IRS Inconsistencies: Section 213 and the Deductibility of Assisted Reproductive Technology

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I. INTRODUCTION

The Internal Revenue Code (the "Code") is a powerful tool that both reflects and shapes public policy. Through its complex set of deductions, tax rates, and credits, the Code creates financial incentives that encourage certain behavior, such as buying a house or donating to charity.[1] While the Treasury Department writes the Code, the Internal Revenue Service ("IRS") performs the essential role of interpreting its language, hopefully in a way that reflects taxpayers' values. Thus, as values change, the IRS's application of the Code or the Code itself should change. Unfortunately, both Congress and the IRS can be slow to accept evolving values. As a result, many Code provisions preserve outdated and inaccurate assumptions about families, resulting in a "landscape of discrimination hidden within the tax code."[2] Section 213 is one

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1. For example, the mortgage interest deduction encourages homeownership, although many scholars criticize this deduction's adverse effects. I.R.C. § 163(h) (providing a mortgage interest deduction); *see* Roberta F. Mann, *The (Not So) Little House on the Prairie: The Hidden Costs of the Home Mortgage Interest Deduction*, 32 ARIZ. ST. L.J. 1347 (2000) (noting that the mortgage interest deduction does encourage homeownership but also has deleterious effects on urban cities). Congress enacted the charitable contribution deduction to incentivize charitable giving, although academics also question its efficacy. I.R.C. § 170 (providing an itemized deduction for charitable donations); *see, e.g.*, Harvey P. Dale & Roger Colinvaux, *The Charitable Contributions Deduction: Federal Tax Rules*, 68 TAX LAW. 331, 362 (2015) (exploring the charitable contribution deduction's impact on charitable giving).

2. NAT'L WOMEN'S L. CTR., NEW REPORTS TACKLE GENDER AND RACIAL BIAS EMBEDDED IN THE TAX CODE (2019), https://nwlc.org/press-releases/new-reports-tackle-gender-and-racial-bias-embedded-in-the-tax-code/ [https://perma.cc/8PVX-P7ZT]. There are other forms of inequity in the tax code. For example, tax rules favor unearned investment income over earned income, which benefits business and property owners who are disproportionately white. *See* Clinton G. Wallace, *Tax Policy and Our Democracy*, 118 MICH. L. REV. 1233, 1256 (2020). The Code also offers less preferential treatment to expenses incurred disproportionately by people of color and female workers, including caregiving and other nonmarket work. ARIEL JUROW KLEIMAN ET AL., NAT'L WOMEN'S L. CTR., THE FAULTY FOUNDATIONS OF THE TAX CODE: GENDER AND RACIAL BIAS IN OUR TAX CODE 6 (2019).

such provision, where the IRS has applied a traditional view of family and medical care that discriminates against same-sex couples who want to have children.

Section 213 allows taxpayers to deduct expenses for their "medical care" and defines "medical care" as amounts paid "for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body."[3] This broad definition of "medical care" includes reproductive treatments for individuals dealing with medical infertility.[4] Medical infertility affects one in ten couples[5] and causes emotional and financial burdens for these individuals.[6] Advancing technology has allowed infertile patients to utilize medical treatments known as assisted reproductive technologies ("ARTs"),[7] which include in vitro fertilization ("IVF"), egg donation, intracytoplasmic sperm injection ("ICSI"), and surrogacy.[8] Unfortunately, ARTs are expensive,[9] but the Section 213 medical expense deduction could reduce the after-tax costs if the treatment qualifies as "medical care" under Section 213.[10] ARTs qualify as "medical care" if they manage a disease, satisfying the disease prong of Section 213, or affect a bodily structure or function, satisfying the structure-or-function prong.[11] Despite a history of interpreting the "medical care" definition broadly, the IRS recently narrowed its view for same-sex couples and unmarried taxpayers.[12]

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3. I.R.C. § 213(d)(1)(A).

4. I.R.C. § 213(a).

5. *How Common Is Infertility?*, EUNICE KENNEDY SHRIVER NAT'L INST. OF CHILD HEALTH & HUM. DEV. (Feb. 8, 2018), https://www.nichd.nih.gov/health/topics/infertility/conditioninfo/common [hereinafter NICHD article]. This number is higher when considering forms of infertility that go beyond infertility attributable to an illness, disease, or injury. For example, a person's sexual orientation or decision to not have a sexual partner are nonmedical reasons for having an inability to conceive and bear children.

6. Katherine Pratt, *Inconceivable? Deducting the Costs of Fertility Treatment*, 89 CORNELL L. REV. 1121, 1127–28 (2004) (describing the heavy emotional and financial toll that long-term fertility treatment brings).

7. *Id.* at 1132–34.

8. *See* Anna L. Benjamin, *The Implications of Using the Medical Expense Deduction of I.R.C. § 213 To Subsidize Assisted Reproductive Technology*, 79 NOTRE DAME L. REV. 1117, 1119 (2004). *See generally* Jim Hawkins, *Financing Fertility*, 47 HARV. J. ON LEGIS. 115 (2010) (describing IVF and ICSI markets and refund programs).

9. Hawkins, *supra* note 8, at 115–16 (noting that ART costs can easily exceed $50,000 because a single round of IVF costs over $12,000 and successful implantations require an average of three IVF cycles).

10. Benjamin, *supra* note 8, at 1131; I.R.C. § 213(a); I.R.C. § 213(d)(1)(A).

11. I.R.C. § 213(d)(1)(A).

12. *See, e.g.*, I.R.S. Priv. Ltr. Rul. 2021-11-4001 (Apr. 9, 2021) (disallowing a male same-sex couple from deducting their ART costs).

The IRS, with the courts' affirmation, has disallowed same-sex couples and taxpayers without a sexual partner from deducting their ART expenses under both prongs of the Section 213 definition of "medical care."[13] Courts found that such taxpayers did not qualify under the disease prong because they did not have a physiological medical anomaly causing their infertility.[14] The IRS and courts have not recognized any other form of infertility, such as infertility due to social circumstances.[15] These taxpayers also did not satisfy the structure-or-function prong because of the type of ARTs received.[16] Some taxpayers must utilize "collaborative" ARTs, or treatments that require a third party.[17] Male same-sex couples, for example, need a third-party surrogate to facilitate their process of having a biological child.[18] The IRS and courts held that these collaborative ARTs are not "medical care" because they do not directly affect the taxpayer's body.[19]

The IRS's position in these cases and its own administrative guidance create multiple inconsistencies. First, its arguments contradict the rationales of prior rulings. The IRS argued in *Magdalin v. Commissioner* that the disease prong must be satisfied even if the structure-or-function prong is satisfied.[20] Not only does this ignore the clearly disjunctive language of Section 213, but it is also inconsistent with IRS rulings allowing other reproductive treatment to qualify as "medical care" under the structure-or-function prong when the treatment is not addressing any disease.[21] Furthermore, the IRS's argument that collaborative ARTs cannot satisfy the structure-or-function prong contradicts IRS rulings allowing taxpayers to

13. Magdalin v. Comm'r, 96 T.C.M. (CCH) 491 (2008), *aff'd*, No. 09-1153, 2009 WL 5557509 (1st Cir. Dec. 17, 2009); Longino v. Comm'r, 105 T.C.M. (CCH) 1491 (2013), *aff'd*, 593 Fed. App'x 965 (11th Cir. 2014); Morrissey v. United States, 871 F.3d 1260 (11th Cir. 2017); I.R.S. Priv. Ltr. Rul. 2021-11-4001 (Apr. 9, 2021).

14. *See Morrissey*, 871 F.3d at 1266–67 (disallowing the male taxpayer's ART deduction because his reproductive functions as a male worked properly).

15. *Id.*

16. *See, e.g.*, I.R.S. Priv. Ltr. Rul. 2021-11-4001 (Apr. 9, 2021).

17. Katherine Pratt, *Deducting the Costs of Fertility Treatment: Implications of* Magdalin v. Commissioner *for Opposite-Sex Couples, Gay and Lesbian Same-Sex Couples, and Single Women and Men*, 2009 WIS. L. REV. 1283, 1287–89 (2009).

18. *Id.*

19. *See, e.g.*, I.R.S. Priv. Ltr. Rul. 2021-11-4001 (Apr. 9, 2021).

20. Opening Brief for Respondent at 14–19, Magdalin v. Comm'r, 96 T.C.M. (CCH) 491 (2008) (No. 7880-07), 2008 WL 5535409 (arguing that "an expense must be directly or proximately related to a medical condition to be deductible under section 213" even if the treatment satisfies the structure-or-function prong).

21. In 1973, 2003, and 2007 revenue rulings, the IRS held that vasectomies, elective abortions, and pregnancy tests fell within the structure-or-function prong of the Section 213 "medical care" definition even though the operations did not treat an underlying condition or disease. Rev. Rul. 73-201, 1973-1 C.B. 140; Rev. Rul. 2007-72, 2007-50 I.R.B. 1154; Rev. Rul. 73-603, 1973-2 C.B. 76.

deduct procedures that are not performed on the taxpayer's body if the treatment is for the taxpayer.[22] For example, expenses for an organ donor's procedures and a notetaker assisting a deaf college student were deductible under the structure-or-function prong because these services were "primarily for" the taxpayer.[23] The IRS also allowed different-sex married couples to deduct non-collaborative surrogacy expenses in two settled cases.[24] The IRS is wrong to take conflicting positions regarding the deductibility of ARTs.

Second, the IRS's view that infertility only includes the inability to physiologically conceive a child ignores modern societal and medical advancements that broaden the concept of infertility. And the IRS may be inconsistently applying this narrow definition. Medically fertile, married, different-sex couples are using ARTs for health reasons, such as to protect a child from inheriting a genetic disease, yet there is no literature regarding the deductibility of these ARTs.[25] The lack of rulings or discussion suggests that the IRS is actually allowing these couples to deduct their expenses. The IRS may be allowing these deductions under the disease prong with the potential child's genetic mutation as the disease, in which case same-sex couples with genetic disorders could deduct their ARTs. But more likely, the IRS views the ARTs as treating infertility and the IRS is not scrutinizing the form of infertility for these married different-sex couples. Applying a different and effectively broader definition of infertility for medically fertile, married, different-sex couples but not for medically fertile, married, same-sex couples is discriminatory.

Finally, the IRS's current position creates convoluted qualifiers for taxpayers wishing to deduct their ART expenses. The deductibility of ARTs depends on several factors, including gender, marital status, sexual orientation, and type of ART.[26] These factors do not promote any known policy objective behind Section 213 and result in discriminatory effects.

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22. *See* Pratt, *supra* note 6, at 1143 nn.129–31; I.R.S. Priv. Ltr. Rul. 2003-18-017 (May 2, 2003) (allowing the deduction of egg donor fees); I.R.S. Info. Ltr. 2005-0102 (Mar. 29, 2005) (explaining that "surgical, hospital, laboratory, and transportation expenses paid by or on behalf of a donor . . . are deductible medical expenses").

23. Rev. Rul. 68-452, 1968-2 C.B. 111 (ruling that the costs of medical procedures performed on an organ donor for the taxpayer were deductible even though the donor was not the taxpayer's spouse or dependent); Estate of Baer v. Comm'r, 26 T.C.M. (CCH) 170, 173 (1967) (holding that "the amount paid to the 'notetaker' was for the primary purpose of alleviating [the] physical defect of deafness and, therefore, is deductible as a medical expense").

24. *See* Morrissey v. United States, 871 F.3d 1260, 1271 (11th Cir. 2017) (noting that the petitioner cited to two cases that reached a settlement "in which heterosexual couples disputed the disallowance of their deductions of surrogacy and egg-donor expenses").

25. *See infra* Section III.C.2.

26. *See infra* Section III.C.3.

Despite these inconsistencies, the IRS continues to apply Section 213 in this way.[27] Scholars have proposed to broaden the definition of "medical care" to include all taxpayers with various forms of infertility.[28] Such proposals, however, ignore the practical difficulties of amending the federal tax code.[29]

This comment argues that states, including Arizona, should write their own definition of "medical care" that specifically includes collaborative treatments to ensure consistent application to all taxpayers and encourage intending parents to form families. Part II reviews how courts and the IRS interpret "medical care" generally under Section 213. Part III analyzes how the IRS and courts have applied this definition to fertility treatments, including ARTs, and explains the problems with the current interpretation. Part IV explores a potential solution in the states, analyzing the issues and benefits of state conformity to federal tax law. This Part argues that Arizona should not conform to the federal definition of "medical care" so it can provide clearer requirements, avoid potentially discriminatory effects, and encourage effective and safe reproductive care. Finally, this Part proposes a new definition of "medical care" for Arizona's tax code.

II. WHAT IS "MEDICAL CARE"?

Not all tax deductions are created equal. Some deductions are seemingly more about politics than subsidizing behavior, while others actually assist taxpayers in meaningful ways.[30] This Part first explores the federal medical expense deduction's significance and who it benefits, establishing the IRS's responsibility to administer this deduction equitably. After explaining the deduction's importance, this Part unpacks the definition of "medical care," as taxpayers can only take this deduction if their treatment qualifies as "medical care" under Section 213.

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27. *See, e.g.*, I.R.S. Priv. Ltr. Rul. 2021-11-4001 (Apr. 9, 2021).

28. *See, e.g.*, Katherine Pratt, *The Curious State of Tax Deductions for Fertility Treatment Costs*, 28 S. CAL. REV. L. & SOC. JUST. 261, 314–15 (2019) (proposing an amended "medical care" definition); *see also, e.g.*, Tessa Davis, *Reproducing Value: How Tax Law Differentially Values Fertility, Sexuality, and Marriage*, 19 CARDOZO J.L. & GENDER 1, 37–38 (2012).

29. Federal tax law is subject to a formal tax legislation process. *See* Will Kenton, *Formal Tax Legislation*, INVESTOPEDIA (Aug. 29, 2020) https://www.investopedia.com/terms/f/formaltaxlegislation.asp [https://perma.cc/9N6P-RW64]; *see also Tax Code, Regulations and Official Guidance*, IRS (Jan. 13, 2022), https://www.irs.gov/privacy-disclosure/tax-code-regulations-and-official-guidance [https://perma.cc/3BVK-7MAL] (noting that federal tax law is found in the Internal Revenue Code and is enacted by Congress).

30. *See, e.g.*, Dale & Colinvaux, *supra* note 1, at 362 (exploring whether the charitable contribution deduction actually promotes charitable giving efficiently).

A. Why Have the Deduction and Who Benefits?

The Section 213 medical expense deduction is an exception to the general rule that taxpayers may not deduct personal expenses from their income.[31] One theory that explains the reasoning behind this exception is that medical expenses merely reflect medical need and not taxable capacity, and these expenses reduce the taxpayer's ability to pay tax.[32] Similar to the function of health insurance, the medical expense deduction puts money into the taxpayer's hands by reducing their tax liability.[33] Section 213's broadness[34] theoretically allows taxpayers to deduct more of these semi-involuntary expenses, further reducing tax liability.

While Congress intended to define "medical care" broadly,[35] this deduction is not without limits. Section 213 allows taxpayers to deduct their expenses for "medical care" only "to the extent that such expenses exceed 7.5 percent of adjusted gross income," or income after applying specified deductions.[36] Taxpayers' adjusted gross income ("AGI") varies depending on their income, but an expense that is greater than 7.5% of AGI generally must be significant.[37] For example, the average American must spend approximately $5,500 on their medical expenses in one year to qualify for the deduction.[38] Furthermore, the medical expense deduction is an itemized

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31. I.R.C. § 262. Similarly, reimbursements received from flexible spending accounts for qualified medical expenses are excludable from gross income. I.R.C. § 105; DEP'T TREASURY, INTERNAL REVENUE SERV., PUB. NO. 969, HEALTH SAVINGS ACCOUNTS AND OTHER TAX-FAVORED HEALTH PLANS 16 (2022).

32. *See* William D. Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309, 314 (1972); *see also* Pratt, *supra* note 6, at 1162–68 (reviewing medical expense literature based on taxpayer liquidity).

33. The amount of tax saved from a tax deduction depends on the taxpayer's tax rate, because the deduction reduces the amount of income multiplied by the tax rate. *See* Lily L. Batchelder et al., *Efficiency and Tax Incentives: The Case for Refundable Tax Credits*, 59 STAN. L. REV. 23, 24 (2006).

34. S. REP. NO. 77–1631, at 6 (1942), https://www.finance.senate.gov/imo/media/doc/SRpt77-1631.pdf [https://perma.cc/E2CW-W5D7] (explicitly stating "the term 'medical care' is broadly defined" for the medical expense deduction). Cosmetic care is one of the only explicit exclusions to the definition of "medical care." I.R.C. § 213(d)(9).

35. S. REP. NO. 77–1631, at 6 (1942), https://www.finance.senate.gov/imo/media/doc/SRpt77-1631.pdf [https://perma.cc/E2CW-W5D7].

36. I.R.C. § 213(a).

37. *Id.* AGI is defined as gross income minus the deductions specified in I.R.C. § 62(a).

38. Michael Parisi, *Individual Income Tax Returns, Preliminary Data, Tax Year 2017*, 3 STATS. INCOME BULL. 2, at 3 (2019), https://www.irs.gov/pub/irs-soi/soi-a-inpd-id1903.pdf [https://perma.cc/KY33-5H8F] (noting that the average AGI reported on individual income tax returns was $71,268 in 2017).

deduction,[39] which typically means a taxpayer will only take the deduction if their itemized deductions in the aggregate are greater than the standard deduction.[40] The standard deduction is a flat deduction of $12,000 for individuals.[41] Most Americans take the standard deduction because it is substantial.[42] However, high-income taxpayers often itemize.[43] These limitations may undermine Section 213's overall value. The deduction's 7.5% of AGI limit and the fact that Section 213 is itemized might suggest that the deduction only helps wealthy taxpayers with expensive, rare medical treatments. This would mean a small portion of Americans could utilize the deduction.

Despite these utility concerns, this deduction could benefit most taxpayers who incur ART costs. While the 7.5% of AGI floor does limit the deduction to costly medical treatments, this Comment focuses on an expensive medical treatment. ARTs cost $30,000 to $50,000 on average.[44] This number is likely higher for taxpayers using surrogacy treatment, including male same-sex couples, as surrogacy costs range from $80,000 to $150,000.[45] Using the $30,000 price, any taxpayer with an AGI of $400,000 or less would benefit from itemizing their deductions when faced with a typical ART bill. Over 98% of U.S. households have an AGI below $400,000,[46] so nearly all taxpayers using ARTs could benefit from the medical expense deduction despite the 7.5% of AGI floor. Because the deduction can mitigate this financial burden, the IRS has a responsibility to apply Section 213 consistently.

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39. I.R.C. §§ 62–63, 213.

40. *See* I.R.C. § 63(d). During years 2018 through 2025, the standard deduction is $18,000 for taxpayers filing as head of household and $12,000 for all other taxpayers. I.R.C. § 63(c)(7)(A).

41. I.R.C. § 63(c)(7)(A)(ii).

42. In 2018, approximately 87.3% of Americans claimed the standard deduction. *SOI Tax Stats – Tax States-at-a-Glance*, IRS (May 16, 2022), https://www.irs.gov/statistics/soi-tax-stats-tax-stats-at-a-glance [https://perma.cc/2MWM-SVA4]; *see* Aaron Tang, *Life After Janus*, 119 COLUM. L. REV. 677, 752 (2019) (stating that most low- and middle-class workers take the standard deduction).

43. Abigail Margaret Frisch, *The Class Is Greener on the Other Side: How Private Donations to Public Schools Play into Fair Funding*, 67 DUKE L.J. 427, 453 n.139 (2017) (noting that middle- and upper-class individuals are more likely to itemize deductions).

44. *See* Hawkins, *supra* note 8; Marissa Conrad, *How Much Does IVF Cost?*, FORBES HEALTH (June 27, 2022, 5:09 AM), https://www.forbes.com/health/family/how-much-does-ivf-cost/ [https://perma.cc/GF6B-NGZE].

45. *See* Daphna Birenbaum-Carmeli & Piero Montebruno, *Incidence of Surrogacy in the USA and Israel and Implications on Women's Health: A Quantitative Comparison*, 36 J. ASSISTED REPROD. & GENETICS 2459, 2461 (2019).

46. *PWBM Analysis of the Biden Platform*, PENN WHARTON BUDGET MODEL (Oct. 28, 2020), https://budgetmodel.wharton.upenn.edu/issues/2020/9/14/biden-2020-analysis [https://perma.cc/FR2V-9GD5].

B. The Basics of Defining "Medical Care": "Inherently Medical" Versus Personal Expense

While most Americans using ARTs would receive a tax benefit if the costs are deductible, this deduction is only available if ARTs qualify as "medical care" under Section 213. Section 213(d)(1)(A) defines "medical care" as amounts paid "for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body."[47] When drafting Section 213, Congress expressly intended to "broadly define[]" "medical care."[48] With this broad definition, tax law sources and case law provide necessary guidance on what constitutes "medical care."

"Medical care" must be "inherently medical" and not a personal expense that is simply health enhancing.[49] The Treasury Regulation interpreting Section 213 provides an illustrative list of "inherently medical" treatment, including hospital services, diagnostic and laboratory tests, prescription drugs, and surgery.[50] There has also been substantial litigation regarding the deductibility of medical care that does not fall under this list.[51] These cases, however, have not involved reproductive care treatment.

An "elective" treatment, or treatment that a patient autonomously decides to undergo, is not an automatic personal expense.[52] A patient must give informed consent for nearly all medical treatment, including for emergency, life-changing operations if possible.[53] Thus, most medical treatment is

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47. I.R.C. § 213(d)(1)(A).

48. S. REP. NO. 1631–77, at 6 (1942), https://www.finance.senate.gov/imo/media/doc/SRpt 77-1631.pdf [https://perma.cc/E2CW-W5D7].

49. *See* Huff v. Comm'r, 69 T.C.M. (CCH) 2551, 2555 (1995) (distinguishing between nonmedical treatments, such as a massage, and "inherently medical" treatments).

50. Treas. Reg. § 1.213-l(e)(1)(ii).

51. Taxpayers have tried, unsuccessfully, to use the medical expense deduction as a way to deduct personal consumption costs that are nondeductible. Courts look for a "direct or proximate relation" between the expense and the alleged medical issue to distinguish between deductible medical expenses and nondeductible personal consumption expenses. Havey v. Comm'r, 12 T.C. 409, 412 (1949). For example, costs of a vacation or other recreational activities may be therapeutic and important to a person's health, but they are not expenses for "medical care" under Section 213 and are instead nondeductible personal consumption expenses. In other words, if the taxpayer would have made the expense regardless of the medical issue, the expense is not "inherently medical" care under Section 213. *See, e.g.*, *id.* at 413 (denying deduction under Section 213 for the taxpayer's vacation recommended by her doctor); Evanoff v. Comm'r, 44 T.C.M. (CCH) 1394, 1396 (1982) (disallowing deduction for pool installation costs at the taxpayers' home).

52. *See* Pratt, *supra* note 17, at 1293–94.

53. PARTH SHAH ET AL., INFORMED CONSENT (2022), https://www.ncbi.nlm.nih.gov/books/NBK430827/#:~:text=Informed%20consent%20is%20the%20process,undergo%20the%20procedure%20or%20intervention.

"elective" in this way.[54] Instead, the inquiry is whether the purpose of the care is to diagnose, cure, mitigate, treat, or prevent a disease, or to affect the patient's functioning or body structure.[55] For example, if a sixty-year-old woman can walk without assistance but chooses to have knee replacement surgery so she can play tennis, the surgery is "medical care" even though the surgery is "elective."

The treatment also need not be "medically necessary" to be considered "medical care" under Section 213.[56] This is distinct from most medical insurance plans, where certain insurance coverage depends on the patient establishing "medical necessity."[57] For example, insurance companies have denied breast reconstruction surgery following mastectomy on the grounds that the surgery is not "medically necessary,"[58] but this surgery is "medical care" under Section 213.[59] Thus, even if patients cannot meet the medical necessity standard for insurance, their treatment can still qualify as "medical care" under Section 213.[60]

Overall, Section 213 can provide a substantial deduction for taxpayers with high medical costs if their treatment is "inherently medical" and not personal consumption. The next Part explores how the IRS has applied the "medical care" definition to reproductive care and its problems with respect to ART deductibility.

III. APPLYING THE "MEDICAL CARE" DEFINITION TO REPRODUCTIVE TREATMENT

Taxpayers who require medical assistance to have a biological child could reduce the financial burden of ARTs by deducting their medical expenses under Section 213. However, Congress enacted the medical expense deduction years before many medical reproductive treatments existed and

54. Pratt, *supra* note 17, at 1293–94.

55. *Id.*

56. A treatment being "medically necessary" may be sufficient to prove that the treatment is Section 213 "medical care," but it is not required. Katherine Pratt, *The Tax Definition of "Medical Care:" A Critique of the Startling IRS Arguments in* O'Donnabhain v. Commissioner, 23 MICH. J. GENDER & L. 313, 370 (2016); *see* I.R.C. § 213.

57. *See, e.g.*, Linda A. Bergthold, *Medical Necessity: Do We Need It?*, 14 HEALTH AFFS. 180, 180 (1995) (noting insurance plans use the ambiguous term "medical necessity" to "define the limits of their benefit coverage").

58. *See* Pratt, *supra* note 28, at 273. Several federal and state statutes require insurance coverage for breast reconstruction surgery following mastectomy, despite this surgery failing the insurance companies' "medical necessity" test. *See, e.g.*, 29 U.S.C. § 1185(a). Regardless of if the surgery is covered, it is still not technically "medically necessary."

59. *See* 136 CONG. REC. 30570 (1990).

60. *See supra* notes 56–59 and accompanying text.

certainly before any child was born through modern ART procedures.[61] Thus, the IRS's application of the Section 213 definition of "medical care" has evolved as reproductive treatment has become more common. This Part explores this application, first to reproductive care that is not an ART, then to ARTs specifically. The comparison will highlight the IRS's inconsistencies that discriminate based on sexual orientation, marriage status, and gender.

A. Before ARTs: The "Medical Care" Definition Applied to General Reproductive Care

To determine if reproductive treatment is "medical care" or personal consumption, a taxpayer must prove that the care falls into one of the two prongs of Section 213: either the treatment is: (i) "for the diagnosis, cure, mitigation, treatment, or prevention of disease" (the "disease prong"); or (ii) "for the purpose of affecting any structure or function of the body" (the "structure-or-function prong").[62]

The IRS provides some binding guidance on the interpretation of "medical care" under Section 213 in Treasury Regulation 1.213-1(e)(1)(ii).[63] The regulation explicitly includes obstetrical care under the structure-or-function prong of Section 213(d)(1).[64] Furthermore, the IRS requires that deductions for medical expenses be "confined strictly to expenses incurred primarily for the prevention or alleviation of a physical or mental defect or illness."[65] However, this "prevention or alleviation" provision has not clarified the meaning of "medical care."[66] Other IRS publications and case law provide more helpful guidance regarding the deductibility of specific reproductive treatments.

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61. Congress enacted the medical expense deduction in 1942 under the Revenue Act of 1942. *Historical Highlights of the IRS*, INTERNAL REVENUE SERV. (Sept. 29, 2022), https://www.irs.gov/newsroom/historical-highlights-of-the-irs [https://perma.cc/UCX4-BNQ4]. The first IVF baby was born in 1978. Pierre Jouannet, *Evolution of Assisted Reproductive Technologies*, 193 BULL. ACAD. NAT'L MED. 573, 574 (2009).

62. I.R.C. § 213(d)(1).

63. Treas. Reg. § 1.213-l(e)(1)(ii).

64. *Id.*

65. *Id.*

66. Courts and scholars have fiercely debated the interpretation of this regulation, especially in the fertility treatment context. *See, e.g.*, O'Donnabhain v. Comm'r, 134 T.C. 34, 59–63 (2010) (discussing the impact of Treas. Reg. § 1.213-1(e)(1) on the deductibility of gender identity disorder treatments).

The IRS includes birth control as "medical care" under Section 213.[67] This inclusion was gradual. In 1967, the IRS allowed taxpayers to deduct birth control expenses only when the doctor determined that "the possibility of childbirth raises a serious threat to the life of the wife."[68] The Chief Counsel of the IRS cautioned against expanding the deduction to include costs of a truly elective use of birth control where the woman could safely carry a baby but preferred not to have children.[69] The IRS, however, changed its position six years later in 1973 and expanded the deductibility of birth control costs by scrapping the "inability to carry" requirement.[70] This change illustrates the IRS's ability to shift its views in tandem with evolving public opinion on sexuality.[71]

In 1973, 2003, and 2007 revenue rulings, the IRS also included costs for vasectomies, elective abortions, and pregnancy tests as deductible medical expenses under the structure-or-function prong of the "medical care" definition under Section 213.[72] Even though the operations did not treat an underlying condition or disease, the IRS held that the procedures satisfied the Regulation 1.213-1(e)(1)(ii) "prevention or alleviation" provision because the treatment affected the structure or function of the taxpayer's body.[73] In other words, whether the treatment addressed an underlying disease was immaterial as long as the treatment satisfied the structure-or-function prong. This disjunctive view of the two prongs followed the IRS Chief Counsel's Office advice to IRS employees when issuing rulings to consider that "the ['prevention or alleviation' provision] was not intended to, and does not, apply to any medical expenses otherwise meeting the statutory definition of "medical care," such as amounts paid for legal surgical operations, since

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67. Rev. Rul. 67-339, 1967-2 C.B. 126; Rev. Rul. 73-200, 1973-1 C.B. 140 ("[T]he amount expended for the birth control pills is an amount paid for medical care.").

68. Rev. Rul. 67-339, 1967-2 C.B. 126.

69. Frederick R. Parker, Jr., *Federal Income Tax Policy and Abortion in the United States*, 13 MICH. ST. U. J. MED. & L. 335, 342 (2009).

70. Rev. Rul. 73-200, 1973-1 C.B. 140; Davis, *supra* note 28, at 8.

71. Davis, *supra* note 28, at 9 (using the IRS's changed position regarding birth control as support for the idea that the IRS could change its position regarding ART deductibility). This change occurred shortly after *Griswold v. Connecticut*, the 1965 U.S. Supreme Court case deciding that married couples have a right to buy and use contraceptives without government interference. 381 U.S. 479, 485 (1965).

72. Rev. Rul. 73-201, 1973-1 C.B. 140 ("[A] taxpayer's expenditures for an operation . . . at her own request to [be sterilized] are deemed to be for the purpose of affecting a structure or function of the body, and therefore, are amounts paid for medical care."); Rev. Rul. 73-603, 1973-2 C.B. 76; Rev. Rul. 2007-72, 2007-50 I.R.B. 1154.

73. Rev. Rul. 73-201, 1973-1 C.B. 140 ("Since the purpose of the [vasectomy] is to effect [sic] both a structure and a function of the body, its cost is an amount paid for medical care as defined in section 213(e) of the Code and section 1.213-1(e)(1)(ii) of the regulations."); Rev. Rul. 2007-72, 2007-50 I.R.B. 1154.

those operations affect a structure or function of the body."[74] These rulings and statements clearly suggest that the IRS interpreted the Section 213 "medical care" definition as needing to satisfy either the disease prong or the structure-or-function prong.

Overall, the IRS's application of Section 213 evolved to allow taxpayers to deduct all types of reproductive treatment and it never required non-ART expenses to satisfy both prongs of the "medical care" definition. The IRS changed its position, however, when it began applying Section 213 to ARTs.

B. Applying the "Medical Care" Definition to ARTs

The IRS has recently addressed the deductibility of ARTs under Section 213. This deductibility is contingent on several factors, including the type of infertility and whether the treatment is collaborative.

Whether ARTs fall within the Section 213 definition of "medical care" depends in part on the definition of infertility. The IRS and courts view infertility as an inability to conceive after unprotected, heterosexual intercourse,[75] which follows the typical infertility definition in state and federal statutes.[76] This definition assumes heterosexuality and marriage.[77] Professor Lisa Ikemoto criticized this assumption and coined the term "dysfertility" to incorporate nontraditional patients, including single parents and same-sex couples, in the fertility discussions.[78] Infertility generally refers to individuals who cannot reproduce without medical assistance due to an organic etiology, or a physiological abnormality causing the infertility.[79] Dysfertile individuals, on the other hand, cannot reproduce without medical assistance because of their social circumstances, including lacking a sexual partner (regardless of marital or relationship status) or having a same-sex

74. *Id.*

75. *See* Magdalin v. Comm'r, No. 09-1153, 2009 WL 5557509, at *1 (1st Cir. Dec. 17, 2009) (using the fact that the taxpayer had children through "natural processes" as support for determining the taxpayer's fertility).

76. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 1374.55(b) (West 2014) (defining "infertility" as "(1) the presence of a demonstrated condition recognized by a licensed physician and surgeon as a cause of infertility, or (2) the inability to conceive a pregnancy or to carry a pregnancy to a live birth after a year or more of regular sexual relations without contraception").

77. Lisa C. Ikemoto, *The In/fertile, the Too Fertile, and the Dysfertile*, 47 HASTINGS L.J. 1007, 1033 (1996) (discussing how the social perception of families, women, and gender is driving the prohibition of ARTs to individuals that fall out of these traditional norms).

78. *Id.*

79. *Id.* at 1027.

partner.[80] As dysfertility encapsulates non-physiological infertility, taxpayers who choose not to reproduce for the mother's or potential child's safety are also dysfertile. While both forms of infertility require medical assistance, this distinction matters to the case law and regulatory guidance. This Comment will thus use the terms medically infertile and dysfertile to distinguish the two scenarios.

Another factor that the IRS and courts use to determine if ARTs are "medical care" is whether the ARTs are "collaborative," requiring a third party to assist with the reproduction process as a sperm or egg donor or a surrogate. These "collaborative" ARTs differ from "non-collaborative" ARTs where the procedure or treatment is performed directly on the taxpayer's body. This distinction is relevant to the "medical care" inquiry because of the IRS's narrow interpretation of the structure-or-function prong with respect to ARTs.

1. Non-collaborative ARTs

The deductibility of non-collaborative ARTs depends on whether the taxpayer is medically infertile or dysfertile.

a. Medically Infertile Taxpayers

Medically infertile female taxpayers in a different-sex relationship may utilize "non-collaborative" ARTs, such as intrauterine insemination ("IUI"), in vitro fertilization ("IVF"), and intracytoplasmic sperm injection ("ICSI").[81] The most common ART is IVF,[82] where a doctor prescribes hormone drugs to stimulate a woman's ovaries, extracts her eggs, fertilizes the eggs with sperm in a Petri dish, and then implants the resulting embryos in the same woman's uterus.[83]

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80. *Id.* While some scholars have accepted this term, others have criticized the term for implying dysfunctionality to an individual's relationship status or sexual orientation. *Compare* Pratt, *supra* note 17, at 1327 (using the dysfertility term), *with* Davis, *supra* note 28, at 36 n.236 (rejecting the term dysfertility because it implies that same-sex attraction is dysfunctional).

81. Pratt, *supra* note 6, at 1133–34.

82. Hawkins, *supra* note 8, at 115.

83. RESOLVE: THE NAT'L INFERTILITY ASS'N, RESOLVING INFERTILITY: UNDERSTANDING THE OPTIONS AND CHOOSING SOLUTIONS WHEN YOU WANT TO HAVE A BABY, 176–80 (1999); *What Is In Vitro Fertilization?*, AM. SOC'Y FOR REPROD. MED., https://www.reproductivefacts.org/faqs/frequently-asked-questions-about-infertility/q05-what-is-in-vitro-fertilization/ [https://perma.cc/H7QX-3739].

Tax law consistently views medical infertility as a "disease."[84] Thus, ARTs used to assist medically infertile taxpayers qualify as "medical care" under the disease prong of Section 213.[85] Furthermore, non-collaborative ARTs are used on the body of the taxpayer or the taxpayer's spouse, so these also qualify under the structure-or-function prong without debate.[86]

Publication 502, intended for lay taxpayers, confirms this analysis, stating that taxpayers can deduct the costs of "fertility enhancements," including IVF, to "overcome an inability to have children."[87] The publication does not limit the deductions to costs spent for treatments that address a medical inability to have children. It merely states that the purpose of the procedures must treat "an inability to have children."[88] This unqualified language should apply to dysfertile individuals who utilize ARTs to "overcome an inability to have children," but the IRS takes a narrower view in its private rulings and arguments in case law. Although taxpayers cannot rely on Publication 502 in court, the advice sheds light on the evolution of the IRS's position regarding ART deductibility.

b. Dysfertile Taxpayers

Case law does not address the deductibility of non-collaborative ARTs for dysfertile taxpayers, and the IRS guidance is limited and conflicting. The IRS argued in *Magdalin v. Commissioner* that the taxpayer must be physiologically infertile to deduct even non-collaborative ART expenses.[89] But in a 2021 Private Letter Ruling ("PLR"), the IRS mentioned that a male dysfertile taxpayer could deduct costs of freezing or donating his own

84. *See, e.g.*, Magdalin v. Comm'r, 96 T.C.M. (CCH) 491, 493 (2008), *aff'd*, No. 09-1153, 2009 WL 5557509 (1st Cir. Dec. 17, 2009) (holding that the taxpayer did not have a medical condition, "such as, for example, infertility, that required treatment or mitigation through IVF procedures" and could not deduct his ART costs).

85. I.R.C. § 213(d)(1).

86. *Id.*

87. *See, e.g.*, U.S. DEP'T TREASURY, INTERNAL REVENUE. SERV., PUB. NO. 502, MEDICAL AND DENTAL EXPENSES (INCLUDING THE HEALTH COVERAGE TAX CREDIT) 2–3, 12 (2022) (specifying various medical expenses that are deductible, including costs for surgeries and procedures); I.R.S. Priv. Ltr. Rul. 2003-18-017 (Jan. 9, 2003) (finding that egg donor costs and related expenses are deductible). The "fertility enhancement" and "in vitro fertilization" language in Publication 502 has not changed for years. *See, e.g.*, Pratt, *supra* note 6, at 1139 n.102 (quoting language from the 2002 version of Publication 502 that is identical to the 2022 version).

88. U.S. DEP'T TREASURY, INTERNAL REVENUE. SERV., PUB. NO. 502, MEDICAL AND DENTAL EXPENSES (INCLUDING THE HEALTH COVERAGE TAX CREDIT) 7 (2022).

89. Opening Brief for Respondent at 14–19, Magdalin v. Comm'r, 96 T.C.M. (CCH) 491 (2008) (No. 7880-07), 2008 WL 5535409 (arguing that an expense that satisfies the structure-or-function prong must still be related to a medical condition to be deductible under Section 213).

sperm.[90] Ultimately, there is little guidance for dysfertile taxpayers deducting non-collaborative ARTs, and the scant guidance is conflicting and unhelpful.

2. Collaborative ARTs

The IRS has addressed the deductibility of collaborative ARTs in two contexts: sperm and egg donations and surrogacy. The IRS's rationales are contradictory in these two contexts, viewing fertility as a function of the body for taxpayers needing egg donations but not for taxpayers needing surrogacy.

a. Sperm and Egg Donation

The IRS suggested in two PLRs in the early 2000s that the costs of sperm and egg donations are deductible under Section 213.[91] While both PLRs referred to women who had the egg or embryo inserted into their bodies, the issue was whether the donor's fees, and not the insemination costs, were deductible.[92] The IRS only focused on whether the donation falls into the structure-or-function prong of the Section 213 definition of "medical care" and never referred to the disease prong.[93] Arguably, the donation itself does not affect the taxpayer's body—only the insemination physically alters her body. Yet, the IRS repeatedly stated that a procedure that facilitates overcoming infertility "affects a structure or function of the body" and is therefore "medical care" under Section 213.[94] In both pronouncements, the IRS compared the sperm and egg donor's expenses to a kidney donor's expenses, which are also deductible.[95]

Overall, the IRS at that time explicitly held that "fertility is a function of the body" without mentioning whether infertility was a "disease."[96] This suggests that whether the taxpayer is medically infertile or dysfertile is irrelevant to the deductibility of non-collaborative ARTs because a procedure that helps overcome any infertility is affecting the body's reproductive function.

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90. I.R.S. Priv. Ltr. Rul. 2021-14-001 (Apr. 9, 2021).
91. I.R.S. Priv. Ltr. Rul. 2003-18-017 (May 2, 2003); I.R.S. Info. Ltr. 2005-0102 (Mar. 29, 2005).
92. *See supra* note 91.
93. *See supra* note 91.
94. *See supra* note 91.
95. *See supra* note 91.
96. I.R.S. Info. Ltr. 2005-0102 (Mar. 29, 2005).

b. Surrogacy

The tax analysis becomes more complicated when the intended parent or parents require a surrogate because unlike other ARTs, the goal of a surrogate procedure is to have a third party, not the taxpayer, become pregnant and bear the child. If the intended parent cannot gestate a child, a doctor will implant the fertilized embryos in the uterus of a third party who carries and bears the child. The third party is known as a gestational surrogate.[97]

i) Medically Infertile Taxpayers

The IRS has not provided much guidance regarding the deductibility of surrogacy costs for medically infertile taxpayers, and the little guidance given is inconsistent. In a nonbinding 2002 IRS Information Letter, the IRS stated that gestational surrogacy costs are not deductible medical expenses under Section 213.[98] Yet, the IRS settled two cases, one in 1994 and one in 2011, in which it allowed medically infertile different-sex married couples to deduct surrogacy costs.[99] Thus, while these cases are not binding, there is evidence of medically infertile couples successfully deducting their surrogacy costs.

Although the IRS has been relatively quiet on surrogacy cost deductibility for medically infertile taxpayers, the IRS's analysis in three rulings regarding the deductibility of medical expenses suggests that surrogacy could be included in the definition of "medical care." First, since a 1968 Revenue Ruling regarding the deductibility of an organ donor's expenses, a taxpayer can deduct the costs of a medical procedure performed on another person who is not the taxpayer's spouse or dependent if the costs were incurred "primarily for" the taxpayer.[100] Under this rationale, the costs of a surrogate's medical procedures are arguably incurred "primarily for" the taxpayer and should therefore be deductible.

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97. *Gestational Surrogacy Fact Sheet*, N.Y. DEP'T HEALTH (Feb. 2021), https://health.ny.gov/community/pregnancy/surrogacy/gestational_surrogacy_fact_sheet.htm#:~:text=What%20is%20gestational%20surrogacy%3F,for%20another%20person%20or%20couple [https://perma.cc/Q7KW-WQL2].

98. I.R.S. Info. Ltr. 2002-0291 (Dec. 31, 2002).

99. Morrissey v. United States, 871 F.3d 1260, 1271 (11th Cir. 2017) (citing Sedgwick v. Comm'r, No. 10133-94 (T.C. filed June 14, 1994); Osius v. Comm'r, No. 15472-11S (T.C. filed June 30, 2011)). In both *Osius* and *Sedgwick*, different-sex couples were seeking the Section 213 medical deduction for their surrogacy and IVF expenses. These cases settled, so there is no opinion, but both couples were able to claim the deduction.

100. *See* Rev. Rul. 68-452, 1968-2 C.B. 111 (allowing the deductibility of costs of medical procedures performed on an organ donor who was not the taxpayer's spouse or dependent); *see also* Pratt, *supra* note 6, at 1143.

Second, the IRS views treatment that "substitutes for normal functioning" as "medical care" under Section 213 even when the care is not "inherently medical" and the services do not affect the taxpayer's body.[101] For example, expenses of a guide for a blind person are deductible because the "sole purpose" in having such services is to "alleviate the . . . physical defect of blindness."[102] Like a kidney donation, which provides a substitute for normal functioning of the body's blood filtering system,[103] the surrogate provides a substitute for "normal" functioning of the taxpayer's reproductive system.[104] Thus, surrogacy expenses could be deducted also under this "substitute for normal functioning" rationale.

Finally, the IRS's "facilitating overcoming infertility" argument in the early 2000's egg donor pronouncements also suggests that medically infertile taxpayers could deduct surrogacy costs.[105] Surrogacy, like an egg or kidney donation, does not physically alter the taxpayer's body, but surrogacy does "facilitate . . . overcoming infertility" just like an egg donation.[106] This rationale is the most related to reproductive treatment and is therefore the most useful for medically infertile taxpayers wanting to deduct their surrogacy expenses.

Ultimately, even though these rationales from IRS rulings and law suggest that surrogacy costs incurred for a medically infertile taxpayer could be deductible, there is no binding law or clear guidance from the IRS about the deductibility of these expenses.

ii) Dysfertile Taxpayers

The law regarding the deductibility of surrogacy costs for dysfertile taxpayers, while not abundant, is clearer than for medically infertile taxpayers. In three cases and a 2021 PLR responding to male same-sex

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101. *See* Treas. Reg. § 1.213-1(e)(1)(iii); Rev. Rul. 64-173, 1964-1 C.B. 121 (ruling that the expenses of having an individual walk with the taxpayer's blind child at school are deductible); Rev. Rul. 55-261, 1955-1 C.B. 307 (allowing the taxpayer to deduct costs of a seeing-eye dog to accompany the taxpayer who is blind under Section 213); Estate of Baer v. Comm'r, 26 T.C.M. (CCH) 170, 173 (1967) (holding that "the amount paid to the 'notetaker' was for the primary purpose of alleviating [the] physical defect of deafness and, therefore, is deductible as a medical expense").

102. Rev. Rul. 64-173, 1964-1 C.B. 121.

103. Rev. Rul. 68-452, 1968-2 C.B. 111 (allowing the deduction of kidney donor costs).

104. *See* Pratt, *supra* note 17, at 1322–24. This language is rooted in traditional views of what a "normal" reproductive process looks like and is thus problematic. A "substitute for the physiological functions" is better language.

105. I.R.S. Priv. Ltr. Rul. 2003-18-017 (May 2, 2003); I.R.S. Info. Ltr. 2005-0102 (Mar. 29, 2005).

106. I.R.S. Priv. Ltr. Rul. 2003-18-017 (May 2, 2003); I.R.S. Info. Ltr. 2005-0102 (Mar. 29, 2005).

couples who sought the medical deduction for surrogacy expenses, the IRS disallowed surrogacy costs, and this position was upheld by the courts.[107] According to the IRS and the First and Eleventh Circuits, the expenses do not qualify under either the disease prong, because the taxpayer is not medically infertile, or the structure-or-function prong, because the medical treatment is not being used on the taxpayer or the taxpayer's spouse.[108] There are several problems with the courts' arguments, and other courts may not rule the same way. As of now, however, the law is unfavorable for dysfertile taxpayers who wish to deduct their surrogacy expenses under Section 213.

Overall, the IRS's application of Section 213 connects the deductibility of ART costs to the type of treatment and the form of infertility. The next section explores the flaws of this application.

C. The Problems of the IRS's Position

The IRS's interpretation of "medical care" with respect to ARTs is inconsistent with its prior rulings, is based on outdated notions of infertility that are only applied to same-sex and unmarried couples, and is confusing and potentially discriminatory given that its effect hinges deductibility on taxpayers' gender, sexuality, and relationship status.

1. Inconsistent with Earlier Rulings

The first flaw with the IRS's position regarding the deductibility of ARTs is that it contradicts rationales and arguments presented in its own prior rulings. Although PLRs and information letters are not binding precedent,[109] the IRS usually makes arguments based on prior rulings.[110] Yet here, the IRS took new positions, without mentioning the contradictory rulings, that hurt a taxpayer's ability to deduct ART expenses under both the disease prong and the structure-or-function prong.

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107. *See* Magdalin v. Comm'r, 96 T.C.M. (CCH) 491 (2008), *aff'd*, No. 09-1153, 2009 WL 5557509 (1st Cir. Dec. 17, 2009); Longino v. Comm'r, 105 T.C.M. (CCH) 1491 (2013), *aff'd*, 593 Fed. Appx. 965 (11th Cir. 2014); Morrissey v. United States, 226 F. Supp. 3d 1338, 1342–44 (M.D. Fla. 2016), *aff'd*, 871 F.3d 1260 (11th Cir. 2017); I.R.S. Priv. Ltr. Rul. 2021-11-4001 (Apr. 9, 2021).

108. *See* cases cited *supra* note 107.

109. *See* I.R.C. § 6110(k)(3).

110. *See* MICHAEL I. SALTZMAN, IRS PRACTICE & PROCEDURE 3.03, at 2 (2d ed. 1991).

a. The New Disease-Prerequisite Rule

In *Magdalin v. Commissioner*, the IRS argued that the treatment must address an underlying disease or condition even if the treatment affects the structure or function of the taxpayer's body.[111] In other words, the taxpayer must prove medical infertility as a prerequisite for deducting ART expenses that satisfy the structure-or-function prong. This is inconsistent with the general reproductive treatment doctrine that allows taxpayers to deduct reproductive treatment satisfying the structure-or-function prong even if it is not addressing an underlying "disease" such as medical infertility.[112] Before *Magdalin*, it was clear that a taxpayer could qualify under either prong.[113] Since *Magdalin*, the courts and IRS have flip-flopped in applying this new rule: the Eleventh Circuit has adopted the disease-prerequisite rule while the IRS has mentioned that a treatment could actually be deducted under the structure-or-function prong only.[114] The Eleventh Circuit decision is binding for taxpayers in its jurisdiction, but the IRS has a broader geographic scope. At this point, it is unclear what the IRS's next position will be, but there is enough law using the disease-prerequisite rule to suggest that a taxpayer could be subject to this unfavorable new rule.

b. Structure-or-Function Prong

The IRS's argument, accepted by the First and Eleventh Circuits, that procedures affecting a third-party surrogate do not affect the body of the taxpayer is inconsistent with its earlier rulings and rationales. The three arguments regarding surrogacy costs for medically infertile taxpayers apply.[115] First, like the third-party organ donor's medical procedures, which affected the "structure or function" of the taxpayer's body because it was "primarily for" the taxpayer, the surrogate's medical treatments are also

111. Opening Brief for Respondent at 14–19, Magdalin v. Comm'r, 96 T.C.M. (CCH) 491 (2008) (No. 7880-07), 2008 WL 5535409.

112. *See* I.R.S. Priv. Ltr. Rul. 2003-18-017 (May 2, 2003); *see also* I.R.S. Info. Ltr. 2005-0102 (Mar. 29, 2005).

113. *See* I.R.S. Priv. Ltr. Rul. 2003-18-017 (May 2, 2003); *see also* I.R.S. Info. Ltr. 2005-0102 (Mar. 29, 2005).

114. In the 2021 PLR, the IRS mentioned that non-collaborative treatment may be deductible for the same-sex couple, suggesting it does not actually require taxpayers to meet the disease prong if the structure-or-function prong is satisfied. I.R.S. Priv. Ltr. Rul. 2021-11-4001 (Apr. 9, 2021). However, in *Morrissey v. United States*, the court conflated the two prongs and focused on the taxpayer's physiological fertility when determining if the ARTs satisfied the structure-or-function prong. This effectively made the disease prong a prerequisite. 871 F.3d 1260, 1279–72 (11th Cir. 2017).

115. *See supra* Section III(B)(2)(b)(i).

"primarily for" the taxpayers.[116] Second, surrogacy treatments affect a taxpayer's body even though the taxpayer is not the surrogate because it provides a substitute for the "normal" reproductive process.[117] Third, surrogacy facilitates overcoming a form of infertility just like an egg or sperm donation does—both of which are deductible.[118]

Ultimately, the IRS seemed to ignore a plethora of precedent when making its arguments against the deductibility of ARTs for dysfertile taxpayers. This inconsistency is not only confusing for taxpayers but is also questionable because the changes occurred specifically for taxpayers who are single and in same-sex relationships.

2. Inconsistent Notions of Infertility

The IRS uses a limiting definition of infertility, and it potentially applies this narrow definition in a discriminatory manner. The IRS's view of infertility is critical for taxpayers seeking to deduct their ART expenses because the *Magdalin* disease-prerequisite rule requires that the treatment satisfy the disease prong, and the "disease" that ARTs are "mitigat[ing]" is typically[119] infertility.[120] In case law and rulings about dysfertile taxpayers' ability to deduct ART expenses, the courts and the IRS view infertility solely as a malfunction of the physiological reproduction process.[121] This aligns with most statutory definitions of infertility, which generally define infertility as the inability to conceive after a year of unprotected intercourse.[122]

The IRS's physiological-based concept of infertility is outdated and rooted in traditional notions of family formation. With social and medical advancements, increasing numbers of same-sex couples and individuals

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116. *See* Rev. Rul. 68-452, 1968-2 C.B. 111 (allowing the deduction of the costs of medical procedures performed on an organ donor even though the donor was not the taxpayer's spouse or dependent because the procedure was "primarily for" the taxpayer).

117. *See supra* note 104 and accompanying text.

118. I.R.S. Priv. Ltr. Rul. 2003-18-017 (May 2, 2003); I.R.S. Info. Ltr. 2005-0102 (Mar. 29, 2005).

119. There could be instances where ARTs are treating other diseases, such as a genetic disorder of a potential child. *See infra* note 126.

120. *See* I.R.C. § 213(d)(1)(A).

121. *See* Magdalin v. Comm'r, No. 09-1153, 2009 WL 5557509, at *1 (1st Cir. Dec. 17, 2009) (using the fact that the taxpayer had children through "natural processes" as support for determining the taxpayer's fertility).

122. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 1374.55(b) (defining "infertility" as "(1) the presence of a demonstrated condition recognized by a licensed physician and surgeon as a cause of infertility, or (2) the inability to conceive a pregnancy or to carry a pregnancy to a live birth after a year or more of regular sexual relations without contraception").

without a sexual partner intend to parent using ARTs.[123] These dysfertile individuals experience the same end-result as medically infertile couples: they are unable to have children without medical assistance. In this way, dysfertility is simply another form of infertility, and this type of infertility should be treated the same as medical infertility in accordance with progressive notions of family. A narrow concept of infertility suggests that a same-sex couple is fertile because they could have sex with people of the opposite sex outside their partnership and conceive. This view bases a same-sex couple's fertility on opposite sex relations that ignores their sexual orientation, whereas a different-sex couple's fertility is viewed in a context that aligns with their sexual orientation. Evolving social norms and medical studies encourage individuals to live consistent with their sexual orientation and family formation preferences.[124] Thus, the IRS should broaden its notion of infertility by including the socially infertile with the medically infertile in the disease prong of Section 213 to align with the modern understanding of relationships and families.[125]

Another reason the IRS should expand its view of infertility is because the IRS seems to be using a broader definition of infertility for married, different-sex, medically fertile taxpayers. Like same-sex couples who use ARTs to have a child despite their medical fertility, different-sex couples who are medically fertile may use ARTs for the mother or child's safety.

For example, medically fertile taxpayers with inheritable genetic disorders are using ARTs to have healthy, biological children.[126] If one parent carries

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123. Juan J. Tarin et al., *Deficiencies in Reporting Results of Lesbians and Gays After Donor Intrauterine Insemination and Assisted Reproductive Technology Treatments: A Review of the First Emerging Studies*, 13 REPROD. BIOLOGY & ENDOCRINOLOGY, no. 52, 2015, at 2, https://rbej.biomedcentral.com/articles/10.1186/s12958-015-0053-9 [https://perma.cc/A7TZ-TVND]; Ikemoto, *supra* note 77, at 1029 (discussing how the social perception of families, women, and gender is driving the prohibition of ARTs to individuals that fall out of these traditional norms).

124. *See* Patrick W. Corrigan & Alicia K. Matthews, *Stigma and Disclosure: Implications for Coming Out of the Closet*, 12 J. MENTAL HEALTH 235, 244 (2003) (finding substantial health benefits for gay and lesbian individuals who have come "out" as gay or lesbian to the public).

125. The argument that all forms of infertility, including infertility caused by relationship type or status, should qualify as a "disease" under Section 213 is imperfect because the word "disease" may imply that being in a homosexual relationship is abnormal or the relationship itself is the underlying condition or "disease." Of course, this is far from true. Despite its flaws, this argument is important because of the disease-prerequisite rule the IRS has used against dysfertile taxpayers.

126. Genetic diseases are DNA mutations that are passed from parent to offspring. Joshua D. Seitz, *Striking a Balance: Policy Considerations for Human Germline Modification*, 16 SANTA CLARA J. INT'L L. 60, 64–69 (2018); *see* Joep Geraedts, *Healthy Children Without Fear*, 18 EMBO

a genetic disorder such as Tay-Sachs, cystic fibrosis, or Huntington's disease, there can be a 50% chance of the child inheriting the disease depending on the genetic mutation.[127] As genetic disorders are often extremely debilitating and sometimes fatal,[128] and since most are uncurable,[129] the only way a taxpayer could have a biological child without playing with the odds of passing the disease to the child is through ARTs. Specifically, the taxpayer can utilize a process called preimplantation genetic diagnosis (PGD), whereby embryos are tested using IVF and those embryos without the genetic mutation are inserted into the female's body. [130]

Additionally, a medically fertile taxpayer may choose to pursue ARTs because of medical complications experienced in prior pregnancies or because of the substantial harm inherent to pregnancy and labor. Despite a cultural presumption that pregnancy risks are "rarities," contemporary data regarding medical hazards of pregnancy, labor, and postpartum recovery shows "how frequent, unpredictable, [and] severe" the health risks are for pregnant women.[131] The United States has the highest rate of maternal mortality among developed countries at 700 deaths per year,[132] and despite

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REPS. 666, 666 (2017); Jamie Talan, *IVF Used by Some To Avoid Passing on Genetic Diseases to Offspring*, WASH. POST (Dec. 4, 2021), https://www.washingtonpost.com/health/preimplantation-genetic-testing/2021/12/03/3127e97e-1640-11ec-a5e5-ceecb895922f_story.html [https://perma.cc/VK8W-2TAW].

127. *See* Seitz, *supra* note 126, at 64–65 (explaining that because one chromosome carrying the mutated gene is sufficient to cause Huntington's disease, one parent with the mutation who has a child risks a 50% chance of passing the disease to the child).

128. *Id.* at 65 (noting complex symptoms of Phenylketonuria, or PKU, such as heart problems, head size reduction, and low birth weight); E. Jonathan Mader, *The Wholesale Human: The Ineffectuality of Responsive Regulation to Advancements in Reproductive Biotechnology Post* Roe v. Wade, 42 UNIV. ARK. LITTLE ROCK L. REV. 203, 227 (2019) (discussing Tay-Sachs symptoms, including loss of muscle and mental functioning, and noting that children with this disease do not typically survive beyond five years old).

129. Nathan A. Adams, IV, *Creating Clones, Kids & Chimera: Liberal Democratic Compromise at the Crossroads*, 17 NOTRE DAME J.L., ETHICS & PUB. POL'Y 71, 95 (2003) (describing a ten-year "therapeutic gap" between the discovery of sex-linked inheritable diseases and treatment); Mader, *supra* note 128, at 227 (noting there is no known cure for Tay Sachs).

130. Seitz, *supra* note 126, at 66 (observing that PMG is widely used in the U.S. and other countries "to increase the chance that people afflicted with genetic diseases will have healthy offspring").

131. Elyssa Spitzer, *Pregnancy's Risks and the Health Exception in Abortion Jurisprudence*, 22 GEO. J. GENDER & LAW. 127, 129 (2020).

132. HEALTH RES. & SERV. ADMIN., U.S. DEPT. OF HEALTH & HUM. SERV., HRSA MATERNAL MORTALITY SUMMIT: PROMISING GLOBAL PRACTICES TO IMPROVE MATERNAL HEALTH OUTCOMES, TECHNICAL REPORT 2 (2019) (finding the U.S. ranked 46th of 181 countries in 2015 and was "among the highest of developed countries"); Emily E. Petersen et al., *Racial/Ethnic Disparities in Pregnancy-Related Deaths—United States, 2007–2016*, 68

medical advancements, this rate has increased 75% since 1999.[133] Maternal mortality is also much more common for Black or indigenous women.[134] Other highly dangerous risks include sepsis,[135] disc herniation,[136] postpartum hemorrhage,[137] and preeclampsia.[138] And births involve immense pain, and most involve vaginal tearing.[139] Thus, a medically fertile woman, especially a woman of color in the United States, may decide to use ARTs to have a child because the dangers associated with pregnancy are too substantial to justify becoming pregnant.

Medically fertile taxpayers who use ARTs because of safety concerns, either for the mother or the child, may feel functionally infertile. Because of the risks of bearing an unhealthy child or experiencing substantial medical complications during labor, a taxpayer may decide she cannot safely or ethically have a child without medical assistance. Regardless of whether the deduction should be taken this far, these safety concerns are legitimate reasons why a taxpayer might use ARTs. And while the full extent of taxpayers using ARTs to avoid pregnancy risks is not known, it is at least known that medically fertile taxpayers with inheritable diseases are using ARTs to protect the child.[140]

Because these taxpayers are medically fertile like some taxpayers in same-sex relationships, their ARTs should not qualify as "medical care" under the disease prong of Section 213 according to the IRS and courts' rationale in cases with dysfertile taxpayers. But what is actually happening? There is no literature about the deductibility of ARTs for different-sex, medically fertile couples using ARTs. The lack of cases or rulings regarding this scenario creates a negative inference that the IRS is in fact allowing medically fertile,

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MORBIDITY & MORTALITY WKLY. REP. 762, 762 (2019) (finding 16.7 maternal deaths per 100,000 births in the United States, and that maternal death rates of black women were three times that of white women).

133. Spitzer, *supra* note 131, at 151.

134. Khirara M. Bridges, *Racial Disparities in Maternal Mortality*, 95 N.Y.U. L. REV. 1229, 1248 ("Black women are three to four times as likely to die from pregnancy-related causes than white women.").

135. Colleen D. Acosta et al., *The Continuum of Maternal Sepsis Severity: Incidence and Risk Factors in a Population-Based Cohort Study*, 8 PLOS ONE 1, 1 (2013).

136. *See* Guinn Dunn et al., *Trajectories of Lower Back, Upper Back, and Pelvic Girdle Pain During Pregnancy and Early Postpartum in Primiparous Women*, 15 WOMEN'S HEALTH 1, 2 (2019).

137. Yinka Oyelese & Cande V. Ananth, *Postpartum Hemorrhage: Epidemiology, Risk Factors, and Causes*, 53 CLINICAL OBSTETRICS & GYNECOLOGY 147, 149–51 (2010).

138. Spitzer, *supra* note 131, at 155 (describing preeclampsia as "a condition associated with the development of significantly elevated blood pressure that carries the risk of progressing to eclampsia, in which seizures are present").

139. *Id.* at 160–62.

140. *See* Geraedts, *supra* note 126, at 669; Talan, *supra* note 126.

married, different-sex taxpayers with genetic disorders to deduct ART expenses under Section 213.[141]

One theory for why different-sex, medically fertile couples are successfully deducting their ARTs is that the IRS views the genetic mutation in the potential child or pregnancy itself as the "disease" the ARTs are treating. If the IRS viewed pregnancy as the disease, all unsterilized women could deduct any ART expense under the disease prong. Any unsterilized woman, regardless of relationship status or sexual orientation, has the "natural" physiological ability to become pregnant and could thus be subject to this "disease" that ARTs could treat. Furthermore, the IRS may maintain that a parent with a genetic disorder using ARTs is treating the potential child's disease and not the infertility caused by the genetic disorder. In this case, all men or women with inheritable genetic disorders could deduct ARTs under the disease prong because a biological child could be subject to the genetic disorder regardless of the parent's marital status or sexual orientation. This view would allow all same-sex couples with a genetic disorder and all female same-sex couples to deduct ART expenses.

Conversely, the IRS may view infertility as the disease that different-sex, medically fertile couples are treating with ARTs. This infertility theory is more likely than the pregnancy[142] or genetic mutation theory because ARTs were made to treat infertility,[143] and it is likely administratively difficult for the IRS to determine what disease ARTs are treating beyond infertility.[144] Under this theory, the IRS is assuming the different-sex couples' ARTs are

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141. *See, e.g.*, Pratt, *supra* note 28, at 306 (noting the lack of IRS denial cases suggests that the IRS is actually allowing the deduction).

142. It is also unlikely that the IRS views pregnancy as a disease because of the generally positive societal attitudes towards pregnancy, the lack of "abnormality" in a typical pregnancy, and the expansive effect this would have on Section 213 deductibility. *See* Frank Newport & Joy Wilke, *Desire for Children Still Norm in U.S.*, GALLUP (Sept. 25, 2013), https://news.gallup.com/poll/164618/desire-children-norm.aspx [https://perma.cc/24Y8-FQFD] ("More than nine in 10 adults say they already have children, are planning to have children, or wish that they had children."); *Trends in Pregnancy and Childbirth Complications in the U.S.*, BLUE CROSS BLUE SHIELD (June 17, 2020), https://www.bcbs.com/the-health-of-america/reports/trends-in-pregnancy-and-childbirth-complications-in-the-us#:~:text=and%20postnatal%20care.-,Pregnancy%20complications%20include%20gestational%20diabetes%20and%20preeclampsia.,a%20certain%20window%20surrounding%20delivery [https://perma.cc/47D2-5E2H] ("80% of women have healthy pregnancies and deliveries."); *cf.* Man Guo, *Parental Status and Late-Life Well-Being in Rural China: The Benefits of Having Multiple Children*, 18 AGING & MENTAL HEALTH 19, 28 (2014).

143. *Assisted Reproductive Technology*, MEDLINEPLUS, https://medlineplus.gov/assistedreproductivetechnology.html#:~:text=Assisted%20reproductive%20technology%20(ART)%20is,with%20sperm%20to%20make%20embryos [https://perma.cc/2X5K-A3G8].

144. *See Tax Advocate Criticizes IRS Taxpayer Service*, 107 PRAC. TAX STRATEGIES 32, 32 (2021) (explaining that, due to changes in workflow brought on by the COVID-19 pandemic, the IRS had a backlog of approximately thirty million unprocessed tax returns as of May 2021).

treating infertility and is not scrutinizing their cause of infertility. But for same-sex couples and unmarried individuals, the type of infertility is crucial. Thus, the IRS is effectively broadening the definition of infertility for married, different-sex couples while maintaining a narrow definition for same-sex couples and single taxpayers.

The differentiation between married and unmarried couples may be attributable to Section 213's aggregation provision,[145] but this does not explain the IRS's distinct treatment of same-sex married couples. Section 213 aggregates expenses only for married couples, removing the IRS's need to determine which spouse is receiving the medical treatment and what is the etiology, or medical cause, of the "infertility."[146] Thus, the different standards of proving etiology between married and single taxpayers, while problematic, is aligned with Section 213's text. However, the IRS's differential treatment extends beyond marital status—even married same-sex couples must prove physiological infertility,[147] ultimately narrowing what constitutes as "infertility" for purposes of qualifying under the disease prong of Section 213.

The fact that medically fertile, married, different-sex couples can deduct their ART expenses without the IRS inquiring further about their physiological infertility while married same-sex couples are scrutinized and barred from deducting their same ART expenses because of their medical fertility is wrong. If the IRS is going to effectively broaden the definition of infertility to include any married different-sex taxpayers who use ARTs regardless of their medical infertility status, it must apply a consistent standard and allow all married couples to deduct their ARTs without determining their physiological etiology. Otherwise, the IRS's application of Section 213 depends solely on a taxpayer's sexual orientation and is therefore discriminatory. Overall, the IRS's narrow definition of infertility is wrong, not only because it is outdated and inconsistent with evolving views of family and relationships, but also because it is discriminatorily applied.

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145. Section 213(a) allows a deduction for medical care expenses of "the taxpayer, his spouse, or a dependent." I.R.C. § 213(a); *see* Pratt, *supra* note 17, at 1321 (noting "the aggregation of medical expenses of a husband and wife under section 213 eliminates the need to attribute the medical infertility to one of the two spouses").

146. Pratt, *supra* note 17, at 1321.

147. *See* Morrissey v. United States, 871 F.3d 1260, 1267 (11th Cir. 2017) (finding the taxpayer in a married, same-sex relationship cannot deduct his ART expenses because he "is capable of producing and providing healthy sperm with or without the involvement of an egg donor or a gestational surrogate").

3. Inconsistent & Complicated Effects in Practice

Breaking down the effects of the IRS's application of ART deductibility to taxpayers based on marital status, gender, and sexual orientation highlights how complicated the doctrine is in practice and demonstrates the potentially discriminatory effects on taxpayers. Because unmarried couples cannot file jointly,[148] taxpayers in nonmarital different-sex and same-sex relationships will be analyzed below with single taxpayers.

a. Married Different-Sex Couples

The IRS's interpretation of "medical care" under Section 213 is most favorable to married different-sex couples, especially if they are medically infertile. A medically infertile, married, different-sex couple can likely deduct any ART costs, potentially including surrogacy expenses,[149] regardless of which individual suffers from the medical infertility. These couples can deduct their fertility treatment costs even if the doctor cannot identify the etiology, or medical cause, for the infertility.[150] This includes costs of collaborative treatment such as sperm collection for a medically infertile man[151] and potentially ART costs for medically fertile taxpayers.[152]

b. The Female Taxpayer: Married or Unmarried Same-Sex Couple, Single, or Unmarried Different-Sex Couple

A woman who is not in a different-sex married relationship will be more limited in her ability to deduct ART expenses, depending on the type of infertility, treatment, and sometimes marital status.

i) Medically Infertile Female Taxpayers

If the woman is medically infertile, expenses for procedures on her body such as IVF are likely deductible, regardless of sexual orientation or marital status.[153] The deductibility of expenses for procedures on a third party incurred for the medically infertile woman will further depend on the type of procedure.

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148. The five filing statuses are "Single," "Married Filing Jointly," "Married Filing Separately," "Head of Household," and "Qualifying Widow(er)." *Choosing the Correct Filing Status*, *IRS Tax Tip 2016-10*, IRS (Feb. 1, 2016), https://www.irs.gov/newsroom/choosing-the-correct-filing-status [https://perma.cc/AE6Q-2RWL].

149. *See supra* Section III.C.2.

150. *See* Pratt, *supra* note 17, at 1321.

151. *Id.* at 1320–24.

152. *See supra* Section III.C.2.

153. Pratt, *supra* note 17, at 1320–24 (arguing that medically infertile female taxpayers can likely deduct non-collaborative ARTs).

Sperm donation expenses may not be deductible under the *Magdalin* disease-prerequisite rule because the "woman's body, whether fertile or infertile, can never supply sperm," which means the sperm donation does not treat the medical disease.[154] This is distinct from heterosexual married couples who can deduct sperm or egg donation costs.[155] In other words, two women, one in a heterosexual relationship and one in a same-sex relationship, with the same medical infertility etiology and who receive the same treatment are viewed differently under Section 213 solely because of their sexual orientations.

Medically infertile women with access to sperm who cannot carry a baby to term may be able to deduct their surrogacy expenses under the three rationales regarding surrogacy costs for medically infertile taxpayers.[156] Because a woman's body "normally" has the physiological ability to become pregnant and carry a baby, the IRS's "primarily for," "substitute of normal functioning," and "overcoming infertility" rationales may apply.

Marital status may slightly help a medically infertile female taxpayer deduct her ART expenses, although it is unlikely to make a difference. A female taxpayer in a married same-sex relationship might[157] be able to utilize the aggregation doctrine, which allows married couples to avoid proving infertility beyond the inability to conceive or carry a baby to term.[158] The aggregation doctrine may help medically infertile women who cannot identify the cause of their medical infertility if they can prove an inability to conceive or carry a baby to term. However, it is likely rare that a female same-sex couple can prove an inability to conceive or carry a baby,[159] so the aggregation doctrine is probably not useful.

ii) Dysfertile Female Taxpayers

Same-sex married or unmarried couples and women without a sexual partner biologically cannot have a child without medical assistance. Yet, if a woman's infertility is due to her sexual orientation or lack of a sexual partner,

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154. *Id.* at 1324.

155. *Id.* at 1320–21.

156. *See supra* Section III.B.2.b.i.

157. Under the text of Section 213, all married couples should be able to utilize the aggregation doctrine. I.R.C. § 213(a) (aggregating medical care expenses of "the taxpayer, his spouse, or a dependent"). However, the IRS did not apply this doctrine to married same-sex dysfertile couples, so they may not apply it to married same-sex medically infertile couples. *See supra* Section III(C)(2).

158. Pratt, *supra* note 17, at 1321.

159. This scenario is very specific. A medically infertile female same-sex couple could only prove an inability to conceive or carry a baby to term *after* unsuccessful ARTs or after unsuccessful attempts to conceive with a previous male sexual partner.

she will have difficulty deducting the costs of her ARTs, regardless of the type of treatment. Under the *Magdalin* disease-prerequisite doctrine, a dysfertile woman cannot deduct even the non-collaborative ART expenses that are directly used on her body because the treatment is not addressing a recognized form of infertility. This would also include single women who are physiologically fertile but decide for safety reasons to use ARTs, potentially unlike married different-sex couples.[160] Essentially, women not in a different-sex, married relationship who cannot prove medical infertility may be unsuccessful deducting any ART.

A female same-sex couple where one woman is medically infertile and the other is medically fertile but does not wish to be pregnant faces unique challenges to deducting the costs of fertility treatments. Sperm donation expenses would likely not be deductible because the same analysis applies to medically infertile and dysfertile women. Marital status would not help because the IRS seemingly does not apply the aggregation doctrine to married same-sex couples.[161] If the taxpayers are unmarried and the partner paying for the expenses is the one with the medical inability to carry a baby to term, she may be able to deduct her surrogacy expenses under the three reasonings explained with surrogacy costs for medically infertile taxpayers.[162]

Overall, there are several qualifiers that factor into whether a female taxpayer who is not in a different-sex married relationship can deduct her ART expenses. Being in a same-sex relationship is the most inhibiting qualifier. This should concern the IRS about its application of Section 213, yet the IRS continues to promote its position.

c. The Male Taxpayer: Married or Unmarried Same-Sex Couple, Single, or Unmarried in Different-Sex Relationship

Depending on the type of infertility and treatment, a man not in a different-sex married relationship will generally struggle to deduct his ART expenses.

i) Medically Infertile Male

If the man is medically infertile, he may be able to deduct the costs of non-collaborative ARTs that are used on his body, such as ICSI.[163] Yet, the high

160. *See supra* Section III.C.2.

161. *See supra* Section III.C.2.

162. *See supra* Section III.B.2.b.i.

163. Although the IRS argued in *Magdalin* that reproduction and fertility is solely a "female" function, they have seemingly backed off of this argument because they ruled in the 2021 PLR that the male taxpayer could deduct sperm freezing costs. *Compare* Magdalin v. Comm'r, No. 09-1153, 2009 WL 5557509, at *1 (1st Cir. Dec. 17, 2009) *with* I.R.S. Priv. Ltr. Rul. 2021-11-4001 (Apr. 9, 2021).

costs of egg donations and surrogacy will likely not be deductible because a man's body does not "normally" have the physiological ability to produce eggs or become pregnant. This analysis does not depend on the man's marital status or relationship type. The aggregation doctrine would not help a medically infertile, married, same-sex male couple because the IRS still scrutinizes the medical etiology of infertility for married same-sex couples.

ii) Dysfertile Male

The current IRS doctrine most heavily burdens dysfertile men. A same-sex male couple or a man without a sexual partner wanting a biological child must rely upon collaborative ARTs, including egg donation and surrogacy.[164] Men who are infertile because their partner is a man or they lack a sexual partner cannot deduct the costs of IVF, egg donation, or surrogacy under current case law.[165] These treatments do not fall within the disease prong because the taxpayer does not suffer from medical infertility, and his treatments do not qualify under the structure-or-function prong because the ARTs are performed on a third party's body.[166]

The IRS's application of Section 213 has led to convoluted results where a taxpayer's ability to deduct expenses for the same treatment depends on several factors. The Code often qualifies deductions based on marital status and income, but perhaps no other deduction has so many qualifiers as Section 213 as applied to ARTs. This makes it difficult for taxpayers to know when they can take the deduction. Furthermore, these qualifiers include gender and sexual orientation, which should alert the IRS to its potentially discriminatory application of the deduction.

Overall, the IRS's position is peppered with inconsistencies—it contradicts its prior rulings, it distinguishes acceptable forms of infertility based on sexual orientation, and its application results in unequal abilities to utilize the deduction. The IRS's inconsistent interpretation of "medical care" is rooted in the ingrained traditional concept that caring for children is a function of motherhood, and it encourages the notion that the role of fathers

164. Pratt, *supra* note 17, at 1287–89.

165. Three cases have ruled against dysfertile male taxpayers regarding their ART deductibility. *See* Magdalin v. Comm'r, 96 T.C.M. (CCH) 491 (2008), *aff'd*, No. 09-1153, 2009 WL 5557509 (1st Cir. Dec. 17, 2009); Longino v. Comm'r, 105 T.C.M. (CCH) 1491 (2013), *aff'd*, 593 Fed. Appx. 965 (11th Cir. 2014); Morrissey v. United States, 226 F. Supp. 3d 1338, 1342-44 (M.D. Fla. 2016), a*ff'd*, 871 F.3d 1260 (11th Cir. 2017).

166. *See Magdalin*, 96 T.C.M. (CCH) 491 (denying ART deductibility for male under the disease prong because he was medically fertile); *see also* I.R.S. Priv. Ltr. Rul. 2021-11-4001 (Apr. 9, 2021) (denying deductibility because the ARTs failed to satisfy either prong).

is merely supplemental to the nurturing role of mothers.[167] In reality, mothers and fathers play multiple roles that go beyond traditional gender stereotypes.[168] Additionally, the doctrine feeds skepticism about gay men being able to create a stable family environment in which to raise children.[169] This skepticism has no support in empirical research, as countless families with gay parents are "secure, stable, and nurturing."[170] And yet, because of these traditional views, same-sex couples seeking to parent biological children are largely unable to utilize the Section 213 medical deduction solely, at times, because of their sexual orientation. This inequality must be addressed. The next Part explores and proposes a unique solution to the convoluted and unequal effects of the current interpretation of "medical care" by having states write their own "medical care" definition.

IV. A PROPOSED SOLUTION

Scholars have proposed changes to the definition of "medical care" under Section 213 to avoid the inequitable effects of the IRS and federal courts' interpretation of "medical care."[171] Unfortunately, the IRS ignored these proposals when it released a PLR last year reaffirming its position that surrogacy expenses for male same-sex taxpayers are not deductible.[172] The IRS does not write the Code, but its interpretations of the Code matter to taxpayers because of the IRS's enforcement power.[173] And the 2021 PLR

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167. Ikemoto, *supra* note 77, at 1029, 1055 (critiquing the stereotypical view that "fatherhood depends on motherhood").

168. *See* Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 193 (noting a new norm of middle-class fathers assuming a caregiving role).

169. *See* Clifford J. Rosky, *Like Father, Like Son: Homosexuality, Parenthood, and the Gender of Homophobia*, 20 YALE J.L. & FEMINISM 257, 260 (2009) ("Opponents claim that children should not be exposed to the 'homosexual lifestyle,' and they ask gay men and lesbians to choose between homosexuality and parenthood.").

170. Timothy E. Lin, *Social Norms and Judicial Decisionmaking: Examining the Role of Narratives in Same-Sex Adoption Cases*, 99 COLUM. L. REV. 739, 771–82 (1999) (challenging stereotypes of same-sex parents); AM. PSYCH. ASS'N, LESBIAN AND GAY PARENTING 15 (2005) (concluding that "not a single study has found children of gay and lesbian parents to be disadvantaged in any significant respect relative to children of heterosexual parents"); Adoptions of B.L.V.B. & E.L.V.B., 628 A.2d 1271, 1276 (Vt. 1993).

171. *See, e.g.*, Davis, *supra* note 28, at 38–39 (proposing to amend the "medical care" definition in a way that strikes the *Magdalin* disease pre-requisite); Pratt, *supra* note 28, at 315 (proposing a new definition of "medical care" that includes collaborative reproductive care).

172. I.R.S. Priv. Ltr. Rul. 2021-11-4001 (Apr. 9, 2021).

173. *See IRS Audits*, IRS, https://www.irs.gov/businesses/small-businesses-self-employed/irs-audits [https://perma.cc/UBB4-9PVM] (explaining the process by which the IRS can audit individuals).

along with the IRS's arguments in the discussed case law suggests the IRS is not amenable to viewing "medical care" more expansively. Existing scholarship focuses on revising the Code, something only the U.S. Congress can do. While this proposal would create the best results for dysfertile taxpayers seeking the medical deduction for ARTs, this solution lacks practicality because of the long process of enacting Code changes.[174] Instead of waiting for Congress to change the federal tax code, this Part proposes that states should use their own "medical care" definition to alleviate the financial burden for all taxpayers who undergo expensive ARTs.

A. Balancing Efficiency with Autonomy: The Costs and Benefits of Conformity

In the United States, there are two levels of the income tax system: state and federal.[175] Forty-one states and the District of Colombia currently impose a broad-based individual income tax,[176] and nearly every one of these states base their state income tax system on the federal income tax code through a technique known as conformity.[177] While most states conform to the federal tax law to some degree, no states fully incorporate the federal tax law with exactness.[178] Rather, states vary in the degree to which they conform to federal tax law. The states that conform the most to the federal tax law use federal taxable income, including federal definitions of income and all federal deductions, to calculate their state income.[179] Most states, however, only lightly conform to the federal tax code[180] by beginning their state income tax

174. Kenton, *supra* note 29; *see, e.g.*, Prop. C.F.R. § 1.351-1(a)(3) (this proposed treasury regulation was pending for over forty years).

175. The Sixteenth Amendment enables the federal government to levy an income tax on U.S. citizens. U.S. CONST. amend. XVI.

176. KATHERINE LOUGHEAD & EMMA WEI, TAX FOUND, FISCAL FACT NO. 643, STATE INDIVIDUAL INCOME TAX RATES AND BRACKETS FOR 2019, at 2 (2019), https://files.taxfoundation.org/20190607141743/TaxFoundation_FF643.pdf [https://perma.cc/5RCX-V6HF].

177. Amy B. Monahan, *State Individual Income Tax Conformity in Practice: Evidence from the Tax Cuts & Jobs Act*, 11 COLUM. J. TAX. L. 57, 62 (2019) (noting widespread state conformity to federal tax law).

178. *See* JARED WALCZAK, TAX FOUND., FISCAL FACT NO. 631, TOWARD A STATE OF CONFORMITY: STATE TAX CODES A YEAR AFTER FEDERAL TAX REFORM 9 (2019), https://files.taxfoundation.org/20190201130844/Toward-a-State-of-Conformity-State-Tax-Codes-a-Year-After-Federal-Tax-Reform-FF-631.pdf [https://perma.cc/A8VL-G5NE].

179. *See* Monahan, *supra* note 177, at 62.

180. *See* WALCZAK, *supra* note 178, at 9.

calculations with federal adjusted gross income, incorporating just the federal definition of gross income and a few federal deductions.[181]

There are, however, six states that utilize a broad-based income tax that does not technically conform to federal tax law.[182] While these states do not specifically incorporate the federal law into state statute, they still use aspects of the federal system, including W2 wages.[183]

These varying levels of state conformity occur because states weigh the costs and benefits to conformity based on specific policy goals. The largest benefit to state conformity is administrability.[184] The more a state conforms to the federal tax law, the more it can conserve legislative resources and utilize federal administrative enforcement procedures.[185] This uniformity and consistency also increases simplicity for taxpayers, which encourages compliance.[186] Furthermore, conformity promotes interstate cooperation and economic "harmonization" among the states.[187]

Despite administrability and other advantages, states do not fully conform to federal tax law because there are disadvantages to conformity. The largest cost to conformity is the state losing its autonomy, potentially causing the state to inherit tax rules that contradict the state's own economic and social policy goals.[188] For example, state budgets are made more vulnerable to economic fluctuation and revenue shortfalls when conformity requires states to incorporate federal tax cuts.[189] Additionally, state lawmakers incorporating the federal tax code may not fully understand the "foreign" sources of laws,

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181. *See* Monahan, *supra* note 177, at 62; Richard D. Pomp, *Restructuring a State Income Tax in Response to the Tax Reform Act of 1986*, 36 TAX NOTES 1195, 1200 (1987).

182. Richard Auxier & Frank Sammartino, *The Tax Debate Moves to the States: The Tax Cuts and Jobs Act Creates Many Questions for States that Link to Federal Income Tax Rules*, TAX POL'Y CTR. 1, 2 (2018) (modified to reflect 2019 changes).

183. *Id.*

184. *See, e.g.*, Ruth Mason, *Delegating Up: State Conformity with the Federal Tax Base*, 62 DUKE L.J. 1267, 1267 (2013) (noting that "the administrative and compliance advantages of federal-state tax-base conformity are so significant that states are unlikely to abandon it").

185. Aaron M. Bernstein, *Are We Married? State Tax Filing Problems After Windsor*, 90 N.Y.U. L. REV. 207, 214–15 (2015) (outlining the benefits of conformity).

186. *Id.*

187. *See* Mason, *supra* note 184, at 1347.

188. *See* Bernstein, *supra* note 185, at 210–11 (noting that most states that did not recognize same-sex marriages continued to require same-sex couples to file as unmarried "in an effort to retain autonomy from the federal same-sex marriage policy created in *Windsor*," despite efficiency and equity reasons to conform).

189. *See* HARLEY T. DUNCAN, FED'N OF TAX ADM'RS, RELATIONSHIPS BETWEEN FEDERAL AND STATE INCOME TAXES 2 n.4 (2005) (explaining that states no longer calculate their tax liability from federal liability because when they did, they had little control over reductions in federal liability).

resulting in less transparent lawmaking at the state level.[190] And the public may lack sufficient notice to comply with the adopted federal laws because they may not be aware of what laws the state legislature has adopted.[191] Furthermore, conformity hinders innovation and the opportunity for states to act as laboratories of democracy, experimenting to determine which governmental policies are best.[192]

With these costs and benefits in mind, states fall all along the spectrum of conformity. This Comment's proposal focuses on Arizona's tax code and the next section explores where Arizona falls on the conformity spectrum with respect to the "medical care" definition.

B. Conformity to the Medical Expense Deductions

The need for state tax legislation focusing on the states' definitions of "medical care" is nationwide because no state has provided a different definition of "medical care" from Section 213.[193] Specifically, there are thirty-three states, including Arizona, that allow for a medical expense deduction or exemption.[194] Of these states, fourteen differed from Section 213 in various ways, including changing or eliminating the cost threshold, using state AGI instead of federal AGI, and subtracting certain expenses such as premium payments for medical insurance.[195] Yet, all of these states use the federal definition of "medical care" under Section 213.[196]

Arizona's tax code allows for a medical expense deduction that differs from the federal medical expense deduction by allowing a qualified taxpayer to deduct 100% of their medical expenses.[197] Arizona's medical deduction provision in A.R.S. § 43-1042 references the federal tax code, stating, "[i]n lieu of the amount of the federal itemized deduction for expenses paid for medical care allowed under section [sic] 213 of the internal revenue code, the

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190. This assumes that state lawmakers have a strong understanding of the state laws from non-foreign sources when they adopt them, which may not always be the case. Jim Rossi, *Dynamic Incorporation of Federal Law*, 77 OHIO ST. L.J. 457, 466–68 (2016).

191. *Id.*

192. Erin A. Scharff, *Laboratories of Bureaucracy: Administrative Cooperation Between State and Federal Tax Authorities*, 68 TAX L. REV. 699, 700 (2015) (describing the experimental benefits of state cooperation with the federal government); Mason, *supra* note 184, at 1304–05 (noting that federalism allows for policy experimentation).

193. JUDITH LOHMAN, OFF. OF LEGIS. RSCH., 2011-R-0412, STATE INCOME TAX DEDUCTIONS FOR NURSING HOME RESIDENTS (2011), https://www.cga.ct.gov/2011/rpt/2011-R-0412.htm [https://perma.cc/85JG-YTV5].

194. *Id.*

195. *Id.*

196. *Id.*

197. ARIZ. REV. STAT. § 43-1042(B); I.R.C. § 213(d)(1).

taxpayer may deduct the full amount of such expenses."[198]Arizona expands the medical expense deduction for its taxpayers by eliminating the Section 213 requirement that medical expenses exceed 7.5% of the taxpayer's AGI.[199]

While the amount of the deduction is larger under the state tax provision, Arizona conforms to the federal definition of "medical care."[200] This means that the analysis regarding what types of medical treatment qualify as "medical care" for Arizona's tax code is the same as the federal tax code. The unequal treatment of taxpayers based on marital status, sexual orientation, and gender under Section 213 of the federal statute therefore also apply to Arizona's tax code.

C. Arizona Should Not Conform to Current Definition of "Medical Care" Under Federal Law

Despite the administrative convenience, Arizona should not conform to Section 213's definition of "medical care" because the application results in confusing and discriminatory effects that potentially raise constitutional issues.[201] By writing its own "medical care" definition, Arizona can provide clarity to its taxpayers regarding ART deductibility from their state taxes, encourage effective medical reproduction treatment, and reduce the rate of risky pregnancies.

Because the Arizona tax law uses the federal definition of "medical care," an Arizona taxpayer is subject to the same convoluted and confusing application of Section 213.[202] Often, a Code provision is necessarily complicated because the federal or state's congress is trying to accomplish a

198. ARIZ. REV. STAT. § 43-1042(B).

199. *Id.*

200. *Id.*

201. The IRS's interpretation of "medical care" may violate the Equal Protection Clause in the U.S. Constitution *as interpreted* in *United States v. Windsor*, 570 U.S. 744 (2013). The IRS's unusual and unexplained deviations from its traditional interpretation of Section 213 suggests a "purpose and practical effect" to "impose a disadvantage" to same-sex couples by disallowing them to utilize a deduction that different-sex couples may take. *Id.* at 770. Additionally, the IRS's interpretation of "medical care" may be unconstitutional under the Arizona Constitution's Privileges and Immunities Clause. Arizona citizens "have the right to have the state treat [them] in a neutral manner as compared to the manner in which it treats others in the same class." Simat Corp. v AHCCCS, 56 P.3d 28, 31 (Ariz. 2002). By using the Section 213 definition of "medical care," the medical deduction is not being offered in a "neutral manner" because it favors different-sex couples over same-sex couples. If a strict scrutiny standard applies, this discrimination would likely be unconstitutional.

202. *See supra* Section III.C.

policy goal that is inherently complex.[203] But the policy goal for the medical expense is simple: allow taxpayers to deduct important, semi-involuntary expenses that are not for personal consumption.[204] Determining if treatment is "inherently medical" and not a personal expense can be complicated. But there is no policy ground for the IRS to make distinctions based on gender, sexual orientation, marital status, and type of "inherently medical" treatment. Instead, these requirements look like a discriminatory application of the medical expense deduction that could be subject to constitutional issues under the equal protection clauses of the United States and Arizona constitutions. Thus, Arizona should take the opportunity to provide clarity to its taxpayers and avoid any potential constitutional challenges by jettisoning these qualifiers.

Providing clarity for Arizona's taxpayers regarding the deductibility of ART expenses will also encourage intending parents to elect the most effective and safest fertility treatment for their individual circumstances. A taxpayer using medical assistance in their reproduction process has numerous treatment options. In addition to IVF and surrogacy, patients can utilize hormone treatments and surgery. However, for some taxpayers, including male same-sex couples, surrogacy and IVF are the only effective treatment options for them. For other taxpayers with genetic disorders, IVF treatment may be the only way to safely have a child. Arizona can allow its taxpayers to choose the fertility treatment that works for them as well as reduce the rate of dangerous pregnancies by not conforming to the federal definition of "medical care."

Overall, Arizona can encourage family formation for its taxpayers intending to parent by using its own, more expansive, definition of "medical care" instead of conforming to the Section 213 definition. Many individuals desire to have children and millions of Americans use medical treatment in their reproduction process every year.[205] Having a clearer definition that does not discriminate based on gender, marital status, and sexual orientation will help more Arizonans have the family they want.

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203. *See* Jacob Goldin, *Tax Benefit Complexity and Take-Up: Lessons from the Earned Income Tax Credit*, 72 TAX L. REV. 59, 63–66 (describing how the EITC's phase-ins, phase-out, and eligibility requirements reflect policy goals).

204. *See supra* Section II.B.

205. Frank Newport & Joy Wilke, *Desire for Children Still Norm in U.S.*, GALLUP (Sept. 25, 2013), https://news.gallup.com/poll/164618/desire-children-norm.aspx [https://perma.cc/P7BJ-UK53]; NICHD article, *supra* note 5; Gretchen Livingston, *A Third of U.S. Adults Say They Have Used Fertility Treatments or Know Someone Who Has*, PEW RSCH. CTR. (July 17, 2018), https://www.pewresearch.org/fact-tank/2018/07/17/a-third-of-u-s-adults-say-they-have-used-fertility-treatments-or-know-someone-who-has/ [https://perma.cc/R7FT-AN3H].

D. The Proposed Solution

There are several ways Arizona could implement a broader medical expense deduction than Section 213. One possibility is to remove all conformity to Section 213 and rewrite the "medical care" definition from scratch to specifically include all fertility treatments. While this change would prevent discriminatory effects at the state level, the state legislature may hesitate to make substantial definitional changes because of the administrability benefits of conforming to the federal definition.[206]

Another way to ensure equal application of the state deduction for fertility treatments is to adopt a separate surrogacy deduction. Because surrogacy is necessary for male same-sex couples who are burdened the most by the IRS's current interpretation of Section 213, a surrogacy deduction would substantially limit the discriminatory effects of the Section 213 definition of "medical care." Furthermore, Arizona has leveraged separate deductions in other contexts, including for adoption costs,[207] suggesting that the state is comfortable with making related, explicit deductions for expenses it wants to encourage.

However, a surrogacy deduction does not capture other treatments that are potentially excluded from Section 213 deductibility, including IVF and sperm or egg donations for dysfertile taxpayers. Thus, instead of having a separate deduction, the Arizona legislature can write a definition of "medical care" for purposes of A.R.S. § 43-1042(B) using Section 213(d)(1) language, emphasizing the disjunctive nature of the two prongs and clarifying that collaborative treatments affect the structure or function of a taxpayer's body.

The Arizona statute could look like the following:

> The term 'medical care' means amounts paid for either: 1) the diagnosis, cure, mitigation, treatment, or prevention of disease, or 2) the purpose of affecting any structure or function of the body. Medical care affecting the structure or function of the taxpayer's body includes treatments on a third party's body if the treatment is primarily for the taxpayer.

206. *See, e.g.*, Mason, *supra* note 184, at 1269 (noting that "[t]he usual reason given for federal-state tax-base conformity is administrability").

207. ARIZ. REV. STAT. § 43-1022(12).

Although this proposal does not fix the problems of the federal medical expense deduction, it at least mitigates the post-tax cost for taxpayers utilizing ARTs who are excluded from the Section 213 deduction solely because of their sexual orientation, gender, or marital status. While taxpayers wait for the federal government to amend Section 213, Arizona can be another lever to make change and alleviate the discriminatory effects of Section 213. Furthermore, Arizona can act as a laboratory in which the state legislature can experiment with the economic and social effects of a different definition of "medical care" from Section 213. The IRS's position regarding subsidized birth control evolved quickly in the 1970s.[208] Thus, if Arizona's new definition of "medical care" is effective, this legislation may encourage the IRS and Congress to adopt similar reforms.

V. CONCLUSION

Given the inconsistencies of the IRS's recent interpretation of "medical care" under Section 213, Arizona should not conform to the federal tax law and instead write a definition of "medical care" that explicitly includes collaborative treatments. This will preserve Arizona's autonomy and mitigate the discriminatory effects of the federal definition of "medical care." Arizona can act as an example, but all states can and should use the power of their tax statutes to shape equitable public policy.

208. *See supra* notes 67–70.