

No. 26-193

In the
Supreme Court of the United States

Bethany M. Hall,
Petitioner,

v.

A. Scott Fleming, Director, Virginia State
Counsel of Higher Education,
Respondent.

*On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit*

**BRIEF OF AMICUS CURIAE PACIFIC
JUSTICE INSTITUTE
*in Support of Petitioner***

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STATEMENT OF INTEREST¹

The Pacific Justice Institute (PJI) is a non-profit legal organization established under section 501(c)(3) of the Internal Revenue Code. Since its founding in 1997, PJI has advised and represented in court and administrative proceedings thousands of individuals, businesses, and religious institutions, particularly in the realm of First Amendment rights. PJI often represents institutions such as the Petitioners in this case to vindicate their constitutional rights. As such, PJI has a strong interest in the proper application of the law in this area.

SUMMARY OF ARGUMENT

The Fourth Circuit ruled, relying on *Locke v. Davey*, that the State of Virginia may deny an otherwise available public fund because its no-aid provision forbids the funding of education that leads to religious vocation. This Court has progressively rejected the application of these state-level constitutional provisions to deny funding based on religious status or use. However, *Locke* continues to successfully reinforce the purpose of state no-aid provisions and continues to restrict the free exercise of religion as a result. The Court should grant certiorari

¹ No counsel for any party authored this brief in whole or in part. No person or entity other than amicus and its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Timely notice was given to all parties.

to address the current “stain on our free exercise jurisprudence.” *Hall v. Fleming*, 175 F. 4th 510 at 520.

ARGUMENT

Virginia’s Tuition Assistance Grant (“VTAG”) Program applies a nineteenth-century constitutional principle: religious education should be excluded from public financial assistance².

That concept is embodied in Virginia’s constitutional no-aid provision and tracks directly to the broader Blaine-era movement to prohibit public funding of “sectarian” education³. The question is whether Virginia may continue to enforce that tenet against an individual student after this Court has repeatedly held that government may not exclude religious participants from generally available public benefits.

Virginia’s Constitution permits the General Assembly to provide grants to students attending nonprofit institutions of higher education, but Article VIII, § 11 expressly excludes institutions whose “primary purpose” is “religious training or theological education.” Article VIII, § 10 restricts appropriations to schools not owned or exclusively controlled by the State, subject to specified exceptions for public and secular private education. Together, these provisions create a distinction between secular education and

² <https://www.schev.edu/financial-aid/financial-aid/federal-state-financial-aid/virginia-tuition-assistance-grant-program>

³ <https://www.virginiaplaces.org/government/constitution1956.html>

religious education. All of this is a remnant of the Blaine amendment movement.

This Court has since recognized the constitutional problem presented by these provisions. In *Espinoza v. Montana Department of Revenue*, the Court expressly examined the history of the Blaine movement and concluded that anti-Catholic hostility was a significant part of its history. 591 U.S. 464, 482–87 (2020). More importantly, *Espinoza* held that a State may not invoke a state constitutional no-aid provision to exclude religious schools from an otherwise available public benefit. *Id.* at 486. *Carson v. Makin*, 596 U.S. 767 (2022), subsequently rejected the attempt to preserve that exclusion by distinguishing religious status versus use.

Virginia’s no-aid provision presents the same problem. Virginia does not only prohibit direct payments to churches, it conditions eligibility for generally available educational assistance on the religious nature of the student’s course of study. A student may attend a religious university and take religious courses with public assistance but may lose that assistance when those courses become the student’s major or prepare her for a religious vocation. This is no different from the Blaine amendment principle that this Court has labeled as problematic. Ultimately, the State cannot allow some religious education while withholding funds for religious education pursued as a vocation.

I. Virginia's No-Aid Provisions Are a Form of Blaine Amendment.

Virginia's current constitutional restrictions cannot be separated from the historical Blaine amendment movement. The federal Blaine Amendment proposed in the 1870s would have prohibited public resources from supporting sectarian education (see James G. Blaine, *Proposed Constitutional Amendment*, 4 Cong. Rec. 205 (1875)). Although the federal amendment failed, its principle became embedded in state constitutions throughout the country.⁴ The movement was closely associated with the effort to preserve Protestant-oriented public schools while preventing Catholic schools from receiving public support.⁵ This Court has recognized that anti-Catholic sentiment was a significant part of this history. *Espinoza*, 591 U.S. at 482–87.

Virginia participated in that same historical movement; its 1902 Constitution prohibited appropriations to churches and sectarian institutions and stands today.⁶ Virginia later developed more specific provisions, ultimately including Article VIII, § 11, which permits assistance to students at nonprofit institutions whose primary purpose is collegiate or graduate education but excludes institutions whose

⁴ <https://www.virginiaplaces.org/government/constitution1956.html>, [https://ballotpedia.org/Blaine_Amendment_\(U.S._Constitution\)](https://ballotpedia.org/Blaine_Amendment_(U.S._Constitution))

⁵ Mark Edward DeForrest, *Locke v. Davey: The connection between the Federal Blaine Amendment and Article I, 11 of the Washington State Constitution*, 40 Tulsa L. Rev. 295, 299 (2013)

⁶ <https://encyclopediavirginia.org/entries/constitutional-convention-virginia-1901-1902/>

primary purpose is religious training or theological education.⁷

The original Blaine movement sought to prevent public money from supporting religious education. Virginia's present provision achieves the same result: public money may support a religious institution and even a student's religious coursework, but not the pursuit of religious training or theological education as the primary object of the student's degree. This is not a departure from the Blaine principle and is unified with other Blaine-type amendments in disabling religion.⁸

II. Virginia's No-Aid Provision Operates in a Way This Court Has Rejected.

Virginia's provision identifies a category of education—religious training or theological education—and excludes it from public assistance, a distinction that is not allowed. Under Article VIII, § 11, the State may fund students attending nonprofit institutions of higher education but not theological education. Therefore, a religious university may qualify for public assistance if its mission is secular, while a program focused on religious training does not.

VTAG distinguishes this within a student's individual course of study. A student may attend a

⁷ W. H. McFarlane, Jay L. Chronister & A. E. Dick Howard, *State Aid for Virginia's Private Colleges*, 2 J.L. & EDUC. 593 (1973).

⁸ Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*, 72 Fordham L. Rev. 493, 507 (2003).

religious university and receive VTAG funds while taking religious courses. But when the student makes religious study her degree, the State will not provide the benefit.

In *Espinoza*, this Court held that a State could not exclude religious schools from a generally available scholarship program merely because of their religious character. 591 U.S. at 476–77. In *Carson*, this Court rejected the argument that government could exclude religious recipients by characterizing it as discrimination based on religious use rather than religious status. 596 U.S. at 787–89. Likewise, Virginia's rule cannot survive because its exclusion operates through the student's major rather than coursework or the institution's religious or nonreligious identity.

III. Virginia's constitutional development reflects Blaine principles.

During the Blaine-era push to exclude Catholic influence in public education, Virginia joined the majority of other states in adopting a Blaine Amendment to its constitution in 1902. In Virginia's 1902 constitution, article IV, § 67 prohibited the General Assembly from making “any appropriation” of public funds “to any church, or sectarian society, association, or institution of any kind whatever, which is entirely or partly, directly or indirectly, controlled by any church or sectarian society.”⁹ Further, Article

⁹ Va. Const. art. IV, § 67 (1902) (this section was retained and renumbered in the 1971 constitution as article VIII, section 16,

IX, § 141 of the 1902 Virginia constitution generally prohibited appropriation of public funds to “any school or institution of learning not owned or exclusively controlled by the State or some political subdivision thereof,” but it specifically empowered municipal entities to “make appropriations to non-sectarian schools of manual, industrial, or technical training.”¹⁰

Later, in 1956, Virginia amended its constitutional anti-funding provisions and created more specific religion-based exclusions¹¹. Specifically, allows article VIII, § 10 of its constitution to allow public education funds for “Virginia students in public and *nonsectarian* private schools and institutions of learning.”¹² Most recently in 1971, Virginia amended its constitution and added article VIII, § 11, allowing its government to provide loans or grants to “students attending nonprofit institutions of higher education in the Commonwealth whose primary purpose is to provide collegiate or graduate education and *not to provide religious training or theological education*.”¹³ Section 11 therefore expands the state’s ability to fund religious schools that is otherwise prohibited under Section 10, but explicitly prohibits funding any

“The General Assembly shall not make any appropriation of public funds, personal property, or real estate to any church or sectarian society, or any association or institution of any kind whatever which is entirely or partly, directly or indirectly, controlled by any church or sectarian society.”

¹⁰ Va. Const. art. IX, § 141 (1902).

¹¹ <https://amendments.rmc.edu/constitutionva/>

¹² <https://law.lis.virginia.gov/constitution/article8/section10/>

¹³ *Id.* (citing Va. Const. art. VIII, § 11 (1971) (emphasis added))

religious training or theological study. Not only can Virginia's amendments be traced to the Blaine-era of the early twentieth century, but the amendments include the same sectarian language included in the original Blaine Amendment.

Virginia's constitutional no-aid provisions contain similar language to the original, federal Blaine Amendment. Relevant here, the original Blaine Amendment reads, "No public [monies] . . . shall be appropriated to, or made or used for, the support of any school . . . under the control of any religious or anti-religious sect, organization, or denomination, or wherein the particular creed or tenets of any religious or anti-religious sect, organization, or denomination shall be taught."¹⁴ Virginia's earliest amendment in 1902 mirrored this language prohibiting the General Assembly from making "any appropriation" of public funds "to any church, or sectarian society, association, or institution of any kind whatever, which is entirely or partly, directly or indirectly, controlled by any church or sectarian society."¹⁵ This language was

¹⁴ <https://law.lis.virginia.gov/constitution/article8/section10/>

¹⁵ *Id.*, Section 16. Appropriations to religious or charitable bodies. The General Assembly shall not make any appropriation of public funds, personal property, or real estate to any church or sectarian society, or any association or institution of any kind whatever which is entirely or partly, directly or indirectly, controlled by any church or sectarian society. Nor shall the General Assembly make any like appropriation to any charitable institution which is not owned or controlled by the Commonwealth; the General Assembly may, however, make appropriations to nonsectarian institutions for the reform of youthful criminals and may also authorize counties, cities, or towns to make such appropriations to any charitable institution or association.

preserved in the most recent rendering of the no-aid provision in the 1971 amendment to the Virginia constitution directing that the General Assembly “shall not make any appropriation of public funds . . . to any church or sectarian society, or any association or institution . . . controlled by any church or sectarian society.”¹⁶ Furthermore, Virginia’s constitutional prohibition of public funding for “religious training and theological education” while allowing public funding for private schools, shows the blatant religious targeting that harkens back to the original Blaine Amendment.

Therefore, Virginia’s first no-aid provision adopted in 1902 in the wake of the original Blaine Amendment still exists in the modern Virginia constitution. Aside from historical roots in the Blaine Amendment movement and the textual similarities, Virginia’s no-aid provisions operate exactly as other Blaine Amendments by restricting religious entities and religious individuals from accessing available public funds.

IV. *Locke* Preserved the Blaine Principle.

Locke v. Davey provides the only remaining justification for Virginia’s rule. In *Locke*, Washington excluded theology from an otherwise generally available scholarship program. This Court upheld the exclusion under the “play in the joints” between the Establishment and Free Exercise Clauses. 540 U.S. 712, 718–25 (2004).

¹⁶ *Id.*

Trinity Lutheran, Espinoza and *Carson* progressively rejected the premise that government may exclude the religious from otherwise available benefits. *Carson* specifically rejected the effort to maintain such exclusions through a status/use distinction or the use of different language. 596 U.S. at 787–89.

Virginia’s no-aid provision seeks to do the same and it is incompatible with this Court’s free exercise jurisprudence.

V. Bethany Hall’s Case Demonstrates the Continuing Operation of the Blaine Principle That Must be Addressed.

Ms. Hall’s experience demonstrates precisely how Virginia’s no-aid provision operates. She initially qualified for VTAG and received an award of \$5,000. She subsequently changed her major to Youth Ministries. Compl. ¶25 Virginia then deemed her ineligible because her major fell within a religious classification excluded from VTAG. *Id.* She later changed her major to Christian Leadership and Church Ministries and then Music & Worship, and was disqualified for each. *Id.* ¶28. Virginia did not determine that Liberty University or the courses Ms. Hall took were problematic, but that Ms. Hall’s education had become too religious.

That is the direct effect of Virginia’s no-aid provision that relies on *Locke*. This case is an excellent opportunity for this Court to decide whether *Locke*

allows the government to continue enforcing Blaine Amendments against individual religious exercise.

CONCLUSION

It is time for this Court to re-examine *Locke* and the problems its precedent creates for religious liberty. This Court should grant certiorari.

Respectfully submitted this 14th day of September, 2026,

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