulings

offered by respondent contain no justification for the respondent's differing treatment of Scientologists' and others' payments. /54/

(b) THE TWO REVENUE RULINGS RELIED ON BY RESPONDENT PROVIDE

NO FACTS OR ANALYSIS JUSTIFYING DIFFERENTIAL TREATMENT

Even if the Supreme Court had not already resolved the issue, an examination of the revenue rulings /55/ demonstrates that they do not offer any basis that could explain the disparity in treatment between Scientologists and members of other religions. /56/

Revenue Ruling 70-47 merely states that "[p]ew rents, building fund assessments, and periodic dues paid to a church . . . are all methods of making contributions to the church . . . ." The ruling does not even refer to or describe the characteristics of these types of payments, and simply states respondent's conclusion that they are methods of making contributions. This conclusory statement provides an inadequate explanation for respondent's policy to allow deductions for these types of payments in all circumstances, while denying deductions for payments to a Scientology church for auditing or training.

At trial, petitioners amassed unrebutted evidence demonstrating that periodic dues paid to the vast majority of Jewish synagogues are at least as much a quid pro quo as any payments to churches of Scientology. Rev. Rul. 70-47 in no way explains how dues paid under these circumstances can be distinguished from the payments made to Scientology churches in this case.

Revenue Ruling 78-366 is equally deficient in providing any basis for the disparity in treatment. That revenue ruling provides that a bequest to a Church to say Masses for members of the decedent's family who had previously died is fully deductible. Rev. Rul. 78-366 states that the funds that were the subject of the ruling passed directly to the Church and that the Mass would have been said even if the will had not provided the bequest. Based on these facts, the revenue ruling concludes that the amount of the bequest is deductible from the decedent's gross estate under section 2055.

The first fact referred to in the revenue ruling is irrelevant to the quid pro quo issue. That the funds passed directly to the Church is relevant only to whether the donee is qualified. The second fact, that the Mass would have been said even without the bequest, is also irrelevant, since the quid pro quo issue turns on whether the donor made the bequest in exchange for any thing of value, e.g., the payment secures the celebration of the donor's special intention during the Mass. Revenue Ruling 78-366 does not speak to this issue, nor to the fact that the payor of the stipend "experience[s] more abundant effects," Ex. 107, than do others, even if the Mass would have been said anyway. Thus, Revenue Ruling 78-366 provides NO basis whatsoever for the disparity in treatment.

In fact, respondent's reliance on Rev. Ruls. 70-47 and 78-366 is further evidence her inconsistent administration of section 170. She has taken rulings that are barren of facts from which the quid pro quo nature of the transactions could be determined and has inexplicably assumed that the transactions were not quid pro quo. (See Resp. Br. at 46-49). This procedure is starkly at variance with the procedure she uses whenever Scientology practices are in issue.

In contrast to respondent's ASSUMPTION of no significant return benefit in Rev. Ruls. 70-47 and 78-366 is the Service's intense and factually erroneous inquiry into the nature of Scientology services in Rev. Rul. 78-189. /57/ Given the intrusive and extensive inquiry into Scientology practices that the respondent made in connection with Rev. Rul. 78-189 and with every Scientologists' claim for a deduction, the respondent's assumption of no return benefit in Rev. Rul. 70-47 and 78-366 evidences the Service's failure to examine the practices of other religions and practices of Scientology on an equal basis. Moreover, given the evidence in this record that practices referred to in Rev. Rul. 70-47 and 78-366 do involve quid pro quo transactions, respondent's failure to disallow deductions for them is additional evidence of her administrative inconsistency.

(c) THE REVENUE RULINGS DO NOT COMPORT WITH THE QUID PRO

QUO ANALYSIS APPLIED BY THE SUPREME COURT IN HERNANDEZ
AND BY SEVERAL CIRCUIT COURTS

It is obvious that neither Rev. Rul. 70-47 nor Rev. Rul. 78-366 engages in the analysis of the external structure of the transaction that is required under Hernandez in order to determine whether the transaction is a quid pro quo. 490 U.S. at 690-91. Neither revenue ruling analyzes whether the taxpayer received any valuable consideration in exchange for the payment. The revenue rulings fail to analyze the quid pro quo nature of membership dues, building fund assessments, and Mass bequests, and therefore they do not comport with the analysis of Hernandez.

Indeed, the Courts of Appeals which considered the appeals in Hernandez v. Commissioner, 819 F.2d 1212 (1st Cir. 1987), and Graham v. Commissioner, 822 F.2d 844 (9th Cir. 1987), both expressed strong doubts whether payments discussed in the rulings should be deductible under the quid pro quo analysis applied to payments to churches of Scientology. See Graham, 822 F.2d at 850 ("[W]e are not convinced that. . . rulings [78-366 and 70-47] would comport with the analysis of section 170 that we have set forth here."); Hernandez, 819 F.2d at 1227 ("[W]e have some doubt as to the continuing validity of the presumption in Rev. Rul. 70-47, 170-1 C.B. 39 [sic], that pew rents and mandatory church dues are tax deductible gifts."). The dissenting judge in another one of the appeals based on the stipulated record of Graham, one in which the majority held the taxpayers' payments deductible, drew the same conclusion. See Foley v. Commissioner, 844 F.2d 94, 98 (2d Cir. 1988) (Newman, J., dissenting) ("Payments for pew rentals and attendance at High Holy Day services are close to the line, and, as the Ninth Circuit has observed, not all of respondent's prior rulings in this area may be defensible."), vacated, 490 U.S. 1103 (1989).

Petitioners submit that the revenue rulings are invalid given their failure to apply the quid pro quo analysis required under Hernandez.

6. THE IRS IS PRECLUDED FROM NOW OFFERING JUSTIFICATIONS

THAT IT FAILED TO DISCLOSE IN DISCOVERY

Because of the course of pre-trial discovery in this case, respondent was precluded from offering at trial any evidence that she treats adherents of all religions consistently or that there is any justification for the disparity in treatment of Scientologists and members of other religions other than those that might be found in the limited materials she provided in discovery. She is now similarly precluded from offering justifications for the differential treatment that were neither given in discovery nor presented at trial.

In a hearing on petitioner's motions to compel discovery of, inter alia, respondent's justifications for her administrative practice, respondent argued that any information or document other than a revenue ruling was irrelevant and not discoverable because it is "pre-decisional and deliberative in nature." The Court found that respondent's position warranted prohibiting respondent from explaining its practice or offering any justification for its practice, other than what appears on the face of the revenue rulings. After respondent declined the Court's invitation to amend its discovery answers, the Court precluded respondent from introducing at trial any explanation or justification for its inconsistent treatment of Scientologists not provided in its responses to discovery requests. Teagarden v. Commissioner, Docket No. 11708-89, Transcript of Proceedings, Feb. 12, 1992 at 21, 23, 28-29. /58/

Now, for the first time, respondent has suggested that the IRS had a basis for selectively auditing members of petitioners' religion because of an alleged hostility to paying taxes. Again erroneously attempting to place the burden of disproof on the petitioners, she asserts that petitioners must show there was no rational basis for the IRS to "target []" Scientology. (Resp. Br. at 52-53, 80-82). Respondent's belated attempt at excusing the Service's unequal treatment is unavailing for several reasons.

First, respondent is foreclosed because of her conduct in the discovery phase of this litigation from offering this justification now. /59/ Second, the respondent's rationale is merely an excuse for closer scrutiny of Scientologists, but offers no justification for applying a different standard to and rendering different tax treatment of Scientologists' and others' payments. A purported need to look closely is hardly a legitimate justification for different tax treatment when respondent, in the face of evidence of quid pro quo transactions in other religions, has steadfastly refused to acknowledge her treatment of others has been erroneous or apply the law evenhandedly. /60/

II. THE REMEDY FOR THE IRS' INCONSISTENT TREATMENT IS TO SHIELD

PETITIONERS FROM THE COLLECTION OF TAXES ON THEIR CONTRIBUTIONS, WHETHER OR NOT PETITIONERS' PAYMENTS ARE VIEWED AS QUID PRO QUO TRANSACTIONS

As petitioners proved at trial, there is no valid basis for distinguishing their payments to Churches of Scientology from payments made to other religions. The evidence showed that payments for religious services in Scientology are no more mandatory, fixed and made in exchange for an identifiable benefit than are payments in a range of transactions in other religions. /61/ There simply is no material distinction between payments to Scientology and payments to these other religions. /62/

The evidence also showed that Scientologists' payments for auditing and training are consistently disallowed by the IRS and that the IRS consistently inquires in examinations and audits whether Scientologists received religious benefits in exchange for their payments. The evidence established that, in contrast, the Service does not subject adherents of religions other than Scientology to inquiry as to whether the taxpayer received a religious service or benefit in exchange for his or her donation and the Service consistently allows deductions to members of these other religions.

Respondent has not advanced any compelling or rational basis that can justify the difference in treatment. In light of this evidence, petitioners have clearly established their claim of administrative inconsistency.

Given that petitioner's payments are indistinguishable from those of other faiths, if the Court views these payments as quid pro quo transactions, then the Court must also find that payments to the Jewish, Mormon, Catholic and other religions equally are quid pro quo transactions. As is demonstrated below, petitioners are entitled to protection from the collection of taxes on their payments if their religion has been singled out among those having quid pro quo practices. See infra, Section II.A.

Alternatively, petitioners submit that their payments may properly be viewed not to be quid pro quo transactions under the standards set out in Hernandez. Should the Court agree with this view, petitioners' payments of course would be deductible. See infra Section II.B.1 below. In addition, petitioners' contributions for participation in religious services are indistinguishable from numerous payments to other religions that have historically and consistently been deemed deductible. These payments uniformly have been held to be deductible because they involve religious practices in which the return benefit to the individual has been deemed unsubstantial as a matter of law. Because petitioners' payments cannot be distinguished from these other practices, petitioners' payments must be held to be deductible. See infra Part H.B.2 below.

A. EVEN IF PETITIONERS' PAYMENTS ARE VIEWED AS QUID PRO QUO

TRANSACTIONS, THE PRINCIPLE OF EQUAL TAX TREATMENT,
PARTICULARLY IN THE CONTEXT OF UNEQUAL TREATMENT OF DIFFERENT
RELIGIONS, PROVIDES AN "INDEPENDENT GROUND OF DECISION"
PROHIBITING THE IRS FROM COLLECTING TAXES ON PETITIONERS'
PAYMENTS

As previously stated, the IRS is under an affirmative duty to treat similarly situated taxpayers equally. United States v. Kaiser, 363 U.S. 299, 308 (1960) (Frankfurter, J., concurring). If a taxpayer has shown that he has been victimized by unequal application of the tax laws, he is entitled to the benefit of what has been extended to similarly situated taxpayers. In his concurring opinion in Kaiser, Justice Frankfurter specified that:

If I am right about the justification for asking this Court in

this case to bind respondent to former relevant rulings, WITH
INDIFFERENCE TO THE CORRECTNESS OF HIS PRESENT POSITION as an

independent matter, the appropriate inquiry is not, "Can such and such a principle be drawn from the administrative rulings?" The right question is, "Is there any rational basis for the prior rulings which does not apply to the present case?"

363 U.S. at 308 (emphasis added). Justice Frankfurter's opinion is

directly relevant to this case, as he recognized that where there has been discrimination relief can be granted the victimized parry "with indifference to the correctness of [respondent's] present position." Id. /63/

The principle pronounced by Justice Frankfurter in Kaiser was implicitly adopted in Hernandez and explicitly adopted and applied in Powell v. United States, 945 F.2d 374, 378 (11th Cir. 1991), to reverse a district court dismissal of the precise claim made in this case.

Both the majority and dissent in Hernandez necessarily agreed with Justice Frankfurter's articulation in Kaiser that IRS inconsistency in administering federal tax law can be an independent ground for providing relief directly to the victimized taxpayer, notwithstanding the proper interpretation of the law. There is no explanation for the Hernandez majority's engaging in detailed consideration of the administrative inconsistency claim and of what would constitute a "proper record" on which the Court could make a determination of that claim, 490 U.S. at 700-03, after pronouncing that the petitioners' payments were nondeductible under the controlling principle of law. id. at 694, if proving that claim would entitle the petitioners to no relief. Despite its careful consideration of the claim, the Court at no time as much as suggested that the taxpayers would not be entitled to relief if they made out their case of inconsistent treatment. /64/

In Powell, a case raising precisely the same issue of inconsistent administrative treatment raised here, the Eleventh Circuit held that "[t]here is no question 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 (emphasis added). /65/ The Powell Court understood the roots in Supreme Court precedent for the principle that administrative inconsistency can be remedied by granting relief to the disadvantaged party with indifference to the correctness of respondent's present position:

Hernandez alerts us to the fact that there is a claim for

> administrative inconsistency. That claim has been alluded to before by the Supreme Court. Justice Frankfurter pronounced, "[I]t can be an independent ground of decision that respondent had been inconsistent . . ." United States v. Kaiser, 363 U.S. 299, 308 (1960).

945 F.2d at 377.

Significantly, the relief sought in Powell was a refund to rectify the unequal treatment, not a ruling that the payments were technically deductible under a proper reading of the statute:

> Powell argues that he is entitled to a refund because it is the administrative practice of the IRS to allow tax deductions to members of other religions who make contributions to their churches as a quid pro quo for participation in or to obtain the performance of religious services or benefits.

Id. at 377. The key to the decision, evidently not understood by

> respondent, was the court's holding that where the plaintiff proves an ongoing pattern of inconsistent treatment he is entitled to relief even if "technically all the donations should be nondeductible" /66/:

> Powell is not attempting to make something a deduction that is not a deduction. His claim is that the IRS allows some quid pro quo payments for religious services to be tax deductible while disallowing them for members of his church.

Id. at 378. This statement is crucial to a correct understanding of

the decision. Powell did not argue that his quid pro quo payments for

access to religious services were deductible under the proper interpretation of the statute set out in Hernandez; he was not arguing that something not deductible was deductible. Rather, where he and members of his religion consistently had been disallowed the deduction while members of other religions were and continued to be allowed them, he was entitled to relief from the collection of taxes. Similarly, petitioners here do not seek a ruling that their payments fit the definition of charitable contributions under the statute. Rather, they seek protection from collection of taxes where the IRS systematically refrains from collecting taxes from similarly-situated taxpayers. /67/

This result would not, as respondent suggests, constitute the overruling of Hernandez. (Resp. Br. at 40). The basic holding of Hernandez is that quid pro quo payments are not deductible under the statute even if the benefit received is purely religious. 490 U.S. at 692. Nothing in the Powell opinion challenges that ruling. Rather, Powell's holding is based on the independent proposition of law, implicitly recognized in Hernandez, that there is a right to relief for inconsistent applications of law, particularly where the differential treatment is based on a constitutionally suspect classification such as religion. Far from overruling Hernandez, the Powell decision carries out this implicit directive of Hernandez.

Respondent suggests that the duty of consistency cannot prevail here because deductions for quid pro quo payments for religious benefits were "expressly disallowed by a prior opinion by the Supreme Court." (Resp. Br. at 33.) While Hernandez sets forth the authoritative interpretation of what Congress intended section 170 to reach, the situation presented here is no different than if the reach of the statute were clear on its face. The fact that the proper interpretation of the statute is that quid pro quo payments for religious services are not deductible is simply a starting premise.

What must be determined is whether relief from collection of taxes should be granted because of the systematic and ongoing unequal administration of the statute on religious grounds. Assuming the facts that have been proven at trial here, the Eleventh Circuit in Powell -- drawing from Hernandez, Justice Frankfurter's opinion in Kaiser, and Establishment Clause jurisprudence -- ruled emphatically that it should. 945 F.2d at 378.

Important to the Powell court were the allegations that the differential treatment was ongoing and that the IRS had not admitted its treatment of members of other religions was erroneous. Like the Powell district court (reversed by the Eleventh Circuit), respondent here relies on an inapposite case to argue that petitioners here have "no right to insist upon the same erroneous treatment afforded a similarly situated taxpayer in the past." Resp. Br. at 3940, quoting Mid-Continent Supply Co. v. Commissioner, 571 F.2d 1371, 1376 (5th Cir. 1978). The Eleventh Circuit properly made short shrift of district court reliance on Mid-Continent:

[S]ince the IRS has not admitted that the deductions for quid

pro quo payments given to the members of other religions are erroneous, the holding of Mid-Continent has no impact on this case.

945 F.2d at 378.

The Powell court's dismissal of Mid-Continent is warranted for several reasons. First, petitioners have proven that the IRS systematically, over a period of years, administered section 170 unequally, drawing a line between members of one religion and members of all others. This is a far cry from refusing to grant one taxpayer the undeserved benefit that another had received some time in the past. In these circumstances, even if the respondent today admitted the error of her past treatment of others and began enforcement against them, petitioners would still be entitled to relief for the systematic differential treatment to which they were subjected during the past tax years in issue.

Second, respondent has compounded her error by failing to acknowledge and correct it to this day. Neither prior to trial nor even in the face of the evidence presented at trial has the IRS admitted that its treatment of other religions is erroneous and acted to rectify the situation. To the contrary, respondent persists in her post trial brief in refusing to take a position as to whether IRS treatment of other religions has been erroneous and in arguing there may conceivably be a basis justifying the IRS' unequal treatment. /68/ (Resp. Br. 54, 56, 68, 73, 75, 77 and 78). Given these facts respondent's reliance on Mid-Continent, where a single taxpayer had been afforded more favorable treatment "in the past" under a ruling "now . . recognized by respondent as erroneous," 571 F.2d at 1376, is absurd.

Respondent very narrowly relies on a single statement of Prof. Lawrence Zelenak in which he asserts his view that Justice Frankfurter was stating rather than adopting the position of the taxpayer in Kaiser. Zelenak, Should Courts Require the Internal Revenue Service to be Consistent?, 38 Tax. L. Rev. 411, 417 (1985) ("IRS Duty of Consistency"). First, respondent fails to acknowledge that a federal court of appeals viewed Justice Frankfurter as having "PRONOUNCED, 'it can be an independent ground of decision that respondent has been inconsistent. . . .'" Powell v. United States, 945 F.2d at 377, quoting Justice Frankfurter (emphasis added). Moreover, respondent fails to make any reference to Prof. Zelenak's subsequent statement in the same paragraph communicating his view that Justice Frankfurter saw substantial merit in the argument:

> Still, [Justice Frankfurter's] efforts to demonstrate the absence of unequal treatment suggest he took seriously the proposition that disparate treatment could serve as an independent ground of decision, WITHOUT REGARD TO THE PROPER interpretation of the applicable Code provisions.

IRS Duty of Consistency, 38 Tax L. Rev. at 417 (emphasis added). As discussed below -- and completely ignored by respondent in her brief -- Prof. Zelenak's Article presents a detailed discussion of the cases decided prior to 1985 (and therefore not including either Hernandez or Powell) which support or apply the principle that disparate tax treatment by the IRS is an independent ground of decision without regard to the proper interpretation of the applicable Code provisions. Respondent similarly ignores Prof. Zelenak's conclusion that in narrow circumstances, like those presented here, consistency should he enforced by granting the disadvantaged party relief, even if contrary to the dictates of the substantive law. Id. at 432-33.

Prof. Zelenak discusses in his article many of the lower court decisions previously cited by petitioners, see Pet. Trial Memorandum at p. 44, n. 34, which provide support for the principle that a duty of consistency can be imposed on the IRS or which explicitly impose the duty. IRS Duty of Consistency, at 425 & n.84. See Xerox Corp. v. United States, 656 F.2d 659, 660 (Cl. Ct. 1981) ("Having adopted and maintained the 'service' doctrine, the IRS cannot now disavow it because it leads to the taxpayer's result. . . .") and Zelenak commentary on Xerox at 38 Tax L. Rev. at 446-7; see also Vesco v. Commissioner, 39 T.C.M. (CCH) 101 (1979).

Other pre-Hernandez cases previously cited by petitioners, Pet. Trial Mem. at 44, n.34, and discussed by Zelenak, strongly support the principal that administrative inconsistency by the IRS is a basis for granting relief to a party notwithstanding the proper interpretation of the statute. These cases ultimately did not need to apply the principle since they could be and were decided on other grounds. See Sirbo Holdings Inc. v. Commissioner, 476 F.2d 981, 987 (2d Cir. 1973) (Friendly, J.), /69/ supra, aff'd after remand, 509 F.2d 1220 (2d Cir. 1975). /70/; Ogiony v. C.I.R., 617 F.2d 14, 18 (2d Cir.) (Oakes, J., concurring), cert. denied, 449 U.S. 900 (1980); Nile v. United States, 710 F.2d 1391 (9th Cir. 1983); and International Business Machines Corp. v. United States, 343 F.2d 914 (Cl.Ct. 1965), cert. denied, 382 U.S. 1028 (1966).

Considerations of fairness and practicality require that petitioners be protected from the collection of taxes on their payments. As Prof. Zelenak points out, "[t]here is virtually no judicial review of a Service decision to be lenient" to other taxpayers:

> Taxpayers directly affected will not challenge the position because it is favorable to them. The Service will not, of course, challenge its own position. Third parties may sue to prevent Service leniency toward other taxpayers . . . but such suits are almost always dismissed for lack of standing.

IRS Duty of Consistency, at Tax L. Rev. 429 (footnote omitted). In

> this case, the described conditions are undoubtedly met. The Jewish, Mormon, Catholic, Hindu and other taxpayers who benefit from lenient treatment by the IRS certainly will not challenge their treatment. The IRS has shown itself unwilling to alter its own position toward

these categories of taxpayers. Petitioners are unlikely to have standing to challenge the IRS tax treatment of adherents of other religions. See, e.g., Allen v. Wright, 468 U.S. 737 (1984); In re U.S. Catholic Conference, 885 F.2d 1020 (2d Cir. 1989), cert. denied, 495 U.S. 918, (1990). Thus, precluding petitioners from seeking relief from collection of taxes for themselves denies them their only possible remedy for the unequal treatment they suffer. The necessary effect of a decision to deny them relief is to improperly preclude any judicial review whatever of the IRS' inconsistent treatment of parishioners of one religion. See, e.g., Texas Monthly. Inc. v. Bullock, 489 U.S. 1, 8 (1989).

Respondent conjures up the image of every tax trial being extended by the taxpayer's inquiry into how similarly situated taxpayers have been treated. (Resp. Br. at 31). /71/ In truth, cases will be extremely rare in which a petitioner can credibly make out a prima facie case that the Service has engaged in an ongoing pattern and practice of applying the law inconsistently between that taxpayer and similarly situated taxpayers. /72/ The particularly compelling instances, like this one, where the systematic inconsistency is based on the constitutionally suspect classification of religion will be fewer still.

Prof. Zelenak's scholarly and objective opinion on this point is

of interest:

I expect that judicial enforcement of consistency at the expense

of substance would be a rare event. In most cases, the Service will be able to distinguish apparently inconsistent precedents, or will renounce those precedents. In fact, a significant virtue of a consistency requirement is that it forces the Service to focus and resolve inconsistencies that might otherwise go unnoticed. Only in a few cases will the Service be unable to distinguish and unwilling to renounce its apparently

inconsistent treatment of similarly situated taxpayers. Those cases will be of two types. First is the case where the Service attempts to distinguish the present case from its allegedly inconsistent treatment of other taxpayers, but the court finds the proposed distinction meaningless. Second, and probably more rare, is the situation where the Service's position in the present case is a total lark, perhaps the result of overzealousness on the part of a Service employee involved in the case. In those few cases, equal treatment under the law is an important enough principle to justify elevating the duty of consistency over the court's interpretation of the Code.

IRS Duty of Consistency, 38 Tax L. Rev. at 432-33 (footnotes

omitted). Petitioners submit this case falls into the first type of case identified by Prof. Zelenak, "where the Service attempts to distinguish the present case from its allegedly inconsistent treatment of other taxpayers, but the court finds the proposed distinction meaningless." It is precisely the type of rare case in which the duty of consistency should enforced.

A contrary conclusion would render irremediable respondent's preferential treatment of other religious denominations, a result that would violate the Establishment Clause. See Welsh v. United States, 398 U.S. 333, 361 (1970) (Harlan, J., concurring). In Welsh, the Supreme Court held that a statute granting exemption from military service for persons opposed to war by reason of "religious training and belief" should be construed to cover those whose beliefs were not religiously derived. In his concurrence, Justice Harlan disagreed with the Court's statutory analysis, but concluded that the Constitution compelled the same result:

Where a statute is defective because of underinclusion there

exist two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that

the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion.

Id. at 361. Justice Harlan stated that, since the statute at issue

created a religious benefit not accorded to petitioner, "it is clear to me that this conviction must be reversed under the Establishment Clause of the First Amendment unless Welsh is to go remediless." Id. at 362. The fact that religion is the basis for the differential treatment here is a powerful constitutionally mandated reason to hold that petitioners are entitled to relief. See, e.g., id at 362; Fowler v. Rhode Island, 345 U.S. 67 (1953). Unless relief is granted, petitioners will be denied any remedy for the Establishment Clause violation caused by respondent's unequal application of the statute among members of different religions.

While it is true that Justice Harlan viewed the statute in issue in Welch as unconstitutionally underinclusive, /73/ respondent ignores or misinterprets other Supreme Court cases in which the interpretation of state taxing statutes that was applied to disadvantaged taxpayers was correct, but relief to those taxpayers was ordered nevertheless because of systematic lenient treatment of others. Respondent fails to address Iowa-Des Moines National Bank v. Bennett, 284 U.S. 239 (1931), and incorrectly characterizes cases in the "Bennett line of cases." (Resp. Br. at 34-35).

In Bennett, the Supreme Court found that a state's administration of its tax law constituted discrimination against certain taxpayers in violation of the Equal Protection Clause. The Iowa Supreme Court had recognized that there had been systematic discrimination because other taxpayers had been underassessed, 284 U.S. at 24143, but held "that no right of petitioners under state law was violated, because they were not overassessed." id. at 244 (emphasis added). In addition, according to the Supreme Court, the Iowa court believed that

no right under the federal law was violated, because the lower

taxation of their competitors due to usurpation by officials was

not an act of the state; and that the discrimination thus effected was remediable only by correcting the wrong under the state law in favor of the competitors and not "BY EXTENDING . . . THE BENEFITS AS [SIC] OF A SIMILAR WRONG TO THE PETITIONERS.

Id. at 244 (emphasis added).

The Supreme Court rejected this analysis and held that petitioners had been subjected to an equal protection violation and were entitled to refunds, notwithstanding the fact that they had been properly assessed under the statute. Id. at 245-47. The Court held:

It may be assumed that all grounds for a claim for refund would

have fallen if the state, promptly upon discovery of the discrimination, had removed it by collecting the additional taxes from the favored competitors. By such collection the petitioners' grievances would have been redressed; FOR THESE ARE NOT PRIMARILY OVERASSESSMENT. THE RIGHT INVOKED IS THAT TO EQUAL TREATMENT; and such treatment will be attained if either their competitors' taxes are increased or their own reduced. But it is well settled that a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid. Nor may he be remitted to the necessity of awaiting such action by the state officials upon their own initiative.

The petitioners are entitled to obtain in these suits refund of

the excess of taxes exacted from them.

Id. at 247 (citations omitted, emphasis supplied).

Respondent suggests at several points in her brief that even if there is discrimination, petitioners should be required to wait for respondent to properly enforce the statute against others, and purports to invoke Bennett in support of this conclusion. (Resp. Br. at 39, 51, 52). Bennett squarely rejected this approach, holding that the taxpayer may not be remitted to waiting for officials to take action against others. 284 U.S. at 247.

Allegheny Pittsburgh Coal Co. v. County Commission, 488 U.S. 336 (1989), is a recent "Bennett line" case also refuting respondent's contention. The Supreme Court recognized that West Virginia's constitution and law provided that real property "be taxed at a rate uniform throughout the State according to its estimated market value." Id. at 345. The plaintiffs' home county assessed real property according to the price at which it last sold (making only minor adjustments in the appraisals of property not recently sold), resulting in gross disparities between valuations of recently transferred property and other similar property. Id. at 338.

The Supreme Court agreed with the West Virginia Supreme Court that the plaintiffs had been fairly assessed under the statute, id. at 342, stating, "[v]iewed in isolation, the assessments for petitioners' property may fully comply with West Virginia law." Id. at 346. Yet the Court held that the petitioners' could not be remitted to the remedy of seeking that other taxpayers' assessments be raised, id at 342-3, 345-46, citing, inter alia, Iowa-Des Moines National Bank v. Bennett, 284 U.S. 239, 247 (1931). Therefore, despite the fact that the assessment against the petitioners was proper under the statute, the Supreme Court viewed a refund to them as a necessary form of relief.

Bennett, Allegheny and other cases in the Bennett line similarly state that a taxpayer who has been correctly assessed under a taxing statute but who has been systematically discriminated against though underassessments of others may not be required to seek elevation of others' taxes, but rather is entitled to a refund. /74/ Respondent's suggestion that refunds have been granted only where "there were no obstacles to extending the benefit" (Resp. Br. at 34-35), is simply incorrect. Refunds are proper relief for equal protection violations even where the disadvantaged party has been taxed in accordance with substantive law.

Petitioners submit they have made the case, both legally and factually, that they are entitled to relief from the IRS's systematic and still unrepudiated inconsistent application of Section 170 on the basis of religion. Granting them relief from collection of taxes is the only method to achieve equal application of the laws in this case. Since, under the facts proved at trial members of other denominations have been taking and have been allowed deductions for their quid pro quo payments made throughout the tax years in issue, and since the government cannot now recover taxes from those taxpayers because of the massiveness of the undertaking and the statute of limitations, /75/ relief from collection is necessary to achieve equal treatment.

Finally, respondent erroneously asserts that petitioners seek a ruling that the IRS be "estopped for all time" from collecting taxes on Scientologists' payments for access to religious services. (Resp. Br. at 52). This case only deals with payments made in specified past tax years. More importantly, respondent herself can control whether she may properly collected taxes from petitioners in the future. Assuming petitioners' payments are held to be part of quid pro quo transactions, taxes could be collected from them as soon as the IRS acknowledged the error of its position vis-a-vis payments by members of other religions and began assessing taxes on an even-handed basis.

B. PETITIONERS' DONATIONS WERE FULLY DEDUCTIBLE UNDER HERNANDEZ

1. UNDER THE STANDARDS OF HERNANDEZ, PETITIONERS' DONATIONS

WERE NOT QUID PRO QUO TRANSACTIONS

In Hernandez, the Supreme Court determined that the payments in issue in that case were structured as quid pro quo transactions. A complete record was not made, however, on the donation system in Scientology. The facts here establish that petitioners' donations were not structured as quid pro quo transactions under the governing principles set forth in Hernandez. Petitioners submit that the Supreme Court would not hold that Scientologists' payments are quid pro quo transactions were it presented with the record in this case.

The Supreme Court in Hernandez determined that payments that are mandatory in order to obtain access to the religious services are not deductible contributions within the meaning of section 170. 490 U.S. at 692. Elsewhere in the opinion, the Court underscored the importance of the mandatory nature of a donation as the litmus test for its quid pro quo nature. For example, the Court stated, "[W]e do not know, for example, whether payments for other faiths' are TRULY OBLIGATORY or whether any or all of these services are generally provided whether or not the encouraged 'mandatory' payment is made." Id. at 702 (emphasis supplied). And, the Court said, the determination whether a donation is mandatory "may require the IRS to ascertain from the institution the prices of its services and commodities, the regularity with which payments for such services and commodities are waived, and other pertinent information about the transaction." Id. at 696.

A complete record was not developed in Hernandez on several important features of donations to Scientology. The Court apparently believed that the Church "categorically barred provision of auditing or training sessions for free." Id. at 692. There was no explanation of the meaning or application of this policy or of the means of access to services without full payment -- or even any payment -- that, in fact, are available to Scientologists.

Michael Rinder, who the parties stipulated was an expert qualified to testify about Scientology religious doctrine and practices (Stip. paragraph 10; Tr. 66), testified that the policy letter on which the Supreme Court based its conclusion that the Church categorically barred free services does not, in fact, do so. Mr. Rinder testified, based on familiarity with all aspects of Scientology Church doctrine and administration, that the policy letter must be read in context with "many other policies in Scientology in the scriptures" and does not prohibit churches of Scientology from providing auditing without charge. (Tr. 86-88). He testified that there are directives in the Scriptures of the religions for the provision of free services. (Tr. 94). Mr. Rinder, in his report and testimony, and the three petitioners who testified at trial presented considerable evidence of the ways in which Scientology Churches provide auditing and training at no charge. (PPF 339-346). Thus, the evidence in this case showed that there are a number of "exceptions" to the requirement of payment in Scientology and they are quite common. The evidence also showed they are more extensive and inclusive than the exceptions in many other religions, whose waivers of required fees is generally limited to those who cannot pay. (PPF 382).

As detailed supra, in many religions including Judaism, Mormonism and Catholicism, poverty is the only real exception to the requirement to pay the fixed fee. A person who has the ability to pay is required to do so. In contrast, in Scientology a person who is not poor, as well as a person who is poor, can obtain a waiver of fees. All of the petitioners in this case in fact received free services.

Petitioners also demonstrated other factual differences from the Hernandez record. In Hernandez, the Court concluded that Churches of Scientology "calibrated particular prices to auditing or trailing sessions of particular lengths and levels of sophistication." 490 U.S. at 691. While it is correct that most donations for auditing are generally set for specific hourly durations ("intensives") at the various levels, some auditing and most training is not calibrated; parishioners may take widely varying amounts of time to complete the service at no difference in cost. (PPF 334).

Another factual difference petitioners established from the Hernandez record was in the area of the refundability of donations to Scientology. The Tax Court found as fact that "[i]t is the Church of Scientology's policy to refund advance payments upon request at any time before services are received." Graham, 83 T.C. at 578. The Tax Court noted, however, that "[n]o evidence was produced with respect to the actual amounts, if any, of such refunds during the tax years in issue." Id. at 578, n.8.

At trial in this case, however, Mr. Rinder testified regarding the reasons for and consequences of a repayment of a donation for services. Refunds are quite uncommon in Scientology and are given for religious reasons. As outlined in Mr. Rinder's report and testimony, individuals who are no longer committed to the religious beliefs and goals of Scientology may receive refunds, but only on condition that they no longer receive auditing or training. (PPF 337). A rare occurrence and refunds are "quite an uncommon thing." (Tr. 106; see also stip. paragraph 103). Thus the record in this case showing that Scientology refunds are an unusual, religiously motivated practice is far different from the distorted image of the practice that appeared in the record in Hernandez, which may have left the Court with the impression that refunds were routine and given on a commercial basis.

Petitioners believe that these factual differences, especially in the degree of access to services without payment or without full payment, demonstrate that petitioners' donations for auditing and training are not structured as quid pro quo exchanges under the standards of Hernandez. Petitioners submit that had the Hernandez Court had the record of this case before it, the Court would have found payments for access to Scientology religious services to be charitable contributions within the meaning of section 170.

2. GIVEN THE FACTS IN THIS RECORD SHOWING NO MATERIAL

DIFFERENCE BETWEEN SCIENTOLOGISTS' PAYMENTS AND THOSE OF MEMBERS OF OTHER RELIGIONS LONG HELD TO BE CHARITABLE CONTRIBUTIONS, PETITIONERS PAYMENTS MUST BE HELD DEDUCTIBLE

Because (1) there is no distinction between Scientologists' and others' payments, (2) the others' payments have consistently been allowed (and are still allowed) as a deduction, and (3) there is a consistent history of the IRS's administration of the statute allowing such deductions under a coherent theory of law, petitioners' deductions must be viewed as deductible under Hernandez.

As shown supra, Section I D 4(e), the IRS and the courts have long held as a matter of tax law that the benefits to the individual payor from payments for access to religious services in all religions other than Scientology, have always been deemed incidental to the benefits conferred on the public. See Rev. Rul. 71-580, 1971-2 C.B. 235, 236; A.R.M. 2, 1 C.B. 150 (1919); Murphy v. Commissioner, 54 T.C. 249, 253 (1970). The record in this case has shown that practices in these religions, which been have the subject of prior favorable rulings on deductibility based on the legal conclusion that the benefits are incidental, in fact confer significant benefit on the individuals making the payment.

The Hernandez Court did not have before it the record in this case regarding these other religions' practices. Thus, it could not assess in proper context the consistent determination of the IRS and the courts to deem these substantial benefits incidental to the public benefit conferred. Nor, therefore, did the Court have to consider the Establishment Clause violation that would result from efforts to distinguish between religious practices on the basis of the relative individual or public benefit thought to be derived from them. See Point I D 4(e), supra.

Petitioners submit that had the Hernandez Court had this record before it, the Court would hold that the return benefits to individual Scientologists from payments for participation in religious services, like the return benefits to members of all other religions from their payments, should be deemed incidental to the public benefit conferred. Their payments should therefore be held to be charitable contributions, since they are the "'transfer of money . . . without adequate consideration.'" Hernandez, 490 U.S. at 691, quoting, United States v. American Bar Endowment, 477 U.S. 105, 118 (1986).

III. ALTERNATIVELY, PETITIONERS ARE ENTITLED TO DEDUCT THE AMOUNT BY

WHICH THEIR PAYMENTS EXCEEDED THE COSTS INCURRED BY THEIR

CHURCHES IN PROVIDING RELIGIOUS SERVICES.

Section 170 allows taxpayers a charitable contribution deduction for gifts or contributions they make to qualified charitable donees. When in connection with the contribution taxpayers also receive a return benefit, the amount of the allowable deduction turns on the relationship of the benefit received to the amount contributed. When the amount contributed is equal to the benefit received, no deduction is allowable. However, if the amount contributed exceeds the benefit received such excess amount may qualify for deduction under the doctrine of dual payment. This doctrine treats the contribution as two separate payments -- one as the purchase price for the particular benefit received and the other as a contribution to the charitable donee. For the doctrine of dual payment to apply, the taxpayer must show that (1) the amount paid to the qualified donee exceeds the value of the particular property or service received as a return benefit, and (2) the excess was intended as a gift. United States v. American Bar Endowment, 477 U.S. 105, 117 (1986); Rev. Rul. 67-246, 1967-2 C.B. 104, 105.

The facts of these cases establish beyond question that petitioners purposefully contributed amounts exceeding the benefit they received -- participation in religious services -- in order to support their churches' religious mission. Accordingly, under the "dual payment" doctrine the petitioners are entitled to deduct these excess amounts as charitable contributions.

A. RESPONDENT INCORRECTLY APPLIES THE DUAL PAYMENT DOCTRINE

Respondent takes the position that petitioners have not met either prong of the two-part dual payment test and that no deduction should be allowed. To support her position, respondent argues that petitioners' contributions did not exceed the value of the religious services in which they participated, asserting that the value of the services they received equals the amounts they contributed. She also argues that petitioners lacked the requisite donative intent, asserting they did not establish that the same religious services were available elsewhere at a lower price or that they knew the precise amount of the excess component of their contributions. Moreover, as a threshold matter, respondent further contends that the doctrine of dual payment applies only once the taxpayer has shown that the amount of the payment is "clearly out of proportion" to the value of the benefit received, and that no such showing has been made here. Respondent is wrong on all counts.

1. APPLICATION OF THE DUAL PAYMENT DOCTRINE REQUIRES NO

THRESHOLD SHOWING THAT THE PAYMENT WAS "CLEARLY OUT OF PROPORTION" TO THE RETURN BENEFIT.

Respondent first argues that American Bar Endowment requires that BEFORE the two-part dual-payment test can be applied, the taxpayer must establish that any return benefit is "clearly out of proportion" to the amount of his or her payment. (Resp. Br. at 83- 85). Respondent relies on the following passage from American Bar Endowment:

A payment of money generally cannot constitute a charitable

contribution if the contributor expects a substantial benefit in return. S. Rep. No. 1622, 83d Cong., 2d Sess., 196 (1954); Singer Co. v. United States, 196 Ct. Cl. 90, 449 F.2d 413 (1971). However, as the Claims Court recognized, a taxpayer may sometimes receive only a nominal benefit in return for his contribution. WHERE THE SIZE OF THE PAYMENT IS CLEARLY OUT OF PROPORTION TO THE BENEFIT RECEIVED, it would not serve the purposes of section 170 to deny a deduction altogether. A taxpayer may therefore claim a deduction for the difference between a payment to a 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. See, e.g., Rev. Rul. 67-246, 1967-2 Cum. Bull. 104 (price of ticket to charity ball deductible to extent it exceeds market value of admission); Rev. Rul. 68-32, 1968-2 Cum. Bull. 104,105 (noting possibility that payment to charitable organization may have "dual character").

American Bar Endowment, 477 U.S. at 116-17 (emphasis supplied).

Respondent's argument reads far too much into the Supreme Court's opinion, however, as the quoted language merely explains the policy for not disallowing a deduction altogether when the contributor receives some quid pro quo in exchange for the contribution. No authority before or after American Bar Endowment has required taxpayers to prove their payments were "clearly out of proportion" to the benefits they received as a condition of applying the dual payment doctrine, nor did American Bar Endowment.

Moreover, respondent's asserted standard is impossible to apply in any meaningful manner. The quoted language from American Bar Endowment is wholly ambiguous as to what the term "clearly out of proportion" means, or, indeed, whether the term is relative or absolute. For example, receipt of a one dollar benefit in exchange for a contribution of ten dollars would be "clearly out of proportion" in relative terms (90% contribution to only 10% benefit) yet nine dollars is clearly insubstantial in absolute terms. On the other hand, receipt of a $900,000 benefit in exchange for a contribution of $1 million would be "clearly out of proportion" in absolute terms ($100,000) yet insubstantial in relative terms (only 10% contribution to 90% benefit).

At bottom, the application of the doctrine of dual payment turns on the common sense determination that a dual character payment has been made; that is, that there are both a discernable return benefit and an excess. Where, as here, petitioners are able to prove their donative intent and that their payments exceeded their return benefits, they are entitled to deduct the excess under the unequivocal holdings of American Bar Endowment and Hernandez. /76/

2. THE NONDEDUCTIBLE BENEFITS FROM RELIGIOUS SERVICES

PROVIDED IN A DONATIVE CONTEXT ARE MEASURED BY THE

CHURCH'S COSTS OF PROVIDING THE SERVICES. /77/

Respondent argues that the contribution rate fixed for Scientology religious services provides a reasonable estimate of the value of the services received and that when any quid pro quo arrangement is involved, a presumption arises that the value of the services received equals the value of any payments. (Resp. Br. at 86- 88). Thus, according to respondent, this presumption causes petitioners to fail the first prong of the dual payment test because they have not shown they contributed amounts in excess of the benefits they received. Respondent relies on the Supreme Court's decision in American Bar Endowment, which she asserts "incorporated this assumption into its valuation methodology." (Resp. Br. at 87).

Contrary to respondent's position, however, the Supreme Court in Hernandez made clear that the valuation method used in American Bar Endowment cannot be applied to Scientology religious services. The return benefit in question in American Bar Endowment -- life insurance -- traditionally is traded in a commercial market wholly outside of any donative setting; this market established that commercial consumers are willing to pay the same price for insurance as the amounts paid by those who claimed they also had made a charitable contribution. when religious services are involved, however, market price is not relevant because these services are "purchased" only within a donative context. Hernandez, 490 U.S. at 706-07 (O'Connor, J., dissenting). Market price is not an appropriate method for measuring a return benefit that is offered only in a donative context, because there is no comparable market. Neher v. Commissioner, 852 F.2d 848, 854, 856 (6th Cir. 1988), vacated, 882 F.2d 217 (6th Cir. 1989). In these cases, the cost incurred by the charitable donees in providing the services in question is the ONLY appropriate method for measuring the return benefit they received.

In Hernandez, the Supreme Court expressly recognized the need to use the cost incurred by the service provider to measure the return benefit when the property or service is never traded in a purely commercial context, such as religious services:

[T]he need to ascertain what portion of a payment was a purchase

and what portion was a contribution does not ineluctably create entanglement problems by forcing the Government to place a monetary value on a religious benefit. In cases where the economic value of a good or service is elusive -- where, for

example, no comparable good or service is sold in the marketplace -- the IRS has eschewed benefit-focused valuation. Instead, it has often employed as an alternative method of valuation an inquiry into the cost (if any) to the donee of providing the good or service. This valuation method, while requiring qualified religious institutions to disclose relevant information about church costs to the IRS, involves administrative inquiries that, as a general matter, "bear no resemblance to the kind of government surveillance the Court has previously held to pose an intolerable risk of government entanglement with religion.

Hernandez, 490 U.S. at 697-98 (citations and footnote omitted). That

the Hernandez Court considered the economic value of Scientology religious services to be "elusive," and thus requiring the use of cost to measure the nondeductible return benefit, is clear from the context of the Hernandez litigation. The Supreme Court declined the invitation of the Circuit Courts in Hernandez, 819 F.2d at 1217, and Graham, 822 F.2d at 849-50, to conclude that fixed donations set by churches of Scientology established their fair market value as a matter of law. At the same time, the Supreme Court endorsed cost as an alternative measure of the return benefit in response to the holdings of three lower Circuit Courts that the quid pro quo test could not be applied to donations for Scientology religious services because of the absence of a "market" from which to determine fair market value. /78/ In her dissent, Justice O'Connor also confirmed that the economic value of Scientology religious services is "elusive" under the majority's reasoning and must be determined by something other than "market" price:

It becomes impossible . . . to compute the "contribution"

portion of a payment to a charity where what is received in return is not merely an intangible, but an intangible (or, for that matter a tangible) that is not bought and sold except in donative contexts so that the only "market" price against which it can be evaluated is a market price that always includes donations. Suppose, for example, that the charitable organization that traditionally solicits donations on Veterans Day, in exchange for which it gives the donor an imitation poppy bearing its name, were to establish a flat rule that no one gets a poppy without a donation of at least $10. One would have to say that the "market" rate for such poppies was $10, but it would assuredly not be true that everyone who "bought" a poppy for $10 made no contribution.

Hernandez, 490 U.S. at 706 (O'Connor, J., dissenting); see also

Neher, 852 F.2d at 854, 856, ("[I]n the vast majority of cases there is no market for religious services outside of the relevant religious community. There is certainly no evidence that there is any general market for Scientologist religious services."); id. at 856 ("[T]here are no other providers of similar services to whom the court may look so as to place a value on the offered services.").

Respondent claims that the courts have used market price as a method in many cases involving purely donative transfers. /79/ (Resp. Br. at 90-91). However, in all of these cited cases but Arceneaux, property was FIRST purchased in a wholly commercial context and THEN contributed to charity. Thus, the Court was able to measure the value of the contribution by reference to the price a buyer -- usually the donor himself -- was willing to pay for the property in a wholly commercial context. Moreover, in Arceneaux, the only case in which the taxpayers received services or property in return, the benefit they received -- adoption services -- is commonly utilized by individuals not motivated by any donative intent. /80/ Thus, none of the cases respondent cites involved the factual situation presented here -- the valuation of a service provided only in a donative context. /81/

Respondent's attempt to distinguish the religious-school eases, Oppewal, Winters and Dejong (Resp. Br. at 92-98) is unpersuasive. Respondent begins by asserting that the Supreme Court and First Circuit Hernandez opinions establish the rule that "the price charged by the service provider" and "prices charged by similar service providers" are preferred as valuation methods over "the service provider's cost," since the two opinions list them in that order. (Resp. Br. at 92-94). This interpretation, however, reads the Hernandez opinions as establishing a ranking based solely on the order in which they happened to have been discussed; nothing in either opinion offers any reason for creating such rankings, and respondent herself offers no explanation why such an artificial ranking is appropriate.

The choice of any valuation method depends on the facts and circumstances of the individual case. E.g., Jack Daniel Distillery v. United States, 379 F.2d 569, 576-77 (Ct. Cl. 1967); Messing v. Commissioner, 48 T.C. 502, 512 (1967). Use of cost to measure the nondeductible quid pro pro benefit clearly is inappropriate where the same service can be purchased in a purely commercial context. In such circumstances, the price charged by commercial providers objectively measures the benefit represented by the service separate from any donative aspect: it shows the amount that the taxpayer must pay to obtain the service irrespective of any donative intent. Conversely, use of the "price-charged" method is wholly inappropriate where the service is provided only in a donative context; prices charged by similar providers cannot be used as there is no comparable market from which to locate similar providers, and the price charged by the donee-provider cannot be used because it would wholly ignore the donative aspect of the transaction. See Hernandez, 490 U.S. at 706 (O'Connor J., dissenting)

Respondent dismisses as mere "dicta" the discussion in Hernandez that relies on the religious school tuition cases to support use of cost to measure the nondeductible return benefit. (Resp. Br. at 92). This discussion, however, in fact was integral to the Court's holding on the entanglement issue, explaining why the Court rejected the taxpayers' argument that the quid pro quo test facially violated the Establishment Clause by requiring the government to place a monetary value on religious benefits. See id. at 698 (citations omitted). Under facts and circumstances quite similar to those at hand, the Supreme Court in Hernandez expressly determined that using cost to measure the nondeductible return benefit would lessen the entanglement problems arising from trying to place a monetary value on religious services. /82/

Finally, respondent attempts to distinguish the religious-school cases on the ground that the institutions therein did not REQUIRE tuition payments in return for the students' schooling. (Resp. Br. at 95-98). Justice O'Connor's Hernandez dissent makes clear, however that the "mandatory" character of fixed payments is irrelevant when the property or service is only provided in a donative context. /83/ 490 U.S. at 704-05. In point of fact, each of the religious school cases was based on the fundamental truth that the parents would not have received the educational service they desired had they not contributed sufficient funding, regardless of whether their contributions were "voluntary" or "mandatory." Indeed, in formulating the Service's position on the deductibility of contributions in religious school cases that was eventually issued in Revenue Rulings 79-99 and 83-104, Chief Counsel specifically rejected any distinction based on the mandatory or voluntary nature of such payments:

The fact that a particular parent is under no enforceable legal

duty to make such a contribution or that failing to make same his child will not be removed from the school does not affect the nature of the payment made any more than the fact that some of the children in DeJong received free tuition affected the result in that case with respect to the contributions of those parents who helped make up the school operating deficit.

G.C.M. 34863 (Apr. 28, 1972) (footnote omitted.) The central fact

which makes the religious school cases an appropriate analog is that a religious school education typically is not purchased in a purely commercial setting. This same factor distinguishes these cases from American Bar Endowment, upon which respondent places the entire weight of her argument.

Indeed, the return benefits to be measured here -- participation in the religious rituals of a church -- are far more "elusive" than the religious school education at issue in the cases the Hernandez Court cites. The operation of a private school is not a unique activity offered only in a donative context, /84/ and there are at least some taxable, for-profit private schools from which the Service or a court could have derived a "market" price for private education at a religious school. That the courts have never sought to do so demonstrates that the religious aspects of church school education preclude use of ordinary fair market value principles. /85/ If it is appropriate to use cost rather than market value in the case of church school tuition, where there is simply a religious component to a primarily secular benefit, it is even more appropriate to use cost in lieu of market value to measure the benefit represented by participation in the religious services of a church, a purely intangible benefit that cannot be quantified financially.

3. DONATIVE INTENT IS ESTABLISHED BY PROOF THAT THE

TAXPAYER KNEW THE PAYMENT EXCEEDED THE RETURN BENEFIT

A taxpayer's payment to charity of an amount which exceeds the value of any property or service received in connection with the payment evidences the taxpayer's donative intent under the "dual payment" doctrine. Rev. Rul. 67-246, 1967-2 C.B. 104, 105. Proof that the taxpayer knew that his or her payment exceeded the value of the property or service received and nonetheless willingly made the contribution conclusively establishes donative intent:

> The sine qua non of a charitable contribution is a transfer of
>
> money or property without adequate consideration. The taxpayer, therefore, must at a minimum demonstrate that he purposely contributed money or property in excess of the value of any benefit he received in return.

American Bar Endowment, 477 U.S. at 118.

Respondent first argues that, as a matter of law, in order to prove donative intent a taxpayer must demonstrate that THE SAME SERVICE WAS AVAILABLE LOWER PRICE but that he or she intentionally chose to pay a higher price intending the excess as a gift. (Resp. Br. at 98-99). Respondent bases her argument on American Bar Endowment but once again ignores the material facts distinguishing that case from cases involving religious services. Justice O'Connor disposes of respondent's argument in her Hernandez dissent: where the item or service is available ONLY at a fixed price in a donative context, the taxpayer's inability to obtain the item or service at a lower price is irrelevant. Hernandez, 490 U.S. at 706. The key lies in establishing a donative context for the payment and return benefit.

In American Bar Endowment, the same type of life insurance available to the taxpayers from the charitable donee was available commercially. Since three of the taxpayers failed to prove they knew they could have obtained the insurance for less elsewhere, the Supreme Court simply held that the transaction had no gift potential, because people purchase life insurance for purely non-eleemosynary, economic reasons. Id. at 118. While the fourth taxpayer proved that he could have obtained the life insurance elsewhere for less, he failed to prove that he was aware of the lower-priced insurance at the time of payment. Thus, proof in American Bar Endowment of the known availability of life insurance at a lower cost was necessary to establish a donative context.

Contrary to respondent's argument, the inability to establish the known existence of a lower cost alternative is irrelevant where the circumstances of the payments ALREADY establish a donative context. Hernandez, 490 U.S. at 706-07 (O'Connor, J., dissenting). People buy insurance all the time, but few, if any, of them intend to contribute to the cause of insuring the world. When people make payments to their church in the course of participating in its religious services, however, the natural inference is that they intend at least a portion of their payment as a gift to the cause of propagating their faith. Certainty none of the religious school tuition cases sustaining partially deductible dual payments has imposed a requirement to establish the known existence of a lower cost alternative. Indeed, in at least two of the cases -- Haak and Oppewal -- it was clear that the taxpayers could not possibly have known the exact amount of the deductible portion of their contribution because it was identified for the first time by respondent during audit. Haak, 451 F. Supp. at 1088; Oppewal, 30 T.C.M. at 1178. Accordingly, proof of availability of the product or service at issue at a lower cost elsewhere is material ONLY under facts and circumstances like those of American Bar Endowment, where there is a commercial market for the product or service; it is not a requirement in all cases and is unnecessary where the facts establish that the transaction occurs ONLY in a donative setting.

Respondent also argues that a lack of knowledge of the exact differential between the service provider's cost and the fixed prices charged for the services precludes a finding of donative intent. (Resp. Br. at 101-104). All the case law requires, however, is proof that the taxpayer knew his or her payment exceeded the value of the property or service received in return and willingly made the payment anyway. American Bar Endowment, 477 U.S. at 118. To require any more where, as here, cost is employed to measure the nondeductible return benefit because value is elusive, would effectively preclude application of the dual payment doctrine in all such cases.

Respondent's suggestion that the donee churches here should have provided the petitioners with at least an estimate of their cost of providing the religious services (Resp. Br. at 102-103) is at best premature. Substantially all the donations at issue here were made AFTER this Court's decision in Graham and before the Supreme Court's decision in Hernandez, a period of time during which three of seven courts of appeal to consider the issue held that Church of Scientology contributions were fully deductible without regard to any quid pro quo. Such a requirement likewise is premature here, BEFORE the courts have authoritatively resolved the administrative inconsistency issue left open by Hernandez. Moreover, no court has disallowed deduction of a dual character payment due solely to the donee's failure to quantify at the outset the deductible portion. American Bar Endowment merely requires proof that payment exceeded the return benefit and that the taxpayer intended the excess as a charitable gift. The record here overwhelmingly establishes both.

B. "DUAL PAYMENT" DOCTRINE APPLIED

1. PETITIONERS' CONTRIBUTIONS EXCEEDED THE COSTS THEIR

CHURCHES INCURRED IN PROVIDING RELIGIOUS SERVICES

Hernandez makes clear that cost is the appropriate measure of the non deductible quid pro quo for payments involving receipt of religious services as the return benefit and that it is the only measure permissible under the Establishment Clause of the First Amendment. As discussed below, petitioners believe that only direct costs are appropriately considered in applying the Hernandez cost- based dual payment analysis; petitioners' expert testimony identifying and quantifying the Churches' direct costs not only is uncontradicted but (with one unpersuasive exception, discussed below) is accepted by respondent's expert as well. Alternatively, should the Court determine that indirect costs must be included, petitioners believe that the only methodology for allocating Church of Scientology indirect costs that is reasonable under the facts of these cases is the one proposed by petitioners' expert accounting witness, Richard D. Clark.

a. DIRECT COST TO THE DONEE/SERVICE-PROVIDER CHURCH IS

THE APPROPRIATE MEASURE OF THE NON DEDUCTIBLE QUID
PRO QUO

The Hernandez majority appears to have recognized that only direct costs should be considered in measuring the nondeductible quid pro quo portion of a payment to a church for religious services. In approving the use of cost to avoid the entanglement problems that would arise in attempting to value religious services, the Hernandez majority specifically refers to "the cost IF ANY to the donee of providing the good or service." Hernandez, 490 U.S. at 698 (emphasis supplied). Charitable organizations ALWAYS incur indirect costs in delivering their exempt-function goods or services, but they will not necessarily incur direct costs. /86/ Thus, as an accounting matter, the Supreme Court's "cost if any" language in Hernandez -- necessarily eliminates indirect costs from consideration.

Contrary to respondent's argument (Resp. Br. at 112) the church school tuition cases cited in Hernandez support petitioners' position rather than respondent's because they appear to have looked only to the direct costs of providing the education. While respondent correctly notes that the court in Haak v. United States, 451 F. Supp. 1087 (W.D. Mich. 1978), phrased the issue before it in such terms as "the cost of educating the children," id. at 1088, and the "[t]otal annual per family cost," id. at 1089, the Haak court nevertheless made crystal clear that the taxpayer's church had established SEPARATE contribution guidelines for "the cost of buildings belonging to the Christian School Association." Id. at 1088. Contrary to respondent's argument (Resp. Br. at 112, n.20), it is wholly reasonable to infer that "the cost of buildings maintained by the Christian School Association" would include, at minimum, depreciation, utilities, insurance and other typically "indirect" costs. Indeed, this language strongly suggests that operating costs were excluded as well. And, contrary to respondent's argument (id.), the Haak opinion strongly indicates that the taxpayers' separate contributions for "the cost of buildings maintained by the Christian School Association" were NOT at issue in the taxpayers' refund suit because they had NOT been disallowed by the Service. /87/ Respondent's suggestion that "such contributions may have been contemplated by the court (as an additional amount to be disallowed)" in the Haak court's footnote 8, 451 F. Supp. at 1093 (Resp. Br. at 112, n.20), is wishful thinking. /88/

The language of the courts' opinions in Oppewal v. Commissioner, 468 F.2d 1000 (1st Cir. 1972), aff'g T.C. Memo. 1971-273, 30 T.C.M. (CCH) 1177 (1971), is at best neutral from respondent's perspective. More importantly, this Court sustained the Service's partial disallowance based on testimony about the school's operating budget stated on a per-student basis. Oppewal, 30 T.C.M. at 1178. An operating budget -- by definition a budget for payment of operating expenses -- would exclude capital and noncash items such as depreciation, again items traditionally treated as indirect expenses. Indeed, as in Haak, it is clear that respondent in fact allowed part of the taxpayers' actual cost of educating their children. /89/

Thus, both Haak and Oppewal strongly suggest that at least depreciation, and possibly significant operating costs, of the school buildings had been excluded from the costs used in those cases to measure the nondeductible quid pro quo. /90/ To read these decisions to "suggest that indirect costs were included" (Resp. Br. at 112) is precisely the kind of "case of missing language and/or inference" for which respondent wrongly criticizes petitioners. (Id.)

Respondent's attempt to distinguish Rev. Proc. 90-12, 1990-1 C.B. 471 (Resp. Br. at 113-114), is unpersuasive. The revenue procedure itself strongly indicates that indirect costs are to be excluded. In particular, the cross-reference to "low cost articles," as defined in section 513(h)(2)(A), necessarily is limited to the charitable organization's actual out-of-pocket costs in acquiring such items and necessarily excludes any associated costs from holding and distributing those items, as well as general overhead, that would have to be taken into account if all indirect costs were included. Moreover, to require charitable organizations to employ expensive and time-consuming cost accounting methods to fully allocate indirect costs as well as direct costs would totally frustrate the purpose of this revenue procedure, which was issued in response to complaints that the valuation method required by Rev. Rul. 67-246 was "difficult or burdensome." 1990-1 C.B. at 472. /91/

Finally, respondent misses the thrust of petitioners' position that limiting the dual payment inquiry to direct costs minimizes the potential entanglement in church affairs prohibited by the Establishment Clause. Contrary to respondent's arguments (Resp. Br. at 114-116), petitioners are suggesting neither that the Establishment Clause mandates the exclusion of all indirect costs nor that all potentially entangling disbursement cost categories must be classified as indirect. /92/ What petitioners are asserting is that by limiting the dual payment inquiry to direct costs, certain of the more potentially entangling disbursement categories -- i.e., costs of church administration, proselytization and expansion, capital reserves, and support of other church organizations (including, in hierarchical denominations like Scientology, superior ecclesiastical organizations) -- are excluded. /93/ Indeed, the treatment of one of these categories of expenditures -- ecclesiastical management payments to Church of Scientology International ("CSI"), the "Mother Church" of the Scientology Religion -- by respondent's accounting expert, Professor Swenson, illustrates the entanglement problem resulting from including such costs in the dual payment analysis: He determined that these payments were all allocable to the ministry of religious services based solely on information provided by District Counsel (Tr. 910) and on his own conjectures /94/ and assumptions. /95/

Obviously, the exclusion of indirect costs is no panacea for potential entanglement problems, because many of the categories treated as direct expenses also raise entanglement concerns. Nevertheless, the exclusion of indirect costs is consistent with and reasonably implements the Supreme Court's clear holding in Hernandez that using cost to measure religious benefits prevents any facial infirmity under the Establishment Clause when applying the quid pro quo test.

(1) THE UNREBUTTED EXPERT TESTIMONY OF RICHARD D.

CLARK PROVIDES A REASONABLE MEASURE OF THE
DIRECT COSTS OF PROVIDING RELIGIOUS SERVICES

The report and testimony of petitioners' accounting expert, Richard D. Clark constitutes the ONLY evidence before the Court concerning the identification of Church of Scientology direct costs. The Court recognized Mr. Clark as an expert in general accounting (Tr. 724), a field which encompasses managerial accounting, cost accounting, financial accounting, tax accounting and taxation. (Tr. 723). Respondent herself stipulated that Mr. Clark is an expert on the internal accounting system used by churches of Scientology (Stip. paragraph 106), no doubt based on Mr. Clark's extensive experience with and intimate knowledge of that system. (Ex. 98 at 4-9, 18). Mr. Clark thus is eminently qualified to provide expert testimony on the identification of the direct costs associated with the ministry of religious services by churches of Scientology.

Mr. Clark determined the direct costs to churches of Scientology of providing religious services by examining each category of disbursements shown on the churches' annual income and expenditure ("I&E") summaries. /96/ (Ex. 98, pp. 11-12). He then placed each of the income and expenditure categories under one or more of four descriptive headings --

1. TRAINING AND PROCESSING, defined as "income and direct

expenses of the delivery of religious services;"

2. BOOKSTORE, defined as "income from the sale of books and

other religious materials and expenses directly related to
that activity;"

3. INTEREST/OTHER, defined as "other income and direct expenses

not related to [the] delivery of [religious] services or
bookstore such as interest, rents, contributions from other
organizations, etc.;" and

4. INDIRECT COSTS, defined to include overhead, itself

separately defined as "expenses which are not directly
associated with the delivery of religious services,"
bookstore receipts or the final receipt classification of
Interest/other.

(Ex. 98, pp. 11-12; Tr. 733, 1291). Mr. Clark did this in order to

identify all of the DIRECT costs of churches of Scientology associated with the ministry of religious services, which was his initial assignment. (Ex. 129, p. 1; Tr. 739, 1300, 1325). /97/ Mr. Clark then totalled the expenditure categories he had identified as directly related to the ministry of religious services and divided this sum into total receipts from training and processing to derive a direct "cost" percentage; the reciprocal, one minus the cost percentage, equals the contribution percentage. (Ex. 98, pp. 15-16; Tr. 747). Mr. Clark determined contribution percentages for each donee church and taxable year relevant to this litigation; in addition, he determined 1987 contribution percentages for the fourteen churches of Scientology ("sample churches") specifically recognized by the Service as qualified donees under section 170(c)(2).

In only one instance does respondent dispute Mr. Clark's characterization of disbursement categories: Mr. Clark treats ecclesiastical management payments to Church of Scientology International ("CSI") as indirect costs while respondent's expert, Professor Swenson, treats them as direct costs of training and processing. Professor Swenson's treatment of ecclesiastical management payments to CSI as direct costs of the ministry of religious services assumes a direct relationship between these expenditures and the ministry of religious services in the churches. (Tr. 887-88). Beyond conjectures and assumptions (see nn.94-95, supra), however, Professor Swenson never explains why he believes the requisite direct relationship exists. (Tr. 909-14).

By contrast, based on his extensive experience with Scientology, Mr. Clark explained that he found no direct relationship between the ecclesiastical management payments and ministry of religious services because CSI uses these payments to support its ministry and public benefit programs throughout the world. (Tr. 746). /98/ Moreover, it is a complete non sequitur to assert, as Professor Swenson does, /99/ that a particular expenditure category automatically becomes directly associated with a particular activity simply because some of the revenue from that activity is used to pay the expenditure. From the record, the ecclesiastical management payments to CSI are not necessary to produce revenues nor do they directly support the production of these revenues; thus, they lack the requisite direct relationship to church income from the ministry of religious services. Professor Swenson's unexplained objections to Mr. Clark's exclusion of ecclesiastical management payments to CSI from the direct costs of the ministry of religious services must be rejected. /100/

The contribution percentages Mr. Clark determined for the donee churches and sample churches under his direct cost methodology are reasonable. If anything, these percentages are too low. Mr. Clark was extremely conservative in identifying expenditure categories as strongly associated with the ministry of religious services. In particular, he treated four disbursement categories -- FSM (Fundraising) Commissions, Postage and Carriage, Dissemination, and Printing and Stationery -- as directly associated only with the ministry of religious services, even though in each case at least some of those expenses also would be associated with at minimum the excluded contribution portion of the receipts for training and processing. (Ex. 129, pp. 16-17; Tr. 737-39, 742-44). By so doing, he necessarily overstated the amount of direct costs associated with the ministry of religious services, thereby understating the contribution percentage. (Id.)

The contribution percentages derived under Mr. Clark's direct cost methodology thus are eminently reasonable; any errors from its application favor respondent rather than petitioners. If the Court decides, as it should, that only direct costs be considered, then the Court should accept fully Mr. Clark's direct cost methodology and allow petitioners to deduct a portion of their donations in accordance with the percentages Mr. Clark determined in his original and supplemental reports. (Exs. 98, 99).

b. IF INDIRECT COSTS MUST BE TAKEN INTO ACCOUNT, THEN

PETITIONERS' EXPERT, RICHARD D. CLARK, PROPOSES THE

PROPER METHODOLOGY FOR ALLOCATING INDIRECT COSTS

There is no dispute that ordinary cost accounting principles require indirect costs to be included along with direct costs in determining the total costs of a particular activity, product or service. The question before the Court, however, is whether governing case law and First Amendment considerations permit the application of ordinary cost accounting principles here or, instead, require that indirect costs be excluded.

If the Court should find that indirect costs may be included, then the Court must determine what is a reasonable method for identifying and allocating Church of Scientology indirect costs to the ministry of religious services. For the reasons discussed in detail below, petitioners believe that the allocation methodology proposed by their expert, Richard D. Clark, should be accepted by the Court. Mr. Clark's methodology is the only one before the Court that is consistent with the facts of these cases and the non profit, tax exempt character of the donee churches. The methodology proposed by respondent's expert, Professor Swenson, is wholly inappropriate for non profit tax exempt churches, and, by its very assumptions, precludes the possibility that any meaningful portion of the donee churches' receipts associated with the ministry of religious services could ever qualify as partially-deductible dual payments to their donors.

(1) CLARK'S REBUTTAL METHODOLOGY IS PROPERLY

BEFORE THE COURT; RESPONDENT HAD ADEQUATE
TIME TO PREPARE TO CROSS-EXAMINE MR. CLARK
REGARDING HIS METHODOLOGY FOR ALLOCATING
INDIRECT COSTS.

Respondent's argument that she "did not have the opportunity to properly cross examine" Mr. Clark with respect to his rebuttal report (Resp. Br. at 122) is unsupported by the record. Mr. Clark's rebuttal report was furnished to respondent and lodged with the Court on April 9, 1992, nearly two full weeks before Mr. Clark's rebuttal testimony. (Tr. 540). It was for this reason that the Court properly rejected respondent's objection when Mr. Clark's rebuttal report was offered in evidence. (Tr. 1280-81). /101/ If respondent truly had felt prejudiced, /102/ she could have sought a short continuance or to arrange to cross-examine Mr. Clark at a later date. See Pinson v. Commissioner, T.C. Memo 1990-77, 58 T.C.M. (CCH) 1420 (1990). She did neither. Moreover, respondent offers no authority for the curious proposition that the Court should "give[] little weight" (Resp. Br. at 122) to Mr. Clark's rebuttal report and testimony due to admittedly ineffective cross-examination by the government.

(2) THE CLARK METHODOLOGY USES PRINCIPLES

UNDERLYING GENERALLY ACCEPTED COST ACCOUNTING
STANDARDS FOR NON PROFIT SERVICE
ORGANIZATIONS, THE APPROPRIATE THEORETICAL
MODEL FOR NONPROFIT, TAX-EXEMPT CHURCHES
WHILE THE SWENSON METHODOLOGY IS WHOLLY
INAPPROPRIATE.

Mr. Clark's methodology for allocating indirect costs to the ministry of religious services begins with the correct analytical framework as it recognizes the donees as tax-exempt, nonprofit organizations. (Ex. 129, pp. 13-14; see Stip. paragraphs 87-91). Mr. Clark clearly identified as the appropriate guiding principles the "functional" cost accounting standards for nonprofit organizations as set forth in authoritative pronouncements of the American Institute of Certified Public Accountants ("AICPA") /103/, as well as other authoritative accounting texts. /104/ (Ex. 129, pp. 4-5; Tr. 1285- 90). At the heart of functional cost accounting for nonprofits is the premise that costs are to be accounted for on the basis of the various activities of the organization, whether or not those activities produce revenue. (Ex. 129, pp. 4-5; Tr. 1287-88). As Mr. Clark's rebuttal report states: "Any equitable and reasonable method to allocate the indirect expenses of a church must consider the non- revenue producing activities as a segment." (Ex. 129, p. 6). Even respondent's accounting expert, Professor Swenson, reluctantly acknowledged the general applicability of functional cost accounting principles to nonprofit churches. /105/

The record in this litigation clearly establishes that ALL churches of Scientology are substantially engaged in ministry and public benefit activities that do not themselves generate revenues to the churches. (PPF 21-43). /106/ The only rational inference is that costs are incurred with respect to these substantial nonrevenue generating church activities. The difficulty, of course, is in seeking to identify or segregate those costs sufficiently to permit a reasonable identification of the direct and indirect costs associated with the ministry of religious services. As Mr. Clark noted, the object is not to precisely quantify the direct and indirect costs of all Church of Scientology activities; rather, it is sufficient to identify those associated with the ministry of religious services to "determin[e] a contribution percentage for training and processing donations." (Ex. 129, p. 14). As long as a particular class of expenditure is neither a direct cost of ministering religious services nor an indirect cost which must be allocated in part to the ministry of religious services, it is unnecessary to determine what other category or categories it falls under.

Mr. Clark himself acknowledged that he could not fully apply functional cost accounting standards to the annual income and expenditure summaries prepared by churches of Scientology. /107/ Nevertheless, the accepted functional cost principles are the appropriate analytical framework from which to approach the identification and allocation of indirect costs to the ministry of religious services. Mr. Clark expressly concluded that --

[O]n the basis of the summaries that I have examined and my

knowledge of Church of Scientology financial and accounting practices, I am able to apply the functional classification sufficiently to determine the direct costs of training and processing, the only cost category ultimately material to determining a contribution percentage for training and processing donations.

(Ex. 129, p. 14).

Respondent's expert indicated general knowledge of many public benefit and social betterment activities that generate no revenues to churches of Scientology. (Tr. 916-23). Nevertheless, Professor Swenson categorically rejected use of functional cost accounting principles, while conceding them to be the analytically correct model for nonprofit organizations. (See n.105, supra). Instead, he advanced a cost allocation methodology devised for profit-making entities (Tr. at 928-29) which assumes that all Church of Scientology costs are associated with one or more revenue-generating activities. (Tr. 926) He did so simply because he could not precisely apply functional cost accounting standards to the financial information he was provided. /108/ In other words, because he could not precisely quantify the amount of direct and indirect costs associated with Church of Scientology activities that do not generate revenues, Professor Swenson adopted an allocation methodology that rejects the possibility of any costs associated with such activities.

It is undisputed that functional cost accounting is the appropriate analytical model for nonprofit, tax-exempt churches. Mr. Clark's indirect cost methodology is the only one before the Court that seeks to employ the principles of this model.

(3) THE CLARK METHODOLOGY DOES NOT IMPROPERLY

SEEK TO RECLASSIFY CERTAIN DIRECT COSTS AS
INDIRECT.

In his rebuttal report, Mr. Clark modifies certain expenditure categories he treated as direct costs of the ministry of religious services in his original report. Respondent's attack on Mr. Clark's modifications, however, is unwarranted. As noted above (supra at 267- 68), Mr. Clark's assignment in his original report (Ex. 98) and supplemental report (Ex. 99) was to identify only the DIRECT costs associated with the ministry of religious service and not to address what, if any, indirect costs might be associated as well. His purpose was to derive a "contribution percentage," namely a percentage of church receipts associated with the ministry of religious services that reflects the contribution portion of the dual-character payment. (Ex. 98, pp. 1-2, 15-16; Tr. 724). In so doing, he was required to consider several categories of Church expenditures, a portion of which were directly related to the ministry of religious services -- FSM (Fundraising) Commissions, Postage and Carriage, Dissemination, and Printing and Stationery -- and a portion of which also was related to other church activities. (Ex. 129, p. 16).

Mr. Clark MIGHT have resolved the issue wholly in the petitioners' favor by treating the entire amounts as indirect expenses not directly associated with the ministry of religious services. Alternatively, he COULD have sought to apportion these expenditure categories between the ministry of religious services and other expenditure categories as he did for certain other disbursement categories (Travel and Transportation, Telephone, etc.), whether based on interviews of church accounting staff (Tr. 1309-10) or some other reasonable estimate. Instead, Mr. Clark took the most conservative approach and treated the ENTIRE amount as a direct cost of the ministry of religious services. (Ex. 129, pp. 16-17; Tr. 737- 39, 742-44). By so doing, he necessarily overstated the amount of direct costs associated with the ministry of religious services, thereby understating the contribution percentage. (Id.) In short, because indirect costs were not to be allocated in his original assignment, Mr. Clark could either exclude these expenses in total, apportion them in some manner, or include them; he took the most conservative approach by including all of them as direct costs of training and processing.

Mr. Clark's assignment for his rebuttal report, however, was very different. There he determined a reasonable method for allocating indirect costs to the ministry of religious services, both to demonstrate the defects in the cost accounting methodology of respondent's expert and to identify a reasonable method for allocating indirect costs, should the Court find that allocation of indirect costs is required here. (Ex. 129, p. 13). Once the exclusion of indirect costs was lifted from his original assignment, however, Mr. Clark specifically concluded that "reconsideration of the allocation to direct costs of delivering religious services may be necessary." (Id., p. 16). Mr. Clark states:

Some of the costs which I had categorized in the Report as

direct costs of delivering religious services -- dissemination, postage and carriage, printing and stationery, and FSM commissions -- are in fact direct costs, at a minimum, of both revenue and non revenue producing activities, and possibly in part nonallocable management and overhead as well. Indeed, these disbursement categories might have included direct costs of two or more activities and indirect costs. In preparing my original methodology, I included the entire amount of these costs as a direct cost of delivering religious services. The reason is that

at least a portion of these costs were strongly associated with religious training and processing. Allocation in this manner was adverse to petitioners' interests, in that it yielded a lower donation percentage than a more liberal model would have yielded.

(Id.) It was entirely appropriate for Mr. Clark to reconsider his

initial classification of these expenditure categories as direct costs, since they clearly benefit more than one activity segment. Respondent's argument that Mr. Clark's reclassification of these expenditure categories is improper is unpersuasive.

Initially, respondent seems to argue that Mr. Clark's original categorizations of certain costs as direct somehow acquired the binding force of a stipulation or concession through the discovery process in these cases. (Resp. Br. at 123-24). However, respondent's interrogatories asked petitioners only to identify those expenses "specifically traceable to the delivery of religious services" and "[a]ll expenses that were overhead costs." (Id. at 123) (emphasis deleted). Respondent's interrogatories did not inquire into the reasons the various expenditure categories were so classified. Mr. Clark had been identified as petitioners' accounting expert for the dual payment issue in connection with the Teagardens' June 17, 1991 Offer of Proof. /109/ Respondent had ample opportunity to pursue discovery of "the subject matter and the substance of the facts and opinions" of Mr. Clark's expert testimony, /110/ and even to seek to depose him, /111/ if respondent felt the need to do so. Respondent did neither.

Respondent also argues unpersuasively (and inaccurately) that "Mr. Clark's attempt to redefine terms on or near the last day of trial is inappropriate." (Resp. Br. at 126). Mr. Clark's rebuttal report was provided to respondent on April 9, 1992. Respondent had timely notice of Mr. Clark's reasons for his initial treatment of these items and for his subsequent departure from that treatment. Moreover, respondent specifically cross-examined Mr. Clark on this point during his rebuttal testimony, and Mr. Clark clearly explained that his different treatment of these items flowed from the different natures of his respective assignments under his original and rebuttal reports. (Tr. 1323-26).

Mr. Clark's rebuttal methodology does not "impl[y] that he previously only partially complied with the functional classification requirements." (Resp. Br. at. 127). His original report did not in any way apply the functional classification requirements because he was not allocating indirect costs. Rather, he looked only to a single category -- ministry of religious services ("training and processing") -- to determine the associated direct costs. His other categories were used only (1) to exclude receipts from the religious services column and (2) to determine that certain costs (bookstore) did not belong in the religious services column.

Mr. Clark's reclassification of four expenditure categories in his rebuttal report poses no "paradox" as to whether "the subject expenses did 'in fact' contain direct costs of nonrevenue producing activities, or if they 'might' have included such costs." (Resp. Br. at 138). Respondent quotes from Mr. Clark's rebuttal report as follows:

Some of the costs which I had categorized in the Report as

direct costs of delivering religious services -- dissemination, postage and carriage, printing and stationery, and FSM commissions -- ARE IN FACT DIRECT COSTS, AT A MINIMUM, OF BOTH REVENUE AND NON REVENUE PRODUCING ACTIVITIES, and possibly in part nonallocable management and overhead as well. Indeed, these disbursement categories MIGHT HAVE INCLUDED DIRECT COSTS OF TWO OR MORE ACTIVITIES AND INDIRECT COSTS. * * *. The reason [for the original allocation] is that at least a portion of these costs were strongly associated with religious training and processing.

(Id. 137, quoting from Ex. 129, p. 16, emphasis added and deletions

made by respondent). The meaning of Mr. Clark's statement is self-evident: Expenditure categories that Mr. Clark included in his original report as direct costs of religious services in fact were allocable AT MINIMUM both to religious services and to non-revenue-producing activities, and, IN ADDITION, might include management and overhead (indirect) as well.

Respondent's assertion that "all the advertisements produced by the petitioners relate almost exclusively to training and processing" (Resp. Br. at 139) is inaccurate and misleading. The statement is inaccurate because it ignores the 1970 church publication in the record, entitled "What Your Donations Buy" (Jt. Ex. 21-U), that says virtually nothing about religious services themselves. The statement is misleading because it ignores the fact that the document referred to in respondent's brief, a 1987 publication entitled "Reach for Total Freedom Now" (Jt. Ex. 18-R) was produced to respondent in response to a request for a description of the religious services ministered by churches of Scientology /112/ and was included as a Joint Exhibit at RESPONDENT'S request. /113/

There is no contradiction between Mr. Clark's alternative methodologies. (Resp. Br. at 139). Mr. Clark's original report clearly defines overhead as "expenses which are not directly associated with the delivery of religious services" or paid from the separate bookstore bank accounts. (Ex. 98, pp. 11, 12). He makes the point even more clearly in his rebuttal testimony when he notes that the amounts he identified as "indirect" under his original methodology included "direct costs of non-allocable management, direct costs of non-revenue-producing-activities, non-allocable management and support, and other allocable overhead items." (Tr. 1291).

Finally, respondent argues that even if a portion of parishioners' payments in connection with religious services qualify as contributions, all of the FSM (Fundraising) Commissions nevertheless must be treated as direct expenses of ministering religious services, because "the cost is incurred with the objective of getting people to sign up for training and processing." (Resp. Br. at 141). This position is nonsense. Functional cost accounting principles clearly call for fundraising costs to be accounted separately from program costs. (Ex. 129, p. 5; Ex. 130, pp. 83-84, paragraph 87). Fundraising Commissions are paid on the full amount of parishioner contributions in connection with religious services. (Tr. 737-38, 756). If a parishioner's donation in connection with religious services is in part a payment of the cost of those services and in part a contribution to his church, then a Fundraising Commission calculated upon the entire payment necessarily is allocable both to the religious services and to the contribution. (Ex. 129, pp. 17-18).

In summary, respondent's various objections to Mr. Clark's reclassification of the four expenditure categories are unavailing: Mr. Clark was entitled to take different approaches in applying two separate and distinct methodologies for identifying the amount of costs incurred in ministering religious services to quantify the dual character of payments associated with those services.

(4) THE CLARK METHODOLOGY REASONABLY APPROXIMATES

THE SEGREGATION OF DIRECT AND INDIRECT COSTS
CALLED FOR UNDER AICPA STANDARD OF PROCEDURE
78-10.

Although unable to precisely apply the specific functional cost accounting standards under AICPA SOP 78-10, Mr. Clark has devised a method that approximates the effect of those standards. Mr. Clark identifies direct costs to the extent he is able and then treats the remainder as indirect costs allocable to and among the ministry of religious services and other church activities:

Because I am unable to apply the functional classification

to determine the direct costs of non revenue producing religious activities or of management and support services, I have, with two exceptions discussed below, left those costs not directly allocable to training and processing or the bookstore in a single category -- Indirect -- and allocated them under my methodology. The result is that the amount of indirect costs allocated to training and processing under my methodology is in excess of what would properly be allocable were I able at this time fully to apply the functional classification, because it includes amounts which are truly direct costs of segments other than training and processing and because I cannot identify other categories to which some of the actual indirect expenses ordinarily would be allocated. In other words, my methodology overstates the total cost of delivering religious services, resulting in an overstated cost percentage and an understated donation percentage, which is a lower percentage than the economic realities would otherwise warrant.

(Ex. 129, pp. 14-15).

Once again, respondent's objections are unpersuasive. It is true that Mr. Clark's new column in the summary sheets attached to his rebuttal report for "Non Revenue Producing Activities [and] Management Support" does not strictly follow "the type of functional classification contemplated by [AICPA] SOP 78-10." (Resp. Br. at 128). The question, however, is not whether Mr. Clark followed AICPA SOP 78-10 to the letter but rather whether, by seeking to apply the principles of functional cost accounting for nonprofits, Mr. Clark devised a method that reasonably measures the direct and indirect costs of ministering religious services to Scientology parishioners. AICPA SOP 78-10 does not require compliance with specific allocation procedures. To the contrary, SOP 78-10 states:

It is not the intention of this statement to require

organizations to undertake extensive detailed analyses and computations aimed at making overly meticulous allocations. The division recognizes that meaningful financial statements can often be prepared using estimates and overall computations when appropriate.

(Ex. 129, p. 14, quoting AICPA SOP 78-10 at p. 87).

Contrary to respondent's assertions, Mr. Clark was not "[s]imply guessing that there are certain activities which may incur some expenses" as a "justification for a separate column." (Resp. Br. at 129-30). Mr. Clark had personal knowledge of many of the non revenue- generating activities conducted by churches of Scientology. (Ex. 129; Tr. 1284, 1289). /114/ Irrespective of Mr. Clark's testimony, the record here, drawn from the expert testimony of Michael Rinder about Scientology practices and doctrine and from the representative testimony of several individual petitioners, clearly reveals numerous activities by churches of Scientology that do not generate revenues to the churches. Examples include (but are by no means limited to) local, national and international programs dealing with such social problems as drug abuse, illiteracy, environmental protection, abusive and dangerous psychiatric practices, reform of law enforcement, rehabilitation of criminals, and general morality. (See PPF 21-43). Any "lack of specificity" (Resp. Br. at 130-13l) pertains not to the churches' non revenue-producing activities but only to the precise costs associated therewith.

Mr. Clark was not saying that only the direct costs associated with the ministry of religious services is relevant (Resp. Br. at 130) but that the cost category (activity segment) for ministry of religious services is the only one relevant to determining a contribution percentage, so long as it includes a reasonable allocation of indirect expenses. It thus was unnecessary for Mr. Clark "to specifically identif[y] any of [the] 'non revenue producing activities.'" (Id. at 130). It likewise was unnecessary for Mr. Clark to "establish[] a nexus between any such activities and the expenses placed in the new column." (Id.) In any event, the only expenses that Mr. Clark placed under this "new" category were the cost categories allocated upon the basis of estimates from church staff (Telephone, etc. and Travel, etc.) and compensation related items that he already had allocated to the ministry of religious services. Mr. Clark excluded these items simply in order not to count them twice in allocating indirect expenses. (Tr. 1338).

Respondent's argument that the indirect costs to be allocated to the ministry of religious services must include management and general support is unsupported by the record. (Resp. Br. at 132-33). The excerpt from the United Way accounting publication respondent quotes (id.) indicates that for internal purposes non profits MAY allocate management and general costs among its various program service categories. Contrary to respondent's assertions, however, this statement does not support her conclusion that for tax purposes non profits MUST allocate management and general costs among their various program service categories. In fact, Form 990, Exempt Organization Information Return, and the return instructions expressly mandate that management and general expenses be reported separately from program services. (Ex. 129, p. 6). /115/

Professor Swenson also treats as allocable indirect costs certain expenditures that Mr. Clark treated as direct costs of church bookstores. Specifically, Mr. Clark treated all categories of expenditures paid from separate church bookstore accounts as direct costs associated with the bookstore (Ex. 98, pp. 12-15; Tr. 732), while Professor Swenson treated several of these categories -- Office and Admin, Hire of Equipment, Repairs & Maintenance, Rent, Rates & Insurance, Travel & Transport and Bank Charges -- as allocable indirect costs. (Ex. CC, App. B, pp. 1-2, 3 n.**). Mr. Clark clearly explained the reasons for his determination:

[B]ecause that was paid directly from the bookstore and because

we could associate it directly with their activities -- that is,
they would only pay for their own [expenses] -- I would say that
was a direct cost.

* * *

[Bookstores] do pay some [expenses] directly, and when they do,

I believe, from my experience with the books and records, that those are payments specifically for the bookstore.

(Tr. 1315). By contrast, Professor Swenson's report states:

While bookstore figures MAY have been traced to bookstore

accounts, in light of the nature of the expense and to obviate the need to look at source documents, it would be reasonable to allocate [the] entire amount as indicated [i.e., as allocable indirect costs rather than direct bookstore costs].

(Ex. CC, App. B., p. 3 n.**) (emphasis in original). Professor

Swenson thus ignored the direct relationship clearly established by payment from separate bookstore accounts (and confirmed by Mr. Clark's testimony) and recharacterized a number of expenditures in a manner favorable to respondent because he did not have access to source documents. Professor Swenson's recharacterization of these items must be rejected. /116/

Ultimately, respondent's objections boil down to the acknowledged fact that Mr. Clark cannot fully apply the functional cost accounting standards of AICPA SOP 78-10. The question simply is whether it is preferable to apply the principles of the appropriate analytical model -- the model for nonprofit organizations -- despite the inability to fully apply the underlying accounting conventions, as Mr. Clark did, or to reject the correct analytical model in favor of a wholly inappropriate one -- the model for taxable commercial entities -- as Professor Swenson did. /117/ The question answers itself.

(5) THE TECH/ADMIN RATIO IS A REASONABLE METHOD

FOR ALLOCATING CHURCH OF SCIENTOLOGY INDIRECT

COSTS TO THE MINISTRY OF RELIGIOUS SERVICES;

PROFESSOR SWENSON'S REVENUE/PAYROLL METHOD IS

NOT

Once the direct costs from the ministry of religious services and the indirect costs to be allocated have been identified, the next step is to determine a "reasonable" method for allocating those indirect costs. The parties' experts have presented competing allocation methodologies for the Court's consideration.

Once again, Mr. Clark's cost allocation methodology begins with the proper analytical foundation by seeking a methodology "for the allocation of cost that would resemble or be more related to the functional activities of the church." (Tr. 1290). Mr. Clark then identified as an appropriate "cost driver" (in Professor Swenson's words) the "Tech/Admin" ratio. Mr. Clark stated in his report that the Tech/Admin ratio "provides the only contemporaneously recorded information which directly distinguishes between Training and Processing and other church activities. This ratio has a high degree of reliability and is directly on point to determining an estimate of expenditures for each of the two activities." (Ex. 129, p. 18). In his testimony in chief, he further stated that the Tech/Admin ratio is a contemporaneous Church record identifying on a weekly basis the number of people who are either engaged in the ministry of religious services ("tech") or other activities of the church ("admin"). (Tr. 735). He elaborated on this point in his rebuttal testimony, stating that the Tech/Admin ratio "is from personnel records which weekly accumulate the number of personnel engaged in the delivery of religious services or other staff engaged in the other activities of the Church," and concluded that the Tech/Admin ratio is an appropriate measure for allocating indirect costs to the ministry of religious services because "[it] was contemporaneously kept and * * * related to the question at hand [--] * * * what is the relationship between the delivery of religious services, and the other activities of the church." (Tr. 1297).

The "revenue/payroll" method proposed by Professor Swenson suffers from two separate defects, either of which independently precludes its use. First, Professor Swenson's methodology uses revenues as one of its principal "cost drivers" in deriving an allocation formula. This formula reflects Professor Swenson's underlying premise that costs are attributable only to activities that produce revenues (Tr. 927-28) and leads to the implicit conclusion that churches of Scientology only have revenue-producing activities. This view cannot be reconciled with the character of the donees as tax-exempt, nonprofit churches (Stip. paragraphs 87-91), with the unrebutted evidence here of substantial and varied church activities that do not produce revenues (PPF 21-43), or with the accepted functional cost accounting principles for nonprofit organizations. (See supra at 270-75). /118/ Indeed, the relevant Treasury regulations addressing the allocation of expenses (direct and indirect) between exempt and taxable activities for calculating unrelated business taxable income specifically reject revenue-based allocation. /119/ In short, respondent and her expert effectively disregard the stipulations herein that all of the donees are qualified charitable donees under section 170(c)(2) /120/ and seek to treat the donee churches as for-profit commercial organizations. /121/

Second, when applied to the purpose for which Church of Scientology costs are being identified in this proceeding -- to measure the contribution portion of dual character payments in connection with participation in religious services -- Professor Swenson's methodology creates an inescapably circular calculation: total training and processing revenue is used to allocate indirect expenses in order to determine total costs of ministering religious services in order to derive a contribution percentage. The contribution percentage so derived, however, is then applied to those same total training and processing receipts to determine the contribution portion of those same receipts. (Ex. 129, pp. 8, 17-18). Professor Swenson himself implicitly acknowledged this defect when he confirmed on cross-examination that under his methodology, donations should be considered a separate revenue source. (Tr. 929).

Respondent's criticisms of using the Tech/Admin ratio to allocate indirect costs to the ministry of religious services are unpersuasive. Contrary to respondent's arguments (Resp. Br. at 142), the Tech/Admin ratio is more than adequately defined. The policy letter that instructs church staff how and why to keep this regular record -- included in the record as Joint Exhibit 17-Q at respondent's insistence /122/ -- is clear on its face. Staff involved in the ministry of religious services are considered to be technical (Tech) staff, while everyone else is considered to be administrative (Admin) staff. (Jt. Ex. 17-Q, p. 1; Tr. 735). /123/

None of respondent's litany of instances in which "[t]he record is devoid of specific evidence regarding" aspects of the Tech/Admin ratio (Resp. Br. at 143 n.46) is well-founded. As an expert, Mr. Clark is entitled to rely upon and testify regarding hearsay or matters otherwise not in evidence provided it is the sort of evidence that experts in his field generally rely upon. Fed. R. Evid. 703. Mr. Clark's testimony clearly lays the requisite foundation for his use of and testimony about the Tech/Admin ratio. Respondent concedes that the ratio can be derived from Mr. Clark's dual payment summary sheets attached as exhibits to his reports. (Resp. Br. at 143 n.46). Respondent, however, conveniently fails to mention that petitioners' counsel provided respondent prior to trial with actual Tech/Admin sheets of many of the donee organizations, which, of course, themselves identified the ratio. /124/ Respondent, of course, could have offered them herself or sought to clarify information from them with Mr. Clark. Once again, she did neither and now seeks to use her brief to overcome deficiencies in her trial strategy.

Respondent argues that use of the Tech/Admin ratio "allocates an unreasonably low amount of indirect expenses" to the ministry of religious services. (Resp. Br. at 143-44). This position, however, assumes, without foundation and contrary to the record, that the expenses of management and support must be included in the allocable indirect costs. (See supra at 283-84). Respondent's argument that this method is unreasonable because it allocates on average two- thirds of indirect costs away from ministry of religious services (Resp. Br. at 144) again reflects her refusal to accept the existence of meaningful non revenue-generating activities in the absence of specific proof of significant associated costs. (See supra at 273-75 & n. 108). Respondent's argument that the Tech/Admin ratio is not the sort of detailed time record contemplated by AICPA SOP 78-10 (Resp. Br. at 143) likewise reflects her refusal to recognize the acceptance of functional cost accounting principles applicable to non profits when they cannot be applied to the letter.

As with the rest of his methodology, Mr. Clark's use of the Tech/Admin ratio as the basis for allocating indirect costs simply reflects his consistent effort to apply the principles and approximate the results of the accepted functional cost accounting principles for nonprofit organizations. Use of the Tech/Admin ratio does not depart significantly from AICPA SOP 78-10, which expressly states that "[a]lthough the following allocation procedures are illustrative * * * only[,] using them or similar procedures ordinarily results in a reasonable allocation of an organization's multiple function expenses." (Tr. 1337-38). Mr. Clark specifically testified, without contradiction, that he considered the Tech/Admin ratio to be a type of "evaluation of [the] preceding year's records, time records or activity reports of key personnel" specifically mentioned in SOP 78-10. (Tr. 1327-28). Indeed, the Tech/Admin ratio is superior to those listed in at least one respect because it records all church staff, not just key personnel.

Respondent's own expert acknowledges that there can be more than one reasonable method for allocating indirect costs. (Tr. 936). Case law here and other tax authorities addressing the allocation of indirect costs, albeit in other contexts, likewise recognize that no one methodology is necessarily correct. /125/ In a different context, this court has stressed where the taxpayer's consistent manner for allocating indirect costs is reasonable, the taxpayer should be required to continue to use that method even if another method more favorable also might be reasonable under the circumstances. Bay Company v. Renegotiation Board, 38 T.C. 535, 546 (1962) (excess profits case). Here, of course, the donee churches have not previously employed any method for allocating indirect costs because "the Churches never have had any reason to summarize their disbursements under the functional classification." (Ex. 129, p. 14). Nevertheless, the Tech/Admin ratio is a consistent, contemporaneous method for segregating between the ministry of religious services and all other church functions which the donees have kept and relied upon for other purposes.

Here, too, we face the same ultimate question: Is it more reasonable to use a methodology that seeks to apply the principles and approximate the results of the correct analytical model -- functional cost accounting -- as Mr. Clark does, or to reject that model in favor of a model -- the revenue model -- wholly alien to the non profit, tax-exempt character of the donees and wholly inconsistent with the uncontradicted evidence in the record of the donee churches' significant nonrevenue-generating activities, as Professor Swenson does? Here too, the question answers itself.

(6) APPENDIX "(A) TO RESPONDENT'S BRIEF ON THE

MERITS MUST BE DISREGARDED

Appendix "A" to Respondent's Brief, purporting to apply Professor Swenson's methodology for allocating Church of Scientology indirect costs, must be disregarded. Although the Court denied petitioners' pretrial motion in limine to exclude Professor Swenson's report and to preclude his testimony with respect to his cost methodology (Tr. 23-24), the Court specifically held that Professor Swenson "will not be allowed to apply the formula or do anything else that wasn't done in the report." (Tr. 23). The Court thus already has rejected the position first asserted in respondent's opposition to petitioners' motion in limine /126/ and restated in respondent's brief /127/ that application of Professor Swenson's methodology is simple arithmetic akin to a Rule 155 computation.

Petitioners' eventual success in deciphering this methodology sufficient to confirm its application in cross-examination of Professor Swenson (Tr. 899-915) cannot obscure the extensive work it took for petitioners' accounting expert to prepare counsel for this cross-examination. Respondent, through her Appendix A, seeks to use her brief to cure deficiencies in the testimony and report of her accounting expert. Respondent's Appendix A is a transparent effort to circumvent both Rule 143(b), which specifically states that assertions on brief are not evidence, and Rule 143(f), which sets forth how expert evidence must be presented to the Court. See Snyder v. Commissioner, 93 T.C. 529, 531-35 (1989).

Respondent's Appendix A is objectionable for a second and independent reason, because the methodology used to derive the percentages therein differs materially from Professor Swenson's testimony on cross-examination. During extensive cross-examination, Professor Swenson confirmed application of his methodology item by item to yield a contribution percentage of about 5% for the Church of Scientology of Missouri for 1988. (Tr. 899-915, 931). Now, however, respondent's Appendix A reports a 1988 contribution percentage for the Missouri Church of 25%, without any explanation for the significant difference in results. At bare minimum respondent's Exhibit A must be disregarded because it does not properly apply the methodology in the manner described by respondent's own expert witness. Respondent's revision certainly is closer to the correct figure, and petitioners do not wish to appear ungrateful. Nevertheless, this striking discrepancy clearly belies respondent's facile suggestion that application of Professor Swenson's methodology is simple arithmetic and strongly indicates the fundamental unsoundness of his entire approach.

(7) CONCLUSIONS REGARDING COMPETING COST

ALLOCATION METHODS

The principles governing evaluation and use of expert testimony

in this Court are clear:

We evaluate [expert] opinions in light of the demonstrated

qualifications of the expert and all other evidence of value. Estate of Newhouse v. Commissioner, 94 T.C. 193, 217 (1990); Parker v. Commissioner, 86 T.C. 547, 561 (1986); Johnson v. Commissioner, 85 T.C. 469, 477 (1985). We are not bound, however, by the opinion of any expert witness when that opinion is contrary to our judgment. Estate of Newhouse v. Commissioner, supra at 217; Parker v. Commissioner, supra at 561. We take expert opinion testimony into account to the extent it aids us in [resolving the issue before the court]. We may accept or reject the opinion of an expert in its entirety. Buffalo Tool &

Die Manufacturing Co. v. Commissioner, [74 T.C. 441,] 452 [1980].

Jefferson-Pilot Corp. v. Commissioner, 98 T.C. 435, 450-51 (1992).

Under these principles, the Court should accept Mr. Clark's testimony in its entirety and reject in its entirety the testimony of Professor Swenson.

The ultimate measure of an expert's reliability, of course, is the soundness and persuasiveness of his report and testimony. Professor Swenson comes up short. Professor Swenson stubbornly insists on applying a cost allocation methodology that is wholly inappropriate for the non profit, tax-exempt entities involved in these cases. Indeed, he rejects application of what he recognizes to be the appropriate analytical model -- functional cost accounting for non profits -- because it cannot be applied according to the letter of AICPA Statement of Procedure 78-10. Likewise, his method for allocating indirect costs, by its very assumptions, precludes the possibility that churches of Scientology have any costs associated with non revenue producing activities. Despite all his academic credentials, Professor Swenson either failed (or was not permitted) to go beyond the narrow confines of his initial assignment /128/ to provide useful guidance to the Court on the actual question before it -- how to measure the potentially deductible portion of dual character payments to churches of Scientology in connection with the ministry of religious services.

Mr. Clark's expert testimony and report present a stark contrast to Professor Swenson's. Mr. Clark has substantial practical experience in all aspects of accounting. (Ex. 98, pp. 3-4; Ex. 98(1); Tr. 717-24). Moreover, Mr. Clark has substantial practical experience with financial records kept by churches of Scientology. (Ex. 98, pp. 4-9). He identified the analytical model -- functional cost accounting principles for nonprofit organizations -- appropriate for the facts of these cases. He identified costs directly associated with the ministry of religious services. He identified a contemporaneous church personnel record to use to allocate indirect expenses -- the Tech/Admin ratio -- that distinguishes between the ministry of religious Services and other church activities. He resolved Several ambiguities in a conservative manner that understates rather than overstates the contribution percentages. Should the Court decide that indirect costs are to be considered in applying the dual payment doctrine in these cases, the Court should accept in its entirety the contribution percentages determined by Mr. Clark in his rebuttal report. (Ex. 129).

c. THE COURT IN ANY EVENT MAY DETERMINE THE DEDUCTIBLE

PORTION OF PETITIONERS' PAYMENTS IN CONNECTION WITH
THEIR PARTICIPATION IN RELIGIOUS SERVICES UNDER
COHAN PRINCIPLES

Petitioners believe that Mr. Clark's expert testimony here is more than adequate to establish the deductible portion of their payments to donee churches of Scientology whether such determination is limited to the churches direct costs (see 264-68, supra or includes indirect costs as well. (See 268-96, supra). Irrespective of the competing cost allocation methodologies, however, the record here clearly establishes that in every case the petitioners' payments substantially exceeded the costs of providing religious services. Thus, even if the Court should decline to accept in its entirety either of Mr. Clark's dual payment methodologies, the facts here clearly warrant the determination of deductible contribution percentages for each of the petitioners under the rule of Cohan v. Commissioner, 39 F.2d 540 (2d Cir. 1930). /129/

Contrary to respondent's arguments (Resp. Br. at 151-54), petitioners are not asking the Court to use Cohan to determine a single, uniform contribution percentage to be applicable to all taxpayers for all years. Any Cohan determination here necessarily will be limited in the first instance to the petitioners herein and will not set forth an unassailable standard for other taxpayers in other cases. /130/

The question of the Service's authority to adopt a single contribution percentage for all churches of Scientology is not directly before the Court; petitioners clearly are not asking the Court to order the Service to do so, and such relief is likely beyond the Court's jurisdiction. Rather, the Service's authority in this regard was raised simply to respond to respondent's periodic objection during these cases to applying the dual payment doctrine based on the feared administrative burden of applying the rules case by case and year by year. /131/

Respondent's argument that determining a single contribution percentage here would "provide deductions [where] none exist" (Resp. Br. at 153) misses the mark. If the "taxpayer's actual contribution percentage is 20%" (id,) the Court would never reach Cohan because the taxpayer necessarily would have established his or her entitlement to deduct that 20%. Any Cohan determination here, whether individually or class-wide, necessarily requires the Court to find that the petitioners have not proven a specific contribution percentage.

Neither does the possibility of administrative adoption of a single contribution percentage for all churches place respondent in a potential whipsaw position with respect to Scientologists contributing to churches with higher contribution percentages than the single agreed-upon figure. The record here makes amply clear that development of any dual payment contribution percentage for any church of Scientology requires the active assistance of the church itself as well as expert accounting assistance. No individual taxpayer or group of taxpayers would have sufficient amounts at stake to undertake such litigation on their own.

Of course, petitioners believe the Court need not need reach the Cohan issue because the record here establishes their entitlement to deduct the specific percentages determined by Mr. Clark in his expert reports.

2. PETITIONERS KNEW THEIR CONTRIBUTIONS EXCEEDED THE COSTS

THEIR CHURCHES INCURRED TO PROVIDE RELIGIOUS SERVICES
AND WILLINGLY PAID THE EXCESS AMOUNT AS A CONTRIBUTION

The record is replete with detailed information about the extensive public benefit and social betterment activities of Churches of Scientology. Local churches work in close cooperation with leaders in their communities to identify the most serious social local problems to which the churches then can contribute to remedying. (PPF 23). Local churches assist to remedy social problems as diverse as gangs and graffiti (PPF 25), underprivileged and abused children (PPF 24, 25), community outreach to the elderly (PPF 24), environmental protection (PPF 27) and drug abuse. (PPF 28). Through the Mother Church, CSI, and various church-sponsored organizations, churches of Scientology work extensively to combat drug abuse, (PPF 33, 34) to rehabilitate drug users (PPF 35) and convicted criminals (PPF 36), to expose and eliminate abusive and harmful psychiatric practices (PPF 41, 42), to promote reform of law enforcement (PPF 43), to eliminate illiteracy (PPF 39) and to promote general morality. (PPF 40).

All of the public benefit and social betterment activities of the churches of Scientology are funded by local churches themselves directly or through their support of the Mother Church, CSI. (PPF 29-31). Moreover, all of these public benefit and social betterment activities take place against a backdrop of religious worship and proselytization, two inherently charitable activities.

The record also is replete with evidence of the petitioners' donative intent. When they made their contributions, petitioners understood that only a portion of their payments were used to pay the costs incurred by their churches in providing the associated religious services and that the balance of their donations was used to carry out other important church activities. (PPF 91). Petitioners acquired this knowledge both from church publications and from their own involvement in community betterment activities with their churches. (PPF 92-94).

None of the petitioners felt that he or she was under any compulsion to donate some predetermined amount of money in order to participate in his or her churches' religious services. (PPF 44-49). Each of the petitioners was aware of numerous alternative ways they could receive their churches' religious services without payment of fixed donations, and each chose of his or her own free will the manner in which he or she would contribute to the churches' religious program. (PPF 332, 334-343).

These facts establish a donative context: only the most hardened cynic could conclude that the "purchase" of Scientology religious services is no different than the purchase of a purely commercial commodity or that Scientology parishioners have no motivation higher than Serving themselves. Moreover, the facts establish that each petitioner knew his or her monetary contribution exceeded the costs his or her church incurred to provide the Services. (PPF 91). Each petitioner willingly contributed the excess anyway. (PPF 91-94). The Court need not inquire further to satisfy itself of these petitioners' donative intent. American Bar Endowment, supra, 477 U.S. at 118 ("The taxpayer, therefore, must at a minimum demonstrate that he purposely contributed money or property in excess of the value of any benefit he received in return.").

Respondent assumes for the sake of argument that the service- provider's cost is the relevant valuation reference but argues that petitioners fail the "donative intent" prong of the "dual payment" doctrine, because they were not aware to a reasonable certainty of the amount by which their payments exceeded the value of the Services they received. (Resp. Br. at 101-104). Where, as here, the facts and circumstances clearly establish a donative setting, the taxpayer's lack of knowledge of the exact amount of the gift cannot preclude a finding of donative intent. (See supra at 257).

Finally, respondent argues that the same external features that, she contends, establish a quid pro quo relationship between the petitioners' payments and the associated religious services also establish that petitioners lacked donative intent. /132/ (Resp. Br. at 104-06). Here again, both the factual premise and the theoretical underpinnings of respondent's argument suffer from respondent's disregard for the material facts: that is, respondent once again ignores the donative context in which the contributions are made and concludes that a fixed price system of contributions per se precludes any donative intent. As discussed above at 255-57, parishioner contributions have unmistakable donative trappings, and where payment for religious services is made only in a donative context, the fixed price is, at most, mildly probative on the subject of intent. Once again respondent seeks to treat the donee churches as if they were for-profit taxable entities, despite the fact that respondent herself has stipulated that all (and has searately recognized that most) are qualified charitable donees under section 170(c)(2).

C. IF COST AS THE MEASURE OF THE NON DEDUCTIBLE QUID PRO QUO IN

CHURCH OF SCIENTOLOGY FIXED DONATIONS CREATES EXCESSIVE FIRST AMENDMENT ENTANGLEMENT WITH INTERNAL CHURCH MATTERS, THE APPROPRIATE REMEDY IS TO ALLOW (NOT TO DISALLOW) THE FULL AMOUNT OF SCIENTOLOGY FIXED DONATIONS

Noting that footnote 12 of Hernandez, 490 U.S. at 698, leaves open the possibility that IRS inquiry into a church's expenses could result in prohibited entanglement (Resp. Br. at 118, respondent asserts that "ANY inquiry into Church of Scientology expenses (within the context at hand) may be inappropriate." (Resp. Br. at 118). Respondent then argues that "the barrage of conflicting evidence and testimony on cost and cost allocations in the instant eases demonstrates that entanglement and accounting problems effectively prevent this Court from arriving at an accurate determination of true "`cost.'" (Id.) Respondent's unstated conclusion is that as a result of the potential entanglement, petitioners here cannot be permitted to use cost to measure the nondeductible return benefit of their contributions to the donee churches of Scientology. Once again, respondent has it wrong.

If identifying and quantifying the donee churches' costs of ministering religious Services to their parishioners creates excessive entanglement, as respondent argues, then the Service and the courts are left with NO constitutionally permissible method to measure the nondeductible return benefit. In such a case, the consequence is that the taxpayers' contributions would be fully deductible, not fully disallowed as respondent implies: The tax- exempt, charitable status of the donee churches and the absence of a competitive commercial market to value comparable benefits warrant the conclusion that the entire payment is a charitable gift, despite its formal quid pro quo structure. See Crosby Valve & Gauge Co. v. Commissioner, 380 F.2d 146, 147 (1st Cir.), cert. denied, 389 U.S. 976 (1967) ("[In the case of a contribution to a charitable organization, the law's policy finds charity in the purposes and works of the qualifying organization . . . ."). Moreover, the deduction should be allowed in full under constitutional principles of accommodation of religion in view of the widespread recognition of the charitable nature of religious observances. See, e.g., Corporation of the Presiding Bishop v. Amos, 483 U.S. 327 (1986) (sustaining exemption from prohibition of religious discrimination in employment for church-afffliated non profit organizations as a permissible accommodation of religion); id. at 345 (Brennan, J., concurring) ("[A] categorical exemption for nonprofit activities * * * demarcates a sphere of deference with respect to those activities most likely to be religious.").

Contrary to respondent's argument, it is respondent and not petitioners seeking to "hide behind the Constitution." (Resp. Br. at 118). Indeed, the Hernandez Court's approval of cost to the donee as an alternative measure of the nondeductible return benefits was its specific response to petitioner's argument that valuing religious Services would violate entanglement principles of the Establishment Clause. (See supra at 247-53). The Hernandez Court thus clearly recognized that the proper remedy for excessive entanglement would be to permit rather than to disallow the full amount of charitable contribution deductions at issue. Indeed, to hold that cost cannot constitutionally be used in this context would throw into question the entire analysis adopted by the Supreme Court in Hernandez and reopen the question of whether, consistent with the Establishment Clause, deductions can be disallowed in connection with religious services.

Rather than directly addressing the entanglement issue arising from a cost-based dual payment inquiry, it would seem preferable to find another approach to resolve the issues presented by these eases. As discussed above (at 238-43), petitioners believe that existing law already provides such a solution. Respondent's consistent position with respect to religions other than Scientology is that the benefit to parishioners from payments to participate in the religious services of their churches is incidental to the public benefits from organized religion. The same conclusion with respect to Scientology is inescapable -- the individual benefit from contributions to participate in the religious services of Scientology are incidental to the public benefits from Scientology as an organized religion. If the Court holds, as it should, that petitioners' payments are fully deductible under section 170 as interpreted by Hernandez, then it need not reach the potential entanglement issues from a cost-based dual payment methodology. /133/

CONCLUSION

The question presented here is simple -- will this Court leave uncorrected respondent's longstanding, systematic and continuing unequal treatment of Scientologists vis-a-vis similarly-situated taxpayers of other religious faiths? More specifically, will the Court consign petitioners to have no remedy for the differential treatment imposed on them merely on account of their religion?

The record overwhelmingly establishes that the structure of contributions to churches of Scientology and to many other religions for participation in religious services do not materially differ. Nevertheless, respondent, as a matter of policy and practice, has systematically disallowed deductions to Scientologists for donations to their churches, while at the same time systematically allowing taxpayers of many other faiths to deduct payments that are materially indistinguishable.

Even if Scientologists' contributions in connection with their participation in religious Services are nondeductible quid pro quo transactions, petitioners cannot be denied relief here while respondent adheres to a policy of treating comparable payments in other religions as deductible. This holding is necessary to remedy respondent's violation of her duties under the Code and the Constitution to provide equal protection under the law to similarly situated taxpayers and to maintain neutrality among religions. Respondent simply cannot justify her complete failure to investigate and administer the statute evenhandedly.

Petitioners believe, however, that the record here -- a record developed much more fully than that in Hernandez -- establishes that contributions to churches of Scientology are NOT structured as quid pro quo transactions. Moreover, the benefits to parishioners from participation in Scientology religious services are just as incidental to the public benefit from those services as are the personal benefits to parishioners from religious services in other faiths, benefits that respondent routinely has held to be incidental. Payments for Services rendering incidental personal benefits are fully deductible charitable contributions.

Alternatively, petitioners are entitled at minimum to deduct the portion of their contributions in excess of the costs to their donee churches of providing religious services. Petitioners believe that only direct costs may be taken into account, but even if indirect costs are included as well, the record establishes that a significant portion of each petitioner's contribution is deductible.

For the foregoing reasons, petitioners request that the Court rule in their favor on all issues raised in this litigation.

Respectfully submitted,

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Dated: January 19, 1993

FOOTNOTES

/1/ Local church activities in Los Angeles provide a useful example, because of the number of churches located there, including Church of Scientology International (Ex. 79, cover page), Church of Scientology Western United States (Stip paragraph 14; Tr. 131, 140), and Church of Scientology of Los Angeles. (Stip paragraph 36).

/2/ Petitioners hereby withdraw their objections to the admission of Joint Exhibits 19-S and 20-T they reserved in paragraph 58 of the Stipulation of Facts.

/3/ A Mormon bishop is the religious leader of a ward, comparable to a pastor or priest within a parish, although the position is not vocational. (Tr. 604).

/4/ The Respondent does argue that, even if an equal protection violation has occurred, it cannot be remedied in these cases. This meritless contention is addressed in Part II, infra.

/5/ It was the majority's view that this claim had been framed in the courts below as one of selective prosecution, and had been refocused in the Supreme Court for the first time as a claim that the IRS had engaged in administrative inconsistency. Id. at 700. Here, the claim is of administrative inconsistency.

/6/ See Moritz v. C.I.R., 469 F.2d 466 (10th Cir. 1972), cert. denied, 412 U.S. 906 (1973); Xerox Corp. v. United States, 656 F.2d 659 (Ct. C1. 1981); Sirbo Holdings, Inc. v. Commissioner, 476 F.2d 981, 987 (2d Cir. 1973) ("[T]he Commissioner has a duty of consistency toward similarly situated taxpayers; he cannot properly concede capital gains treatment m one case and, without adequate explanation, dispute it in another having seemingly identical facts which is pending at the same time."), aff'd after remand, 509 F.2d 1220 (2d Cir. 1975); Ogiony v. C.I.R., 617 F.2d 14, 18 (2d Cir.) (Oakes, J., concurring) ("[C]onsistency over time and uniformity of treatment among taxpayers are proper benchmarks from which to judge IRS actions."), cert. denied, 449 U.S. 900 (1980); Buccino v. United States, 3 Cl. Ct. 658, 662 (1983) ("[T]he Commissioner of the IRS has an affirmative obligation to fairly and uniformly administer the tax statutes so as not to discriminate between taxpayers similarly situated."). See also Vesco v. Commissioner, 39 T.C.M. (CCH) 101 (1979).

See also Baker v. United States, 748 F.2d 1465, 1467 (11th Cir. 1984) (citing Justice Frankfurter in Kaiser). Baker is one of numerous cases in which courts have recognized the IRS' duty of consistent treatment in the context of determining whether the IRS has abused its discretion granted under section 7805(b) by applying new ruling retroactively to one taxpayer and applying it prospectively to other, similarly situated taxpayers. See, e.g., International Business Machines Corp. v. United States, 343 F.2d 914, 920 (C1. Ct. 1965), cert. denied, 382 U.S. 1028 (1966) (quoting Justice Frankfurter's declaration in Kaiser that the "Commissioner cannot tax one and not tax another without some rational basis for the difference," and stating "[t]his factor has come to be recognized as central to the administration of [section 7805(b)]"). See also Exchange Parts Co. v. United States, 279 F.2d 251, 254 (C1. Ct. 1960). All of the cases cited in the previous paragraph address the IRS's general duty of consistency, not its duty to exerciSe its discretion equitably under section 7805(b).

/7/ In Apache Bend, the plaintiff challenged the more favorable treatment that other taxpayers received. Rehearing en banc was granted on the issue of whether the plaintiff had standing to seek reversal of other taxpayers' tax treatment. Here, of course, petitioners challenge the tax treatment they themselves have received.

/8/ The Supreme Court has long held that the Establishment Clause reaches governmental action taken under authority of law. See Engel v. Vitale, 370 U.S. 421, 422-23 (1962); Life Science Church v. Internal Revenue Service, 525 F. Supp. 399, 408 (N.D. Cal. 1981).

/9/ Petitioners submit that the evidence in the record supports a finding of discriminatory intent. The Service systematically investigated the claimed deductions of Scientologists while requiring only proof of payment to a qualified donee from members of other religions. It also systematically disallowed Scientologists' deductions while systematically allowing the deductions of others. While petitioners believe there is sufficient evidence in the record to justify a finding of fact that there was an intent to treat Scientologists more harshly than others, see, e,g., Jt. Exs. 50-AX, 52-AZ, petitioners have not requested such findings because proof of such motive is not an element of petitioners' administrative inconsistency claim.

/10/ The dissent in Hernandez stated: "Just as the Minnesota statute at issue in Larsen v. Valente, 456 U.S. 228 (1982), discriminated against the Unification Church, the IRS' application of the quid pro quo standard here-and only here-discriminates against the Church of Scientology." 490 U.S. at 713 (O'Connor, J., disSenting). While the the Hernandez majority did not believe there was sufficient evidence in the record to decide the administrative inconsistency claim, it nowhere suggested that the standard of review was other than the standard of Larsen.

/11/ Petitioners sought and ultimately moved to compel discovery of any IRS justification of its inconsistent administration of section 170. Respondent, having cited only published rulings in response to petitioners' discovery, and, consequently, having been precluded by the Court from introducing any new justification at trial, Teagarden v. Comm'n, Docket No. 11708-89, Transcript of Proceedings, Feb. 12, 1992, at 12-13, 21, 23, 28-29, produced this one document on the eve of trial.

/12/ See Winters v. C.I.R., 468 F.2d 778, 781 (2d Cir. 1972) (payments constituted "tuition" in "anticipation of economic benefit" based on "the cost of educating [the taxpayers'] children," and were therefore nondeductible "family expenses"); DeJong v. C.I.R., 309 F.2d 373, 376 (9th Cir. 1962) (applying general rule "that tuition paid for the education of the children of a taxpayer is a family expense," relying on cases involving secular educational institutions); Oppewal v. C.I.R., 468 F.2d 1000, 1002 & n.2 (1st Cir. 1972) (payments "served the same function as tuition" even where "taxpayers' children would have received an education of the same academic quality" in a public school); see also Haak v. United States, 451 F. Supp. 1087, 1093 & n.7 (W.D. Mich. 1978).

/13/ For example, in its brief to the Second Circuit in Winters, the government argued that the applicable standard was whether "the payments were made with 'anticipation of an economic benefit' to the donor," (Gov't Br. at 6 in Winters v. C.I.R.) and that the payments were nondeductible because the taxpayers made them in anticipation of an economic benefit -- the education of their children. (id. at 6-7).

/14/ The government, relying on DeJong, itself acknowledged this point at p. 8 n.3 of its brief to the Second Circuit in Winter v. C.I.R.: ("It should be noted that the DeJong court did allow as a charitable deduction part of the taxpayers' payment to the school. In that case there was evidence that the taxpayers' payments exceeded the cost of educating their children.").

/15/ The testimony of other witnesses about Scientology religious services also shows the factual incorrectness of the revenue ruling. Several of the individual petitioners testified that auditing is an inherently religious process that has nothing to do with general education, vocational training or education in the history and tenets of the church. (See, e.g., Tr. 114, 126; Tr. 132, 137; Tr. 150).

/16/ Other Courts of Appeals that considered the cases based on the same record as Hernandez differed with the First Circuit on the relevance of the tuition cases. For example, the court in Staples v. Commissioner, 821 F.2d 1324, 1327 (8th Cir. 1987), vacated, 490 U.S. 1103 (1989), explicitly recognized the difference for tax deduction purposes between purely religious services and religiously-oriented secular services involved in the parochial school tuition cases.

The Chief Counsel of the Service has drawn a distinction between parochial school education and religious services, concluding that "essentially secular activities," including education, stand on a far different footing than "an inherently religious program." G.C.M. 35986 (Sept. 13, 1974).

/17/ The materials compiled by Prof. Beveridge reflect that synagogues rent out their facilities for social events, often at a discount to members. (See, e.g., Ex. 80 H 3, p. 2 (discount rental privileges a benefit of membership); Ex. 80 H 34, p. 2 (family membership privileges include "Bar and Bat Mitzvah ceremonies" AND "special rates for use of the facilities"); Ex. 80 H 43, p. 2 ("Special rates are available to members for use of . . . facilities for special occasions"); Ex. 80 H 58, p. 2 (membership privileges include "[s]pecial rates for personal use of Temple")).

/18/ As set out supra at 155-57, strict scrutiny is the appropriate standard of review of any justification offered by respondent. This standard is clearly not met, since, as established below, respondent has not even met the rational basis test.

/19/ "THE COURT: . . . I anticipate that our findings of fact are . . . going to be based on . . . conclusions as to the comparison between the Jewish practices and Scientology, the Catholic practices and Scientology practices, and the Mormon practices and Scientology practices, and . . . it's logical that the form take almost [a] table in terms of listing those specific ways in which the practices are the same or similar, and specific ways in which they differ."

/20/ The Court underscored the importance of these factors, particularly the mandatory nature of the payment, as the litmus test of the quid pro quo nature of the transaction. For example, the Court in essence found that there are "payments made to purchase services from other churches and synagogues," id. at 701, but that the crucial question of whether these payments are mandatory remained: "We do not know, for example, whether payments for other faiths' are TRULY OBLIGATORY or whether any or all of these services are generally provided whether or not the encouraged 'mandatory' payment is made." 490 U.S. at 702 (emphasis supplied).

Elsewhere, the Court stated that, "[A]scertaing whether a payment to a religious institution is part a of a quid pro quo transaction may require the IRS to ascertain from the institution the prices of its services and commodities, the regularity with which payments for such services and commodities are waived, and other pertinent information about the transaction." Id. at 696.

/21/ The Court listed several other factors as relevant to the inquiry: calibration of prices to lengths and levels of services, refunds, and use of "account cards." 490 U.S. at 691-92. As discussed infra, these factors for the most part provide no factual basis for distinction. In addition, unlike the three factors listed in the text above, they are not universal factors, but rather factors specific to the factual record in the case before the Court. Thus, while analogous factors proving the quid pro quo nature of the practices in other religions should be (and have been) proved, there should be no expectation that the precise factors found in Hernandez be replicated in the other religions.

/22/ Respondent's brief does not attempt to distinguish or even address the evidence of fixed, required payments for access to religious services within Hinduism, Zen Buddhism and the Worldwide Church of God. Respondent makes excuses for failing to address certain practices in other religions referred to by Dr. Melton without even acknowledging her evasion of the compelling factual record on these three religions. (See Resp. Br. at 53 n.5).

/23/ The remaining 16% are either located outside major centers of Jewish population or are in poor financial condition. (Ex. 80, p. 14, paragraph 24; Tr. 239-45).

/24/ In return for payment of their salaries to their Orders, members of Catholic Orders receive the right to remain members of the Order. (PPF 252).

/25/ Catholic Orders set 100% of members' salary earned outside the Order as the percentage they must pay to the Order. (PPF 255).

/26/ Respondent erroneously argues that because there is a variety of practice, it is not possible to reach a general conclusion that synagogue membership dues and ticket sales generally are quid pro quo transactions (Resp. Br. at 69-70), even though she "believes there is sufficient evidence in the record to establish that a rational basis exists upon which it could be concluded" that payments for tickets and memberships are distinguishable. (Resp. Br. at 73- 75). Respondent cannot have it both ways.

More importantly, respondent has chosen to overlook the compelling findings of Prof. Beveridge's comprehensive study, and the 67 volumes of supporting documentary materials which conclusively show that in synagogues serving 91% of members a quid pro quo transaction in the form of payment of membership dues or purchase of a ticket is required to gain admittance to High Holy Day services. At no point during the trial did respondent dispute the methodology or findings of the study.

/27/ As shown at trial and described infra, where High Holy Day service attendance is not limited to members, nonmembers must purchase tickets. (PPF 134-135). In addition, members seeking more seats than are allotted to them by virtue of their membership must pay for them. (See, e.g., Ex. 80 H 6, p. 3).

/28/ The assertion that nonpaying individuals are not turned away if seats are available (Resp. Br. at 72), is largely irrelevant since the record shows that space is usually not available. (See, e.g., Ex. 126, p. 71).

/29/ In some synagogues, access to other benefits, such as bar mitzvah instruction, is contingent on full payment of dues. (See, e.g., Ex. 80 H 12, p. 3).

/30/ Eighteen percent of synagogues include no High Holy Day admission in membership. In virtually all of these cases, the members are required to purchase tickets to High Holy Day services. Altogether some thirty percent of synagogues sell tickets to members either in addition to or instead of providing some seats to High Holy Day services as a benefit of membership. (Ex. 80, p. 13, paragraph 21; Tr. 236-37).

/31/ Some synagogues do not mention the possibility of reductions or waivers of membership dues in order to get more people to pay full membership dues and to derive more income for the synagogue. (Tr. 1220). Many Jews are unaware that exceptions to membership dues may be available. A study on the cost of affiliation to Jewish institutions commissioned by the American Jewish Committee has found that, "[o]ften, the availability of aid is not well publicized so that many in need remain unaware. Those who could be reached are not". (Ex. 80 D, p. 1).

The study also found that many Jews who are aware of the high cost of synagogue membership and who are aware of problems of getting assistance, including that the exceptions process may not be fair, equitable or confidential, "vote with their feet" and choose not to apply for synagogue membership. (Ex. 80, pp. 11-12, paragraph 19; Ex. 80 D, p. 1; Tr. 289-90; 1226).

/32/ Most of these are outside of major centers of Jewish population (defined as areas that have more than 50,000 Jews). The very few synagogues in major centers of Jewish population and that allow free admission appear to be in poor financial condition. (PPF 135).

/33/ Respondent's assertion that there are free High Holy Day services that are open to the public (Resp. Br. at 73), cannot withstand the documentary evidence that there are very limited services that are open to the public and free. Overwhelmingly, those who wish a seat must pay for it.

/34/ A Mormon bishop is the religious leader of a ward, comparable to a pastor or priest within a parish, although the position is not vocational. (Tr. 604).

/35/ Mormons are under a religious command to be honest in all their dealings. They are asked if they are fulfilling this obligation immediately prior to being asked for their tithing declaration. (PPF 170).

/36/ The Handbook is the book issued by the Church's highest authority to Church leaders outlining the procedures for administering the Church. (Tr. 601-02; Ex. 94(b); Ex. 105).

/37/ It is mandatory, pursuant to vows of poverty and obedience, for members of Catholic Orders to pay over their entire salary earned outside the Order as a condition of their continued membership in the Order. (PPF 256). Failure to do so would lead to expulsion. (PPF 257).

/38/ While there may be no religious benefit in sitting in a particular seat (Tr. 1113), there clearly is some benefit in sitting in the sanctuary or in a row closer to the front. (See, e.g., Tr. 1158-59). It cannot be the case that calibrating prices based on religious benefits requires less favorable tax treatment than calibrating them based on secular benefits.

/39/ Tr. 774: "MR. OAKS: If a person had the -- declared himself to be a full tithe payer when he was interviewed, he might use that recommend 11 months later, at that time not being a full tithe payer."

/40/ Hindus wishing to have pujas performed by priests are directed to make arrangements at the temple in advance. (See, e.g., Ex. 116(g)). When a Hindu makes these arrangements there is undoubtedly a record made of the payment and of the person's entitlement to come to the temple (or have the priest come to his or her house) on the specified date to perform the puja.

/41/ Others allow non-Jewish spouses to be members.

/42/ There is no reason why Mr. Oaks', Mr. Greenstein's or Rabbi Freundel's speculations about other people's subjective motivations should be given much credence in any event. Rabbi Freundel specifically admitted he would not know a person's motive unless he had a conversation with that person. (Tr. 1161-62).

/43/ Rabbi Freundel's assumption was that a person who bought a High Holy Day ticket is "indicating that they want to attend services in this synagogue and they want to support the activities of this synagogue." (Tr. 1161-62).

/44/ In example 3 of Rev. Rul. 67-246, respondent states that a taxpayer who buys a ticket to a charity event cannot deduct the payment even if he "had no intention of using the ticket when he acquired it and he did not, in fact, attend the concert." Respondent concludes that if the taxpayer had wished to make a charitable contribution he could have made the payment, "refusing to accept the ticket to the concert." Thus, it is irrelevant that the Mormon who receives a temple recommend chooses not to attend the temple.

/45/ While in some cases the mass itself would not be said but for the payment of the Mass stipend, (Tr. 386, 390; Ex. 83, pp. 4-5, paragraph 11), the service paid for is principally the celebration of the designated intention. (See Tr. 373-74; 381-82; 407; 412-13).

/46/ The amounts paid to priests in Mass stipends are substantial cumulatively, as priests celebrate Mass on a daily basis, often a number of times a day, and receive stipends for the overwhelming number of these Masses. (See, e.g., Tr. 428-30: Ex. 86 (d)).

/47/ While cost of providing services is relevant to dual payment analysis, see Point III __, infra, it is not a legitimate factor for attempting to distinguish between different religions for purposes of the administrative inconsistency claim. It is not legal or constitutional to differentiate between two religions because their respective ratios between payment and cost differ. On the other hand, for purposes of dual payment analysis, normally each individual religions' transactions may independently be subjected to cost analysis, consistent with constitutional principles, as enunciated in Hernandez.

Petitioners note that if cost analysis were excessively entangling for dual payment analysis, as respondent contends, (Resp. Br. at 114-119), it is a fortiori excessively entangling for administrative in consistency analysis.

/48/ As Dr. Melton and Prof. Kliever testified, among long-established religious groups there are both traditions of congregational worship (e.g., Christianity and Judaism) and individual worship (e.g., Hinduism and Buddhism). (See Tr. 1043-44; Tr. 701-04). Those that do not have congregational worship do not and cannot solicit funds by requiring payment for access to group worship. (Tr. 1043-44).

/49/ This witness would have explicitly testified that Scientologists, like members of other religions, participate in auditing and training with the desire to derive spiritual benefit, but with no guarantee of such benefit. Some evidence to this effect is in the record. (See, e.g., Ex. 79, p. 7-8, paragraph 46).

/50/ In response to questioning by the Court, respondent's counsel expressed no view of whether he believed the issue of spiritual benefits was important. (Tr. 1270-71). He expressed no disagreement, however, when the Court expressed the view that the issue was not relevant and that rebuttal was not appropriate or necessary. (Tr. 1273).

/51/ See also Estate of Carroll v. Commissioner, 38 T.C. 868 (1962) (deduction allowed for cost of repairing Roman Catholic chapel on taxpayer's property, although value of property was clearly enhanced); Sims v. Commissioner, 10 T.C.M. (CCH) 608 (1951) (deduction allowed for contributions to church "which [taxpayers] attended"); Lobsenz v. Commissioner, 17 B.T.A. 81, 82 (1929) (deduction allowed for contribution "to a synagogue of which [taxpayer] was a member"); Rev.Rul. 78-366, 1978-2 C.B. 241 (estate tax deduction allowed for bequest to church to say regularly scheduled Masses for members of decedent's family).

/52/ In Judaism, some spiritual benefit is thought to accrue from contributing to one's synagogue. (PPF 102).

/53/ Both rulings were cited in the briefs to the Hernandez Court and the Court specifically referred to Rev. Rul. 70-47, see 490 U.S. at 701, 703, and Rev. Rul 78-366. Id. at 708 (O'Connor, J., dissenting).

/54/ Respondent grossly misinterprets petitioners' argument as to the significance of the above-quoted language. (See Resp. Br. at 50-51). Petitioners do not suggest that the Hernandez Court held that the rulings were indefensible. (Several courts of appeals did suggest they were no longer valid, however, as discussed infra.) Rather, the important point was that the Court believed the revenue rulings contained insufficient information to determine whether there existed a rational basis for distinction. While respondent is not "barred from advancing her rulings" (Resp. Br. at 51), they can provide no better justification today than they did when the Hernandez Court reviewed them.

/55/ Petitioners note that the two revenue rulings relied on by respondent address only a small number of religious practices: pew rents, building fund assessments, periodic dues, and Mass bequests. At trial, petitioners offered evidence with respect to a wide variety of religious practices and demonstrated that there is no basis for distinguishing any of these practices from those of Scientology.

The revenue rulings offered by respondent simply do not address the variety of practices that are structured similarly to Scientology's yet are regarded as fully deductible by respondent. The Hernandez Court itself stated that Rev. Rul. 70-47 "articulates no broad principle of deductibility, but instead merely identifies as deductible three discrete types of payments." 490 U.S. at 703. Thus, the two revenue rulings do not even purport to address most of the practices in issue in this case.

/56/ Respondent purports to rely on Justice Frankfurter's opinion in Kaiser for the proposition that the revenue rulings do not have to provide an explanation, but need only hint or "suggest" at one. (Resp. Br. at 46), citing United States v. Kaiser, 363 U.S. at 309. First, the revenue rulings relied on by respondent here do not even hint at a basis for distinguishing petitioners' payments. Second, even now, respondent has failed to articulate a rational basis for its inconsistent administration of the law, through revenue rulings or otherwise. Finally, Justice Frankfurter did not say that a revenue ruling need only "suggest" a rationale for the administrative inconsistency. He merely stated that some rulings relevant in that case spelled out their reasons, while others suggested them. 363 U.S. at 309.

/57/ See discussion of the grossly inaccurate characterizations of Scientology services contained in Rev. Rul. 78-189, at pp. 163-64, supra.

/58/ Because of respondent's evasive and incomplete answers to interrogatories, the Court was completely justified in precluding respondent from offering at trial any justification for the disparity in treatment of Scientologists. Tax Court Rule 104(c); see also F.R.C.P. 37(d); Klein v. Commissioner, 899 F.2d 1149 (11th Cir. 1990) (precluding introduction of evidence); Rechtzigel v. Commissioner, 79 T.C. 132 (1982), aff'd, 703 F.2d 1063 (8th Cir. 1983); Marcus v. Commissioner, 70 T.C. 562 (1978), aff'd without opinion, 621 F.2d 439 (5th Cir. 1980) (deeming factual allegations admitted); see also United States v. Wright Motor Co., 536 F.2d 1090 (5th Cir. 1976); Smith v. Schlesinger, 513 F.2d 462 (D.C. Cir. 1975); Perry v. Golub, 74 F.R.D. 360 (N.D. Ala. 1976); United States v. National Broadcasting Company, 65 F.R.D. 415 (C.D. Cal. 1974) appeal dismissed, 421 U.S. 940 (1975); Kahn v. Secretary of HEW, 53 F.R.D. 241 (D. Mass. 1971).

/59/ Respondent never attempted to articulate this justification pretrial, nor did she bring it to the Court's attention at trial to seek a reversal of the Court's discovery ruling so that it could be considered.

/60/ By raising a case addressing the exempt status of a Scientology church (Resp. Br. at 81), respondent apparently is trying to avoid her stipulation that the donees in this case are exempt. (Stip. paragraphs 87-91). There is no doubt about the donees exempt status in this case -- each petitioner has contributed to one or more churches of Scientology specifically recognized as a section 170(c)(2) charitable donee. (Compare Stip. paragraphs 90-91 with paragraphs 6, 14, 22, 29, 36, 44, 51).

/61/ Similarly structured transactions exist in the Jewish religion for membership dues entitling members to High Holy Day attendance and tickets for High Holy Day services; in the Mormon religion for temple recommends and advancement in the priesthood; in the Catholic religion for the celebration of special intentions in Masses and for membership in certain Catholic orders; or in the Hindu and Zen Buddhist religions or in certain fundamentalist Protestant denominations.

/62/ To the extent there are differences, Scientology payments are less mandatory, fixed and reciprocal than are payments in other religions.

/63/ Justice Frankfurter's review led him to believe that other principles governed prior rulings, and he concluded that respondent had "not denied the taxpayer 'equal' treatment." 363 U.S. at 314. while Justice Frankfurter found that the prior rulings were based on grounds not applicable to the case before him, his opinion makes clear that the taxpayer would have been entitled to relief had there been no basis for distinction.

/64/ It is clear that the Hernandez dissent believed that petitioners were being denied a deduction allowed to similarly situated members of other religions and that, consequently, they were entitled to the relief that petitioners seek here. Believing that the factual showing of inconsistency had been made, the dissent would have granted the relief "[b]ecause the IRS cannot constitutionally be allowed to select which religions will receive the benefit of its past rulings." Id. at 704, 713 (O'Connor, J., dissenting). It was on the question of whether a sufficient factual showing had been made that the dissent differed from the majority. Here, of course, there can be no doubt the factual record has been made.

/65/ Respondent emphasizes that Powell was before the Eleventh Circuit on a motion to dismiss for failure to state a claim, as if that fact were of assistance to her here. (Resp. Br. at 39). Respondent's position is, if anything, more untenable here, since the allegations "presumed to be true" in Powell (Resp. Br. at 39) have been established at trial here.

/66/ Id. at 378.

/67/ Petitioners do make the ALTERNATIVE argument, infra, that both their payments and those of members of other religions made for participation in religious services may properly be considered not to be quid pro quo transactions.

/68/ Given respondent's ongoing refusal to admit and correct her error, petitioners need not identify the point at which respondent had to correct her error to be entitled to enforce the taxes at issue here against petitioners. But the Supreme Court's opinion in Iowa-Des Moines National Bank v. Bennett, 384 U.S. 239, 247 (1931), may offer some insight: "It may be assumed that all ground for a claim for refund would have fallen if the state, promptly upon discovery of the discrimination, had removed it by collecting the additional taxes from the favored [taxpayers]." (Emphasis added.) Here, of course, it is too late for taxes to be recovered from others for the tax years in issue.

/69/ Prof. Zelenak's discussion of Sirbo Holdings in IRS Duty of Consistency, Tax L. Rev. at 423-25.

/70/ Respondent's reliance on the second Sirbo Holdings opinion, Resp. Br. at 31-32, is misplaced for the same reason as is its reliance on Mid-Continent. The present case is not one in which respondent "made an error in one case," as the Second Circuit found to be the case in its second Sirbo Holdings opinion. 509 F.2d at 1221-22. It is Judge Friendly's opinion in the first Sirbo Holdings case, at the point where he believed respondent was taking different positions with regard to two pending cases, that is relevant here.

/71/ Respondent's citation to Davis v. Commissioner is highly selective. In that case petitioner, administrative law expert Kenneth C. Davis, argued based on Judge Friendly's opinion in Sirbo Holdings and on other cases that a duty of consistency toward similarly situated taxpayers should be applied to the actions of the IRS. 65 T.C. 1014, 1021 (1976). After stating the concerns quoted by respondent in her brief, the court stated:

Although the implementation of the position advocated by Mr.

Davis would present many problems, those problems may not be insurmountable, and the notion of equal justice has strong appeal in our society and might lead to the conclusion that his position should ultimately be adopted.

Id. at 1023. Given the importance of the question and the fact that

the case was before it on a discovery matter that could be resolved on other grounds, the court "concluded that it is unnecessary for us

to face and decide the question of whether a duty of consistency should be applied to the actions of respondent." Id. Of course, Davis was decided before Hernandez and Powell. Petitioners also note they are only arguing here that a duty of consistency must be enforced in the narrow circumstance where there is systematic and ongoing unequal treatment based on the constitutionally suspect classification of religion.

/72/ The fact is courts have means at their disposal to efficiently determine those cases that should go to trial. In this very case, for example, the court required petitioners to submit an offer of proof and only set down the case for trial after determining that petitioners had made out a prima facie case of systematic differential treatment.

/73/ Similarly, Moritz v. C.I.R., 469 F.2d 466, 470 (10th Cir. 1972), cert. denied, 412 U.S. 906 (1973), dealt with an underinclusive statute. In Moritz, the court found that disallowance of a tax deduction for care of a dependent only to men who had never married and its allowance to women, widowers, divorcees and husbands constituted invidious discrimination. The court held that extending coverage of the deduction to the excluded class of persons was the logical and proper remedy, 469 F.2d at 470. While the extension was not contrary to statute neither was it authorized by the statute.

/74/ See e.g., Hillsborough Township v. Crowell, 326 U.S. 620, 623-24 (1946) (state law that required property owner who was assessed at true value of land but who had been singled out for discriminatory taxation to seek increase in assessment of others would violate the equal protection clause); see also McKesson v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18, 36, (1990) (quoting Bennett, 284 U.S. at 247, for the proposition that a taxpayer victimized by differential tax treatment cannot be "'remitted to the necessity of awaiting . . . action [against the advantaged taxpayers] by the state officials upon their own initiative'").

/75/ Under section 6501(a), the IRS must assess taxes within three years after a return is filed. Presumably the limitations period has run for most taxpayers for the tax years in issue, and the IRS cannot now recover any taxes not collected from them because of an erroneous allowance of a section 170 deduction. Even if the limitations period had not run, it would be impractical for the IRS to reexamine the returns of all other taxpayers who have taken deductions for payments for religious services for these years to determine whether the deductions were wrongfully allowed.

/76/ Respondent also seems to argue that Hernandez implicitly rejected the applicability of the dual payment doctrine to Church of Scientology fixed donations: "After a careful review of facts almost identical to those before this Court, the Hernandez Court concluded that there was only an equal exchange of the petitioners' money for auditing and training sessions." (Resp. Br. at 84). The Hernandez Court, however, specifically noted that the taxpayers "have not argued here that their payments qualify as 'dual payments' * * * and that they are therefore entitled to a partial deduction" so that the Court had "no occasion to decide this issue." Hernandez, 490 U.S. at 694 n.10.

/77/ Petitioners' position here with respect to costs incurred by their donee churches in ministering religious services is SOLELY for purposes of their alternative dual payment argument. As discussed above (at pp. 203-06), cost to the donee churches has no bearing on the administrative inconsistency issue.

/78/ Staples v. Commissioner, 821 F.2d 1324, 1327 (8th Cir. 1987), vacated, 490 U.S. 1103 (1989) ("[O]ur tax system does not treat religious services as commodities . . . . Spiritual gain to an individual church member cannot be valued by any measure known in the secular realm.") (internal quotations omitted); Foley v. Commissioner, 844 F.2d 94, 97 (2d Cir. 1988), vacated, 490 U.S. 1103 (1989) ("[t]here is no way of measuring spiritual or religious benefits in such a way as to conclude that they are 'commensurate' with the fees paid. . . . [T]he quo of religious experience can never be considered the equivalent of the quid of a money payment."); Neher v. Commissioner, 852 F.2d 848, 855 (6th Cir. 1988), vacated, 882 F.2d 217 (6th Cir. 1989) ("[T]he problems a court would encounter in attempting to value a truly intangible return such as the one at issue are insurmountable."); id. at 856 ("[T]here are no other providers of similar services to whom the court may look so as to place a value on the offered services. Furthermore, any such approach might well create problems of constitutional magnitude. . . . [T]he benefit one receives from participating in religious worship, a uniquely PERSONAL benefit, is hard to quantify and heretofore has not been quantified.") (emphasis in original).

/79/ For this proposition respondent cites Orth v. Commissioner, 813 F.2d 837 (7th Cir. 1987) (artwork); Goldstein v. Commissioner, 89 T.C. 535 (1987) (artwork); Lio v. Commissioner, 85 T.C. 56 (1985) (artwork); Chiu v. Commissioner, 84 T.C. 722 (1985) (gemstones); Weintrob v. Commissioner, T.C. Memo. 1990-513 (land for gravesites); Schachter v. Commissioner, T.C. Memo. 1986-292 (gemstones); Lampe v. Commissioner, T.C. Memo. 1985-236 (gemstones); Theodotou v. Commissioner, T.C. Memo. 1985-181 (gemstones); and Arceneaux v. Commissioner, T.C. Memo. 1977-363 (adoption services).

/80/ Moreover, adoption services are not inherently charitable, see Easter House v. States, 12 Cl. Ct. 476, 485 (1987), aff'd without op., 846 F.2d 78 (Fed. Cir.), cert. denied, 488 U.S. 907 (1988), so there appears to be a commercial market for valuing these services as well.

/81/ Respondent's reference to the inventory regulations, paragraph 1.471-4(b), Income Tax Regs., is inappropriate for much the same reason: in almost all cases, inventory consists of property sold in a purely commercial context. Treasury certainly was not considering the valuation of religious services when it promulgated the inventory regulations.

/82/ However, the Supreme Court did not rule out the possibility that an IRS inquiry into church costs might present entanglement problems under the circumstances of a particular case. Hernandez, 490 U.S. at 698 n. 12. Respondent argues that use of cost would cause nightmarish entanglement problems (Resp. Br. at 93-94), but accepting respondent's contention would not make the other methods any more appropriate under these facts and circumstances. If there is an entanglement problem, use of "the price charged by the service provider" still is inappropriate because it ignores the donative aspect of the transaction. If this Court were to hold that the only appropriate valuation method results in a prohibited entanglement, the consequence is that it MUST permit the petitioners to deduct the entire amount of their payments to their churches. (See infra at 301- O3).

/83/ Moreover, the record here clearly establishes that Scientologists are not required to make fixed donations in order to participate in the religious services of their faith and that there are a number of ways for them to fully participate without the payment of any money. (See PPF 338-351).

/84/ See e.g., Bob Jones University v. United States, 461 U.S. 574 (1983); John Marshall Law School v. United States, 81-2 USTC paragraph 9514 (Ct. Cl. 1981); Birmingham Business College. Inc. v. Commissioner, 276 F.2d 476 (5th Cir. 1960); Texas Trade School v. Commissioner, 30 T.C. 642 (1958), aff'd, 272 F.2d 168 (5th Cir. 1959). "To be tax-exempt * * * schools must, like all 'charitable' organizations, meet all of the tax law requirements pertaining to these entities, including a showing that they are operated for public, rather than private, interests." Bruce R. Hopkins, The Law of Tax-Exempt Organizations section 8.2, at 178 (6th ed. 1992).

/85/ Moreover, respondent herself, after initially seeking to use fair market value in private school cases, Rev. Rul. 79-99, 1979- 1 C.B. 108, reversed course and accepted cost to the service provider to measure the nondeductible return benefit. Rev. Rul. 83-104, 1983-2 C.B. 46 ("In each situation, the COST of educating the child in the school is not less than the payments made by the parent. . . .").

/86/ Petitioners' accounting expert, Richard D. Clark, unequivocally testified that while a nonprofit organization might deliver its exempt-function goods or services without incurring any direct costs, it will always incur some indirect costs. (Tr. 748-49). Even respondent's accounting expert, Professor Charles W. Swenson, grudgingly acknowledged that a nonprofit organization always will have some indirect costs associated with its provision of goods or services, other than in the extremely unlikely case where all labor, materials and administrative support are donated. (Tr. 893-95).

/87/ The Haak opinion does not indicate how many children the Haaks had enrolled in church schools. Nevertheless, their Church's combined 1967 contribution guidelines for the Church's Annual Operations and the Realty Association was $378.00. 451 F. Supp. at 1094. Subtracting this amount from the Haak's total 1967 payments to their church of $1,326.00, id. at 1088, leaves $948.00, a sum in excess of the amount of $828.65 that respondent disallowed as charitable contributions. Id. (Similar derivations cannot be rendered for 1968 and 1969 because the Haak opinion only includes 1967 contribution guidelines.) It seems clear that not only did the Service allow ALL of the taxpayers' contributions to the church building fund but that it also may have allowed part of the taxpayers' actual cost of educating their children.

/88/ The Haak court's statement in footnote 8 merely raises the possibility that respondent did not disallow all of the actual direct costs of educating the taxpayers' children. See n.87, supra. This statement in no way implies that additional amounts such as Haak's building fund contributions also might be disallowed.

/89/ Respondent only disallowed $260 of the taxpayers' contributions to the school, even though the evidence at trial showed that the school's operating budget on a per-student basis was about $338. Oppewal, 30 T.C.M. at 1178. Moreover, only 40 percent of the school's operating budget was funded from the parents of children attending the school; the remaining 60 percent was funded through "contributions from supporting churches in the area and from nonmembers." Id.

/90/ Neither of the other reported church tuition cases provide any indication of how the nondeductible costs were determined. Winters v. Commissioner, 468 F.2d 778 (2d Cir. 1972); Dejong v. Commissioner, 309 F.2d 373 (9th Cir. 1962), aff'g 36 T.C. 896 (1961).

/91/ Respondent also falls to explain why it is appropriate to use "cost" in lieu of value "for the limited purpose of determining * * * when benefits received are so inconsequential as to obviate the need for a dual payment analysis" (Res. Br. at 114) but inappropriate to use cost rather than value for any other purpose under the dual payment doctrine.

/92/ Respondent's suggestion that petitioners' expert, Mr. Clark, used the potential for entanglement to determine whether an expense was direct or indirect (Resp. Br. at 114-115, 136) is absurd. Nothing in either Mr. Clark's report or testimony remotely suggests that Mr. Clark employed potential entanglement as a criterion in identifying and allocating Church of Scientology costs. Indeed, such an endeavor would have been far outside the scope of his expertise as an accountant, the basis upon which the Court recognized him as an expert. (Tr. 724).

/93/ These are purely ecclesiastical matters whose examination by the IRS would pose the greatest risk of prohibited entanglement. See, e.g., N.L.R.B. v. Catholic Bishop of Chicago, 440 U.S. 490, 502 (1979); Surinach v. Pesquera De Busquets, 604 F.2d 73, 78 (1st Cir. 1979); Taylor v. City of Knoxville, 566 F. Supp 925 (E.D. Tenn. 1982).

/94/ "I conjectured that [the management payment] was some sort of payment to the Church of Scientology, International, based on some rate that's remitted each year from each church." (Tr. at 909-910).

/95/ "I would assume there's a very strong correlation between training and processing fees taken in by an individual church and the amount of payments to CSI." (Tr. at 911).

"I * * * am still assuming that any particular church would not be in a position to * * * make payments to CSI without cash flow, without income * * * from training and processing * * *." (Tr. at 912).

/96/ The parties stipulated that the annual receipt and disbursement totals for each of the subject churches of Scientology, as shown in column A of Exhibits 4-32 of Mr. Clark's report (Ex. 98-4 to 98-32) "represent funds actually paid or received by the respective churches." (Stip. paragraph 101).

/97/ The limitation of Mr. Clark's initial assignment to the identification of only DIRECT costs is clear from his stated assumption that "[n]o part of overhead is allocable to [the] cost of delivering religious services," overhead being defined "as expenses which are not DIRECTLY associated with the delivery of religious services." (Ex. 98, p. 11) (emphasis added).

/98/ Mr. Clark's testimony about CSI's use of payments from subordinate churches for its international ministry and public betterment programs is corroborated by the report of Michael J. Rinder. (Ex. 79, p. 11, paragraphs 75-76). The parties stipulated that Mr. Rinder is "an expert in Scientology religious doctrine and practices." (Stip. paragraph 110).

/99/ [I]t would seem to me for a member church to have sufficient finds to make such a contribution to the mother church, that they would have to generate a certain amount of cash in-flow. And since for most of the churches * * * the major component of cash in-flow is from training and processing ("T&P") fees, I would assume that there's a very strong correlation between [T&P] fees taken in by an individual church and the amount of payments to CSI. (Tr. 911).

* * *

I am still assuming that any particular church would not be in a position to * * * make payments to CSI without cash flow, without income * * * from [T&P]. . . . [T]here is inherently a matching between the revenues generated from [T&P] and the amounts payable or paid to CSI in any one year. (Tr. 912).

/100/ In his report, Professor Swenson recharacterizes certain expenses paid from Church of Scientology bookstore accounts as allocable indirect costs rather than as direct costs of the bookstore. (Ex. CC, App. B, Items h, i, k, l, p and v and note * * *; but compare Resp. Br, App. A at 2, n.1, 3-4). Although these determinations are incorrect, see infra at 284-85, they have no bearing here because Professor Swenson did not treat any of them as direct costs of the ministry of religious services.

/101/ Moreover, only one of respondent's trial attorneys, William A. McCarthy, examined all accounting witnesses on behalf of respondent. Given that the bulk of the testimony between April 9 and April 22 dealt with the administrative inconsistency issue, with respect to which Mr. McCarthy examined no witnesses, and that there was a four-day weekend before trial resumed on April 21, 1992, it would appear that Mr. McCarthy had as much time as (or more than) petitioners' attorneys had to prepare for examination and cross- examination of the expert accounting witnesses.

/102/ Moreover, prejudice must be shown; it is never assumed or accepted on the basis of naked allegations. See, e.g., Ware v. Commissioner, 92 T.C. 1267, 1268-69 (1989), aff'd 906 F.2d 62, 65-66 (2d Cir. 1990).

/103/ AICPA Audit and Accounting Guide -- Audits of Certain Non- profit Organizations, issued in 1981 by the AICPA Non-profit Organizations Subcommittee ("AICPA Guide") to which is appended the Statement of Position 78-10, Accounting Principles and Reporting Practices for Certain Non-Profit Organizations, issued in 1978 by the AICPA Accounting Standards Division.

/104/ See. e.g., Ex. 129, pp. 4-5, citing M.J. Gross and S.F. Jablonsky, Principles of Accounting and Financial Reporting for Non- profit Organizations, Ch. 16 (John Wiley & Sons 1979); Accounting & Financial Reporting: A Guide for United Ways and Not-for-Profit Human Service Organizations (United Way 1974) ("United Way Guide"); (National Health Council and National Social Welfare Assembly, Standards of Accounting and Financial Reporting for Voluntary Health and Welfare Organizations, Ch. VI (1964); id. at p. 13, citing George J. Staubus, Activity Costing, ch. 1 (Irwin, 1971).

/105/ [I]n a typical church, there are some activities that may not have any revenue-generating capacity to them and incur only cost.

For example, it may be that in some churches, the typical sorts of program functions that they would have would be general ministry, education or schools, perhaps health care; external programs outside the organization itself, for example, helping the needy, those sorts of things.

That last category typically would not generate revenues. And also general ministry in typical non-profit accounting is thought to be separate from education. And general ministry typically is thought not to generate revenues per se. So these would be considered non- revenue-generating activities.

(Tr. 913).

[Under] generally accepted non-profit accounting * * * one

would have categories for program services versus, oh, support or auxiliary services.

And in the program services, those would include both

revenue-generating sorts of activities and non-revenue-generating activities. . . .

(Tr. 924).

[I]t would seem also sensible to have a separate column for

external services such as * * * work with drug rehabilitation

and prisoners and those sorts of things.

It would also seem to make sense to have a separate

category for internal ministry sorts of things that don't necessarily generate revenue, for example, weddings and funerals. . . .

(Tr. 925).

/105/ Q Isn't it * * * true that tax-exempt non-profit churches have significant costs that are not associated with revenue-producing activities?

A "Significant" is a strong word. I -- I'm sure it varies from

organization to organization. Some may have very large expenditures related to non-revenue-producing activities. Some may have none.

(Tr. 928).

/106/ Respondent's own expert acknowledged that general ministry and public benefit activities are typical non-revenue-generating activities in churches. (Tr. 913).

/107/ "[T]he periodic summaries of original entry records prepared by various church organizations that I have reviewed in preparing the Report, the Supplement and this Rebuttal Report do not summarize the underlying transactions in a manner that allows me fully to apply the functional classification. This is not because the periodic summaries prepared by churches of Scientology are in any way inaccurate but simply that the churches never have had any reason to summarize their disbursements under the functional classification." (Ex. 129, p. 14).

/108/ The problem I faced was the data available to me * * * only provided me with information on profit or revenue-generating activities, specifically training and processing, bookstore, and investment, and other.

I had no way to disentangle those from non-profit or non- revenue-generating sorts of activities. The information was neither characterized in those sorts of classifications, revenue versus non-revenue-generating categories, nor were the cost categories and the descriptions of them, both direct and indirect, sufficient for me to make any sort of judgment about what those activities were.

(Tr. 913-14).

I'm sure the Church of Scientology accounting system, cash receipts and disbursements and their classifications is [sic] very fine for internal purposes.

Unfortunately, the way it's been described and the way it's been used by Mr. Clark in his dual payment analysis, it doesn't really conform to what generally accepted non-profit accounting sorts of practices might be, and in such a practice, one would have categories for program services versus, oh, support or auxiliary services.

* * * Had I been able to, as some sort of invisible guiding hand, pushed Mr. Clark or the church to develop an accounting system, it certainly would be in such a format which would then facilitate determining the costs of [both revenue and nonrevenue generating] activities.

As it is, I can't determine where those costs are and it would be hard for me to say what categories to put those in. . . .

* * *

Unfortunately, I just don't have enough information to tell you what those costs were, what of these costs relate to those [nonrevenue-generating] activities. . . .

(Tr. 924-25).

/109/ Mr. Clark was specifically identified as an "[e]xpert witness on Scientology accounting practices and costs of providing services." Witness List, Teagarden v. Commissioner, No. 20086-88, June 17, 1991 at 2.

/110/ Rule 71(d)(1); see Estate of Van Loben Sels v. Commissioner, 82 T.C. 64, 68-69 (1984); but see Owens-Illinois, Inc. v. Commissioner, 76 T.C. 493, 497 (1981).

/111/ Rule 76.

/112/ See Petitioners Response to Respondent's Interrogatory No. 9 at 18-19 in Teagarden v. Commissioner, No. 11708-79 (November 8, 1991); Petitioners Response to Respondent's Request for Production of Documents Nos. 3 and 5 at 2-3, and relevant attachments, in Teagarden v. Commissioner, No. 11708-79 (November 8, 1991).

/113/ See attached letter of District Counsel James Nelson and Trial Attorney Gordon L. Gidlund to Elizabeth St. Clair, dated February 17, 1992 at 1 ("I would propose attaching as exhibits the documents submitted in response to the respondent's Request for Production nos. 3 and 4.").

/114/ Even Professor Swenson recognized the existence of some of the Churches' non-revenue generating activities and acknowledged the possibility of many others. (Tr. 916-23).

/115/ Moreover, as Mr. Clark notes, were the expenditure categories Telephone, etc. and Travel, etc. treated as allocable indirect expenses, less would be allocated to the ministry of religious services than under Mr. Clark's treatment. (Ex. 129, p. 17). Indeed, even under Prof. Swenson's allocation methodology, treatment of Telephone as allocable indirect costs would result in less being allocated to religious services than under Mr. Clark's treatment, because in EACH CASE Professor Swenson's revenue-payroll ratio is less than the 75 percent that Mr. Clark allocated. Likewise, in the case of Travel, etc., in about half the cases his methodology would result in less expense being allocated to religious services because Professor Swenson's revenue-payroll ratio is less than the 50% figure Mr. Clark used.

/116/ In addition, Mr. Clark wholly excluded the expenditure category "Inter-Org Transfers" (Exs. 129 (34) to 129 (62) while Professor Swenson treats these as allocable indirect costs. (Ex. CC, App. B, pp. 2, 3 n.**). Inter-Org transfers are amounts paid by one church organization to another church organization within the same corporation. (Ex. 98 (3e)). Professor Swenson's report and testimony gave no explanation for his differing treatment of this item. Given Mr. Clark's intimate knowledge of Church of Scientology financial practices and his general credibility established here, the Court should accept Mr. Clark's treatment of this expenditure category.

/117/ It also is worthy of noting that while Professor Swenson declined to apply accepted functional cost accounting principles here because of limitations in the financial data, he was perfectly willing to apply his for-profit cost accounting principles despite the acknowledged lack of information about the value and use of church property, one of the three allocation factors under his preferred revenue-property-payroll method. (Ex. CC, p. 3).

/118/ Professor Swenson's fundamental assumption that all costs must be attributable to one or more revenue-producing activities would be highly suspect even in the case of a purely for-profit commercial entity:

When cause-and-effect relationships are infeasible or impossible

to establish, accountants and managers often resort to arbitrary bases. An often misused base is actual sales dollars or gross margins or some other "ability-to-bear" base that often has only a most tenuous causal relationship to the costs being allocated. * * * Sales dollars MAY be a good substitute for establishing cause-and-effect relationships, but there should always be a serious examination of whether a better base is available, or whether ANY allocation is indeed warranted.

Charles T. Horngren, Cost Accounting 503 (4th ed. 1977) (emphasis in

original). In his report, the Horngren text is the specific example of a "standard cost accounting text" to which Professor Swenson refers his readers as authority for his definitions of direct and indirect costs and their identification and allocation. (Ex. CC, p. 2, n.2.).

/119/ "Allocations based on dollar receipts from various exempt activities will generally not be reasonable since such receipts are usually not an accurate reflection of the costs associated with activities carried on by exempt organizations." Section 1.512(a)- 1(f)(6)(i), Income Tax Regs.

/120/ In the Hernandez litigation, respondent likewise sought, with surprising success, to disregard the parties stipulations that the recipient organizations were qualified charitable donees under section 170(c)(2). See Hernandez, 490 U.S. at 704-05 (O'Connor, J., dissenting). Here, however, there is no room for respondent to evade her stipulations, because each petitioner herein contributed to churches of Scientology the respondent specifically recognizes as qualified charitable donees under section 170(c)(2). Compare Stip. paragraphs 6, 14, 22, 29, 36, 44, and 51 with paragraphs 87-88.

/121/ Indeed, both Professor Swenson's report (Ex. CC, p. 1, n.1) and respondent's brief (p. 121, n.29) assert that the "cost" of Scientology religious services also should include "a normal rate or return (OR PROFIT) for each entity." (emphasis added).

/122/ See attached letter of James A. Nelson, District Counsel, to Monique E. Yingling dated March 23, 1992, p. 2 ("[W]e would like to have HCO Policy Letter of 23 December 1979RB (Tech/Admin Ratio) attached to the Stipulation of Facts.").

/123/ Moreover, these definitions were known or at least available to respondent during the trial. In discovery, petitioners produced to respondent an organizational chart for churches of Scientology identifying church staff by division and post title. See Petitioners Response to Respondent's Interrogatory No. 13 at 25 in Teagarden v. Commissioner, No. 11708-79 (November 8, 1991); Petitioners Response to Respondent's Request for Production of Documents Nos. 3 and 7 at 3A, and relevant attachments, in Teagarden v. Commissioner, No. 11708-79 (November 8, 1991).

/124/ See Petitioners Response to Respondent's Interrogatory No. 13 at 24-26 in Teagarden v. Commissioner, No. 11708-79 (November 8, 1991); Petitioners Response to Respondent's Request for Production of Documents Nos. 6 and 7 at 3-4, and relevant attachments, in Teagarden v. Commissioner, No. 11708-79 (November 8, 1991).

/125/ See, e.g., IT&S of Iowa. Inc. v. Commissioner, 97 T.C. 496, 522 (1991) ("A taxpayer is not required to use the most theoretically correct method" to allocate its costs of acquiring amortizable core bank deposits.); section 1.613A(d)(4)(iii), Income Tax Regs. (Indirect costs shall "be apportioned to mining and to non- mining by use of a method that is reasonable under the circumstances. One method which may be reasonable in a particular case is * * *).

/126/ Respondent's Response to Petitioners' Motion in Limine Regarding Report and Testimony of Charles W. Swenson, April 3, 1992, at 4, n.3 (describing the application of Prof. Swenson's methodology to the financial data of a particular church of Scientology as "[a]n exercise solely in addition and multiplication of the type often left for a Tax Court Rule 155 determination.").

/127/ Resp. Br. at 121 n.30 (asserting it was in any event unnecessary for Prof. Swenson to apply his methodology to actual church data because "[t]his is an exercise solely of addition and multiplication and is the type of calculation often left for a determination under Rule 155.").

/128/ "It may very well be [that the real purpose of the dual payment analysis was determine how much of the T&P receipts was paying for non-revenue activities]. My assignment, as I understood it, was to develop a methodology to allocate indirect costs * * * as shown in Mr. Clark's dual payment analysis, to [T&P] * * * to determine the cost of delivery of [T&P]." (Tr. 926-27).

/129/ Indeed, there is precedent for using Cohan to allocate indirect costs. See Algernon Blair, Inc. v, Commissioner, 29 T.C. 1205, 1219 (1958).

/130/ (Respondent correctly notes, however, that dual payment figures determined herein could be used in future cases under the authority of Cohan. (Resp. Br. at 152).

/131/ Moreover, respondent's diseretion to articulate class-wide rules in administering the tax laws is not as circumscribed as respondent suggests. (Resp. Br. at 152). Certinly, respondent had no statutory authority for excluding de minimus return benefits from the dual payment test, as she did in Revenue Procedure 90-12.

/132/ This argument takes Hernandez a step further than the majority was willing to go, since the taxpayers therein did not raise the "dual payment" issue.

/133/ Moreover, if the Court holds, as it should, that petitioners' payments are fully deductible under section 170 as interpreted by Hernandez, then it likewise need not reach the question of administrative inconsistency.

END OF FOOTNOTES