

2010 Supplement
to
*Federal Income Tax: A Problem-Solving Approach
Cases and Materials*

By Toni Robinson and Mary Ferrari

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www.cap-press.com

Since the 2007 publication date of this text, Congress has passed more than 25¹ major bills that include tax provisions. Most of these laws include some tax and some nontax provisions. As this supplement goes to press, Congress is considering an “extenders bill” to extend some provisions that were set to expire at the end of 2009, the American Jobs and Closing Tax Loopholes Act, H.R. 4213. There also remain a number of other tax items that require congressional action: (1) the setting of tax rates for 2011 and beyond, (2) the reinstatement of the federal estate tax, and (3) an extension of the AMT patch.

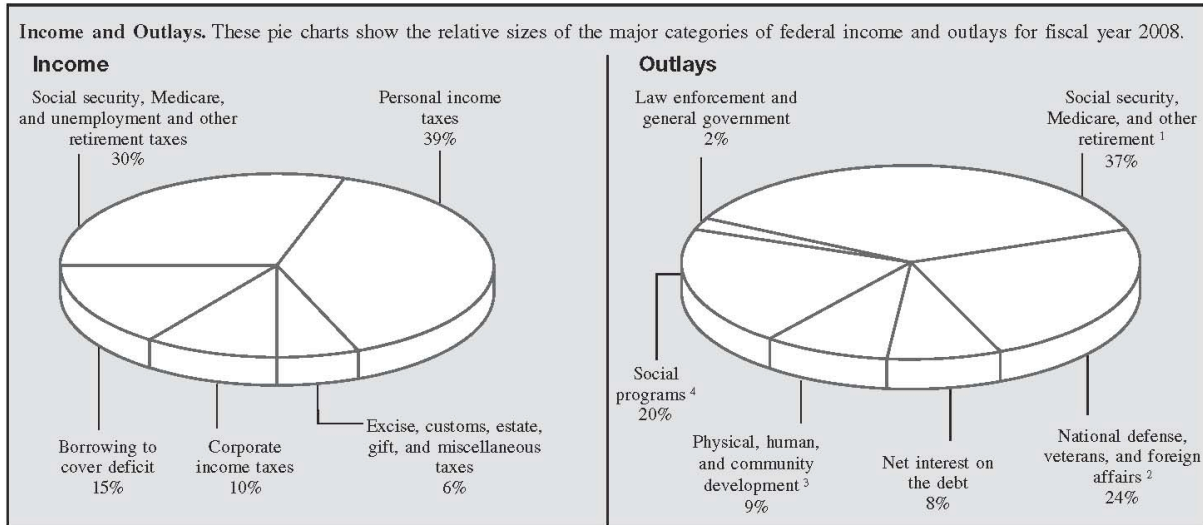
The provisions that appear below come from a number of the bills that have become law since 2007. They represent those which, in our view, are relevant to your study in the Fall of 2010 of Federal Income Tax. This list is meant to assist you in preparing answers to questions based on the most recent version of the Internal Revenue Code (hereinafter the “Code”). (The Table of Internal Revenue Code Sections on page xvii of the text will direct you to the pages where these provisions are discussed.)

Please note that Congress amended a number of provisions more than once during the period from 2007 until the present. Therefore, different rules may apply depending on the tax year to which a provision is applicable. Your required Code book reflects the statute as amended by most of these laws, but it does not contain historic information. Therefore, if a new provision changes the old, you may have to refer to the older version that appeared in the U.S. Code or an earlier unabridged version of the Code from another source. Also note that this summary is not meant as a substitute for a careful reading of the Code. Rather, it is meant to call your attention to those provisions in the bills that we think may be important to you this semester.

The following changes appear in the order in which the applicable explanation appears in the text book. Although your current Selected Code and Regulations volume appears to include most of these changes, the reason for including them on this list is that subsequent legislation made changes, amended sunset dates, or require explanation or emphasis. In most cases, however, we have included changes in this list because they change statements made in the text at the pages listed.

¹ As this update goes to press, Congress is considering several additional major pieces of legislation that will, if enacted, contain tax provisions.

Major Categories of Federal Income and Outlays for Fiscal Year 2008



On or before the first Monday in February of each year, the President is required by law to submit to the Congress a budget proposal for the fiscal year that begins the following October. The budget plan sets forth the President's proposed receipts, spending, and the surplus or deficit for the Federal Government. The plan includes recommendations for new legislation as well as recommendations to change, eliminate, and add programs. After receiving the President's proposal, the Congress reviews it and makes changes. It first passes a budget resolution setting its own targets for receipts, outlays, and the surplus or deficit. Next, individual spending and revenue bills that are consistent with the goals of the budget resolution are enacted.

In fiscal year 2008 (which began on October 1, 2007, and ended on September 30, 2008), federal income was \$2.524 trillion

and outlays were \$2.983 trillion, leaving a deficit of \$459 billion.

Footnotes for Certain Federal Outlays

1. **Social security, Medicare, and other retirement:** These programs provide income support for the retired and disabled and medical care for the elderly.

2. **National defense, veterans, and foreign affairs:** About 20% of outlays were to equip, modernize, and pay our armed forces and to fund national defense activities; about 3% were for veterans benefits and services; and about 1% were for international activities, including military and economic assistance to foreign countries and the maintenance of U.S. embassies abroad.

3. **Physical, human, and community development:** These outlays were for agriculture; natural resources; environment; transportation; aid for elementary and secondary education and direct assistance to college students; job training; deposit insurance, commerce and housing credit, and community development; and space, energy, and general science programs.

4. **Social programs:** About 14% of total outlays were for Medicaid, food stamps, temporary assistance for needy families, supplemental security income, and related programs; and the remaining outlays were for health research and public health programs, unemployment compensation, assisted housing, and social services.

Note. The percentages on this page exclude undistributed offsetting receipts, which were \$86 billion in fiscal year 2008. In the budget, these receipts are offset against spending in figuring the outlay totals shown above. These receipts are for the U.S. Government's share of its employee retirement programs, rents and royalties on the Outer Continental Shelf, and proceeds from the sale of assets.

Page 8 Add to footnote 21: the applicable rates of tax will return to their pre-2001 levels without additional Congressional action.

Page 9 Make the following changes to the chart for the CALCULATION OF INCOME TAX PAYABLE BY INDIVIDUALS: STEP 1: Exclusions now go through

section 139(D)[E]; STEP 2: Deductions now go through section 62(a)(21); STEP 3A: section 68 has been repealed for tax years beginning after December 31, 2009 (but without additional Congressional action will return in 2011); STEP 3B: the phaseout of the personal exemption does not apply for tax years beginning after December 31, 2009 (but without additional Congressional action will return in 2011); and STEP 4A: the applicable rates of tax will return to their pre-2001 levels without additional Congressional action.

Page 20 Amend footnote 15 to add the following sentences. Section 3101(b)(2) of the Patient Protection and Affordable Care Act, P.L. 111-148, as amended by the Health Care and Education Reconciliation Act of 2010, P.L. 111-152, imposed an addition of 0.9% to the Medicare Tax contribution for individual taxpayers with wages from employment in excess of \$200,000 (\$250,00 of 0.9 case of a joint return, \$125,000 for married filing separately). The increase applies only to the excess portion of the employee's wages. In contrast to the current law, the employee's total wage income for this purpose includes the income of the spouse. But, the employer does not have to collect and pay over the extra 0.9% portion on the wages of the spouse. Thus, the new law changes the Medicare tax from a flat tax for all wage earners to one that imposes a higher rate on higher wage earners.

The new law, for the first time, also applies the Medicare Tax to non-wage (unearned) income for tax years beginning after December 31, 2012. New Code section 1411(a)(1), added by section 1402(a)(1) of the Health Care and Educational Reconciliation Act of 2010, P.L. 111-152, imposes a 3.8% Medicare Tax on the lesser of an individual's net investment income for the year or the excess of modified adjusted gross income over \$200,000 (\$250,000 for joint filers, \$125,000 for married filing separately filers), that is, the same thresholds as for wage earners. Therefore, a taxpayer who has both wage income and net investment income can be subject to the 0.9% Medicare Tax on excess wage income and the 3.8% Medicare Tax on net investment income.

Page 27 For an excellent introduction to tax reform proposals, *see* Understanding the Tax Reform Debate: Background, Criteria, & Questions, GAO-05-1009SP (Sept.2005).

Page 41 Amend footnote 10 to provide: Exclusive Tax Court Jurisdiction Over CDP Hearings. Section 855 of the Pension Protection Act of 2006 (P.L. No. 109-280), modified the jurisdiction of the Tax Court, providing it with exclusive jurisdiction over all appeals of collection/due process determinations.

Page 42 Amend footnote 11 to provide: Section 406 of the Tax Relief and Health Care Act of 2006 (P.L. 109-432) amends section 7623 of the Code (not in the selected sections volume), to modify and increase the rewards available to "whistleblowers," those who provide information to the Service regarding

taxpayers in violation of the Code.

- Page 123 Add to the carryover paragraph of footnote 7: The estate tax did, in fact, expire at the end of 2009 without additional Congressional action. As this update goes to press, Congress has still not agreed on whether to reinstate the estate tax and, if so, what the rates and exclusions should be.
- Page 146 Add to the end of the third paragraph of footnote 16: As noted on page 123, the federal estate tax expired as of December 31, 2009. Section 1014(f) provides that the step-up in basis to fair market value is inapplicable after that date. For beneficiaries of estates of decedents dying after December 31, 2009, will determine their bases in assets received under section 1022 unless Congress acts.
- Page 180 Amend Paragraph 1 to provide: P.L. 110-343 encompasses three separate acts: the Emergency Economic Stabilization Act of 2008, the Energy Improvement and Extension Act of 2008, and the Tax Extenders and the Alternative Minimum Tax Relief Act of 2008. Extension of Transportation Fringe Benefits to Bicycle Commuters. Section 211 of the Act amends section 132(f) to include “Any qualified bicycle commuting reimbursement.”
- Page 192 Amend footnote 8 to provide: P.L. 110-343 in section 201 extends through 2009 the deduction for state and local sales taxes in lieu of the deduction for state and local income taxes. In addition, section 1008(a) of the American Recovery and Reinvestment Tax Act of 2009, P.L. 111-5, authorizes the deduction of sales taxes on qualified motor vehicles (generally passenger cars and light trucks), purchased before December 31, 2009. The deductible amount is limited based on the taxpayer’s modified adjusted gross income.
- Page 193 Note in connection with question 3.a. that P.L. 110-343 also extends through 2009 the additional standard deduction for state and local property taxes. The original provision appeared in section 3021 of the Housing and Economic Recovery Act of 2008, P.L. 110-289, which added section 63(c)(1)(C). The new section gave taxpayers who did not itemize, a deduction equal to their state and local property taxes up to a maximum additional standard deduction of \$500, or \$1,000 for joint filers. As this supplement goes to press, Congress is considering an extension of the additional standard deduction for state and local property taxes through 2010 as part of the American Jobs and Closing Tax Loopholes Act, H.R. 4213.
- In addition, Section 1008(c) of the Recovery and Reinvestment Tax Act of 2009, P.L. 111-5, amends section 63(c) to provide an increase in the standard deduction for the sales taxes on vehicles for taxpayers who do not itemize. The same income limits apply for taxpayers who do not itemize as apply for those who do. This provision too applies only for vehicles purchased before December 31, 2009.

- Page 193 Amend Paragraph 1 to provide that section 62(a) now describes 21 categories of expenses that qualify as “above the line” deductions.
- Page 207 Note in connection with section 213(a) that Congress is increasing the floor for calculation of the medical expense deduction from 7.5% to 10% for tax years beginning after December 31, 2012. Section 9013(a) of the Patient Protection and Affordable Care Act, P.L. 111-148. The Act also added new section 213(f) which will return the floor to 7.5% for tax years 2013-2016 for taxpayers or their spouses who have attained age 65. Section 9013(b).
- Page 212 Commencing July 24, 2007, the Tax Court heard the case of the taxpayer, Rhiannon O’Donnabhain, who was the subject of Chief Counsel Advice 200603025. On February 2, 2010, the Tax Court rendered a decision in the case, *O’Donnabhain v. Commissioner*, 134 T.C. No. 4. A small portion of the extensive decision follows. Those students who take the time to read the entire decision will be rewarded with an interesting view into the difficulty that Tax Court judges face in dealing with non-tax issues. Note that this case is one of the rare instances in which more than one Tax Court judge published a concurrence or dissent.

O'DONNABHAIN v. COMMISSIONER

UNITED STATES TAX COURT

134 T.C. No. 4

February 2, 2010, as amended February 12, 2010.

GALE, *Judge*: [T]he issue for decision is whether petitioner may deduct as a medical care expense under *section 213* amounts paid in 2001 for hormone therapy, sex reassignment surgery, and breast augmentation surgery that petitioner contends were incurred in connection with a condition known as gender identity disorder.

OPINION

I. Medical Expense Deductions Under Section 213

...

B. Definition of Medical Care

Congress first provided an income tax deduction for medical expenses in 1942. See Revenue Act of 1942, ch. 619, sec. 127(a), 56 Stat. 825. The original provision was codified as *section 23(x)* of the 1939 Internal Revenue Code and read as follows:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

. . .

(x) Medical, Dental, Etc., Expenses. -- Except as limited under paragraph (1) or (2), expenses paid during the taxable year . . . for medical care of the taxpayer

The term "medical care", as used in this subsection, shall include 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

At the time, the Senate Committee on Finance commented on the new deduction for medical expenses in relevant part as follows:

The term "medical care" is broadly defined to include 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. It is not intended, however, that a deduction should be allowed for any expense that is not incurred primarily for the prevention or alleviation of a physical or mental defect or illness.

S. Rept. 1631, 77th Cong., 2d sess. 95-96 (1942), *1942-2 C.B. 504, 576-577* (emphasis added); see *Stringham v. Commissioner*, *12 T.C. 580, 583-584 (1949)* (medical care is defined in broad

and comprehensive language, but it does not include items which are primarily nondeductible personal living expenses), *affd. 183 F.2d 579 (6th Cir. 1950)*.

The core definition of "medical care" originally set forth in *section 23(x)* of the 1939 Code has endured over time and is currently found in *section 213(d)(1)(A)*, which provides as follows:

SEC. 213 (d). Definitions. -- For purposes of this section --

(1) The term "medical care" means amounts paid --

(A) for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body. . . .

Thus, since the inception of the medical expense deduction, the definition of deductible "medical care" has had two prongs. The first prong covers amounts paid for the "diagnosis, cure, mitigation, treatment, or prevention of disease" and the second prong covers amounts paid "for the purpose of affecting any structure or function of the body".

The regulations interpreting the statutory definition of medical care echo the description of medical care in the Senate Finance Committee report accompanying the original enactment. The regulations state in relevant part:

(e) Definitions -- (1) General. (i) The term "medical care" includes the diagnosis, cure, mitigation, treatment, or prevention of disease. Expenses paid for "medical care" shall include those paid for the purpose of affecting any structure or function of the body or for transportation primarily for and essential to medical care. . . .

(ii) . . . Deductions for expenditures for medical care allowable under *section 213* will be confined strictly to expenses incurred primarily for the prevention or

alleviation of a *physical or mental defect or illness*. . . . [Sec. 1.213-1(e)(1), *Income Tax Regs.*; emphasis added.]

Notably, the regulations, mirroring the language of the Finance Committee report, treat "disease" as used in the statute as synonymous with "a physical or mental defect or illness." The language equating "mental defect" with "disease" was in the first version of the regulations promulgated in 1943 and has stood unchanged since. See T.D. 5234, 1943 C.B. 119, 130. In addition, to qualify as "medical care" under the regulations, an expense must be incurred "primarily" for alleviation of a physical or mental defect, and the defect must be specific. "[A]n expenditure which is merely beneficial to the general health of an individual, such as an expenditure for a vacation, is not an expenditure for medical care." *Sec. 1.213-1(e)(1)(ii), Income Tax Regs.*

Given the reference to "mental defect" in the legislative history and the regulations, it has also long been settled that "disease" as used in *section 213* can extend to mental disorders. See, e.g., *Fischer v. Commissioner*, 50 T.C. 164, 173 n.4 (1968) ("That mental disorders can be 'disease' within the meaning of [section 213(d)(1)(A)] is no longer open to question."); *Starrett v. Commissioner*, 41 T.C. 877 (1964); *Hendrick v. Commissioner*, 35 T.C. 1223 (1961).

In *Jacobs v. Commissioner*, 62 T.C. 813 (1974), this Court reviewed the legislative history of *section 213* and synthesized the caselaw to arrive at a framework for analysis of disputes concerning medical expense deductions. Noting that the medical expense deduction essentially carves a limited exception out of the general rule of *section 262* that "personal, living, or family expenses" are not deductible, the Court observed that a taxpayer seeking a deduction under *section 213* must show: (1) "the present existence or imminent probability of a disease, defect or

illness -- mental or physical" and (2) a payment "for goods or services directly or proximately related to the diagnosis, cure, mitigation, treatment, or prevention of the disease or illness." *Id. at 818*. Moreover, where the expenditures are arguably not "wholly medical in nature" and may serve a personal as well as medical purpose, they must also pass a "but for" test: the taxpayer must "prove both that the expenditures were an essential element of the treatment and that they would not have otherwise been incurred for nonmedical reasons." *Id. at 819*.

...

C. Definition of Cosmetic Surgery

The second prong of the statutory definition of "medical care", concerning amounts paid "for the purpose of affecting any structure or function of the body", was eventually adjudged too liberal by Congress. The Internal Revenue Service, relying on the second prong, had determined in two revenue rulings that deductions were allowed for amounts expended for cosmetic procedures (such as facelifts, hair transplants, and hair removal through electrolysis) because the procedures were found to affect a structure or function of the body within the meaning of *section 213(d)(1)(A)*. See *Rev. Rul. 82-111, 1982-1 C.B. 48* (hair transplants and hair removal); *Rev. Rul. 76-332, 1976-2 C.B. 81* (facelifts); see also *Mattes v. Commissioner, 77 T.C. 650 (1981)* (hair transplants to treat premature baldness deductible under *section 213*). In 1990 Congress responded to these rulings by amending *section 213* to include new subsection (d)(9) which, generally speaking, excludes cosmetic surgery from the definition of deductible medical care. See Omnibus Budget Reconciliation Act of 1990, Pub. L. 101-508, sec. 11342(a), 104 Stat. 1388-471. A review of the legislative history of *section 213(d)(9)* shows that Congress deemed the amendment necessary to clarify that deductions for medical care do not include amounts paid

for "an elective, purely cosmetic treatment". H. Conf. Rept. 101-964, at 1031 (1990), *1991-2 C.B. 560, 562*; see also 136 Cong. Rec. 30485, 30570 (1990) (Senate Finance Committee report language on Omnibus Budget Reconciliation Act of 1990).

Section 213(d)(9) defines "cosmetic surgery" as follows:

SEC. 213(d). Definitions. -- For purposes of this section --

(9) Cosmetic surgery. --

(A) In general. -- The term "medical care" does not include 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.

(B) Cosmetic surgery defined. -- For purposes of this paragraph, the term "cosmetic surgery" means 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.

In sum, *section 213(d)(9)(A)* provides the general rule that the term "medical care" does not include "cosmetic surgery" (as defined) unless the surgery is necessary to ameliorate deformities of various origins. *Section 213(d)(9)(B)* then defines "cosmetic surgery" as any procedure that is directed at improving the patient's appearance but excludes from the definition any procedure that "meaningfully [promotes] the proper function of the body" or "[prevents] or [treats] illness or disease". There appear to be no cases of precedential value interpreting the cosmetic surgery exclusion of *section 213(d)(9)*.

II. *The Parties' Positions*

Respondent contends that petitioner's hormone therapy, sex reassignment surgery, and breast augmentation surgery are nondeductible "cosmetic surgery or other similar procedures" under *section 213(d)(9)* because they were directed at improving petitioner's appearance and did not treat an illness or disease, meaningfully promote the proper function of the body, or ameliorate a deformity. Although respondent concedes that GID is a mental disorder, respondent contends, relying on the expert testimony of Dr. Dietz, that GID is not a disease for purposes of *section 213* because it does not arise from an organic pathology within the human body that reflects "abnormal structure or function of the body at the gross, microscopic, molecular, biochemical, or neurochemical levels." Respondent further contends that the procedures at issue did not treat disease because there is no scientific proof of their efficacy in treating GID and that the procedures were cosmetic surgery because they were not medically necessary. Finally, respondent contends that petitioner did not have GID, that it was incorrectly diagnosed, and that therefore the procedures at issue did not treat a disease.

Petitioner maintains that she is entitled to deduct the cost of the procedures at issue on the grounds that GID is a well-recognized mental disorder in the psychiatric field that "falls squarely within the meaning of 'disease' because it causes serious, clinically significant distress and impairment of functioning." Since widely accepted standards of care prescribe hormone treatment, sex reassignment surgery, and, in appropriate circumstances, breast augmentation surgery for genetic males suffering from GID, expenditures for the foregoing constitute deductible "medical care" because a direct or proximate relationship exists between the expenditures and the "diagnosis, cure, mitigation, treatment, or prevention of disease", petitioner

argues. Moreover, petitioner contends, because the procedures at issue treated a "disease" as used in *section 213*, they are not "cosmetic surgery" as defined in that section. (Footnote 30)

III. *Analysis*

The availability of the medical expense deduction for the costs of hormonal and surgical sex reassignment for a transsexual individual presents an issue of first impression.

A. *Statutory Definitions*

Determining whether sex reassignment procedures are deductible "medical care" or nondeductible "cosmetic surgery" starts with the meaning of "treatment" and "disease" as used in *section 213*. Both the statutory definition of "medical care" and the statute's exclusion of "cosmetic surgery" from that definition depend in part upon whether an expenditure or procedure is for "treatment" of "disease". Under *section 213(d)(1)(A)*, if an expenditure is "for the . . . treatment . . . of disease", it is deductible "medical care"; under *section 213(d)(9)(B)*, if a procedure "[treats] . . . disease", it is not "cosmetic surgery" that is excluded from the definition of "medical care".

Because the only difference between the quoted phrases in these two subparagraphs is the use of the noun form "treatment" versus the verb form "treat", we see no meaningful distinction between them. "Code provisions generally are to be interpreted so congressional use of the same words indicates an intent to have the same meaning apply". *Elec. Arts, Inc. v. Commissioner*, 118 T.C. 226, 241 (2002); see also *Commissioner v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 159, 113 S. Ct. 2006, 124 L. Ed. 2d 71 (1993); *United States v. Olympic Radio & Television, Inc.*, 349 U.S. 232, 236, 75 S. Ct. 733, 99 L. Ed. 1024, 131 Ct. Cl. 814, 1951 C.B. 376, 1955-1 C.B. 376 (1955); *Zuanich v. Commissioner*, 77 T.C. 428, 442-443 (1981). Consequently, the determination

of whether something is a "treatment" of a "disease" is the same throughout *section 213*, whether for purposes of showing that an expenditure is for "medical care" under *section 213(d)(1)(A)* or that a procedure is not "cosmetic surgery" under *section 213(d)(9)(B)*. A showing that a procedure constitutes "treatment" of a "disease" both precludes "cosmetic surgery" classification under *section 213(d)(9)* and qualifies the procedure as "medical care" under *section 213(d)(1)(A)*.

Congress's reuse of the terms "treat" and "disease" in defining "cosmetic surgery" in *section 213(d)(9)(B)* triggers a second principle of statutory construction. Given that the phrase "treatment . . . of disease" as used in the *section 213(d)(1)(A)* definition of "medical care" had been the subject of considerable judicial and administrative construction when Congress incorporated the phrase into the definition of "cosmetic surgery" in 1990, it "had acquired a settled judicial and administrative interpretation". *Commissioner v. Keystone Consol. Indus., Inc., supra at 159*. In these circumstances "it is proper to accept the already settled meaning of the phrase". *Id.* Therefore, the pre-1990 caselaw and regulations construing "treatment" and "disease" for purposes of the *section 213(d)(1)(A)* definition of "medical care" are applicable to the interpretation of those words as used in the *section 213(d)(9)(B)* definition of "cosmetic surgery".

B. Is GID a "Disease"?

Petitioner argues that she is entitled to deduct her expenditures for the procedures at issue because they were treatments for GID, a condition that she contends is a "disease" for purposes of *section 213*. Respondent maintains that petitioner's expenditures did not treat "disease" because GID is not a "disease" within the meaning of *section 213*. Central to his argument is respondent's contention that "disease" as used in *section 213* has the meaning postulated by

respondent's expert, Dr. Dietz; namely, "a condition . . . [arising] as a result of a pathological process . . . [occurring] within the individual and [reflecting] abnormal structure or function of the body at the gross, microscopic, molecular, biochemical, or neuro-chemical levels."

On brief respondent cites the foregoing definition from Dr. Dietz' expert report and urges it upon the Court as the meaning of "disease" as used in *section 213*; namely, that a "disease" for this purpose must have a demonstrated organic or physiological origin in the individual.

Consequently, GID is not a "disease" because it has "no known organic pathology", respondent argues. (Footnote 33)

However, this use of expert testimony to establish the meaning of a statutory term is generally improper. "[E]xpert testimony proffered solely to establish the meaning of a law is presumptively improper." *United States v. Prigmore*, 243 F.3d 1, 18 n.3 (1st Cir. 2001). The meaning of a statutory term is a pure question of law that is "exclusively the domain of the judge." *Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92, 99 (1st Cir. 1997); see also *United States v. Mikutowicz*, 365 F.3d 65, 73 (1st Cir. 2004); *Bammerlin v. Navistar Int'l Transp. Corp.*, 30 F.3d 898, 900 (7th Cir. 1994); *Snap-Drape, Inc. v. Commissioner*, 105 T.C. 16, 19-20 (1995), *affd.* 98 F.3d 194, 198 (5th Cir. 1996). Closely analogous is *S. Jersey Sand Co. v. Commissioner*, 30 T.C. 360, 364 (1958), *affd.* 267 F.2d 591 (3d Cir. 1959), where this Court refused to consider the expert testimony of a geologist concerning the meaning of the term "quartzite" as used in the Internal Revenue Code.

While the Court admitted Dr. Dietz' expert report and allowed him to testify over petitioner's objection, the use to which respondent now seeks to put his testimony is improper, and we disregard it for that purpose. (Footnote 34) The meaning of "disease" as used in *section 213*

must be resolved by the Court, using settled principles of statutory construction, including reference to the Commissioner's interpretive regulations, the legislative history, and caselaw precedent. (Footnote 35)

As a legal argument for the proper interpretation of "disease", respondent's position is meritless. Respondent cites no authority, other than Dr. Dietz' expert testimony, in support of his interpretation, and we have found none. To the contrary, respondent's interpretation is flatly contradicted by nearly a half century of caselaw. Numerous cases have treated mental disorders as "diseases" for purposes of *section 213* without regard to any demonstrated organic or physiological origin or cause. See *Fay v. Commissioner*, 76 T.C. 408 (1981); *Jacobs v. Commissioner*, 62 T.C. at 818; *Fischer v. Commissioner*, 50 T.C. 164 (1968); *Starrett v. Commissioner*, 41 T.C. 877 (1964); *Hendrick v. Commissioner*, 35 T.C. 1223 (1961); *Sims v. Commissioner*, T.C. Memo. 1979-499. These cases found mental conditions to be "diseases" where there was evidence that mental health professionals regarded the condition as creating a significant impairment to normal functioning and warranting treatment. . . .

See also *Jacobs v. Commissioner*, *supra* at 818 (taxpayer's "severe depression" as evidenced by his psychiatrist's testimony is "disease" for purposes of *section 213*); *Hendrick v. Commissioner*, *supra* at 1236 ("emotional insecurity" of child is a "disease" for purposes of *section 213*); *Sims v. Commissioner*, *supra* ("disease" for purposes of *section 213* found although "record does not contain a precise characterization of . . . [the taxpayer's son's] condition in medical terminology, there is ample evidence to support a finding that he suffered from some sort of learning disability, accompanied by emotional or psychiatric problems"). We have also considered a condition's listing in a diagnostic reference text as grounds for treating the condition

as a "disease", without inquiry into the condition's etiology. In *Starrett v. Commissioner, supra at 878 & n.1, 880-882*, a reviewed opinion, we treated "anxiety reaction" as a "disease" for purposes of *section 213*, pointing to the condition's recognition in the American Medical Association's Standard Nomenclature of Diseases and Operations (5th ed. 1961).

The absence of any consideration of etiology in the caselaw is consistent with the legislative history and the regulations. Both treat "disease" as synonymous with "a physical or mental defect", which suggests a more colloquial sense of the term "disease" was intended than the narrower (and more rigorous) interpretation for which respondent contends.

In addition, in the context of mental disorders, it is virtually inconceivable that Congress could have intended to confine the coverage of *section 213* to conditions with demonstrated organic origins when it enacted the provision in 1942, because physiological origins for mental disorders were not widely recognized at the time. As Dr. Dietz confirmed in his testimony, the physiological origins of various well-recognized mental disorders -- for example, panic disorder and obsessive-compulsive disorder -- were discovered only about a decade ago. Moreover, Dr. Dietz confirmed that bulimia would not constitute a "disease" under his definition, because bulimia has no demonstrated organic origin, nor would post-traumatic stress disorder. Dr. Dietz was unable to say whether anorexia would meet the definition because he was uncertain regarding the current state of scientific knowledge of its origins. Petitioner's expert, Dr. Brown, testified without challenge that most mental disorders listed in the DSM-IV-TR do not have demonstrated organic causes. Thus, under the definition of "disease" respondent advances, many well-recognized mental disorders, perhaps most, would be excluded from coverage under *section*

213 -- a result clearly at odds with the intent of Congress (and the regulations) to provide deductions for the expenses of alleviating "mental defects" generally.

In sum, we reject respondent's interpretation of "disease" because it is incompatible with the stated intent of the regulations and legislative history to cover "mental defects" generally and is contradicted by a consistent line of cases finding "disease" in the case of mental disorders without regard to any demonstrated etiology.

Having rejected respondent's contention that "disease" as used in *section 213* requires a demonstrated organic origin, we are left with the question whether the term should be interpreted to encompass GID. On this score, respondent, while conceding that GID is a mental disorder, argues that GID is "not a significant psychiatric disorder" but instead is a "social construction" -- a "social phenomenon" that has been "medicalized". Petitioner argues that GID is a "disease" for purposes of *section 213* because it is well recognized in mainstream psychiatric literature, including the DSM-IV-TR, as a legitimate mental disorder that "causes serious, clinically significant distress and impairment of functioning".

For the reasons already noted and those discussed below, we conclude that GID is a "disease" within the meaning of *section 213*. We start with the two caselaw factors influencing a finding of "disease" in the context of mental conditions: (1) A determination by a mental health professional that the condition created a significant impairment to normal functioning, warranting treatment, see *Fay v. Commissioner*, 76 T.C. 408 (1981); *Jacobs v. Commissioner*, 62 T.C. 813 (1974); *Fischer v. Commissioner*, 50 T.C. 164 (1968); *Hendrick v. Commissioner*, 35 T.C. 1223 (1961), or (2) a listing of the condition in a medical reference text, see *Starrett v.*

Commissioner, 41 T.C. 877 (1964). Both factors involve deference by a court to the judgment of medical professionals.

As noted in our findings, GID is listed as a mental disorder in the DSM-IV-TR, which all three experts agree is the primary diagnostic tool of American psychiatry. (Footnote 37)

Even if one accepts respondent's expert Dr. Schmidt's assertion that the validity of the GID diagnosis is subject to some debate in the psychiatric profession, the widespread recognition of the condition in medical literature persuades the Court that acceptance of the GID diagnosis is the prevailing view. Dr. Schmidt's own professed misgivings about the diagnosis are not persuasive, given that he continues to employ the diagnosis in practice, believes that psychiatrists must be familiar with it, and recently gave a GID diagnosis as an expert in another court proceeding. (Footnote 39) On balance, the evidence amply demonstrates that GID is a widely recognized and accepted diagnosis in the field of psychiatry.

Second, GID is a serious, psychologically debilitating condition. Respondent's characterization of the condition on brief as a "social construction" and "not a significant psychiatric disorder" is undermined by both of his own expert witnesses and the medical literature in evidence. All three expert witnesses agreed that, absent treatment, GID in genetic males is sometimes associated with autocastration, autopenectomy, and suicide. Respondent's expert Dr. Schmidt asserts that remaining ambiguous about gender identity "will tear you apart psychologically". Petitioner's expert Dr. Brown likewise testified that GID produces significant distress and maladaptation. Psychiatric reference texts, established as reliable authority by Dr. Brown's testimony, confirm the foregoing.

Ms. Ellaborn [Petitioner's psychotherapist] concluded that petitioner exhibited clinically significant impairment from GID, to the extent that she designated petitioner's condition as "severe" under the DSM-IV-TR standards. Her diagnosis was supported by another doctoral-level mental health professional and by Dr. Brown. The severity of petitioner's impairment, coupled with the near universal recognition of GID in diagnostic and other medical reference texts, bring petitioner's condition in line with the circumstances where a mental condition has been deemed a "disease" in the caselaw under *section 213*.

Third, respondent's position that GID is not a significant psychiatric disorder is at odds with the position of every U.S. Court of Appeals that has ruled on the question of whether GID poses a serious medical need for purposes of the *Eighth Amendment*, which has been interpreted to require that prisoners receive adequate medical care. See *Estelle v. Gamble*, 429 U.S. 97, 103, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976). In *Estelle v. Gamble*, *supra* at 104, the U.S. Supreme Court held that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' . . . proscribed by the *Eighth Amendment*." The U.S. Courts of Appeals have accordingly interpreted *Estelle v. Gamble*, *supra*, as establishing a two-prong test for an *Eighth Amendment* violation: it must be shown that (1) the prisoner had a "serious medical need" which (2) was met with "deliberate indifference" by prison officials. See, e.g., *Cuoco v. Moritsugu*, 222 F.3d 99, 106 (2d Cir. 2000) (applying the *Eighth Amendment* test to a pretrial detainee); *White v. Farrier*, 849 F.2d 322, 325-327 (8th Cir. 1988).

Seven of the U.S. Courts of Appeals that have considered the question have concluded that severe GID or transsexualism constitutes a "serious medical need" for purposes of the *Eighth Amendment*. See *De'lonta v. Angelone*, 330 F.3d 630, 634 (4th Cir. 2003); *Allard v. Gomez*, 9

Fed. Appx. 793, 794 (9th Cir. 2001); *Cuoco v. Moritsugu*, *supra*; *Brown v. Zavaras*, 63 F.3d 967, 970 (10th Cir. 1995); *Phillips v. Mich. Dept. of Corr.*, 932 F.2d 969 (6th Cir. 1991), *affg.* 731 F. Supp. 792 (W.D. Mich. 1990); *White v. Farrier*, *supra*; *Meriwether v. Faulkner*, 821 F.2d 408, 411-413 (7th Cir. 1987); see also *Maggert v. Hanks*, 131 F.3d 670, 671 (7th Cir. 1997) (describing gender dysphoria as a "profound psychiatric disorder"). No U.S. Court of Appeals has held otherwise.

Deliberate indifference "requires that a prison official actually know of and disregard an objectively serious condition, medical need, or risk of harm." *De'lonta v. Angelone*, *supra* at 634. Many of the foregoing opinions either found that "deliberate indifference" had not been shown or remanded to the District Court for further proceedings regarding that point, but they reflect a clear consensus that GID constitutes a medical condition of sufficient seriousness that it triggers the *Eighth Amendment* requirement that prison officials not ignore or disregard it.

In view of (1) GID's widely recognized status in diagnostic and psychiatric reference texts as a legitimate diagnosis, (2) the seriousness of the condition as described in learned treatises in evidence and as acknowledged by all three experts in this case; (3) the severity of petitioner's impairment as found by the mental health professionals who examined her; (4) the consensus in the U.S. Courts of Appeal that GID constitutes a serious medical need for purposes of the *Eighth Amendment*, we conclude and hold that GID is a "disease" for purposes of *section 213*.

C. *Did Petitioner Have GID?*

...

We find that petitioner's GID diagnosis is substantially supported by the record. Ms. Ellaborn was licensed under State law to make such a diagnosis. A second licensed professional

concluded, as did petitioner's expert, a recognized authority in the field. Ms. Ellaborn's testimony concerning her diagnosis was persuasive. She considered and ruled out comorbid conditions, including depression and transvestic fetishism, and she believed her initial diagnosis was confirmed by petitioner's experience with the steps in the triadic therapy sequence.

...

D. Whether Cross-Gender Hormones, Sex Reassignment Surgery and Breast Augmentation Surgery "Treat" GID

1. Cross-Gender Hormones and Sex Reassignment Surgery

Our conclusions that GID is a "disease" for purposes of *section 213*, and that petitioner suffered from it, leave the question of whether petitioner's hormone therapy, sex reassignment surgery, and breast augmentation surgery "[treated]" GID within the meaning of *section 213(d)(1)(A)* and *(9)(B)*.

In contrast to their dispute over the meaning of "disease", the parties have not disputed the meaning of "treatment" or "treat" as used in *section 213(d)(1)(A)* and *(9)(B)*, respectively. We accordingly interpret the words in their ordinary, everyday sense. . . .

"Treat" is defined in standard dictionaries as: "to deal with (a disease, patient, etc.) in order to relieve or cure", Webster's New Universal Unabridged Dictionary 2015 (2003); "to care for or deal with medically or surgically", Merriam Webster's Collegiate Dictionary 1333 (11th ed. 2008); "5 a: to care for (as a patient or part of the body) medically or surgically: deal with by medical or surgical means: give a medical treatment to * * * b: to seek cure or relief of * * *", Webster's Third New International Dictionary 2435 (2002).

The regulations provide that medical care is confined to expenses "incurred primarily for the prevention or alleviation of a physical or mental defect or illness". *Sec. 1.213-1(e)(1)(ii), Income Tax Regs.* (emphasis added). A treatment should bear a "direct or proximate therapeutic relation to the . . . condition" sufficient "to justify a reasonable belief the . . . [treatment] would be efficacious". *Havey v. Commissioner, 12 T.C. 409, 412 (1949)*. In *Starrett v. Commissioner, 41 T.C. at 881*, this Court concluded that the taxpayer's psychoanalysis was a treatment of disease because the taxpayer was "thereby relieved of the physical and emotional suffering attendant upon" the condition known as anxiety reaction.

Hormone therapy, sex reassignment surgery and, under certain conditions, breast augmentation surgery are prescribed therapeutic interventions, or treatments, for GID outlined in the Benjamin standards of care. The Benjamin standards are widely accepted in the psychiatric profession, as evidenced by the recognition of the standards' triadic therapy sequence as the appropriate treatment for GID and transsexualism in numerous psychiatric and medical reference texts. Indeed, every psychiatric reference text that has been established as authoritative in this case endorses sex reassignment surgery as a treatment for GID in appropriate circumstances. No psychiatric reference text has been brought to the Court's attention that fails to list, or rejects, the triadic therapy sequence or sex reassignment surgery as the accepted treatment regimen for GID. Several courts have accepted the Benjamin standards as representing the consensus of the medical profession regarding the appropriate treatment for GID or transsexualism. See *Gammatt v. Idaho State Bd. of Corr., No. CV05-257-S-MHW, 2007 U.S. Dist. LEXIS 55564 (D. Idaho, July 27, 2007)* (memorandum decision and order); *Houston v. Trella, No. 2:04-CV-01393 (D.N.J.,*

Sept. 25, 2006) (opinion); *Kosilek v. Maloney*, 221 F. Supp. 2d 156, 158 (D. Mass. 2002); *Farmer v. Hawk-Sawyer*, 69 F. Supp. 2d 120, 121 n.3 (D.D.C. 1999).

Nonetheless, respondent's expert Dr. Schmidt contends in his report that "physician acceptance of the . . . [Benjamin standards] is limited" and that the standards are guidelines and are only "accepted as more than guidelines by professionals who advocate for hormonal and surgical treatment of Gender Identity Disorder". However Dr. Schmidt conceded on cross-examination his prior sworn statement to the effect that he agreed with the Benjamin standards (except that psychotherapy should be mandatory rather than recommended) and was unaware of any significant disagreement with the Benjamin standards in the psychiatric field, other than those who believe that sex reassignment surgery is unethical, (Footnote 47) a position that Dr. Schmidt characterized as a minority one. Dr. Schmidt also acknowledged that all GID patients at the sexual disorders clinic at Johns Hopkins where he practices are advised to become familiar with the Benjamin standards of care and he concedes that cross-gender hormone therapy and sex reassignment surgery "have recognized medical and psychiatric benefits" for persons suffering from GID. Dr. Schmidt also observed in his report that most physicians -- indeed, most psychiatrists -- know very little about GID or its treatment and shun GID patients, which may explain why the acceptance of the Benjamin standards is not broad based in American medicine. In any event, given his own acceptance of the standards and their use in his clinic, to the extent Dr. Schmidt is suggesting that the standards have limited acceptance among professionals knowledgeable regarding GID, he is unpersuasive. The widespread recognition of the Benjamin standards in the medical literature in evidence strongly supports the conclusion that the standards enjoy substantial acceptance.

Moreover, petitioner's expert Dr. Brown contends that in the case of severe GID, sex reassignment surgery is the only known effective treatment; indeed, Dr. Brown was unaware of any case where psychotherapy alone had been effective in treating severe GID. The U.S. Court of Appeals for the Seventh Circuit and the highest courts of two States have reached similar conclusions. See *Maggert v. Hanks*, 131 F.3d at 671; *Sommers v. Iowa Civil Rights Commn.*, 337 N.W.2d 470, 473 (Iowa 1983); *Doe v. Minn. Dept. of Pub. Welfare*, 257 N.W.2d 816, 819 (Minn. 1977). (Footnote 49)

...

However, even assuming some debate remains in the medical profession regarding acceptance of the Benjamin standards or the scientific proof of the therapeutic efficacy of sex reassignment surgery, a complete consensus on the advisability or efficacy of a procedure is not necessary for a deduction under *section 213*. See, e.g., *Dickie v. Commissioner, T.C. Memo. 1999-138* (naturopathic cancer treatments deductible); *Crain v. Commissioner, T.C. Memo. 1986-138* (holistic cancer treatments deductible but for failure of substantiation); *Tso v. Commissioner, T.C. Memo. 1980-399* (Navajo "sings" (healing ceremonies) deductible); *Rev. Rul. 72-593, 1972-2 C.B. 180* (acupuncture deductible); *Rev. Rul. 55-261, 1955-1 C.B. 307* (services of Christian Science practitioners deductible). It is sufficient if the circumstances "justify a reasonable belief the . . . [treatment] would be efficacious". *Havey v. Commissioner, 12 T.C. at 412*. That standard has been fully satisfied here. The evidence is clear that a substantial segment of the psychiatric profession has been persuaded of the advisability and efficacy of hormone therapy and sex reassignment surgery as treatment for GID, as have many courts.

Finally, the Court does not doubt that, as respondent's expert Dr. Schmidt points out in his report, some medical professionals shun transsexual patients and consider cross-gender hormone therapy and sex reassignment surgery unethical because they disrupt what is considered to be a "normally functioning hormonal status or destroy healthy, normal tissue." However, the Internal Revenue Service has not heretofore sought to deny the deduction for a medical procedure because it was considered unethical by some. See, e.g., *Rev. Rul. 73-201, 1973-1 C.B. 140* (cost of abortion legal under State law is deductible medical care under *section 213*); *Rev. Rul. 55-261, supra* (services of Christian Science practitioners deductible). Absent a showing of illegality, any such ground for denying a medical expense deduction finds no support in *section 213*.

In sum, the evidence establishes that cross-gender hormone therapy and sex reassignment surgery are well-recognized and accepted treatments for severe GID. The evidence demonstrates that hormone therapy and sex reassignment surgery to alter appearance (and, to some degree, function) are undertaken by GID sufferers in an effort to alleviate the distress and suffering occasioned by GID, and that the procedures have positive results in this regard in the opinion of many in the psychiatric profession, including petitioner's and respondent's experts. Thus, a "reasonable belief" in the procedures' efficacy is justified. See *Havey v. Commissioner, supra at 412*. Alleviation of suffering falls within the regulatory and caselaw definitions of treatment, see *Starrett v. Commissioner, supra; sec. 1.213-1(e)(1), Income Tax Regs.*, and to "relieve" is to "treat" according to standard dictionary definitions. 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.

While our holding that cross-gender hormone therapy and sex reassignment surgery are not cosmetic surgery is based upon the specific definition of that term in *section 213(d)(9)(B)*, our conclusion that these procedures treat disease also finds support in the opinions of other courts that have concluded for various nontax purposes that sex reassignment surgery and/or hormone therapy are not cosmetic procedures. See, e.g., *Meriwether v. Faulkner*, 821 F.2d at 411-413 (rejecting, in an *Eighth Amendment* case, the District Court's conclusion that a transsexual inmate's requested hormone therapy was "'elective medication' necessary only to maintain 'a physical appearance and life style'" and noting that numerous courts have "expressly rejected the notion that transsexual surgery is properly characterized as cosmetic surgery, concluding instead that such surgery is medically necessary for the treatment of transsexualism"); *Pinneke v. Preisser*, 623 F.2d 546, 548 (8th Cir. 1980) (State Medicaid plan may not deny reimbursement for sex reassignment surgery on grounds that it is "cosmetic surgery"); *Rush v. Parham*, 440 F. Supp. 383, 390-391 (N.D. Ga. 1977) (to same effect), revd. on other grounds 625 F.2d 1150 (5th Cir. 1980); *J.D. v. Lackner*, 80 Cal. App. 3d 90, 145 Cal. Rptr. 570, 572 (Ct. App. 1978) (sex reassignment surgery is not "cosmetic surgery" as defined in State Medicaid statute; "We do not believe, by the wildest stretch of the imagination, that such surgery can reasonably and logically be characterized as cosmetic."); *G.B. v. Lackner*, 80 Cal. App. 3d 64, 145 Cal. Rptr. 555, 559 (Ct. App. 1978) (to same effect); *Davidson v. Aetna Life & Cas. Ins. Co.*, 101 Misc. 2d 1, 420 N.Y.S.2d 450, 453 (N.Y. Sup. Ct. 1979) (sex reassignment surgery is not "cosmetic surgery" within meaning of medical insurance policy exclusion; sex reassignment surgery "is performed to correct a psychological defect, and not to improve muscle tone or physical appearance. . . . [It] cannot be considered to be of a strictly cosmetic nature."). But see *Smith v. Rasmussen*, 249 F.3d

755, 759-761 (8th Cir. 2001) (denial of reimbursement for sex reassignment surgery proper where State Medicaid plan designated sex reassignment surgery as "cosmetic surgery" and alternate GID treatments available).

2. Breast Augmentation Surgery

We consider separately the qualification of petitioner's breast augmentation surgery as deductible medical care, because respondent makes the additional argument that this surgery was not necessary to the treatment of GID in petitioner's case because petitioner already had normal breasts before her surgery. Because petitioner had normal breasts before her surgery, respondent argues, her breast augmentation surgery was "directed at improving . . . [her] appearance and [did] not meaningfully promote the proper function of the body or prevent or treat illness or disease", placing the surgery squarely within the *section 213(d)(9)(B)* definition of "cosmetic surgery". Petitioner has not argued, or adduced evidence, that the breast augmentation surgery ameliorated a deformity within the meaning of *section 213(d)(9)(A)*. Accordingly, if the breast augmentation surgery meets the definition of "cosmetic surgery" in *section 213(d)(9)(B)*, it is not "medical care" that is deductible pursuant to *section 213(a)*.

For the reasons discussed below, we find that petitioner has failed to show that her breast augmentation surgery "[treated]" GID. The Benjamin standards provide that breast augmentation surgery for a male-to-female patient "may be performed if the physician prescribing hormones and the surgeon have documented that breast enlargement after undergoing hormone treatment for 18 months is not sufficient for comfort in the social gender role." The record contains no documentation from the endocrinologist prescribing petitioner's hormones at the time of her surgery. To the extent Ms. Ellaborn's or Dr. Coleman's recommendation letters to Dr. Meltzer

might be considered substitute documentation for that of the hormone-prescribing physician, Ms. Ellaborn's two letters are silent concerning the condition of petitioner's presurgical breasts, while Dr. Coleman's letter states that petitioner "appears to have significant breast development secondary to hormone therapy". The surgeon here, Dr. Meltzer, recorded in his presurgical notes that petitioner had "approximately B cup breasts with a very nice shape." (Footnote 51) Thus, all of the contemporaneous documentation of the condition of petitioner's breasts before the surgery suggests that they were within a normal range of appearance, and there is no documentation concerning petitioner's comfort level with her breasts "in the social gender role".

Dr. Meltzer testified with respect to his notes that his reference to the "very nice shape" of petitioner's breasts was in comparison to the breasts of other transsexual males on feminizing hormones and that petitioner's breasts exhibited characteristics of gynecomastia, a condition where breast mass is concentrated closer to the nipple as compared to the breasts of a genetic female. Nonetheless, given the contemporaneous documentation of the breasts' apparent normalcy and the failure to adhere to the Benjamin standards' requirement to document breast-engendered anxiety to justify the surgery, we find that petitioner's breast augmentation surgery did not fall within the treatment protocols of the Benjamin standards and therefore did not "treat" GID within the meaning of *section 213(d)(9)(B)*. Instead, the surgery merely improved her appearance.

The breast augmentation surgery is therefore "cosmetic surgery" under the *section 213(d)(9)(B)* definition unless it "meaningfully [promoted] the proper function of the body". The parties have stipulated that petitioner's breast augmentation "did not promote the proper function of her breasts". Although petitioner expressly declined to stipulate that the breast augmentation

"did not meaningfully promote the proper functioning of her body within the meaning of *I.R.C. section 213*", we conclude that the stipulation to which she did agree precludes a finding on this record, given the failure to adhere to the Benjamin standards, that the breast augmentation surgery "meaningfully [promoted] the proper function of the body" within the meaning of *section 213(d)(9)(B)*. Consequently, the breast augmentation surgery is "cosmetic surgery" that is excluded from deductible "medical care".

E. Medical Necessity

Finally, respondent argues that petitioner's sex reassignment surgery was not "medically necessary", which respondent contends is a requirement intended by Congress to apply to procedures directed at improving appearance, as evidenced by certain references to "medically necessary" procedures in the legislative history of the enactment of the cosmetic surgery exclusion of *section 213(d)(9)*. (Footnote 54) Respondent in effect argues that the legislative history's contrast of nondeductible cosmetic surgery with "medically necessary" procedures evidences an intent by Congress to impose a requirement in *section 213(d)(9)* of medical necessity for the deduction of procedures affecting appearance. We find it unnecessary to resolve respondent's claim that *section 213(d)(9)* should be interpreted to require a showing of "medical necessity" notwithstanding the absence of that phrase in the statute. That is so because respondent's contention would not bar the deductions at issue, inasmuch as we are persuaded, as discussed below, that petitioner has shown that her sex reassignment surgery was medically necessary.

The mental health professional who treated petitioner concluded that petitioner's GID was severe, that sex reassignment surgery was medically necessary, and that petitioner's prognosis

without it was poor. Given Dr. Brown's expert testimony, the judgment of the professional treating petitioner, the agreement of all three experts that untreated GID can result in self-mutilation and suicide, and, as conceded by Dr. Schmidt, the views of a significant segment of knowledgeable professionals that sex reassignment surgery is medically necessary for severe GID, the Court is persuaded that petitioner's sex reassignment surgery was medically necessary.

IV. Conclusion

The evidence amply supports the conclusions that petitioner suffered from severe GID, that GID is a well-recognized and serious mental disorder, and that hormone therapy and sex reassignment surgery are considered appropriate and effective treatments for GID by psychiatrists and other mental health professionals who are knowledgeable concerning the condition. Given our holdings that GID is a "disease" and that petitioner's hormone therapy and sex reassignment surgery "[treated]" it, petitioner has shown the "existence . . . of a disease" and a payment for goods or services "directly or proximately related" to its treatment. See *Jacobs v. Commissioner*, 62 T.C. at 818. She likewise satisfies the "but for" test of *Jacobs*, which requires a showing that the procedures were an essential element of the treatment and that they would not have otherwise been undertaken for nonmedical reasons. Petitioner's hormone therapy and sex reassignment surgery were essential elements of a widely accepted treatment protocol for severe GID. The expert testimony also establishes that given (1) the risks, pain, and extensive rehabilitation associated with sex reassignment surgery, (2) the stigma encountered by persons who change their gender role and appearance in society, and (3) the expert-backed but commonsense point that the desire of a genetic male to have his genitals removed requires an explanation beyond mere dissatisfaction with appearance (such as GID or psychosis), petitioner

would not have undergone hormone therapy and sex reassignment surgery except in an effort to alleviate the distress and suffering attendant to GID. Respondent's contention that petitioner undertook the surgery and hormone treatments to improve appearance is at best a superficial characterization of the circumstances that is thoroughly rebutted by the medical evidence.

Petitioner has shown that her hormone therapy and sex reassignment surgery treated disease within the meaning of *section 213* and were therefore not cosmetic surgery. Thus petitioner's expenditures for these procedures were for "medical care" as defined in *section 213(d)(1)(A)*, for which a deduction is allowed under *section 213(a)*.

...

Reviewed by the Court.

COLVIN, COHEN, THORNTON, MARVEL, WHERRY, PARIS, and MORRISON, JJ.,
agree with this majority opinion.

FOOTNOTES:

30 Petitioner also argues that the expenditures for the procedures at issue are deductible because they affected a structure or function of the body (within the meaning of *sec.213(d)(1)(A)*) and were not "cosmetic surgery" under *sec. 213(d)(9)* because they were not "directed at improving the patient's appearance" and because they "meaningfully [promoted]the proper function of the body" (within the meaning of *sec.213(d)(9)(B)*). Given our conclusion, discussed hereinafter, that the expenditures for petitioner's hormone therapy and sex reassignment surgery are deductible because they "[treated] . . .disease" within the meaning of *sec. 213(d)(1)(A)* and *(9)(B)*, we need not resolve the foregoing issues with respect to those expenditures. We consider petitioner's arguments with respect to the breast augmentation surgery more fully *infra*.

33 The experts all agree and the Court accepts, for purposes of deciding this case, that no organic or biological cause of GID has been demonstrated.

34 In contrast, the testimony of the other two experts presents specialized medical knowledge concerning the nature of GID. These facts bear upon whether GID should be considered to qualify as a "disease", as the Court interprets that term.

35 Dr. Dietz' testimony as a forensic psychiatrist is proper and useful regarding other matters, such as the state of knowledge concerning organic origins of mental conditions, and the Court relies on the testimony for certain other purposes, as discussed *infra*.

37 We recognize that the DSM-IV-TR cautions that inclusion of a diagnostic category therein "does not imply that the condition meets legal or other non-medical criteria for what constitutes mental disease, mental disorder, or mental disability." For purposes of our decision in this case, GID's inclusion in the DSM-IV-TR (and its predecessors) evidences widespread recognition of the condition in the psychiatric profession. Indisputably, the issue of whether GID is a "disease" for purposes of *sec. 213* is for this Court to decide, and we do so on the basis of a range of factors, including GID's inclusion in the DSM-IV-TR.

39 Dr. Schmidt attributed his misgivings in part to the "lack of a scientifically supported etiology of the condition", but as petitioner's expert Dr. Brown pointed out, the same could be said of most mental disorders listed in the DSM.

47 Dr. Schmidt cited an article by Dr. Paul McHugh as evidence of the view of sex reassignment surgery as unethical and not medically necessary. On cross-examination, Dr. Schmidt acknowledged that the McHugh article was not published in a peer-reviewed medical journal but instead in a religious publication. See McHugh, "Surgical Sex", First Things, The Institute on Religion and Public Life (November 2004), <http://www.firstthings.com/index.php> (online edition). Respondent likewise cites the McHugh article on brief as medical opinion, without disclosing the source of its publication.

49 Judge Posner wrote in *Maggert v. Hanks*, 131 F.3d at 671:

The cure for the male transsexual consists not of psychiatric treatment designed to make the patient content with his biological sexual identity -- that doesn't work -- but of estrogen therapy designed to create the secondary sexual characteristics of a woman followed by the surgical removal of the genitals and the construction of a vagina-substitute out of penile tissue.
[Citations omitted.]

. . .

51 Even petitioner conceded in her testimony that she had "a fair amount of breast development . . . from the hormones" at the time of her presurgical consultation with Dr. Meltzer.

54 Respondent relies upon the following excerpts from the report of the Senate Finance Committee issued in connection with the enactment of the cosmetic surgery exclusion of *sec.213(d)(9)*:

Expenses for purely cosmetic procedures that are not medically necessary are, in essence, voluntary personal expenses, which like other personal

expenditures (e.g., food and clothing) generally should not be deductible in computing taxable income.

...

... [E]xpenses for procedures that are medically necessary to promote the proper function of the body and only incidentally affect the patient's appearance ... continue to be deductible ... [136 Cong. Rec.30485, 30570 (1990).]

The Senate Finance Committee report is set out more fully *supra* note 27. We note that the discussion of *sec. 213(d)(9)* in the conference report issued with respect to the agreed final version of *sec. 213(d)(9)* contains no reference to "medical necessity" or any variant of the phrase. See H. Conf. Rept. 101-964, at 1031(1990), *1991-2 C.B. 560, 562*.

- Page 251 Amend Paragraph 1 to note that section 303 of the Heroes Earnings Assistance and Relief Tax Act of 2008, P.L. 110-245, amended section 6651(a) to provide an increase to \$135 in the minimum penalty for failure to file a tax return.
- Page 262 Note in connection with the carryover paragraph discussion of the rules under Circular 230 for advising a client concerning a tax return position: The Service is currently studying how it should revise section 10.34(a) of Circular 230 to conform with recent changes to the return preparer penalty under section 6694(a). The new section 6694(a) imposes a penalty on a tax return preparer who “prepares any return or claim of refund with respect to which any part of an understatement of liability is due to” an “unreasonable” position. A tax return position is unreasonable unless there is either (a) substantial authority for that position, or (b) the preparer discloses the position and there is a reasonable basis for the position. The Tax Section of the American Bar Association recently submitted comments urging Treasury to conform the standards of section 10.34(a) to the standards of section 6694.
- Page 264 The Ninth Circuit affirmed the Tax Court’s decision in *Sklar v. Commissioner*, 549 F. 3d 1252 (9th Cir. 2008).
- Page 290 Add to Paragraph 2 of number 5: Section 202 of the Emergency Economic Stabilization Act of 2008, Energy Improvement and Extension Act of 2008, and Tax Extenders and the Alternative Minimum Tax Act of 2008, P.L. 110-343, extended the above-the-line deduction for higher education expenses under section 222 through 2009. As this supplement goes to press, Congress is considering extending the deduction through 2010 as part of the American Jobs and Closing Tax Loopholes Act, H.R. 4213.

- Page 290 Add also to Paragraph 2 of number 5: Section 1004(a) of the American Recovery and Reinvestment Act of 2009, P.L. 111-5, modifies and increases the Hope Credit for tax years 2009 and 2010 only, naming it for those two years the “American Opportunity Tax Credit.” Look at new section 25A(i).
- Page 318 Add to footnote 138: Section 1201(a) of the American Recovery and Reinvestment Act of 2009, P.L. 111-5, extended bonus depreciation under section 168(k) through 2009. The Economic Stimulus Act of 2008 had only extended it through 2008. This extension also applies to the calculation of the maximum allowable first-year deduction on luxury cars placed in service in 2009.
- Page 324 Add to the carryover paragraph in connection with section 280F: The changes noted above regarding bonus depreciation under section 168(k) also apply to the allowable first-year amount under section 280F for passenger automobiles. That is, section 168(k)(2)(F) (not in the selected sections volume), provides an increase of \$8,000 in the amount of depreciation allowed on passenger automobiles governed by section 280F.
- Page 325 See amendment above to page 27, citing the GAO Report: Understanding the Tax Reform Debate: Background, Criteria, & Questions (Sept. 2005).
- Page 411 Since the book went to press, a number of additional states and the District of Columbia have approved same-sex marriages. Those states include Connecticut, Iowa, Massachusetts, New Hampshire, and Vermont. California permitted same-sex marriages for a time based on a decision of the California Supreme Court. That decision was overturned in November, 2008, by a referendum known as Proposition 8. As this update goes to press, the Federal District Court in California is considering a case challenging Proposition 8. It may render a decision this fall. So, too, voters in Maine voted against permitting same-sex marriage in that state. Governor Paterson of New York ordered state agencies to recognize same-sex marriages performed legally outside New York based upon a decision of New York’s intermediate court. That case arose from the request of a teacher in the New York State college system to cover her spouse for the purpose of medical insurance and other benefits. The couple were legally married in Canada. *Martinez v. County of Monroe*, 859 N.Y. Supp. 2d 740 (S. Ct., App. Div., 4th Dept. 2008). New York is one of three states that now recognize same-sex marriages but do not perform them: Maryland, New York, and Rhode Island. Despite the growing number of states and countries that recognize same-sex marriage, federal tax law still does not.
- Page 412 After the second paragraph of Question 2 add the following text and case:

The introduction of same-sex marriage in Massachusetts and other states makes the reasoning in *Mueller* inapplicable to those couples in these states who are

legally married. It is no surprise, therefore, that these couples would seek to challenge DOMA. The first case to come before a federal court was *Gill v. Office of Personnel Management*, ___ F.Supp. ___, No. 09-c.v.-10309-JLT, 2010 U.S. Dist. LEXIS 67874 (D.Mass. 2010). Judge Tauro's opinion provides in part:

GILL v. OFFICE OF PERSONNEL MANAGEMENT

Civil Action No. 09-10309-JLT

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
MASSACHUSETTS**

2010 U.S. Dist. LEXIS 67874

**July 8, 2010, Decided
July 8, 2010, Filed**

MEMORANDUM

TAURO, J.

I. Introduction

This action presents a challenge to the constitutionality of Section 3 of the Defense of Marriage Act (Footnote 1) as applied to Plaintiffs, who are seven same-sex couples married in Massachusetts and three survivors of same-sex spouses, also married in Massachusetts. Specifically, Plaintiffs contend that, due to the operation of Section 3 of the Defense of Marriage Act, they have been denied certain federal marriage-based benefits that are available to similarly-situated heterosexual couples, in violation of the equal protection principles embodied in the *Due Process Clause of the Fifth Amendment*. (Footnote 3) Because this court agrees, Defendants' Motion to Dismiss . . . is DENIED and Plaintiffs' Motion for Summary Judgment . . . is ALLOWED. . . .

II. Background

A. The Defense of Marriage Act

In 1996, Congress enacted, and President Clinton signed into law, the Defense of Marriage Act ("DOMA"). (Footnote 5) At issue in this case is Section 3 of DOMA, which defines the terms "marriage" and "spouse," for purposes of federal law, to include only the union of one man and one woman. In particular, it provides that:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or wife.

In large part, the enactment of DOMA can be understood as a direct legislative response to *Baehr v. Lewin*, (Footnote 7) a 1993 decision issued by the Hawaii Supreme Court, which indicated that same-sex couples might be entitled to marry under the state's constitution. That decision raised the possibility, for the first time, that same-sex couples could begin to obtain state-sanctioned marriage licenses. (Footnote 9)

The House Judiciary Committee's Report on DOMA (the "House Report") referenced the *Baehr* decision as the beginning of an "orchestrated legal assault being waged against traditional heterosexual marriage," and expressed concern that this development "threaten[ed] to have very real consequences . . . on federal law." (Footnote 10) Specifically, the Report warned that "a redefinition of marriage in Hawaii to include homosexual couples could make such couples eligible for a whole range of federal rights and benefits."

And so, in response to the Hawaii Supreme Court's decision, Congress sought a means to both "preserve[] each State's ability to decide" what should constitute a marriage under its own

laws and to "lay[] down clear rules" regarding what constitutes a marriage for purposes of federal law.

In enacting Section 2 of DOMA, (Footnote 13) Congress permitted the states to decline to give effect to the laws of other states respecting same-sex marriage. In so doing, Congress relied on its "express grant of authority," under the second sentence of the *Constitution's Full Faith and Credit Clause*, "to prescribe the effect that public acts, records, and proceedings from one State shall have in sister States." With regard to Section 3 of DOMA, the House Report explained that the statute codifies the definition of marriage set forth in "the standard law dictionary," for purposes of federal law. (Footnote 15)

The House Report acknowledged that federalism constrained Congress' power, and that "[t]he determination of who may marry in the United States is uniquely a function of state law." Nonetheless, it asserted that Congress was not "supportive of (or even indifferent to) the notion of same-sex 'marriage,'" and, therefore, embraced DOMA as a step toward furthering Congress's interests in "defend[ing] the institution of traditional heterosexual marriage."

The House Report further justified the enactment of DOMA as a means to "encourag[e] responsible procreation and child-rearing," conserve scarce resources, and reflect Congress' "moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality." In one unambiguous expression of these objectives, Representative Henry Hyde, then-Chairman of the House Judiciary Committee, stated that "[m]ost people do not approve of homosexual conduct . . . and they express their disapprobation through the law."

In the floor debate, members of Congress repeatedly voiced their disapproval of homosexuality, calling it "immoral," "depraved," "unnatural," "based on perversion" and "an attack upon God's principles." They argued that marriage by gays and lesbians would "demean" and "trivialize" heterosexual marriage and might indeed be "the final blow to the American family."

Although DOMA drastically amended the eligibility criteria for a vast number of different federal benefits, rights, and privileges that depend upon marital status, the relevant committees did not engage in a meaningful examination of the scope or effect of the law. For example, Congress did not hear testimony from agency heads regarding how DOMA would affect federal programs. Nor was there testimony from historians, economists, or specialists in family or child welfare. Instead, the House Report simply observed that the terms "marriage" and "spouse" appeared hundreds of times in various federal laws and regulations, and that those terms were defined, prior to DOMA, only by reference to each state's marital status determinations.

In January 1997, the General Accounting Office issued a report clarifying the scope of DOMA's effect. It concluded that DOMA implicated at least 1,049 federal laws, including those related to entitlement programs, such as Social Security, health benefits and taxation, which are at issue in this action. A follow-up study conducted in 2004 found that 1,138 federal laws tied benefits, protections, rights, or responsibilities to marital status. (Footnote 27)

B. The Federal Programs Implicated in This Action

Prior to filing this action, each Plaintiff, or his or her spouse, made at least one request to the appropriate federal agency or authority for treatment as a married couple, spouse, or widower

with respect to particular federal benefits available to married individuals. But each request was denied. In denying Plaintiffs access to these benefits, the government agencies responsible for administering the relevant programs all invoked DOMA's mandate that the federal government recognize only those marriages between one man and one woman.

...

3. Filing Status Under the Internal Revenue Code

Lastly, a number of Plaintiffs in this case seek the ability to file federal income taxes jointly with their spouses. The amount of income tax imposed on an individual under the Internal Revenue Code depends in part on the taxpayer's "filing status." In accordance with the income tax scheme utilized by the federal government, a "married individual . . . who makes a single [tax] return jointly with his spouse" is generally subject to a lower tax than an "unmarried individual" or a "head of household." "[I]f an individual has filed a separate return for a taxable year for which a joint return could have been made by him and his spouse," the couple may file a joint return within three years after the filing of the original returns. Should the amended return call for a lower tax due than the original return, the taxpayer may also file an administrative request for a refund of the difference.

III. Discussion

...

[T]he analysis turns to the central question raised by Plaintiffs' Complaint, namely whether Section 3 of DOMA as applied to Plaintiffs violates constitutional principles of equal protection.

D. Equal Protection of the Laws

"[T]he Constitution 'neither knows nor tolerates classes among citizens.'" (Footnote 83) It is with this fundamental principle in mind that equal protection jurisprudence takes on "governmental classifications that 'affect some groups of citizens differently than others.'" (Footnote 84) And it is because of this "commitment to the law's neutrality where the rights of persons are at stake" (Footnote 85) that legislative provisions which arbitrarily or irrationally create discrete classes cannot withstand constitutional scrutiny.

To say that all citizens are entitled to equal protection of the laws is "essentially a direction [to the government] that all persons similarly situated should be treated alike." (Footnote 87) But courts remain cognizant of the fact that "the promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." (Footnote 88) And so, in an attempt to reconcile the promise of equal protection with the reality of lawmaking, courts apply strict scrutiny, the most searching of constitutional inquiries, only to those laws that burden a fundamental right or target a suspect class. A law that does neither will be upheld if it merely survives the rational basis inquiry-if it bears a rational relationship to a legitimate government interest. (Footnote 90)

...

DOMA fails to pass constitutional muster even under the highly deferential rational basis test. As set forth in detail below, this court is convinced that "there exists no fairly conceivable set of facts that could ground a rational relationship" (Footnote 91) between DOMA and a legitimate government objective. DOMA, therefore, violates core constitutional principles of equal protection.

1. The Rational Basis Inquiry

This analysis must begin with recognition of the fact that rational basis review "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." (Footnote 92) A "classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity...[and] courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends." (Footnote 93) Indeed, a court applying rational basis review may go so far as to hypothesize about potential motivations of the legislature, in order to find a legitimate government interest sufficient to justify the challenged provision. (Footnote 94)

Nonetheless, "the standard by which legislation such as [DOMA] must be judged is not a toothless one." (Footnote 95) "[E]ven in the ordinary equal protection case calling for the most deferential of standards, [courts] insist on knowing the relation between the classification adopted and the object to be attained." (Footnote 96) In other words, a challenged law can only survive this constitutional inquiry if it is "narrow enough in scope and grounded in a sufficient factual context for [the court] to ascertain some relation between the classification and the purpose it serve[s]." (Footnote 97) Courts thereby "ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." (Footnote 98)

Importantly, the objective served by the law must be not only a proper arena for government action, but also properly cognizable by the governmental body responsible for the law in question. And the classification created in furtherance of this objective "must find some footing in the realities of the subject addressed by the legislation." That is to say, the constitution will not tolerate government reliance "on a classification whose relationship to an asserted goal

is so attenuated as to render the distinction arbitrary or irrational." (Footnote 101) As such, a law must fail rational basis review where the "purported justifications... [make] no sense in light of how the [government] treated other groups similarly situated in relevant respects." (Footnote 102)

2. Congress' Asserted Objectives

The House Report identifies four interests which Congress sought to advance through the enactment of DOMA: (1) encouraging responsible procreation and child-bearing, (2) defending and nurturing the institution of traditional heterosexual marriage, (3) defending traditional notions of morality, and (4) preserving scarce resources. For purposes of this litigation, the government has disavowed Congress's stated justifications for the statute and, therefore, they are addressed below only briefly.

...

This court can readily dispose of the notion that denying federal recognition to same-sex marriages might encourage responsible procreation, because the government concedes that this objective bears no rational relationship to the operation of DOMA. . . .

...

Similarly, Congress' asserted interest in defending and nurturing heterosexual marriage is not "grounded in sufficient factual context [for this court] to ascertain some relation" between it and the classification DOMA effects. To begin with, this court notes that DOMA cannot possibly encourage Plaintiffs to marry members of the opposite sex because Plaintiffs are *already* married to members of the same sex. But more generally, this court cannot discern a means by which the federal government's denial of benefits to same-sex spouses might

encourage homosexual people to marry members of the opposite sex. And denying marriage-based benefits to same-sex spouses certainly bears no reasonable relation to any interest the government might have in making heterosexual marriages more secure.

What remains, therefore, is the possibility that Congress sought to deny recognition to same-sex marriages in order to make heterosexual marriage appear more valuable or desirable. But to the extent that this was the goal, Congress has achieved it "*only* by punishing same-sex couples who exercise their rights under state law." And this the Constitution does not permit. "For if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean" that the Constitution will not abide such "a bare congressional desire to harm a politically unpopular group." (Footnote 114)

Neither does the Constitution allow Congress to sustain DOMA by reference to the objective of defending traditional notions of morality. As the Supreme Court made abundantly clear in *Lawrence v. Texas* and *Romer v. Evans*, "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law...." (Footnote 115)

And finally, Congress attempted to justify DOMA by asserting its interest in the preservation of scarce government resources. While this court recognizes that conserving the public fisc can be a legitimate government interest, (Footnote 116) "a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources." (Footnote 117) This court can discern no principled reason to cut government expenditures at the particular expense of Plaintiffs, apart from Congress' desire to express its disapprobation of same-sex marriage. And "mere negative attitudes, or fear, unsubstantiated by

factors which are properly cognizable [by the government]" are decidedly impermissible bases upon which to ground a legislative classification. (Footnote 118)

3. Objectives Now Proffered for Purposes of Litigation

Because the rationales asserted by Congress in support of the enactment of DOMA are either improper or without relation to DOMA's operation, this court next turns to the potential justifications for DOMA that the government now proffers for the purposes of this litigation.

In essence, the government argues that the Constitution permitted Congress to enact DOMA as a means to preserve the "status quo," pending the resolution of a socially contentious debate taking place in the states over whether to sanction same-sex marriage. Had Congress not done so, the argument continues, the definitions of "marriage" and "spouse" under federal law would have changed along with each alteration in the status of same-sex marriage in any given state because, prior to DOMA, federal law simply incorporated each state's marital status determinations. And, therefore, Congress could reasonably have concluded that DOMA was necessary to ensure consistency in the distribution of federal marriage-based benefits.

In addition, the government asserts that DOMA exhibits the type of incremental response to a new social problem which Congress may constitutionally employ in the face of a changing socio-political landscape.

For the reasons set forth below, this court finds that, as with Congress' prior asserted rationales, the government's current justifications for DOMA fail to ground a rational relationship between the classification employed and a legitimate governmental objective.

To begin, the government claims that the Constitution permitted Congress to wait for the heated debate over same-sex marriage in the states to come to some resolution before

formulating an enduring policy at the national level. But this assertion merely begs the more pertinent question: whether the federal government had any proper role to play in formulating such policy in the first instance.

There can be no dispute that the subject of domestic relations is the exclusive province of the states. (Footnote 119) And the powers to establish eligibility requirements for marriage, as well as to issue determinations of marital status, lie at the very core of such domestic relations law. (Footnote 120) The government therefore concedes, as it must, that Congress does not have the authority to place restrictions on the states' power to issue marriage licenses. And indeed, as the government aptly points out, DOMA refrains from directly doing so. Nonetheless, the government's argument assumes that Congress has some interest in a uniform definition of marriage for purposes of determining federal rights, benefits, and privileges. There is no such interest. "The scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law. This is especially true where a statute deals with a familiar [sic] relationship [because] there is no federal law of domestic relations." (Footnote 122)

This conclusion is further bolstered by an examination of the federal government's historical treatment of state marital status determinations. (Footnote 123) Marital eligibility for heterosexual couples has varied from state to state throughout the course of history. Indeed, pursuant to the sovereign power over family law granted to the states by virtue of the federalist system, as well as the states' well-established right to "experiment[] and exercis[e] their own judgment in an area to which States lay claim by right of history and expertise," individual states have changed their marital eligibility requirements in myriad ways over time. And yet the federal

government has fully embraced these variations and inconsistencies in state marriage laws by recognizing as valid for federal purposes any heterosexual marriage which has been declared valid pursuant to state law. (Footnote 126)

By way of one pointed example, so-called miscegenation statutes began to fall, state by state, beginning in 1948. But no fewer than sixteen states maintained such laws as of 1967 when the Supreme Court finally declared that prohibitions on interracial marriage violated the core constitutional guarantees of equal protection and due process. (Footnote 127) Nevertheless, throughout the evolution of the stateside debate over interracial marriage, the federal government saw fit to rely on state marital status determinations when they were relevant to federal law.

...

Importantly, the passage of DOMA marks the *first* time that the federal government has ever attempted to legislatively mandate a uniform federal definition of marriage-or any other core concept of domestic relations, for that matter. . . .

Though not dispositive of a statute's constitutionality in and of itself, "a longstanding history of related federal action . . . can nonetheless be 'helpful in reviewing the substance of a congressional statutory scheme,' and, in particular, the reasonableness of the relation between the new statute and pre-existing federal interests." (Footnote 131) And the *absence* of precedent for the legislative classification at issue here is equally instructive, for "'discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the [C]onstitution[.]....'" (Footnote 132)

The government is certainly correct in its assertion that the scope of a federal program is generally determined with reference to federal law. But the historically entrenched practice of

incorporating state law determinations of marital status where they are relevant to federal law reflects a long-recognized reality of the federalist system under which this country operates. The states alone have the authority to set forth eligibility requirements as to familial relationships and the federal government cannot, therefore, have a legitimate interest in disregarding those family status determinations properly made by the states.

Moreover, in order to give any meaning to the government's notion of preserving the status quo, one must first identify, with some precision, the relevant status quo to be preserved. The government has claimed that Congress could have had an interest in adhering to federal policy regarding the recognition of marriages as it existed in 1996. And this may very well be true. But even assuming that Congress could have had such an interest, the government's assertion that pursuit of this interest provides a justification for DOMA relies on a conspicuous misconception of what the status quo was *at the federal level* in 1996.

The states alone are empowered to determine who is eligible to marry and, as of 1996, no state had extended such eligibility to same-sex couples. In 1996, therefore, it was indeed the status quo *at the state level* to restrict the definition of marriage to the union of one man and one woman. But, the status quo *at the federal level* was to recognize, for federal purposes, any marriage declared valid according to state law. Thus, Congress' enactment of a provision denying federal recognition to a particular category of valid state-sanctioned marriages was, in fact, a significant *departure* from the status quo at the federal level.

Furthermore, this court seriously questions whether it may even consider preservation of the status quo to be an "interest" independent of some legitimate governmental objective that preservation of the status quo might help to achieve. Staying the course is not an end in and of

itself, but rather a means to an end. Even assuming for the sake of argument that DOMA succeeded in preserving the federal status quo, which this court has concluded that it did not, such assumption does nothing more than describe what DOMA does. It does not provide a justification for doing it. This court does not doubt that Congress occasionally encounters social problems best dealt with by preserving the status quo or adjusting national policy incrementally. But to assume that such a congressional response is appropriate requires a predicate assumption that there indeed exists a "problem" with which Congress must grapple.

The only "problem" that the government suggests DOMA might address is that of state-to-state inconsistencies in the distribution of federal marriage-based benefits. But the classification that DOMA effects does not bear any rational relationship to this asserted interest in consistency. Decidedly, DOMA does not provide for nationwide consistency in the distribution of federal benefits among married couples. Rather it denies to same-sex married couples the federal marriage-based benefits that similarly situated heterosexual couples enjoy.

And even within the narrower class of heterosexual married couples, this court cannot apprehend any rational relationship between DOMA and the goal of nationwide consistency. As noted above, eligibility requirements for heterosexual marriage vary by state, but the federal government nonetheless recognizes any heterosexual marriage, which a couple has validly entered pursuant to the laws of the state that issued the license. For example, a thirteen year-old female and a fourteen year-old male, who have the consent of their parents, can obtain a valid marriage license in the state of New Hampshire. Though this court knows of no other state in the country that would sanction such a marriage, the federal government recognizes it as valid simply because New Hampshire has declared it to be so.

More importantly, however, the pursuit of consistency in the distribution of federal marriage-based benefits can only constitute a legitimate government objective if there exists a relevant characteristic by which to distinguish those who are entitled to receive benefits from those who are not. (Footnote 137) And, notably, there is a readily discernible and eminently relevant characteristic on which to base such a distinction: *marital status*. Congress, by premising eligibility for these benefits on marriage in the first instance, has already made the determination that married people make up a class of similarly-situated individuals, different in relevant respects from the class of non-married people. Cast in this light, the claim that the federal government may also have an interest in treating all same-sex couples alike, whether married or unmarried, plainly cannot withstand constitutional scrutiny. (Footnote 138)

Similarly unavailing is the government's related assertion that "Congress could reasonably have concluded that federal agencies should not have to deal immediately with [the administrative burden presented by] a changing patchwork of state approaches to same-sex marriage" in distributing federal marriage-based benefits. Federal agencies are not burdened with the administrative task of implementing changing state marriage laws-that is a job for the states themselves. Rather, federal agencies merely distribute federal marriage-based benefits to those couples that have already obtained state-sanctioned marriage licenses. That task does not become more administratively complex simply because some of those couples are of the same sex. Nor does it become more complex simply because some of the couples applying for marriage-based benefits were previously ineligible to marry. Every heterosexual couple that obtains a marriage license was at some point ineligible to marry due to the varied age restrictions placed on

marriage by each state. Yet the federal administrative system finds itself adequately equipped to accommodate their changed status.

In fact, as Plaintiffs suggest, DOMA seems to inject complexity into an otherwise straightforward administrative task by sundering the class of state-sanctioned marriages into two, those that are valid for federal purposes and those that are not. As such, this court finds the suggestion of potential administrative burden in distributing marriage-based benefits to be an utterly unpersuasive excuse for the classification created by DOMA.

Lastly, even if DOMA succeeded in creating consistency in the distribution of federal marriage-based benefits, which this court has concluded that it does not, DOMA's comprehensive sweep across the entire body of federal law is so far removed from that discrete goal that this court finds it impossible to credit the proffered justification of consistency as the motivating force for the statute's enactment.

The federal definitions of "marriage" and "spouse," as set forth by DOMA, are incorporated into at least 1,138 different federal laws, many of which implicate rights and privileges far beyond the realm of pecuniary benefits. (Footnote 141) For example, persons who are considered married for purposes of federal law enjoy the right to sponsor their non-citizen spouses for naturalization, (Footnote 142) as well as to obtain conditional permanent residency for those spouses pending naturalization. (Footnote 143) Similarly, the Family and Medical Leave Act ("FMLA") entitles federal employees, who are considered married for federal purposes, to twelve weeks of unpaid leave in order to care for a spouse who has a serious health condition or because of any qualifying exigency arising out of the fact that a spouse is on active military duty. (Footnote 144) But because DOMA dictates that the word "spouse", as used in

the above-referenced immigration and FMLA provisions, refers only to a husband or wife of the opposite sex, these significant non-pecuniary federal rights are denied to same-sex married couples.

It strains credulity to suggest that Congress might have created such a sweeping status-based enactment, touching every single federal provision that includes the word marriage or spouse, simply in order to further the discrete goal of consistency in the distribution of federal marriage-based pecuniary benefits. For though the government is correct that the rational basis inquiry leaves room for a less than perfect fit between the means Congress employs and the ends Congress seeks to achieve, this deferential constitutional test nonetheless demands some *reasonable* relation between the classification in question and the purpose it purportedly serves.

In sum, this court is soundly convinced, based on the foregoing analysis, that the government's proffered rationales, past and current, are without "footing in the realities of the subject addressed by [DOMA]." And "when the proffered rationales for a law are clearly and manifestly implausible, a reviewing court may infer that animus is the only explicable basis. [Because] animus alone cannot constitute a legitimate government interest," this court finds that DOMA lacks a rational basis to support it.

This court simply "cannot say that [DOMA] is directed to any identifiable legitimate purpose or discrete objective. It is a status-based enactment divorced from any factual context from which [this court] could discern a relationship to legitimate [government] interests." Indeed, Congress undertook this classification for the one purpose that lies entirely outside of legislative bounds, to disadvantage a group of which it disapproves. And such a classification, the Constitution clearly will not permit.

In the wake of DOMA, it is only sexual orientation that differentiates a married couple entitled to federal marriage-based benefits from one not so entitled. And this court can conceive of no way in which such a difference might be relevant to the provision of the benefits at issue. By premising eligibility for these benefits on marital status in the first instance, the federal government signals to this court that the relevant distinction to be drawn is between married individuals and unmarried individuals. To further divide the class of married individuals into those with spouses of the same sex and those with spouses of the opposite sex is to create a distinction without meaning. And where, as here, "there is no reason to believe that the disadvantaged class is different, in *relevant* respects" from a similarly situated class, this court may conclude that it is only irrational prejudice that motivates the challenged classification. As irrational prejudice plainly *never* constitutes a legitimate government interest, this court must hold that Section 3 of DOMA as applied to Plaintiffs violates the equal protection principles embodied in the *Fifth Amendment to the United States Constitution*.

...

FOOTNOTES

1 *1 U.S.C. § 7.*

3 Though the *Fifth Amendment to the United States Constitution* does not contain an *Equal Protection Clause*, as the *Fourteenth Amendment* does, the *Fifth Amendment's Due Process Clause* includes an Equal Protection component. See *Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S. Ct. 693, 98 L. Ed. 884 (1954).

5 Pub. L. No. 104-199, 110 Stat. 2419 (1996)

7 74 Haw. 530, 852 P.2d 44 (Haw. 1993).

9 Notably, the Baehr decision did not carry the day in Hawaii. Rather, Hawaii ultimately amended its constitution to allow the state legislature to limit marriage to opposite-sex couples. See *HAW. CONST. art. I, § 23*. However, five other states and the District of

Columbia now extend full marriage rights to same-sex couples. These five states are Iowa, New Hampshire, Connecticut, Vermont, and Massachusetts, where Plaintiffs reside.

10 Aff. of Gary D. Buseck, Ex. D, H.R. Rep. No. 104-664 at 2-3 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906-07 ("H. Rep.") [hereinafter "House Report"].

13 Section 2 of DOMA provides that "[n]o State...shall be required to give effect to any public act, record, or [*8] judicial proceeding of any other State...respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State."

15 *Id.* at 29. (citing BLACK'S LAW DICTIONARY 972 (6th ed. 1990)).

27 U.S. Gov. Accountability Office, GAO-04-353R Defense of Marriage Act (2004), *available at* <http://www.gao.gov/new.items/d04353r.pdf>.

83 *Romer v. Evans*, 517 U.S. 620, 623, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559, 16 S. Ct. 1138, 41 L. Ed. 256 (1896) (Harlan, J. dissenting)).

84 *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, , 128 S. Ct. 2146, 2152, 170 L. Ed. 2d 975 (2008) (quoting *McGowan v. Maryland*, 366 U.S. 420, 425, 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961)).

85 *Romer*, 517 U.S. at 623.

87 *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982)).

88 *Romer*, 517 U.S. at 631 (citing *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 271-72, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979); *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, 40 S. Ct. 560, 64 L. Ed. 989 (1920)).

90 *Id.* (citing *Heller v. Doe*, 509 U.S. 312, 319-320, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993)). This constitutional standard of review is alternately referred to as the rational relationship test or the rational basis inquiry.

91 *Medeiros v. Vincent*, 431 F.3d 25, 29 (1st Cir. 2005) (internal citation omitted).

92 *Heller v. Doe*, 509 U.S. 312, 319-20, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993) (internal citations omitted).

93 *Id.* (internal citations omitted).

94 *Shaw v. Oregon Public Employees' Retirement Bd.*, 887 F.2d 947, 948-49 (9th Cir. 1989) (internal quotation omitted).

95 *Matthews v. de Castro*, 429 U.S. 181, 185, 97 S. Ct. 431, 50 L. Ed. 2d 389 (1976) (internal quotation omitted).

96 *Romer*, 517 U.S. at 633.

97 *Id.*

98 *Id.* (citing *Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 181, 101 S. Ct. 453, 66 L. Ed. 2d 368 (1980) (Stevens, J., concurring) ("If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect.")).

101 *City of Cleburne*, 473 U.S. at 447.

102 *Garrett*, 531 U.S. at 366 n.4 (citing *City of Cleburne*, 473 U.S. at 447-450).

114 *Moreno*, 413 U.S. at 534 (1973); see also, *Lawrence* 539 U.S. at 571, 578 (suggesting that the government cannot justify discrimination against same-sex couples based on traditional notions of morality alone).

115 *Lawrence*, 539 U.S. at 577 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986) (Stevens, J., dissenting)).

116 This court notes that, though Congress paid lip service to the preservation of resources as a rationale for DOMA, such financial considerations did not actually motivate the law. In fact, the House rejected a proposed amendment to DOMA that would have required a budgetary analysis of DOMA's impact prior to passage. See 142 CONG. REC. H7503-05 daily ed. July 12, 1996). Furthermore, the Congressional Budget Office concluded in 2004 that federal recognition of same-sex marriages by all fifty states would actually result in a net *increase* in federal revenue. See Buseck Aff., Ex. C at 1, Cong. Budget Office, The Potential Budgetary Impact of Recognizing Same-Sex Marriages.

117 *Plyler v. Doe*, 457 U.S. 202, 227, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982) (quoting *Graham v. Richardson*, 403 U.S. 365, 374-75, 91 S. Ct. 1848, 29 L. Ed. 2d 534 (1971)).

118 *City of Cleburne*, 473 U.S. at 448.

119 See, e.g., *Elk Grove United Sch. Dist. v. Newdow*, 542 U.S. 1, 12, 124 S. Ct. 2301, 159 L. Ed. 2d 98 (2004) (quoting *In re Burrus*, 136 U.S. 586, 593, 10 S. Ct. 850, 34 L. Ed. 500 (1890)); *Commonwealth of Mass. v. Dep't of Health and Human Servs., et al.*, No. 09-cv-11156-JLT, 2010 U.S. Dist. LEXIS 67927 (D.Mass. July 8, 2010) (Tauro, J.).

120 See *Ankenbrandt v. Richards*, 504 U.S. 689, 716, 112 S. Ct. 2206, 119 L. Ed. 2d 468 (1992) (Blackmun, J., concurring).

122 *DeSylva v. Ballentine*, 351 U.S. 570, 580, 76 S. Ct. 974, 100 L. Ed. 1415 (1956) (internal citation omitted).

123 This court addresses the federal government's historical treatment of state marital status determinations at length in the companion case of *Commonwealth of Mass. v. Dep't of Health and Human Servs., et al.*, No. 09-cv-11156-JLT, 2010 U.S. Dist. LEXIS 67927 (D.Mass. July 8, 2010) (Tauro, J.).

126 See, e.g., *Dunn v. Comm'r of Internal Revenue*, 70 T.C. 361, 366 (1978) ("recognizing that whether an individual is 'married' is, for purposes of the tax laws, to be determined by the law of the State of the marital domicile") . . . Indeed, the only federal statute other than DOMA, of which this court is aware, that denies federal recognition to *any* state-sanctioned marriages is another provision that targets same-sex couples, regarding burial in veterans' cemeteries, enacted in 1975. See 38 U.S.C. § 101(31).

127 See *Loving v. Virginia*, 388 U.S. 1, 6 n.5, 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967).

131 *United States v. Comstock*, 130 S. Ct. 1949, 176 L. Ed. 2d 878, 892 (2010) [*50] (internal citations omitted).

132 *Romer*, 517 U.S. at 633 (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38, 48 S. Ct. 423, 72 L. Ed. 770 (1928)).

137 *City of Cleburne*, 473 U.S. at 439 (explaining that equal protection of the laws is "essentially a direction [to the government] that all persons similarly situated should be treated alike") (internal citation omitted).

138 See *Garrett*, 531 U.S. at 366 n.4 (finding that a law failed rational basis review where the "purported justifications...made no sense in light of how the [government] treated other groups similarly situated").

141 See U.S. Gov. Accountability Office, GAO-04-353R Defense of Marriage Act (2004), available at <http://www.gao.gov/new.items/d04353r.pdf>.

142 8 U.S.C. § 1430.

143 8 U.S.C. § 1186b(a)(2)(A).

144 See 5 U.S.C. § 6382.

Judge Tauro's decision holds that DOMA violates Fifth Amendment principles of equal protection as applied to the plaintiffs in the case. Questions remain, however, as to DOMA's applicability to other cases. For example, does DOMA continue to apply to taxpayers who have entered into valid marriages but now live in states that do not recognize same-sex marriages. Other uncertainties include the outcome of possible appeals and how courts in other circuits will regard *Gill*.

In the companion case, *Commonwealth of Massachusetts v. United States Department of Health and Human Services*, ___ F.Supp. ___, No. 09-c.v.-11156-JLT, 2010 U.S. Dist. LEXIS 67927 (D. Mass. 2010), the Commonwealth challenged DOMA based on the denial of federal funds payable to the state for spousal benefits in the case of same-sex marriages. The Court held that "DOMA violates the Tenth Amendment of the Constitution, by intruding on areas of exclusive state authority, as well as the Spending Clause, by forcing the Commonwealth to engage in invidious discrimination against its own citizens in order to receive an repay federal funds. . . ." For those who are interested in the issue of standing, this opinion includes rejection of the government's contention that the Commonwealth does not have standing to challenge DOMA.

- Page 438 Note that Section 1409(b) of the Health Care and Education Reconciliation Act of 2010 added Code sections 6662(b)(6) imposing a 20% penalty for an underpayment of tax resulting from the disallowance of claimed tax benefits because the transaction lacked economic substance. Section 7701(o) defines "economic substance." Section 6662(i) increases the penalty to 40% if the noneconomic substance is not disclosed.
- Page 459 Question 7 should read: "why did the Commissioner determine that the proper amount of the income of the Cowdens was less than the face value of the note?"
- Page 463 Question 3, second sentence should read "the court also states that the Board of Tax Appeals (predecessor to the United States Tax Court), had refused to follow that decision in three of its cases."
- Page 651 Add to Paragraph 2 of Question 1: Section 3092 of the Housing and Economic Recovery Act of 2008, P.L. 110-289, amended section 121 to provide that a taxpayer may not exclude from gross income gain from the sale or exchange of a principal residence allocated to periods of non-qualified use. See section 121(b)(4)[5].
- Page 694 Add a new note: Section 2 of the Mortgage Forgiveness Debt Relief Act of 2007, P.L. 110-142, added section 108(a)(1)(E) which excludes income from a discharge before 2010 of qualified principal residence indebtedness.

Section 303 of the Emergency Economic Stabilization Act of 2008, Energy Improvement and Extension Act of 2008, and Tax Extenders and the Alternative Minimum Tax Act of 2008, P.L. 110-343, extended the provision to discharges occurring through 2012. Note the change to section 25A described above as a change to page 290 of the text. Note the change to section 222 described above as a change to page 290 of the text.

Page 714 Add to Paragraph 3: Section 3011 of the Housing and Economic Recovery Act of 2008, P.L. 110-289, added new section 36 to the Code, giving a tax credit to first-time home buyers. Section 1006 of the American Recovery and Reinvestment Act of 2009, P.L. 111-5, increased the amount of the credit to \$8,000 for homes purchased between January 1, 2009 and before December 1, 2009. Unlike the earlier version of the credit, the amended credit need not be repaid. It is not, however, available to all taxpayers: there is a phaseout based on modified adjusted gross income.

The Worker, Homeownership, and Business Assistance Act of 2009, P.L. 111-92, extended the provision to cover purchases under contract by April 30, 2010 if the buyer closed the sale by June 30, 2010. In response to the paperwork backlog of lenders, Congress further extended the deadline for closing to September 30, 2010. The Homebuyer Assistance and Improvement Act of 2010, P.L. 111-198.

Page 731 Amend footnote 2: Section 1004 of the American Recovery and Reinvestment Act of 2009, P.L. 111-5, further extends through 2009 the right of a taxpayer to use non-refundable credits to offset the alternative minimum tax. The Emergency Economic Stabilization Act of 2008, the Energy Improvement and Extension Act of 2008, and the Tax Extenders and Minimum Tax Relief Act of 2008, P.L. 110-343, had earlier extended the provision through 2008. Note also the change to section 25A described above as a change to page 290 of the text.

Page 732 Note the change to section 25A described above as a change to page 290 of the text. Note the change to section 222 described above as a change to page 290 of the text.

Page 739 Add to last part of Question 5: Section 1003 of the American Recovery and Reinvestment Act of 2009 provides a different floor for calculating the amount of the section 24 child credit that is refundable. For 2009 and 2010 only, the refund equals 15% of the taxpayer's income in excess of \$3,000. This refundable amount is further limited, however. The maximum is the amount of the child credit.

Page 740 Add to the end of the Low Income Taxpayer Problem: Section 1001 of the American Recovery and Reinvestment Act of 2009, P.L. 111-5, added new Code section 36A, the Making Work Pay Credit for 2009 and 2010 only. The credit

equals the lesser of 6.2% of the taxpayer's earned income or \$400 (\$800 for a joint return). There is a phaseout based on modified adjusted gross income.

- Page 757 Add to Question 5: Section 403 of the Emergency Economic Stabilization Act of 2008, the Energy Improvement and Extension Act of 2008, and the Tax Extenders and Minimum Tax Relief Act of 2008, P.L. 110-343, requires that every broker required to file a return under section 6045(a), reporting the gross proceeds from the sale of a covered security, must include in the return: (1) the customer's adjusted basis in the security, and (2) whether any gain with respect to the security is long-term or short-term.
- Page 767 Note the change to section 25A described above as a change to page 290 of the text. Note the change to section 222 described above as a change to page 290 of the text.
- Page 768 Note the change to section 25A described above as a change to page 290 of the text.
- Page 769 Amend Paragraph 3 of Question 11: Note the change to section 25A described above as a change to page 290 of the text.