

WHEN GENDER-AFFIRMING HEALTHCARE BECOMES ILLEGAL, WILL IT (STILL) BE TAX-DEDUCTIBLE?

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ABSTRACT

More than twenty states currently limit or ban access to gender-affirming medical and surgical care for minors, and three more have bans that went into effect on January 1, 2024. For many transgender youths and their families, this will mean crossing state lines to obtain appropriate medical care and make this often-costly care even more expensive. This situation is not only a crisis for the civil rights of trans people; it also presents an undecided issue of federal income tax law. Since 2011, when the IRS acquiesced in O’Donnabhain v. Commissioner, the tax-deductibility of at least some gender-affirming health-care has seemed secure. But a situation in which medical care deemed deductible for federal income tax purposes is illegal under the state law of the taxpayer’s residence is unprecedented. The Internal Revenue Code and its Regulations do not address this possibility. Section 213 of the Internal Revenue Code, which permits taxpayers to take a federal income tax deduction for unusually large medical expenses, does not condition deductibility on the legality of the medical treatment, but the current Regulations do. These Regulations must be amended to clarify that so long as gender-affirming care is lawful where provided, the associated expenses are tax deductible, regardless of their status under the state law of the taxpayer’s residence.

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INTRODUCTION

We are living in a time of unprecedented legal attacks on the health, safety, and existence of transgender people. One aspect of these attacks includes laws restricting or even prohibiting access to gender-affirming health care, including

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prescription drugs and surgical treatments. According to the American Civil Liberties Union, more than 130 bills pending nationwide as of August 2023 “target access to medically-necessary health care . . . for transgender people.”¹

As of August 2023, at least twenty-one states have banned gender-affirming care for minors; another seven are considering similar laws;² Missouri’s attorney general sought to severely restrict gender-affirming care for all ages³; and three states (Oklahoma, Texas, and South Carolina) have considered extending the ban to transgender people up to 26 years old.⁴ On May 17, 2023, a law took effect in Florida that requires that hormone prescriptions be written by physicians.⁵ Formerly, at least 80% of such prescriptions were ordered by advanced practice registered nurses, not doctors, severely impacting access for transgender *adults*, many of whom have been on such treatments for years.⁶

With or without health insurance, gender-affirming care is expensive. But since 2011, when the Internal Revenue Service (“IRS”) acquiesced in *O’Donnabhain v. Commissioner*,⁷ the tax-deductibility of at least some gender-affirming health-care has seemed secure.⁸ This is fortunate, because the expenses can easily go up to six figures.⁹ But what if this care becomes illegal at the state level? Will it still be deductible for federal income tax purposes? Neither the Internal Revenue Code nor the Regulations contain a clear answer. As of 2023, federal tax law does not contemplate that medical care might be lawful in one state while being banned (or even criminalized) in another.

In the absence of universal health care, which itself exacts a deadly toll on Americans,¹⁰ all too many people face unmanageable medical costs. Even those *with* insurance may find themselves with large, uninsured expenses. The Internal Revenue Code acknowledges these realities by permitting taxpayers to take a deduction for unusually large medical expenses incurred in a taxable year, whether for the taxpayer, their spouse, or their children or other dependents (up to

1. *Mapping Attacks on LGBTQ Rights in U.S. State Legislatures*, AM. C. L. UNION, perma.cc/UTE7-RMRG.

2. *Map: Attacks on Gender Affirming Care by State*, HUM. RTS. CAMPAIGN (Aug. 29, 2023), perma.cc/R2FD-4UXW.

3. Mitch Smith, *Missouri Lawmakers Pass Bill to Ban Transition Care for Minors*, N.Y. TIMES (May 10, 2023), <https://perma.cc/B5GE-J9PH>.

4. *Map: Attacks on Gender Affirming Care by State*, *supra* note 2.

5. *Id.*

6. *Id.*

7. *O’Donnabhain v. Comm’r*, 134 T.C. 34 (2010), *action on dec.*, 2011-47 (Nov. 21, 2011). “Acquiescence” means that the IRS has decided not to appeal an adverse decision. It indicates neither approval nor disapproval of the reasons assigned by the court for its conclusions. IRM. 4.10.7.2.8.8.1 (Sept. 12, 2022).

8. *See O’Donnabhain v. Comm’r*, 134 T.C. 34 (2010), *action on dec.*, 2011-47 (Nov. 21, 2011) (affirming deductibility of “sex reassignment surgery” and hormone therapy and denying deductibility of breast augmentation surgery); *O’Donnabhain v. Comm’r*, 134 T.C. 34, 77 (2010).

9. Benji Jones, *The staggering costs of being transgender in the US, where even patients with health insurance can face six-figure bills*, INSIDER (July 10, 2019, 2:38 PM), perma.cc/7WUH-8T34.

10. *See Decrease in US health insurance coverage led to 25,180 deaths*, OPEN ACCESS GOV’T (Oct. 29, 2020), perma.cc/X9BQ-PSSN.

age 24 for full-time students).¹¹ Although Section 213 of Title 26, the statutory provision that creates this deduction, does not condition deductibility on the legality of the medical treatment, the Regulations do.¹² 26 CFR § 1.213-1(e)(1)(ii) expressly states that “[a]mounts expended for illegal operations or treatments are not deductible.”¹³ State-level gender-affirming care bans will create an acute problem for taxpayers seeking to deduct these medical expenses as soon as the 2023 tax year.

The cruel and discriminatory impact of gender-affirming care bans will be measured in suicides,¹⁴ hate crimes, and immense human suffering. The tax law should not make this increasingly desperate situation even worse by penalizing those who obtain this necessary, life-saving care, for themselves or their family members, often at great hardship and expense. The IRS Regulations must immediately be amended to clarify that so long as gender-affirming care is lawful where provided, the associated expenses are deductible, regardless of their status under the state law of the taxpayer’s residence.

In Part I of this Essay, I survey the current state of the law, including the Internal Revenue Code’s treatment of medical expenses under Section 213 and the leading Tax Court case involving deductibility of gender-affirming care, *O’Donnabhain v. Commissioner*. Part II examines the applicable Regulation, 26 C.F.R. § 1.213-1, in the context of state-level bans on gender-affirming care. Part III contains my recommendations for amending the Regulations, specifically 26 C.F.R. § 1.213-1(e)(1)(ii) and 26 C.F.R. § 1.213-1(e)(2), to clarify and reinforce the continuing deductibility of gender-affirming care, regardless of state-level law. Part IV concludes with an acknowledgement that although the specific tax issue is one likely to affect relatively few taxpayers, it is nevertheless important that the federal tax law affirm the equal dignity of trans persons and the propriety of medical expense deductions to which they are rightfully entitled by our tax law.

I. CURRENT LAW: MEDICAL EXPENSES, SECTION 213, AND *O’DONNABHAIN*

Uninsured medical expenses incurred for oneself or one’s dependents are among the most significant expenses a taxpayer may incur in their life. In fact, nearly two-thirds of all bankruptcies in the United States are the result of medical debt.¹⁵ In recognition of the impact of large medical expenses on taxpayers’ ability to pay (and real income for the year), Section 213(a) of the Internal Revenue Code (hereinafter the “Code”) permits “as a deduction the expenses paid during the taxable year, not compensated for by insurance or otherwise, for medical care

11. 26 U.S.C. § 213(a) (2020); 26 U.S.C. § 152(c)(3)(A) (2017).

12. *Id.*

13. 26 C.F.R. § 1.213-1(e)(1)(ii) (2023).

14. Jo Yurcaba, “Keeps me up at night”: Doctors who care for transgender minors brace for bans, NBC NEWS (June 2, 2021, 9:19 AM), <https://perma.cc/DJ2S-X8FR>.

15. 49+ US Medical Bankruptcy Statistics for 2023, RETIREGUIDE (Aug. 30, 2022), <https://perma.cc/V39B-7CZB>.

of the taxpayer, [their] spouse, or a dependent . . . to the extent such expenses exceed 7.5 percent of gross income.”¹⁶ Section 213(d)(1)(B) and (2) also permits the deduction of associated expenses for transportation and lodging, so long as the travel is “primarily for and essential to receiving medical care.”¹⁷

Medical expenses are never fully deductible; the Code imposes a percentage “floor” meant to approximate what level of medical expenses are simply non-deductible consumption-type expenses. This floor is a compromise with the principle codified in Section 262(a) that “no deduction shall be allowed for personal, living, or family expenses.”¹⁸ Section 213 reflects a recognition that when medical expenses are large enough, a deduction from taxable income is appropriate, while the percentage floor is intended to approximately reflect the lesser marginal impact of larger expenses on a higher-income taxpayer. When first enacted in 1942,¹⁹ the adjusted gross income (“AGI”) floor was 5%;²⁰ it was lowered to 3% in 1954.²¹ The AGI floor was later raised to 10%; under current tax law as amended by the Tax Cuts and Jobs Act (“TCJA”), the threshold for deductible medical expenses is 7.5%.²² With a 7.5% floor, a taxpayer with an AGI of \$100,000 cannot deduct medical expenses until they exceed \$7,500 (and can only deduct expenses in excess of that amount); while a taxpayer with an AGI of \$50,000 can deduct medical expenses once they exceed \$3,750.

Several years ago, YouTube star Elle Bradford shared the costs of the transgender procedures she undertook between the ages of 16 and 19 (from 2006 to 2009), when she was presumably either a dependent child of her parents or a taxpayer herself.²³ She detailed annual costs of \$1,500 for hormones, plus one-time expenses of \$30,000 for “gender reassignment surgery” (genital reconstruction); another \$30,000 for partial facial feminization surgery (including forehead and jawline contouring); and between \$5,000 and \$10,000 for breast augmentation—a total of around \$70,000.²⁴

16. 26 U.S.C. § 213(a) (2023). The Tax Cut and Jobs Act (TCJA) nearly doubled the standard deduction, greatly reducing the likelihood that taxpayers will itemize their deductions. In 2016, the standard deduction for a single filer was \$6,300 and \$12,600 for a married couple filing jointly; in 2022, the standard deduction is \$12,900 for a single filer and \$25,900 for a married couple filing jointly. However, this is subject to change when the TCJA “sunsets” and future standard deductions are unknown. *How did the TCJA Change the Standard Deduction and Itemized Deductions?* TAX POL’Y CTR., <https://perma.cc/94M5-KQV8>.

17. *O’Donnabhain v. Comm’*, 134 T.C. 34, 48 (T.C. 2010) (citing 26 U.S.C. § 213(d) (2023)); *see also* 26 U.S.C. § 1.213-1(e)(1)(iv) (2023).

18. 26 U.S.C. § 262(a) (2023).

19. JOEL S. NEWMAN, DOROTHY A. BROWN, & BRIDGET J. CRAWFORD, *FEDERAL INCOME TAX: CASES, PROBLEMS, AND MATERIALS* 502 (7th ed. 2019).

20. *Id.*

21. *Id.* at 503.

22. I.R.S., *Publ’n 502: Medical and Dental Expenses*, 3 (Feb. 6, 2023).

23. Elle Bradford, *You Won’t Believe How Much It Costs to Be Transgender in America*, TEEN VOGUE (Nov. 24, 2015), <https://perma.cc/G384-ZWWL> (understandably, writing for *Teen Vogue*, she never mentions the tax-deductibility or otherwise of these expenses (nor does she indicate how they were paid for)).

24. *Id.*

These expenses and procedures are typical. Transition related expenses today can run to \$125,000 to \$140,000,²⁵ including both ongoing and one-time expenses, some or all of which may not be covered by insurance.²⁶ Gender-affirming healthcare, encompassing therapy, hormone treatment, and a variety of surgeries, is definitely expensive enough to exceed the AGI floor for all but the most high-income taxpayers, especially if the patient must travel out of state to receive care (as many must, to find the experienced, specialized surgeons who know how to perform these procedures).²⁷

Feminizing surgery for transwomen and transfeminine patients may include orchiectomy (removal of testicles); penectomy (removal of the penis); vaginoplasty, clitoroplasty, and labiaplasty; breast augmentation (with implants, tissue expanders, or fat transplants); abdominoplasty (“tummy tuck”); gluteal augmentation (buttock lift); voice feminizing therapy and surgery; as well as facial feminization surgeries, which may include forehead contouring; eye and eyelid modification; cheek augmentation (with implants, fat transplants, or cheekbone reshaping); nose reshaping (rhinoplasty); lip lift and augmentation (with implants, fillers, or fat transplants); jaw angle reduction; and chin width reduction.²⁸ Transwomen may also obtain a tracheal shave (to minimize the thyroid cartilage known as the “Adam’s apple”); and changes to the hairline including hair transplantation.²⁹

For transmasculine individuals, the most frequent surgery is bilateral mastectomy, with chest reconstruction.³⁰ Hysterectomy is also common, and usually required before vaginectomy, scrotoplasty, and/or phalloplasty. Oophorectomy (ovary removal), complete or partial, may be used, depending in part on whether the person will be taking testosterone. Metoidioplasty (clitoral release of the testosterone-enlarged clitoris) is one approach to genital reconstruction, focusing on preserving erectile capacity and erotic sensation; an alternative is phalloplasty, using grafts to create a phallus that more closely resembles an erect male-assigned penis in appearance with erectile capacity created by a penile implant (a subsequent surgery). Phalloplasty has a high rate of complications, many of

25. Alyssa Jackson, *The High Cost of Being Transgender*, CNN (July 31, 2015), <https://perma.cc/ZHY4-4TC4>.

26. *Know Your Rights in Healthcare*, NAT’L CTR. FOR TRANSGENDER EQUAL., <https://perma.cc/6MHC-3N6F>. (Although current federal and some state law prohibits anti-trans discrimination in insurance, current anti-trans legislation would deny Medicaid coverage for gender-affirming care. Indiana, Missouri, New Hampshire, and Oklahoma proposed bills which would allow insurance plans in the state to opt out of coverage for gender-affirming care entirely.)

27. *Transgender Surgery Programs at Academic Medical Centers in the U.S.*, TRANS-HEALTH, <https://perma.cc/9JFN-L2X8>.

28. *Facial feminization surgery*, MAYO CLINIC, <https://perma.cc/M5XF-P7BF>; *Feminizing surgery*, MAYO CLINIC, <https://perma.cc/8PCQ-CSGR>; see also *Gender Confirmation Surgery*, PENN MEDICINE, <https://perma.cc/8TYH-HHSF>.

29. *Feminizing surgery*, MAYO CLINIC, <https://perma.cc/8PCQ-CSGR>.

30. *Surgical Options for Trans Masculine (FTM) Individuals*, TRANSLINE, <https://perma.cc/SC9D-CZ6S>.

which require subsequent surgery.³¹ Either of these is typically performed together with scrotoplasty (using tissue of the labia majora and silicone implants). Urethroplasty permits urination through the clitoris, but carries the risk of fistula, which may require further surgery.³²

The specific medical details of these evolving procedures are less significant for tax purposes than the way they interact with one further limitation on deductibility: expenses for “cosmetic” surgery are expressly *not* deductible.

Section 213(d)(9) defines “medical care” to exclude “cosmetic surgery or other similar procedures, unless the surgery or procedure is necessary to ameliorate a deformity arising from, or directly related to, a congenital abnormality, a personal injury resulting from an accident or trauma, or disfiguring disease.”³³ Excluded cosmetic surgery is defined as “any procedure which is directed at improving the patient’s appearance and does not meaningfully promote the proper function of the body or prevent or treat illness or disease.”³⁴

As Tax Court Judge Halpern helpfully summarized the somewhat convoluted inner workings of Section 213,

The best way of framing the question of deductibility is to view the medical-expense provisions in the Code as creating a series of rules and exceptions. Section 262(a) creates a general rule that personal expenses are not deductible. Section 213(a) and (d)(1) then create [sic] an exception to the general rule for the expenses of medical care if they exceed a particular percentage of adjusted gross income. Section 213(d)(9) then creates an exception to the exception for cosmetic surgery. And section 213(d)(9)(A) then creates a third-order exception restoring deductibility for certain types of cosmetic surgery.³⁵

Even the brief descriptions offered above about gender-affirming care should make clear that many of these procedures serve both functional and appearance-related ends. Precisely *which* expenses related to gender-affirming care are deductible, and which are not, as well as the general deductibility of gender-affirming care, were addressed by the Tax Court in 2010. In *O’Donnabhain v. Commissioner*, the Internal Revenue Service denied a deduction to Rhiannon O’Donnabhain, who sought to deduct a total of nearly \$22,000 in uninsured transition-related medical expenses she incurred in the

31. See Annie M.Q. Wang, Vivian Tsang, Peter Mankowski, Daniel Demsey, Alex Kavanagh, & Krista Genoway, *Outcomes Following Gender Affirming Phalloplasty: A Systematic Review and Meta-Analysis*, 10 *SEXUAL MED. REV.* 499 (2022), <https://perma.cc/53XT-XXDJ>.

32. *Surgical Options for Transmasculine (FTM) Individuals*, TRANSLINE, <https://perma.cc/QVQ4-YCXK>; see generally *Gender Confirmation Surgery*, PENN MEDICINE, <https://perma.cc/BN6A-BSAK>.

33. 26 U.S.C. § 213(d)(9)(A) (2023).

34. 26 U.S.C. § 213(d)(9)(B) (2023).

35. *O’Donnabhain v. Comm’r.*, 134 T.C. 34, 90 (2010) (Halpern, J., concurring).

tax year 2001.³⁶ The uninsured expenses were broken down into a few categories. The surgical procedures (totaling more than \$19,000) were by far the largest; other expenses included medical equipment, travel and lodging related to presurgical consultation and surgery, and other minor expenses.³⁷

In a lengthy decision (including five concurrences and partial concurrences/partial dissents), an *en banc* panel of nine Tax Court judges held that the expenses associated with surgery and hormones were deductible,³⁸ while the expenses of breast augmentation were not (as “cosmetic”).³⁹ The IRS “acquiesced” in this decision.⁴⁰ As a technical matter, this means that the IRS decided not to appeal despite this adverse decision, and will treat factually similar cases the same way going forward; to that extent, “an acquiescence is similar in effect to a favorable Revenue Ruling.”⁴¹

Whether particular gender-affirming procedures or treatments are properly characterized as non-deductible “cosmetic” surgery, or are properly deductible under Section 213(a) and (d)(9)(A), continues to be hotly contested.⁴² However, thus far, there has been consensus on the deductibility of the most significant expense, genital reconstruction (which may actually involve multiple surgeries), as well as the ongoing (potentially lifelong) expense of hormone therapy.

Recent state legislation, however, calls this seriously into question.

II. 26 C.F.R. § 1.213-1 AND STATE-LEVEL BANS ON GENDER-AFFIRMING CARE

Although Section 213 (quoted above) does not condition deductibility on legality, the IRS Regulations do. 26 C.F.R. § 1.213-1 expressly excludes “illegal operations or treatments” from deductibility and restricts the deductibility of medication to “items which are legally procured.”⁴³ This approach is echoed in

36. *O'Donnabhain*, 134 T.C. at 41–42; see also I.R.S., Publ'n 501: Exemptions, Standard Deduction, and Filing Information, 1,18 (2001). In that year, the standard deduction for a single filer was just \$4550, so *O'Donnabhain* very reasonably itemized her deductions to minimize her tax liability.

37. *O'Donnabhain*, 134 T.C. at 41–42.

38. *Id.* at 70 (“We therefore conclude and hold that petitioner’s hormone therapy and sex reassignment surgery ‘[treated] * * * disease’ within the meaning of section 213(d)(9)(B) and accordingly are not ‘cosmetic surgery’ as defined in that section”).

39. *Id.* at 72–73.

40. *O'Donnabhain v. Comm'r*, 134 T.C. 34 (2010), *acq.*, 2011-47 (Nov. 21, 2011). “Acquiescence” means that the IRS has decided not to appeal an adverse decision. It indicates neither approval nor disapproval of the reasons assigned by the court for its conclusions. I.R.M. *Action on Decision* 4.10.7.2.8.8.1.

41. Burton W. Kanter & Sheldon I. Banoff, eds., *Is it Safe to Rely on Acquiescence?*, 69 J. TAX'N 199, 199–200 (Sept. 1988).

42. See Nancy J. Knauer & David B. Cruz, *Commentary on O'Donnabhain v. Commissioner in FEMINIST JUDGMENTS: REWRITTEN TAX OPINIONS*, 266–296 (Bridget J. Crawford & Anthony C. Infanti eds., 2017).

43. 26 C.F.R. § 1.213-1(e)(1)(ii) (2023) (“Amounts paid for operations or treatments affecting any portion of the body, including obstetrical expenses and expenses of therapy or X-ray treatments, are deemed to be for the purpose of affecting any structure or function of the body and are therefore paid for medical care. Amounts expended for illegal operations or treatments are not deductible.”); 26 C.F.R. § 1.213-1(e)(2) (2023) (“The term “medicine and drugs” shall include only items which are *legally*

the instructions the IRS provides to taxpayers for the proper tax treatment of medical expenses. IRS Publication 502 defines (deductible) medical expenses as “payments for *legal* medical services rendered by physicians, surgeons, dentists, and other medical practitioners.”⁴⁴ Under “Operations,” it states, “You can include in medical expenses amounts you pay for *legal* operations that aren’t for cosmetic surgery.”⁴⁵ Taxpayers also “can include in medical expenses the cost of a *legal* sterilization (a *legally performed* operation to make a person unable to have children).”⁴⁶

The legality of gender-affirming care, including surgery and hormone therapy, is now under attack across the country. In the past several months, numerous states have passed a dizzying array of laws restricting access to gender-affirming care.⁴⁷ States with laws limiting or prohibiting gender-affirming care are currently in effect in Alabama, Arizona, Arkansas, Georgia, Iowa, Mississippi, Oklahoma, South Dakota, Tennessee, and Utah; Florida and Texas have restricted access through executive action.⁴⁸ The restrictions in Alabama, Arkansas, and Texas are currently being litigated.⁴⁹ Currently, these laws overwhelmingly focus on minors up to age 17, but efforts to restrict care for adults are also underway.⁵⁰ On May 17, 2023, a law took effect in Florida that makes refilling hormone prescriptions nearly impossible for approximately 80% of transgender *adults*, many of whom have been on such treatments for years.⁵¹ Missouri’s governor sought to limit such care by emergency action for minors and incarcerated persons of *any* age;⁵² Florida is considering a bill that would deny health care coverage for gender-affirming care for patients of any age.⁵³ Texas and South Carolina have bills proposing age restrictions up to age 26; bills in Kansas, Oklahoma, and South Carolina restrict access up to age 21, and a Nebraska bill would restrict access up to and including age 18.⁵⁴

This situation is likely to get worse, long before it gets any better. *Bostock v. Clayton County*, the 2020 U.S. Supreme Court case that extended Title VII to transgender employees, may prove to have been a high-water mark for

procured and which are generally accepted as falling within the category of medicine and drugs (whether or not requiring a prescription).”)(emphasis added).

44. I.R.S., *Publ’n. 502*, *supra* note 22, at 2 (emphasis added).

45. *Id.* at 12.

46. *Id.* at 13 (emphasis added).

47. Elana Redfield, Kerith J. Conron, Will Tentindo, & Erica Browning, *Prohibiting Gender-Affirming Medical Care for Youth*, 6–9 (Mar. 2023); see also Francesca Paris, *Bans on Transition Care for Young People Spread Across U.S.*, N.Y. TIMES (Apr. 15, 2023), <https://perma.cc/6CYF-SLMM>.

48. Redfield, Conron, Tentindo, & Browning, *supra* note 47, at 6–9.

49. *Id.* at 8.

50. Azeen Gorayshi, *Many States Are Trying to Restrict Gender Treatment for Adults, Too*, N.Y. TIMES (Apr. 22, 2023), <https://perma.cc/V643-2STP>; Oriana Gonzalez, *GOP lawmakers expand gender-affirming care restrictions to adults*, AXIOS (Mar. 29, 2023), <https://perma.cc/MJB7-ARWG>.

51. S.B. 254, 125th Reg. Sess. (Fla. 2023).

52. Gorayshi, *supra* note 50.

53. H.B. 1421, 125th Reg. Sess. (Fla. 2023).

54. Redfield, Conron, Tentindo, & Browning, *supra* note 47, at 10.

transgender rights for the foreseeable future.⁵⁵ Although the majority opinion was written by Justice Neil Gorsuch, Justices Alito, Thomas, and Kavanaugh dissented, and Justice Ginsburg, who joined the majority, has been replaced by Justice Amy Coney Barrett, who is much less likely to support transgender rights.⁵⁶

The current Internal Revenue Code and Regulations simply do not contemplate our current situation, in which a medical procedure, treatment, or drug is lawful in some states and not in others, and in which taxpayers may be crossing state lines to obtain very expensive medical care in a state where it is still legal, when it has been outlawed at home.

The closest the Code comes to addressing anything like this is in its treatment of cannabis, which is legal for adults for all purposes in twenty-two states, permitted for medical use in many others, and entirely prohibited in others.⁵⁷ The difference, however, is that cannabis is still a Schedule I drug, prohibited at the *federal* level, and it is clearly not tax-deductible, even for medical use.⁵⁸ Although neither the statute nor the Regulations explicitly mention it, IRS Publication 502, under “Controlled Substances,” states, “You can’t include in medical expenses amounts you pay for controlled substances (such as marijuana, laetrile, etc.) that aren’t legal under federal law, even if such substances are legalized by state law.”⁵⁹ Similarly, under Section 280E, cannabis businesses (but not *other* unlawful businesses) are prohibited from deducting even “ordinary and necessary” business expenses (like rent and employee salaries).⁶⁰

Beyond FDA approval of hormone therapy, however, gender-affirming care is not federally regulated. State-level bans on gender-affirming care therefore cannot be analogized to state bans on cannabis, for purposes of assessing the deductibility of those expenses. Arguably, state-level bans on gender-affirming care are as irrelevant to federal income tax-deductibility as state laws against other illegal

55. 140 U.S. 1731 (2020).

56. *Amy Coney Barrett Is an Absolute Threat to LGBTQ Rights*, HUM. RTS. CAMPAIGN (Sept. 22, 2020), <https://perma.cc/U4EK-TT9V>. As a judge on the U.S. Court of Appeals for the Seventh Circuit, Barrett twice was part of 3-judge panels that affirmed lower-court rulings against trans prisoners challenging the health care they received in prison. See *Balsewicz v. Blumer*, 788 Fed.Appx. 379 (7th Cir. Sept. 20, 2019); *Mitchell v. Mahoney*, 744 Fed.Appx. 961 (7th Cir. Dec. 13, 2018) (Mem).

57. Jeremy Burke, Shayanne Gal, & Yeji Jesse Lee, *Delaware Just Became the Latest State to Legalize Recreational Marijuana*. See *a List of Every State Where Cannabis is Legal*, BUSINESS INSIDER, <https://perma.cc/3KTN-YJPL>; see also *State-by-State Medical Marijuana Laws*, PROCON.ORG, <https://perma.cc/T5TS-R5NN>.

58. Kyle Jaeger, *IRS Official Clarifies That Medical Marijuana Is Not Tax-Deductible Under Federal Law After Misstatement*, SCHEDULE 6 FOUND. (Feb. 14, 2022), <https://perma.cc/P67G-CJAK>.

59. I.R.S., *Publ'n 502*, *supra* note 22, at 15.

60. 26 U.S.C. § 280E (“No deduction or credit shall be allowed for any amount paid or incurred during the taxable year in carrying on any trade or business if such trade or business (or the activities which comprise such trade or business) consists of trafficking in controlled substances (within the meaning of schedule I and II of the Controlled Substances Act) which is prohibited by Federal law or the law of any State in which such trade or business is conducted”).

businesses are to the deductibility of their ordinary and necessary business expenses, under Section 162.⁶¹ Current law, however, is far from clear.

III. RECOMMENDATION

Current IRS regulations condition the deductibility of medical expenses (for operations, treatments, and medicine/drugs) on their legality.⁶² They should not do so. At least so long as any treatments are not prohibited by federal law, patient autonomy and medical judgment should be sufficient for tax-deductibility.

Prior scholars have recommended going even further. In 2016, Douglas Kahn and Howard Bromberg published an article arguing that “the denial of a deduction for unlawful medical expenses conflicts with the principle allowing the patient a deduction for whatever treatment the patient chooses so long as it is based on a bona fide effort to deal with the illness.”⁶³ They assert that “the denial of a deduction for illegal medical expenses . . . is undesirable in that it conflicts with the principle of permitting the taxpayer the option of choosing whatever procedure the taxpayer prefers to deal with his illness.”⁶⁴ In this context, however, we should not go so far. The dangers of incompetent, unlicensed transgender care are well-documented, and transgender patients are already vulnerable enough that it seems ill-advised to put unlicensed, illegal care on the same tax footing as legitimate licensed medical treatment. I would recommend a much narrower modification and clarification of current law.

26 C.F.R. § 1.213-1(e)(1)(ii) currently includes the sentence, “Amounts expended for illegal operations or treatments are not deductible.”⁶⁵ This sentence should be stricken, and replaced with the following: “Amounts expended for operations or treatments legal where rendered are deductible, regardless of whether they are legal in the taxpayer’s state of residence.”

26 C.F.R. § 1.213-1(e)(2) currently includes the sentence, “The term ‘medicine and drugs’ shall include only items which are legally procured.”⁶⁶ This sentence should be amended to read, “The term ‘medicine and drugs’ shall include only items which are legally prescribed or procured where obtained . . .” This is intended to clarify that so long as the items are not prohibited under federal law, their deductibility is not conditioned on their lawfulness (or their lawfulness for a particular use or for a particular patient) under the state law of the taxpayer’s state of residence.

61. See George G. Bovingdon, *Deducting the Expenses of an Illegal Business*, 19 MONT. L. REV. 140, 140–141 (1957).

62. I.R.S. *Publ’n 502*, *supra* note 22, at 2.

63. Douglas A. Kahn & Howard Bromberg, *Provisions Denying a Deduction for Illegal Expenses and Expenses of an Illegal Business Should Be Repealed*, 18 FLA. TAX. REV. 207, 208 (2016).

64. *Id.* at 233–34.

65. 26 C.F.R. § 1.213-1(e)(1)(ii) (2023).

66. *Id.* at § 1.213(e)(2).

CONCLUSION

As a practical matter, the tax-deductibility of gender-affirming care will affect a limited number of taxpayers. Few taxpayers paying for hormone treatment for their teenage children (and few teenage taxpayers) would be likely to itemize deductions based on the cost of the types of treatment usually made available to minors. The 2023 standard deduction (\$13,850 for a single taxpayer, \$20,800 for a head of household, and \$27,700 for a married couple filing jointly⁶⁷) is likely greatly to exceed medical expenses when surgery is not included (especially given the AGI floor). However, a taxpayer who is itemizing for other reasons may seek to deduct these expenses as well. More importantly, Section 213 permits the deduction of expenses incurred for dependents up to age 19, and up to age 24 if they are full time students.⁶⁸ A significant number of trans patients still living at home may seek to undergo surgery between the ages of 18 and 24. A large and growing number of states have laws in place making this care illegal. As states move more and more aggressively to restrict access to gender-affirming care for trans people of any age, the tax-deductibility of such care will become an even more acute issue as soon as tax year 2023.

Transgender Americans and their families face unprecedented threats from right-wing state legislatures and governors—what Nancy Knauer has called a “politics of eradication.”⁶⁹ In the face of this hatred and bigotry, trans people will continue to undergo the hardship and expense required to obtain the gender-affirming care they need and desire. At least so long as this care remains legal in the states that provide it, the IRS must immediately clarify that qualifying expenses remain deductible. Respect for the dignity, the lives, and the economic well-being of thousands of our fellow trans citizens and their families demands no less.

67. 26 U.S.C. § 63.

68. 26 U.S.C. § 213.

69. Nancy Knauer, *The Politics of Eradication and the Future of LGBT Rights*, 21 *GEO. J. GENDER & L.* 615, 620, 639, 654–55 (2020) (“The goal of these measures is the eradication of transgender identity, plain and simple.”).