



January 15, 2025

VIA EMAIL

National Board of Management
National Society of the Daughters of the American Revolution
1776 D Street NW
Washington, D.C. 20006-5303

**Re: Legality of Excluding Trans-Identifying Men from Membership in the
National Society of the Daughters of the American Revolution**

Dear Board Members:

The Martha Laird Chapter (Chapter) of the Daughters of the American Revolution (DAR) has engaged the Center for American Liberty to evaluate the legality of amending the DAR bylaws to exclude natal men—including natal men who identify as women—from membership eligibility. Attached to this letter is a memorandum to the Chapter analyzing this question. As the memorandum explains, we conclude that such an amendment is likely both lawful and would not jeopardize the DAR's tax-exempt status.

On or about February 8, 2025, the DAR National Board of Management will consider a proposed bylaw amendment that would prohibit natal men—including men who identify as women—from joining the DAR. We offer this memorandum for the Board's review as it considers whether to allow the proposed bylaw amendment to go to the full DAR membership for a vote at the upcoming Continental Congress this summer. Not only does the DAR have a constitutional right to pass such an amendment, but doing so would ensure the organization stays true to its roots as a genealogical society for women only. We encourage the Board to allow the proposed amendment to proceed.

The attached memorandum was drafted solely for the purpose of advising the Chapter. Neither it nor this letter establishes an attorney client relationship with any other person or entity, does not contain or constitute legal advice, and should not be relied upon as a substitute for consulting with a qualified attorney. We encourage the DAR to consult with counsel regarding the issues at hand.



Sincerely,

A handwritten signature in blue ink that reads "Harmeet K. Dhillon".

Harmeet K. Dhillon

A handwritten signature in black ink that reads "Mark Trammell".

Mark Trammell

Enclosures as stated

cc:

Josh W. Dixon (jdixon@libertycenter.org)
Center for American Liberty

Eric Sell (esell@libertycenter.org)
Center for American Liberty



January 15, 2025

TO: Martha Laird Chapter of the National Society of the Daughters of the American Revolution

FROM: Harmeet Dhillon
Mark Trammell
Center for American Liberty

RE: Legality of Excluding Trans-Identifying Men¹ from Membership in the National Society of the Daughters of the American Revolution

QUESTIONS PRESENTED

The Martha Laird Chapter of the National Society of the Daughters of the American Revolution has engaged the Center for American Liberty to evaluate (1) whether the National Society (DAR) has a First Amendment right to change membership requirements to exclude trans-identifying men from eligibility, and (2) whether such a change would impact the DAR's tax-exempt status. Our research concludes the following:

1. Yes. As a private, genealogical society founded solely for female descendants of those who advanced the American Revolution—and organized for the purpose of conducting charitable acts and promoting American patriotism—the DAR is likely an expressive association. To the extent state and local public accommodation statutes may be interpreted to require the DAR to admit trans-identifying men, such a requirement would likely violate the DAR's First Amendment rights if the DAR determined that such a requirement would interfere with its ability to advance its intended message. The DAR therefore likely has a First Amendment right to exclude trans-identifying men from eligibility regardless of any contrary public accommodation laws.
2. No. Non-profits run the risk of losing their tax-exempt status if they act in a way that is illegal or contrary to public policy. It is unlikely that a genealogical association that limits membership to natal females violates public policy. To the best of our knowledge, neither the IRS nor the District of Columbia has ever revoked a sex-based organization's non-profit status because the organization excluded trans-identifying men from membership eligibility. Moreover, the DAR currently excludes men who do not identify as transgender

¹ This memo uses the term “trans-identifying men” to refer to natal males who assert a female gender identity.



from eligibility. This exclusion constitutes discrimination on the basis of sex, which is typically prohibited by public accommodation laws, yet to the best of our knowledge, neither the IRS nor the District has ever considered exclusion of men from a private organization’s membership rolls contrary to public policy. Because the DAR is a sex-based genealogical society—and has been for well over 100 years—it is unlikely the IRS or the District would take such a position now with respect to exclusion of trans-identifying men from membership eligibility.

BACKGROUND

I. The DAR

The DAR was founded in 1890 for the purpose of giving female descendants of American Revolutionaries an organization to call their own.² The Sons of the American Revolution (SAR)—founded years earlier—would not allow women to join as members.³ Accordingly, women formed their own organization, and the DAR later became a Congressionally chartered organization.⁴ The DAR is tax-exempt under § 501(c)(3) of the Internal Revenue Code.

The DAR’s purpose includes “perpetuat[ing] the memory and spirit of the men and women who achieved American Independence.” 36 U.S.C. § 153102; *see also* DAR Bylaws Art. II § (1). To accomplish this purpose, the DAR engages in charitable acts, such as protecting historical sites and records, encouraging historical research related to the American Revolution, and celebrating patriotic anniversaries. DAR Bylaws Art. II § (1)–(2). The DAR’s purpose also includes advancing ideological messages such as “developing an enlightened public opinion,” “foster[ing] true patriotism and love of country,” and “aid[ing] in securing for mankind all the blessings of liberty.” *Id.* Art. II § (3). Among other things, the DAR focuses on restoring historical sites, preserving genealogical records, supporting local schools through volunteer efforts, sponsoring essay contests

² *See* Daughters of the American Revolution Magazine, DAR (July 1915) at 234, available at https://www.google.com/books/edition/Daughters_of_the_American_Revolution_Mag/7S5CAQAAAJ?hl=en&gbpv=1&pg=PA234&printsec=frontcover (last visited Jan. 3, 2025); *see also* *The Founding of the DAR*, <https://www.dar.org/national-society/about-dar/dar-history> (last visited Jan. 3, 2025).

³ *Id.*

⁴ *Id.*; *see also* 36 U.S.C. § 153101. The SAR is also a Congressionally chartered organization. *See* 36 U.S.C. § 153301.



for youth, providing scholarship programs for high school students, and volunteering to assist military veterans.

The DAR’s mission statement provides that its mission is to “promote historic preservation, education and patriotism.”⁵ This mission helps “*women* [find] purpose and passion in DAR membership.”⁶

Membership eligibility to the DAR is restricted to women who are “not less than eighteen years of age, and who [are] lineally descended from a man or woman who, with unfailing loyalty to the cause of American Independence, served as a sailor, or a soldier or civil officer in one of the several Colonies or States, or in the United Colonies or States or as a recognized patriot, or rendered material aid thereto.” *Id.* Art. III § 1. To demonstrate such eligibility, DAR applicants must undergo a rigorous process to demonstrate the requisite genealogical connection. *Id.* Art. III at § 2. The applicant must “request to begin her application process through the state regent of the state in which she wishes to join.” *Id.* Art. III § 2(b). The “state regent shall assign a DAR member to work with the prospective member,” and within one year, the applicant must submit a completed application along with fees and dues. *Id.* Art. III § 2(a). Once an applicant submits the requisite documentation and payment, the application is given to the DAR’s Board of Management, which votes on the application. *Id.* Art. III § 4. A two-thirds vote of the Board is required for admission. *Id.*

The requirements that the DAR places on applicants to prove their genealogy is strict—so strict in fact, that female applicants are not allowed to establish the requisite genealogical connection through their adoptive parents, even with a legal, altered birth certificate.⁷ Instead, female applicants who have been adopted must prove their ancestry through their biological parents.⁸ This requirement typically requires female applicants who have been adopted to “submit copies of both [their] original birth certificate and [their] amended birth certificate after adoption, or [their] amended birth certificate along with a copy of the adoption papers naming [their] biological parents.”⁹ The DAR also encourages female applicants who are adopted to submit lab certified paternity, maternity or siblingship tests that should be accompanied by a brief statement

⁵ <https://www.dar.org> (last visited on Jan. 3, 2025).

⁶ *Id.* (emphasis added).

⁷ See DNA & DAR Applications: FAQs.

⁸ *Id.*

⁹ *Id.*



from at least one of the biological parents.¹⁰ Unlike adoptees, this same burden to provide the original birth certificates is not currently placed on trans-identifying male applicants who submit an altered birth certificate reflecting their new gender identity.

Finally, the DAR bylaws prohibit discrimination “against an eligible applicant based on race, religion, sexual orientation, national origin, age, disability, or any other characteristic protected by applicable law.” *Id.* § 1. While “sex” and “gender” are typically protected characteristics under state and local public accommodation laws, it appears the DAR construes its bylaws to allow the exclusion of men who do not identify as transgender. *Id.*

II. The Bylaw amendment to allow admission of trans-identifying men.

In recent years, the debate regarding the eligibility of trans-identifying men to join the DAR has intensified. In 2022, the first known trans-identifying man joined a DAR chapter.¹¹ At the 132nd Continental Congress in 2023, members of the DAR’s Board of Management proposed amending the bylaws to prohibit discrimination on the basis of “sexual orientation,” which some members believe prohibited discrimination against trans-identifying men.¹² During debate, present and past leadership, as well as the President General, claimed that the amendment was “required” by federal law, and that failure to allow trans-identifying men to join the DAR would jeopardize the organization’s non-profit status.¹³ The DAR membership approved the bylaw change by standing vote.

The bylaw change prompted backlash within DAR membership, with many daughters objecting to the decision. In October 2023, the Sage Brush Chapter—with the support of eleven other chapters—submitted a proposed bylaw amendment to the Board of Management that would prohibit all men—including trans-identifying men—from becoming members. DAR President General Pamela Wright later wrote in a message to members:

¹⁰ *Id.*

¹¹Charlotte McDonald-Gibson, *Historic US women’s group provokes anger by allowing trans member*, London Times, (March 14, 2024), <https://www.thetimes.com/world/article/historic-us-womens-group-daughters-american-revolution-trans-row-dd0gfr2p2>.

¹²https://www.youtube.com/live/SsvXtKnLtOw?si=RazXwBzcrQ_ujQrE&t=8350; <https://x.com/MaryMargOlohan/status/1684243426458345472> (last visited Jan. 3, 2025).

¹³ <https://www.youtube.com/watch?v=SsvXtKnLtOw> (last visited, Jan. 3. 2025).



A government-issued birth certificate continues to serve as acceptable proof of eligibility. Some have asked if this means a [trans-identifying man] can join DAR or if this means that DAR chapters have previously welcomed [trans-identifying men]? The answer to both questions is, yes. The bylaw amendment does not change that fact, and we will continue to welcome them into our Society in the future.¹⁴

Despite allowing trans-identifying men, the DAR also takes the position that it is a “private member association” and that its “membership policies are generally considered outside the scope of anti-discrimination laws when membership is restricted to people who share a protected characteristic – in this case women.”¹⁵ In other words, the DAR holds the view that it is permissible for it to discriminate against men who do not identify as transgender. To justify these views, the DAR takes the position that a “transgender woman is not a man.”¹⁶

In February 2024, the Board of Management considered and rejected the Sage Brush Chapter’s proposed bylaw amendment to exclude trans-identifying men.¹⁷ In public and private statements to local chapters, the Board of Management again warned that barring trans-identifying men from membership could violate public accommodation laws and jeopardize the DAR’s non-profit status.

In September 2024, the Martha Laird Chapter—with the endorsement of eleven other chapters—submitted another proposed bylaw amendment to prohibit all men, including trans-

¹⁴ Hunter Spears, *When the DAR Said Trans Women Were Allowed, Controversy Ensued*, Washingtonian (Jan. 8, 2024), <https://www.washingtonian.com/2024/01/08/when-the-dar-said-trans-women-were-allowed-controversy-ensued/#:~:text=“Some%20have%20asked%20if%20this,both%20questions%20is%2C%20yes.”>

¹⁵ See Answers to Frequently Asked member Questions Regarding Transgender Women in DAR, available at <https://mcusercontent.com/25e2535ce36f62383e1ab2f0e/files/92e66d4f-be38-c37d-779e-eae75a527d64/PGAnswers.pdf> (last visited Jan. 3, 2025).

¹⁶ In response to this position, over 1,000 daughters resigned their membership from the DAR. In what appears to be an attempt to stem the tide of mass resignations, President General Wright distributed a survey in an apparent attempt to urge former members to reinstate their membership. See <https://www.surveymonkey.com/r/DARMembershipExperienceSurvey>. Nevertheless, to date, almost 3,500 daughters have resigned their membership from the DAR as a direct result of its decision to allow trans-identifying men to join.

¹⁷ *National Board of Management Meeting Minutes, May/June Newsletter, p. 186-187.*



identifying men, from DAR membership eligibility. The Board of Management will consider this amendment during its next meeting in February 2025. The Martha Laird Chapter has engaged the Center for American Liberty to analyze the legality of its proposal.

DISCUSSION

The Martha Laird Chapter’s proposed amendment to the DAR membership requirements to exclude trans-identifying men presents two primary questions. The first is whether the DAR has a First Amendment right to define its membership eligibility in this manner. The second is whether doing so would jeopardize the organization’s non-profit status. We conclude the answer to the first is “yes” and the second is “no.”

I. The First Amendment likely protects the DAR’s right to limit its membership based on sex and gender identity.

The First Amendment to the United States Constitution protects the freedom of speech. U.S. Const., amend. I. The freedom of speech includes the right of certain private organizations to choose their own members. *Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981) (holding political parties have the right to decide how they nominate candidates). Indeed, the First Amendment protects “the freedom to join together in furtherance of common political beliefs, which necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only.” *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574–75 (2000).

The Supreme Court has recognized two types of associational rights: the right to expressive association and the right to intimate association. The DAR likely has an expressive associational right to define its members.¹⁸

A. Expressive Association

An organization has a First Amendment “right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.” *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647 (2000). To qualify for such protection, the organization must take positions on “public questions.” *Bd. of Dir. of Rotary Intern. v. Rotary Club of Duarte*, 481 U.S. 537 (1987). If it does so, the organization’s membership may be bound up with its expressive purpose. *Id.* In general, the government cannot force a membership organization engaged in expression or expressive activity to associate with those with whom it does not wish to associate.

¹⁸ Because the contours of the intimate associational right are not as well developed in the case law as the expressive associational right, we evaluate only the latter.



Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 585 U.S. 878, 892 (2018) (“The right to eschew association for expressive purposes is likewise protected.”). The First Amendment is therefore a defense to any attempt by the government to regulate membership eligibility when such regulation interferes with the organization’s expressive message unless the government demonstrates the regulation satisfies strict scrutiny. *See Dale*, 530 U.S. at 647; *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984) (“There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire.”).

But not all private organizations benefit from this protection. If the organization is more like a commercial business than a selective membership organization, it is more likely to lack associational rights. *Roberts*, 468 U.S. at 624. Likewise, if the organization is expressive but the regulation at issue does not actually interfere with the organization’s “expressive purpose,” the regulation does not implicate the organization’s associational right. *Id.* 468 U.S. at 267. For example, a regulation that requires organizations to engage in certain non-expressive conduct—such as certain tax reporting requirements or public safety standards for property owned by the organization—does not interfere with the organization’s ability to express its message. *Id.* Such regulations are therefore subject only to rational basis review and are generally upheld.

The Supreme Court’s decision in *Roberts* is instructive. There, a state passed a law prohibiting discrimination based on sex in places of public accommodation. 468 U.S. at 612. The Jaycees, a national men’s organization that made networking and management classes available to members for a fee, relied on the First Amendment to defend its exclusion of women. *Id.* While the organization advanced messages of civic virtue, its messages were in no way related to sex and gender. *Id.* The Supreme Court held that because the admission of women would not “impede the [Jaycees’] ability to engage in [protected] activities or to disseminate its preferred views,” the regulation did not implicate its First Amendment right to expressive association. *Id.*

Concurring, Justice O’Connor would have held that the Jaycees could not rely on the First Amendment to exclude women because the organization was a commercial business as opposed to a private membership organization united for an expressive purpose. *Id.* at 633. Among the Jaycees’ commercial characteristics included the facts that it made networking and leadership training courses available for a fee and emphasized “selling membership” to boost revenue from dues. *Id.* at 639. According to Justice O’Connor, the First Amendment protects membership decisions only “when the association is predominantly engaged in protected expression that state regulation of its membership will necessarily affect, change, dilute, or silence.” *Id.* The Jaycees’ operation as a commercial entity precluded it from relying on the First Amendment to shield membership decisions from government regulation. *Id.* at 636 (“Once [an organization] enters the marketplace of commerce in any substantial degree it loses the complete control over its



membership that it would otherwise enjoy if it confined its affairs to the marketplace of ideas otherwise be heard.”).

More recently, the Supreme Court adopted an expansive view of private organizations’ First Amendment right to define their membership. In *Dale*, the Court held the Boy Scouts could not be forced to allow a gay man to serve as a scout master despite a New Jersey law prohibiting discrimination based on sexual orientation. 530 U.S. at 647. The Court held that the Boy Scouts “engage in expressive activity” through its efforts to “transmit . . . a system of values” to young people. *Id.* The Court accepted the Boy Scouts’ position that admitting a gay man as a scout master would interfere with its expressive message and concluded it “need not inquire further to determine the nature of the Boy Scouts’ expression with respect to homosexuality.” *Id.* at 651. The Court observed that “associations do not have to associate for the ‘purpose’ of disseminating a certain message in order to be entitled to the protections of the First Amendment.” *Id.* Instead, an “association must merely engage in expressive activity that could be impaired in order to be entitled to protection.” *Id.* at 655. Moreover, the First Amendment “does not require that every member of a group agree on every issue in order for the group’s policy to be ‘expressive association.’” *Id.* The organization can take “an official position with respect to [a given issue],” which is “sufficient for First Amendment purposes.” *Id.* And while states may have a “compelling interest in eliminating discrimination,” the “enforcement of anti-discrimination statutes” cannot “materially interfere with the ideas that the organization [seeks to] express.” *Id.* Because the Boy Scouts advanced a message rejecting homosexuality, requiring it to admit gay scoutmasters would interfere with its ability to control its message. *Id.*

Given the above precedent, any organization seeking the protection of the First Amendment to define its membership must show (1) that it is a bona fide private membership organization rather than a commercial enterprise, and (2) that regulation requiring the undesired members interferes with the organization’s expressive activity.

B. The DAR is likely an expressive association and not a commercial enterprise

In *Dale*, the Supreme Court concluded the Boy Scouts was an expressive association because it sought “to transmit” a “system of values” to a broader audience and thus “engages in expressive activity.” 530 U.S. at 650. Applying *Dale*, the DAR is likely an expressive association. The DAR’s mission “is to promote historic preservation, education and patriotism” surrounding the American revolution. DAR Bylaws Chapter IV. This mission includes “developing . . . an enlightened public opinion,” pursuing efforts to “cherish, maintain and extend the institutions of American freedom,” and seeking “to foster true patriotism and love of country.” *Id.* Art. II(2)–(3). Similar to the Boy Scouts, the DAR encourages “participation in community service” that is



“intended to develop good morals, reverence, patriotism, and a desire for self-improvement.” *Dale*, 530 U.S. 650. For this reason, the DAR likely qualifies as an expressive association.

The DAR also differs from commercial organizations like the Jaycees in several important respects. As Justice O’Connor discussed in *Roberts*, factors courts consider in evaluating this question include the organization’s size and membership eligibility requirement and whether the organization operates in a commercial manner to sell products or some benefit to its membership through payment of dues. 468 U.S. at 633. Though the DAR is a large organization, membership is strictly limited to those with a genealogical connection to American revolutionaries. DAR Bylaws Art. III § 2. This is in stark contrast to the Jaycees, which were open to every male of a certain age. 468 U.S. at 613. Moreover, unlike the Jaycees, the DAR does not “sell” memberships for the purpose of generating revenue, nor does it hold the same place of significance in local commerce as the Jaycees did in the 1980s. *Id.* at 639. Instead, the DAR was founded for the specific purposes of allowing women descendants of American revolutionaries an outlet to engage in certain charitable and civic acts. DAR Bylaws Art. II.

To be sure, many state and local laws prohibit discrimination against protected classes in places of “public accommodation,” *see, e.g.*, D.C. Law § 2-1402.31 (prohibiting “discrimination” in places of “public accommodation” based on “sex” and “gender identity”), and it is possible that the DAR membership may be considered a “public accommodation” under some of these statutes. But if the DAR is an expressive association for purposes of the First Amendment—which, for reasons already discussed, it likely is—and if the prohibition of discrimination against trans-identifying men would interfere with the organization’s speech—which, for reasons discussed below, it likely does—then the First Amendment would provide the DAR a defense to any contrary public accommodation law.

C. Forcing the DAR to admit trans-identifying men as members would likely interfere with the organization’s speech if the DAR were to make that determination.

A government regulation violates the First Amendment when it restricts an organization’s ability to define its own membership in a way that interferes with its expressive activity. *See Dale*, 530 U.S. at 647; *see also N.Y. State Club Ass’n, Inc. v. N.Y.C.*, 487 U.S. 1, 13 (1988) (holding organization must show “it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those” it chooses). To qualify for this protection, the organization must explain how requiring it to admit certain members “alter[s] the expressive content” of its message. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 572–73 (1995).



The DAR was founded for women in response to their exclusion from the SAR. The DAR’s objective is to develop “an enlightened public opinion,” and to “cherish, maintain and extend the institutions of American freedom.” DAR Bylaws Art. II (1). The DAR has the right to define how it achieves these goals. *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 790–91 (1988). (“The First Amendment mandates that [courts] presume that speakers, not the government, know best both what they want to say and how to say it.”). If the DAR were to determine that its expressive message precluded advocacy for trans-identifying men and show that allowing trans-identifying men to join the organization undermined that message, that determination and showing would likely be sufficient to invoke the First Amendment right to exclude such members. *Id.*; *see also Dale*, 530 U.S. at 651 (observing “it is not the role of the courts to reject a group’s expressed values because they disagree with those values or find them internally inconsistent”); *Green v. Miss United States of Am., LLC*, 52 F.4th 773, 783 (9th Cir. 2022) (holding Miss United States Pageant has First Amendment Right to exclude trans-identifying men from competing because it would interfere with organization’s message). Indeed, there “can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together.” *Green*, 52 F.4th at 783 (*quoting Roberts*, 468 U.S. at 623).

D. Laws or regulations requiring the DAR to admit trans-identifying men as members would likely fail strict scrutiny.

If a law or regulation interfered with the DAR’s expressive message by requiring it to admit trans-identifying men as members, it would be subject to strict scrutiny. *See Dale*, 530 U.S. at 655. To satisfy strict scrutiny, the government must demonstrate the law or regulation serves a “‘compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms.’” *Harris v. Quinn*, 573 U.S. 616, 648–49 (2014) (*quoting Roberts*, 468 U.S. at 623). The government likely would not be able to satisfy this standard here for several reasons.

First, it is unclear whether the government could demonstrate a compelling state interest in forcing the DAR to accept trans-identifying men. The Supreme Court in *Roberts* relied on the historical exclusion of women from commercial and political society in determining it was lawful to force the Jaycees to admit them. 468 U.S. at 623. Here, natal males have faced no such historical exclusion. And while it is possible the government could demonstrate a history of discrimination against trans-identifying men, *see, e.g., Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 527–28 (3d Cir. 2018) (holding school had compelling interest in “preventing discrimination against transgender students”), it is unclear whether such a showing would be sufficient considering trans-identifying men are eligible for the same social benefits that the DAR provides by joining the SAR. *See Green*, 52 F.4th at 792 (holding question “is not whether the



[government] has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in” application of the non-discrimination policy to the specific organization at issue). The fact that trans-identifying men may join the SAR appears to undermine any compelling interest the government might have in forcing the DAR to admit them.

Second, and similarly, even if preventing discrimination against trans-identifying men is a compelling interest, forcing the DAR to admit them likely is not narrowly tailored to achieve this interest. Because the DAR is a private organization that requires a genealogical connection and offers no goods or services to the general public beyond DAR memorabilia, it is difficult to see how requiring it to admit trans-identifying men—and thereby alter its expressive message—could be narrowly tailored. *Cf. 303 Creative LLC v. Elenis*, 600 U.S. 570, 592 (2023) (noting that “public accommodations statutes can sweep too broadly when deployed to compel speech”). Moreover, unlike the Jaycees’ exclusionary membership policy in *Roberts*—which harmed women’s economic prospects—excluding trans-identifying men from the DAR arguably does not harm them because they have an alternative organization available to them—the SAR—that serves a similar purpose. *Green*, 52 F.4th at 792. Because the DAR does not make its membership available to the general public, and because trans-identifying men are eligible for the SAR, forcing the DAR to admit them into its membership ranks is likely not narrowly tailored to remedy any societal harm caused by discrimination against trans-identifying men.

While we have been unable to locate a case specifically holding the government did not satisfy strict scrutiny in a perfectly analogous situation, it is helpful to consider the consequences of a contrary conclusion. If the government has a narrowly tailored compelling interest in requiring the DAR to admit trans-identifying men, that same logic would arguably extend to a public accommodations provision requiring the DAR to allow men who do not identify as transgender. If preventing discrimination based on gender identity is a compelling interest, and requiring organizations to admit trans-identifying members of the opposite sex is the only way to achieve it, this reasoning could call into question the legality of all sex-based organizations. No court that we are aware of has arrived at such a holding, and it is unlikely that a court would do so.

II. Limiting DAR membership to natal females is highly unlikely to jeopardize its tax-exempt status.

DAR leadership has also raised the specter of the organization losing its tax-exempt status if it does not allow trans-identifying men to become members. We conclude that such an outcome is highly unlikely.



A. Federal Tax-Exempt Status

Under Internal Revenue Code § 501(c)(3), “[c]orporations . . . organized and operated exclusively for . . . charitable . . . purposes” are entitled to tax-exempt status. But organizations that engage in activity or advance purposes that are illegal or contrary to “national public policy” are not entitled to tax exempt status. *Bob Jones Univ. v. United States*, 461 U.S. 574, 593 (1983); *see also* Rev. R. 71-447, 1971-2 C.B. 230 (1971) (providing that a school that discriminates based on race is not “charitable” because “racial discrimination in education is contrary to Federal public policy”). In practice, organizations not engaged in criminal activity rarely face revocation of their tax-exempt status. *See* Jean Wright, *et al.*, *Illegality and Public Policy Considerations*, Internal Revenue Service, at 8 (1994) (“*Bob Jones* is the only case to date in which an organization was alleged only to have violated public policy and not any specific law.”).

In *Bob Jones*, the Supreme Court assessed whether a university was entitled to tax-exempt status under § 501(c)(3) despite its practice of denying admission to applicants who were married to members of other races. 461 U.S. at 590. The Court traced the national policy of prohibiting racial segregation and discrimination in public education and concluded that an “unbroken line of cases” established that racial discrimination in education violated the “most fundamental national public policy.” *Id.* at 594. The Court held that allowing tax-exempt status for an educational institution supportive of racial discrimination was “wholly incompatible” with § 501(c)(3).

Here, it is unlikely that failure to admit trans-identifying men into the DAR violates national public policy. Unlike racial integration in education, there is no “national public policy” of supporting inclusion of natal males in private genealogical organizations created for women. Indeed, the Supreme Court has not recognized transgender status as a suspect classification under the Equal Protection Clause, and circuit courts are split on the level of scrutiny applicable to laws that discriminate against transgender-identifying individuals. *Compare* *Gore v. Lee*, 107 F.4th 548 (6th Cir. 2024) (declining to apply heightened scrutiny to law that discriminates based on transgender status) *with* *Hecox v. Little*, 104 F.4th 1061 (9th Cir. 2024) (applying heightened scrutiny to law based on transgender status) *and* *Kadel v. Folwell*, 100 F.4th 122 (4th Cir. 2024) (holding that discrimination based on transgender status is subject to intermediate scrutiny); *see also* *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791 (11th Cir. 2022) (holding that discrimination based on biological sex does not entail discrimination based on transgender status). While laws and court decisions regarding transgender individuals are evolving, it is highly unlikely that a court would conclude that limiting membership in the DAR to natal females violates “national public policy.”



Indeed, the DAR currently excludes men who do not identify as transgender from eligibility. This exclusion constitutes discrimination based on sex, which is typically prohibited by public accommodation laws, yet to the best of our knowledge, the IRS has never considered exclusion of men from a private organization’s membership rolls as contrary to national public policy. Because the DAR is a sex-based genealogical society—and has been for over 100 years—it is unlikely the IRS would take such a position now with respect to exclusion of men, whether trans-identifying or not.

B. Tax-Exempt Status in the District of Columbia

We are informed that the DAR is also exempt from real property and income taxation by the District of Columbia. Indeed, federal and / or District law provides that the DAR’s real property located in the District shall not be subject to taxation so long as it is used for the purposes for which such exemption was granted. *See* D.C. Code §§ 47-1028–1032, 47-1002(5); *see also* Act of Dec. 24, 1942, Pub. L. No. 77-846, 56 Stat. 1089; Act of May 21, 1924, Pub. L. No. 68-125, 43 Stat. 135; Act of Sept. 16, 1922, Pub. L. No. 67-305, 42 Stat. 846; Act of Feb. 27, 1903, Pub. L. No. 57-118, 32 Stat. 907. Because this exemption is statutory, it appears that it could only be rescinded by further legislative enactment.

District law also provides that § 501(c)(3) organizations—like the DAR—are exempt from income taxation so long as they obtain a letter from the Mayor of the District acknowledging their status as a charitable organization. *See* D.C. Code § 47–1802.01(a)(3). We have not located any legal authority holding that an entity’s § 501(c)(3) status is not dispositive to the question of whether it is exempt from income taxes under District law. Even assuming that status were not dispositive, we have not located any legal authority suggesting a different analysis from the one set forth in *Bob Jones* would apply to any attempted revocation of an organization’s income tax exemption under District law. That is, it appears that the legal question in any such attempted revocation would be whether the revocation was based on a violation of District public policy. And for the same reasons discussed in Section II.A above, the DAR would have a strong argument that limiting membership in a sex-based genealogical society to natal females does not violate District public policy. Moreover, and for the same reasons as discussed in Section I above, the DAR would have a strong argument that any attempted revocation of its income-tax exemption would violate its First Amendment associational rights. Accordingly, it appears that the DAR would not lose its tax-exempt status in the District by virtue of its exclusion of trans-identifying men.

CONCLUSION

If the DAR changes its bylaws to exclude trans-identifying men from membership edibility, it is possible that a state or local government could bring an enforcement action against the DAR



under a public accommodations law, but the DAR would have a strong First Amendment defense to such an action if it determined that admitting trans-identifying men interferes with its expressive message and articulated reasons why this is the case. Moreover, it is unlikely that the IRS or the District of Columbia would revoke the DAR's non-profit status over such a bylaw change given the facts that there is likely no public policy opposing exclusion of transgender-identifying men from female-only private genealogical organizations and that any such attempted revocation would likely violate the DAR's associational rights.

Sincerely,

A handwritten signature in blue ink that reads "Harmeet K. Dhillon".

Harmeet K. Dhillon

A handwritten signature in black ink that reads "Mark Trammell".

Mark Trammell

cc:

Josh W. Dixon (jdixon@libertycenter.org)
Center for American Liberty

Eric Sell (esell@libertycenter.org)
Center for American Liberty