



January 14, 2025

***VIA ELECTRONIC MAIL***

Delegate C. Todd Gilbert  
Minority Leader  
Virginia House of Delegates  
General Assembly Building  
201 North 9<sup>th</sup> Street  
Richmond, VA 23219

Re: House Joint Resolution 9 (Marriage Amendment)

Dear Leader Gilbert:

Alliance Defending Freedom (ADF) is one of the nation's foremost legal organizations committed to protecting religious freedom, free speech, marriage and the family, parental rights, and the sanctity of life. ADF has achieved an 80 percent win rate in its cases, including securing 15 victories at the U.S. Supreme Court.

We write to offer our legal analysis of the potential harms that House Joint Resolution 9 may cause. If adopted into law, that resolution would:

1. require the state and its political subdivisions to recognize any lawful marriage between two adult persons and treat such marriages equally under the law, regardless of the sex, gender, or race of such persons; and
2. repeal the state constitutional provision defining marriage as the union between one man and one woman.

**First**, H.J. 9 injects "gender" into Virginia's foundational document and deems it different from "sex". This is the core concept underlying gender identity and ideology and its belief that a person's "gender" is fluid, on a spectrum, and separate from his or her biological sex as male or female. The amendment elevates "gender" to protected class status in the Constitution on the same level as race. This is a radical step few states have taken.

When the law deems "gender" or "gender identity" to be distinct from sex, chaos and abuses of longstanding fundamental rights have inevitably followed. Men invade women's sports and women's locker rooms. Public school bureaucrats

withhold information about a child experiencing gender confusion from parents and even fire teachers who refuse to lie about a student's sex. Activists sue doctors who object to pushing puberty blockers and cross-sex hormones on vulnerable kids.

H.J. 9 reflects bad ideas about what it means to be female and male, and bad ideas—particularly ones enshrined in the Constitution—have victims.

**Second**, the infiltration of gender ideology into the Commonwealth's charter might embolden activist judges to go farther. Virginia courts have already held that the due process clause in Article I, Section 11 of the constitution has a "substantive" component. In multiple contexts, judges have abused "substantive due process" theory to invent new "rights" that strip proper authority away from the people and their elected representatives. Adding "gender" to the Virginia Constitution might encourage progressive judges to handcuff the legislature's ability to pass laws reflecting the people's views on the distinction between the sexes.

**Third**, the inclusion of "gender" in the amendment has no innocent explanation. H.J. 9's drafters only needed to include "sex" to accomplish their stated purpose of preserving same-sex marriage. A person's "gender" or "gender identity" (understood as something distinct from sex) has *never* been the basis for withholding a marriage license. The argument for same-sex marriage was based on the fact that marriage had historically been limited to two people of the opposite *biological sex*. It had nothing to do with the self-identified "gender" of the two individuals marrying. That concept is simply foreign to the institution of marriage.

H.J. 9's drafters surely understand this. They added "gender" for a reason. And that reason goes far beyond preserving legal recognition of same-sex unions.

**Fourth**, H.J. 9 is completely unnecessary. It is predicated on the false notion that interracial and same-sex marriage are somehow in jeopardy. The U.S. Constitution has protected interracial marriage since 1967. It is preposterous to believe that the U.S. Supreme Court will overrule *Loving v. Virginia* or that the Virginia General Assembly will outlaw interracial marriage.

As for same-sex marriage, the U.S. Supreme Court required the legal recognition of same-sex unions almost ten years ago in *Obergefell v. Hodges*. Virginia circuit court clerks are not withholding marriage licenses from same-sex couples. No state is refusing to recognize same-sex marriages. No advocacy organizations are filing legal challenges to *Obergefell*.

But that's not all. The federal Respect for Marriage Act purports to ensure that same-sex marriage will exist in *all* states if it exists in *one* state. Does anyone really believe that *no* state will preserve same-sex marriage in the extraordinarily

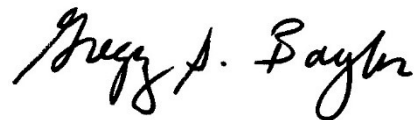
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unlikely event that the U.S. Supreme Court overrules *Obergefell*? Finally, the General Assembly enacted a law essentially identical to the proposed amendment less than one year ago. What's the point of replicating it in the Commonwealth's Constitution?

**Fifth**, the proposed amendment conspicuously stripped out the religious liberty protections included in the essentially identical statute the General Assembly enacted last year. While the sponsor claims such protections are unnecessary, the hostility evidenced at the hearing in November toward those who hold to the good-faith religious belief that marriage is a sacred union between one man and one woman shows that protections for people of faith and religious organizations are never superfluous. There is no legitimate reason for the decision by H.J. 9's legislative supporters to omit potentially critical religious liberty guarantees.

Thank you in advance for your consideration of our analysis. We hope that you will find it useful in your consideration of H.J. 9. Please let us know if you have any questions or comments.

Very truly yours,

A handwritten signature in black ink that reads "Gregory S. Baylor". The signature is written in a cursive, flowing style.

Gregory S. Baylor

cc: House of Delegates Republicans