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NOTES

FOSTERING FREE EXERCISE

*Joseph R. Ganahl**

INTRODUCTION

Each child is “endowed by [its] Creator with certain unalienable Rights,”¹ and through the natural course of generation, with a mother and father who are the presumptive guardians, not only of the child, but of the child’s rights. The law shows great reverence for the parent-child relationship, and the State usually is very reluctant to interfere with it.² The task of the State in supervising the care of children whose own parents are unable to care for them is a very weighty one. When it becomes necessary for the State to act to protect the child because of parental incapacity, neglect, disinterest, or abuse, the optimal resolution is to work with the natural parents to solve whatever

* Candidate for Juris Doctor, University of Notre Dame Law School, 2013; Bachelor of Arts in Music, University of California, Los Angeles, 1995. I dedicate this Note to my father, Robert, and my mother, Nancy, who gave me the gift of life and from whose example and word I learned the meaning of marriage and fatherhood, and to my wife, Hyeja, and my sons, Andrew, Matthew, Alexander, and Joseph, who have been infinitely patient with me as I learn the art of marriage and fatherhood. I am grateful to Thomas Messner and Richard Garnett whose advice and encouragement improved this Note immeasurably, and to the staff of the *Notre Dame Law Review* who helped prepare this Note for publication.

1 *Cf.* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

2 *See* *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977) (“[T]he right of the family to remain together without the coercive interference of the awesome power of the state . . . encompasses the reciprocal rights of both parent and children. It is the interest of the parent in the ‘companionship, care, custody and management of his or her children,’ and of the children in not being dislocated from the ‘emotional attachments that derive from the intimacy of daily association,’ with the parent.” (quoting *Smith v. Org. of Foster Families for Equal. and Reform*, 431 U.S. 816, 844 (1977) and *Stanley v. Illinois*, 405 U.S. 645, 651 (1972))).

problems have led to the State intervention and to reunite the family, which is happily what occurs at least half of the time.³

While the State assumes the role of the parent, it is bound, both morally and legally, to respect the rights that still reside with the legal parents⁴ and to safeguard the child's rights as well. Among these are the mutual rights of the parent to direct the child's religious formation and of the child to exercise her religious beliefs, which are closely intertwined. In order to protect these rights, children are often matched with religious foster agencies and families adhering to the same faith as the child. The question arises: what if there is a conflict between the teachings of a religious group and the public policy of the State?

A handful of states have terminated contracts or licenses of religious foster care agencies that refuse, based on their religious and moral convictions, to place children in same-sex or unmarried cohabitant households. These states defend their actions by pointing to a policy of prohibiting discrimination on the basis of sexual orientation or marital status. Applying such a policy in the context of foster care, however, can undermine the interest that children and their parents have in obtaining access to foster care providers that will embrace a child's faith and will reinforce the moral and religious formation that parents have begun to impart to their child. Any social benefits the State is seeking to obtain by the elimination of certain religious foster care providers is far outweighed by the costs to parents and children

3 See Kelsi Brown Corkran, Comment, *Free Exercise in Foster Care: Defining the Scope of Religious Rights for Foster Children and Their Families*, 72 U. CHI. L. REV. 325, 326 (2005); see also U.S. DEP'T OF HEALTH & HUMAN SERVS., ADMIN. FOR CHILDREN & FAMILIES, THE AFCARS REPORT PRELIMINARY FY 2010 ESTIMATES AS OF JUNE 2011, available at http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report18.htm.

4 Some scholars argue that the concept of parents' rights is ill-conceived. E.g., James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CAL. L. REV. 1371, 1373 (1994) ("[T]he claim that parents should have child-rearing rights . . . is inconsistent with principles deeply embedded in our law and morality."). But see Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions*, 81 N.Y.U. L. REV. 631, 675 (2006) (discussing the substantive due process rights of parents to control their children's upbringing and the particularly strong right of parental speech). Dwyer particularly addresses the suitability of state intervention in the narrow range of cases where parents' religiously motivated child-rearing decisions are perceived as harmful to their children's temporal interests. Dwyer, *supra* at 1377. The focus of this Note is on the dynamics of state intervention through foster care placement generally, and does not seek to distinguish "parents' rights" as a category opposed to "children's rights." For our purposes, "parents' rights" may be considered a placeholder for a broader conception of familial rights, subsuming the child's right to a stable family and the family's right to preservation of its integrity and freedom from undue interference. See *supra* note 2.

whose interest in religious matching is undermined. This Note argues that states should contract with a broad range of foster agencies, both religious and secular, and should not discriminate against agencies that utilize religious criteria in placing children with foster care families.

Part I of this Note examines the primary legal arguments that states have used to justify ending cooperation with certain religious foster care providers. As explained in Part II, the actions these states have taken are problematic in light of state religious matching statutes which encourage the placement of a child with a foster provider adhering to the same beliefs as the child or her parents. These religious matching statutes' constitutionality has been upheld against Establishment Clause challenges. Further, the policy implicit in them is buttressed by an independent "reasonable efforts" standard articulated in several cases which deal with the free exercise rights of children in the custody of the State and of the parents of those children.

Part III of this Note examines the how the First Amendment rights of parents and children may be burdened by states' refusal to contract with religious foster care agencies and whether such a policy is constitutionally permissible. Finally, Part IV offers a model statute that would make explicit and more easily enforceable the First Amendment assumptions that are implicit in religious matching statutes.

I. TERMINATING CONTRACTS WITH RELIGIOUS AGENCIES

A. *Broad Outlines of the Controversy*

There has been increasing controversy over religious social service agencies being forced to close because they decline to place children with same-sex or unmarried cohabiting couples.⁵ The agencies' objection to such placements arises from their conviction—often influenced by religious belief—that the best interests of children are

5 See Pam Adams, *Catholic Charities Seeks Ruling on Foster Care Contracts*, PEORIA JOURNAL STAR (July 11, 2011), <http://www.pjstar.com/news/x1850043265/Catholic-Charities-seeks-ruling-on-foster-care-contracts> (discussing closures in Illinois); Michelle Boorstein, *Catholic Archdiocese Ends D.C. Foster-Care Program*, WASH. POST, Feb. 17, 2010, at B1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/16/AR2010021604899.html> (same in Washington, D.C.); Patricia Wen, *California Archdiocese to Reconsider Its Adoption Policy*, BOSTON GLOBE, Mar. 10, 2006, at A16 (same in California and Boston).

not served by such placements.⁶ Much of the focus has been on the refusal to place children with same-sex couples, but in reality the refusals are rooted in the deeply held belief of a broad range of persons that placing a child with either a same-sex couple *or* an unmarried cohabiting couple, whether for foster care or adoption, can be harmful to the child's moral and spiritual development.⁷

After changes in marriage law to include same-sex couples in a number of jurisdictions—notably Massachusetts, California,⁸ and the District of Columbia—religious providers' state contracts or licenses were terminated based on agencies' unwillingness to place children with same-sex couples.⁹ Even in Illinois, which extends marriage-like domestic partnership benefits to same-sex couples but does not recognize same-sex unions as equivalent to marriage, agencies were told by

6 The question of whether children in general are best served by placement with a mother-father family is beyond the scope of this Note. Suffice it to say that there is broad disagreement on this issue.

7 A common objection to placement with same-sex couples is the lack of sexual complementarity in the household—rooted in the understanding that mothers and fathers play different roles in a child's formation. See Congregation for the Doctrine of the Faith, *Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons* ¶ 7 (2003), available at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexual-unions_en.html (arguing that a child adopted by a same-sex couple “would be deprived of the experience of either fatherhood or motherhood”). This is only a partial explanation, however, and does not reconcile with objections to placement with unmarried cohabiting couples or the willingness to place a child with a single person, or two persons of the same sex in a non-sexual relationship. See Daniel Avila, *Same-Sex Adoption in Massachusetts, the Catholic Church, and the Good of the Children: The Story Behind the Controversy and the Case for Conscientious Refusals*, 27 CHILD. LEGAL RTS. J. 1, 16 (2007) (stating that Catholic teaching would have no objection to “placements involving other parental settings, for example, by two sisters, by a single adult, or even by a single adult ineligible to marry”). The objection to placements with same-sex couples—like the objection to placement with unmarried cohabiting couples—is based on a disagreement with the couple's moral values, not a simple rejection of same-sex attraction. See *id.* (explaining that the “focus [is] on the moral educational capacities . . . regardless of sexual orientation”).

8 California currently does not include same-sex unions in its definition of marriage, though it did for a short time in 2008 prior to the passage of Proposition 8. The state's position may change depending on the outcome of the litigation over Proposition 8, however, and the future for religious agencies in the state is unclear.

9 See *supra* note 5. Following up on a Vatican statement explaining that such placements are gravely immoral, Sean Cardinal O'Malley in Boston and Archbishop George Niederauer in San Francisco directed Catholic Charities to adhere to Catholic teaching by not placing any more children with same-sex couples. See Maggie Gallagher, *Banned in Boston*, THE WEEKLY STANDARD, May 15, 2006, at A16, available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/012/191kgwgh.asp>; Wen, *supra* note 5.

the Department of Children and Family Services (DCFS) that they will not be offered contracts if they do not agree to place children in domestic partner households, whether same-sex or opposite-sex.¹⁰

Four agencies run by Catholic Charities in Illinois sued to prevent the State from terminating their contractual relationship, which had been ongoing for approximately forty years.¹¹ In a crucial judgment which virtually ended the litigation, the judge's terse property-law analysis sidestepped the complex arguments briefed by the two sides in the case.¹² After the State expedited the process of transferring the care of children from Catholic Charities to other agencies, Catholic Charities dropped its appeal to the circuit court's grant of summary judgment because it would be unable to maintain its facilities or pay its employees pending the outcome of the suit once the contract funding was terminated.¹³ As the arguments briefed in Catholic Charities' case are typical of those in other cases where contracts have been denied or refused, they are examined in some detail below.

B. *The Catholic Charities Case*

The primary thrust of Catholic Charities' argument was that the State had explicitly denied renewal of its contract on illegal grounds,

10 Adams, *supra* note 5. The first agency that was warned that it would have to choose between maintaining its placement policy or losing its contracts was Evangelical Child & Family Services of Wheaton, Illinois. Second Amended and Supplemental Complaint for Declaratory Judgment, Preliminary and Permanent Injunctions, and Other Relief at Exhibit D-1, Catholic Charities of the Diocese of Springfield v. State, No. 2011-MR-254 (Ill. App. Ct. July 26, 2011) [hereinafter Amended Complaint], available at <http://www.scribd.com/doc/67942370/Illinois-Catholic-Charities-Summary-of-Grounds-for-Entry-of-a-Stay-on-Foster-Care-Case>.

11 *After 90 Years, Catholic Charities Foster Care Will Cease in Illinois*, THOMAS MORE SOCIETY (Nov. 14, 2011), <https://www.thomasmoresociety.org/2011/11/14/after-90-years-catholic-charities-foster-care-will-cease-in-illinois-states-action-to-remove-children-from-charities-care-forces-cessation-of-lawsuit/>. Ironically, Catholic Charities was notified by the DCFS that they had received the highest rating for foster care in Illinois four months after their contracts were not renewed. *Catholic Charities: Stay Denied to Stop Illinois from Taking Away Children – DCFS Gives Catholic Charities Highest Ranking for Foster Care*, THOMAS MORE SOCIETY (Oct. 27, 2011), <http://www.thomasmoresociety.org/2011/10/27/catholic-charities-stay-denied-to-stop-illinois-from-taking-away-children-dcfs-gives-catholic-charities-highest-ranking-for-foster-care/>.

12 Summary Judgment Order at 3, Catholic Charities of the Diocese of Springfield v. State, No. 2011-MR-254 (Sangamon Cnty., Ill., Cir. Ct. Aug. 18, 2011) [hereinafter Summary Judgment Order], available at <http://www.aclu-il.org/wp-content/uploads/2011/08/110818-Order-granting-Def-motion-for-SJ.pdf> (“[T]he Plaintiffs have failed to show that they have a legally recognized property right to renew their contracts.”).

13 See *After 90 Years, Catholic Charities Foster Care Will Cease in Illinois*, *supra* note 11.

even after both parties had agreed to the terms of the new contract.¹⁴ The State contended that it was concerned with the harm that flowed to foster children and foster parents from the agencies' policies.¹⁵ Several claims supported each side's contentions.

Catholic Charities main arguments in support of its position were that (1) it was exempt as a sectarian agency from the Illinois Human Rights Act,¹⁶ which bars only "non-sectarian" adoption agencies from discriminating on the basis of marital status and sexual orientation;¹⁷ (2) even if the Human Rights Act could be construed to extend to sectarian agencies, the Illinois Religious Freedom Restoration Act¹⁸ would bar that interpretation as an impermissible burden on religion in the absence of a compelling governmental interest;¹⁹ (3) the newly passed "Religious Freedom Protection and Civil Union Act"²⁰ did not implicate Catholic Charities *inter alia* because of a provision that states: "Nothing in this Act shall interfere with or regulate the religious practice of any religious body."²¹

The State attacked the first argument by arguing that Catholic Charities was a state actor and could not raise religious defenses that a

14 See Amended Complaint, *supra* note 10, at 11.

15 See Intervenors' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment at 3, Catholic Charities of the Diocese of Springfield v. State, No. 2011-MR-254 (Sangamon Cnty., Ill., Cir. Ct. Aug. 15, 2011) [hereinafter Intervenors' Memorandum], available at <http://www.aclu-il.org/wp-content/uploads/2011/09/Intervenors-opposition-to-Plaintiffs-Motion-for-SJ-2.pdf>. The suit by Catholic Charities was instigated in part, however, at the request of anonymous employees within the DCFS who were concerned about the loss of Catholic Charities' services. See Patrick Yeagle, *Catholic Groups Lose One Motion But Get Faster Appeal*, CHI. DAILY L. BULLETIN (Oct. 28, 2011), <http://www.thomasmoresociety.org/docs/Chicago-Daily-Law-Bulletin-Catholic-groups-lose-one-motion-but-get-faster.pdf>. According to the intervenors' own statement of "undisputed" facts, Catholic Charities is the only agency in some areas. See Intervenors' Memorandum, *supra* at 5 ("Catholic Charities also admit, however, that in some areas, Catholic Charities is the *only* agency in the area providing foster care services.") (citations omitted).

16 775 ILL. COMP. STAT. 5/101 (2011).

17 Amended Complaint, *supra* note 10, at 37–38.

18 775 ILL. COMP. STAT. 35/1 (2011).

19 Amended Complaint, *supra* note 10, at 4–5. They specifically argued that a less restrictive option would be to allow them to refer those cases that they were unable to process in contravention of their religious beliefs. *Id.* at 8.

20 Public Act 096–1513 (passed June 1, 2011) (codified at 750 ILL. COMP. STAT. 75/1 *et seq.*).

21 *Id.* See also Amended Complaint, *supra* note 10, at 5–7 (noting that the sponsors of the bill explicitly disclaimed any intention to "impede the rights that religious organizations have to carry out their . . . duties and . . . religious activities [sic]" (quoting the 136th Legislative Day, 96th Gen. Assembly, Regular Session, Sen. Transcript, p. 81)).

private agency could raise under the Human Rights Act.²² In response to the second argument, the State claimed that the agency's free exercise rights were not substantially burdened because it was not seeking a generally available government benefit, but the privilege of providing services under a government contract.²³ They argued further that the State has a compelling interest in making contracting agencies abide by its rules barring agencies from refusing to accept unmarried couples as potential foster parents.²⁴

The State first attempted to show a compelling interest by referring to decisions from other jurisdictions that have held that the state has a strong interest in protecting the health and safety of children.²⁵ Contending that a directive requiring children to be placed without consideration of marital status was in the children's best interests and equivalent to a safety regulation,²⁶ the State argued that religious agencies' request for exemption from such rules by asking for a referral system meant they were seeking "to operate in a way that violates the children's best interests."²⁷

The State also alleged a compelling interest by pointing out that the State has an independent interest in eliminating discrimination "[e]ven absent the protection of the Civil Union Act . . ." ²⁸ The State claimed that allowing a religious agency to maintain a policy in line with its values would "erode public confidence in the state's neutrality,"²⁹ and that the only remedy to such discrimination was to forbid it completely.³⁰ Lastly the State argued that Catholic Charities policy stigmatized practicing homosexuals and sent the wrong message to children, two harms the State has a compelling interest in preventing.³¹

22 See Intervenor's Memorandum, *supra* note 15, at 14–16.

23 See *id.* at 22 ("Unlike unemployment benefits or the ability to hold office, a state contract for youth residential services is not a public benefit." (quoting *Teen Ranch v. Udow*, 479 F.3d 403, 410 (6th Cir. 2007))).

24 *Id.* at 26.

25 *Id.* at 26–27.

26 *Id.* at 27.

27 *Id.*

28 *Id.* at 28.

29 *Id.* at 30. They also quote Posner's comment in a case holding that the state could deny a police officer's request to be excused from guarding an abortion clinic: "The objection is to the loss of public confidence in governmental protective services if the public knows that its protectors are at liberty to pick and choose whom to protect." *Id.* (quoting *Rodriguez v. City of Chicago*, 156 F.3d 771, 779 (7th Cir. 1998) (Posner, C.J., concurring)).

30 *Id.* at 32.

31 *Id.* at 33.

There was no response to the plaintiffs' third argument regarding the interpretation of the Religious Freedom Protection and Civil Union Act, other than to implicitly assume that DCFS was interpreting it correctly.³² In sum, the State's primary arguments were that (1) religious agencies that contract with the State are state actors and therefore barred from acting in ways not allowed to the State; (2) providing services such as foster care is not a generally available benefit, and the State may contract with whomever it deems best; (3) religious agencies' consideration of marital status in selecting foster parents is invidious discrimination that must be forbidden from consideration because marital status has no role in determining whether a person will make a good foster parent; (4) by allowing religious agencies to use religious criteria that has a discriminatory effect, public confidence in the State will be undermined; and (5) by considering marital status, religious agencies stigmatize those whose lifestyles are not in keeping with their values.

Each of these arguments, with the exception of (2), attacks a particular practice by religious agencies by setting it against an opposing state interest. The next Part discusses the extent to which the use of religious criteria protects an important interest of children and their parents: the right to free exercise of religion.

II. FREE EXERCISE RIGHTS OF FAMILIES AND CHILDREN

A family's role in a child's life extends well beyond meeting the mere physical needs of the child. The child is also dependent on the family for its intellectual, emotional, moral, and spiritual development. These needs may vary significantly depending on the religious identity of the child's family. Many states have provisions in place that prescribe the matching of children with caretakers of the same faith while in the custody of the state. Such state religious matching statutes that encourage in-religion placement of children in foster care support the contention that, while a child's material needs may generally be easily satisfied, there are elements of child rearing that are best undertaken by those who embrace the same religious values as the child.

A. *Religious Matching Statutes*

The manner in which states provide for the religious matching of children with foster agencies or parents varies greatly. Policies range

³² See, e.g., *id.* at 4 (stating that Catholic Charities declined to "comply" with the Act as required by DCFS).

from detailed prescription³³ to total silence.³⁴ Some states consider religious matching of primary importance, with explicit reference to the need to safeguard the child's free-exercise rights.³⁵ Others regard it as a subsidiary factor to be considered when all else is equal.³⁶ Some states undertake matching whether the parents request it or not,³⁷ and others only do so upon application by the child's parents.³⁸

While some of these statutes only require that children ultimately be placed with families of the same faith as the child or its parents,³⁹ others explicitly oblige the state to place children with agencies

33 New York has a statute containing seven subparts and over 700 words. See N.Y. SOC. SERV. LAW § 373 (McKinney 2012). New York is also the only state to have an explicit constitutional provision:

When any court having jurisdiction over a child shall commit it or remand it to an institution or agency or place it in the custody of any person by parole, placing out, adoption or guardianship, the child shall be committed or remanded or placed, when practicable, in an institution or agency governed by persons, or in the custody of a person, of the same religious persuasion as the child.

N.Y. CONST. art. VI, § 32.

34 Many states have no statutory provision for religious matching in foster care, but even in these states religion is one of the factors often considered in placing children. Corkran, *supra* note 3, at 327 n.11.

35 See, e.g., N.H. REV. STAT. ANN. § 169-D:23 (2012) ("The court and officials in placing children shall, as far as practicable, place them in the care and custody of some individual holding the same religious belief as the child or parents of the said child, or with some association which is controlled by persons of like religious faith. No child under the supervision of any state institution shall be denied the free exercise of his religion or that of his parents, whether living or dead, nor the liberty of worshipping God according thereto.").

36 See, e.g., WYO. STAT. ANN. § 14-3-429(g) (2012) ("[T]he court shall give primary consideration to the needs and welfare of the child. Where a choice of equivalent services exists, the court shall, whenever practicable, select a person or an agency or institution governed by persons of the same religion as that of the parents of the child.").

37 See, e.g., NEB. REV. STAT. § 43-298 (2008) ("The court in committing juveniles under the Nebraska Juvenile Code shall place them as far as practicable in the care and custody of some individual holding the same religious belief as the parents of the juvenile or with some association which is controlled by persons of like religious faith of the parents of the juvenile.").

38 See, e.g., ME. REV. STAT. ANN. tit. 22 § 4063 (2012) ("If the parents of a child in the custody of the department request in writing that the child be placed in a family of the same general religious faith, for foster care or adoption, the department shall do so when a suitable family of that faith can be found.").

39 See, e.g., OR. REV. STAT. § 418.280(4) (2011) ("Private child-caring agencies, in placing children in private families, shall . . . [s]o far as practicable, place such children in families of the same religious faith as that held by the children or their parents.").

directed by persons of the same faith as the child while waiting for placement.⁴⁰ Historically, many of the agencies caring for children have been formed by religious communities, and quite frequently each of the major faith traditions in a particular area will provide such a service.⁴¹

Despite the variety of existing statutes and requirements, there are two themes that run through most of them: the importance of preserving the child's faith,⁴² and the importance of protecting the right of the parents to direct the child's religious formation.⁴³

B. *Constitutionality of Religious Matching Statutes*

Religious matching statutes have been challenged in both state and federal courts and held to be constitutionally permissible. The most extensive challenge to a religious matching statute was played out in New York and spanned more than fourteen years.⁴⁴ The plaintiffs in the *Wilder* litigation sought to have New York's constitutional

40 See *supra* note 37.

41 See, e.g., *Wilder v. Sugarman (Wilder I)*, 385 F. Supp. 1013, 1019–21 (S.D.N.Y. 1974) (detailing the history of foster care in New York).

42 See CAL. WELF. & INST. CODE § 11264 (West 2012); CONN. GEN. STAT. ANN. § 46b-129(j) (West 2009); GA. CODE ANN. § 49-5-12(j) (2012); 225 ILL. COMP. STAT. 10/13 (2012); LA. CHILD. CODE ANN. art. 683(D) (2004); MD. CODE ANN., FAM. LAW § 5-520(a) (West 2012); MO. REV. STAT. § 211.221 (2010); NEB. REV. STAT. § 43-298 (2008); NEB. REV. STAT. § 43-509 (2008); NEV. REV. STAT. § 62E.130 (2012); N.H. REV. STAT. ANN. § 169-B:33 (2012); N.J. STAT. ANN. § 30:4C-26(a) (West 2012); N.Y. SOC. SERV. LAW § 373 (McKinney 2012); OHIO REV. CODE ANN. § 2151.32 (West 2012); OKLA. STAT. tit. 10A, § 1-4-705(A) (2012); OR. REV. STAT. § 418.280(4) (2011); 11 PA. CONS. STAT. ANN. § 31 (West 2012); R.I. GEN. LAWS § 14-1-41 (2012); S.C. CODE ANN. § 63-15-20 (2010); TENN. CODE ANN. § 37-5-506(b) (2012); VA. CODE ANN. § 16.1-288 (2012).

43 See ARK. CODE ANN. § 9-28-106(b) (2012); CAL. WELF. & INST. CODE § 11264 (West 2012); COLO. REV. STAT. § 19-1-103(93) (2012); IDAHO CODE ANN. § 16-1602(31) (2012); 705 ILL. COMP. STAT. 405/1-3(13) (2007); LA. CHILD. CODE ANN. art. 116(24) (2004); ME. REV. STAT. tit. 22 § 4063 (2011); MD. CODE ANN. FAM. LAW § 5-520(a) (West 2012); MINN. STAT. § 260C.193(3)(c) (2007); NEV. REV. STAT. § 432B.550(2)(a) (2011); N.H. REV. STAT. ANN. § 170-C:2(IX) (2012); OHIO REV. CODE ANN. § 2151.011(A)(48) (West 2012); OKLA. STAT. tit. 10A, § 1-4-705(A) (2012); OR. REV. STAT. § 418.280(4) (2011); S.C. CODE ANN. § 63-15-20 (2010); TENN. CODE ANN. § 37-5-506(b) (2012); VA. CODE ANN. § 16.1-288 (2012); WASH. REV. CODE § 13.34.260(1) (2004); W. VA. CODE § 49-2-1 (2009).

44 See *Wilder v. Bernstein (Wilder III)*, 645 F. Supp. 1292 (S.D.N.Y. 1986), *aff'd*, 848 F.2d 1338 (2d Cir. 1988); *Wilder v. Bernstein (Wilder II)*, 499 F. Supp. 980 (S.D.N.Y. 1980); *Wilder I*, 385 F. Supp. 1013. This litigation was confined to the question of religious matching in foster care. An earlier action held religious matching in adoption to be constitutionally permissible. *Dickens v. Ernesto*, 281 N.E.2d 153, 156 (N.Y.), *appeal dismissed*, 407 U.S. 917 (1972).

and statutory religious matching provisions declared contrary to the U.S. Constitution, arguing that, *inter alia*, they were discriminatory and violated the Establishment Clause.⁴⁵

The district court recognized that the challenged provisions struck a delicate balance between the free exercise rights of parents and children on the one hand, and the countervailing concerns surrounding state support for religion on the other.⁴⁶ Citing Supreme Court precedent including *Pierce v. Society of Sisters*⁴⁷ and *Wisconsin v. Yoder*,⁴⁸ the court acknowledged that the state may not willfully interfere with a child's upbringing.⁴⁹ It also admitted that the role of the state becomes much more complicated when it is obliged to take custody of the child and step into the role of parent to safeguard the child's free exercise rights.⁵⁰ The state would abdicate this duty if it ignored the child's spiritual training, but to provide such training would squarely violate a literal interpretation of the Establishment Clause.⁵¹ In order to resolve the tension, the court appealed to *Walz*⁵²:

45 *Wilder I*, 385 F. Supp. at 1018. The Catholic and Jewish agencies in New York enjoyed a good reputation for the quality of their service and had a capacity that exceeded demand. On the other hand the Protestant agencies did not have the capacity to meet demand. As a result, a disproportionate number of black, Protestant children ended up in out-of-religion placement or in less desirable state-run facilities. See Martin Guggenheim, *State-Supported Foster Care: The Interplay Between the Prohibition of Establishing Religion and the Free Exercise Rights of Parents and Children: Wilder v. Bernstein*, 56 BROOK. L. REV. 603, 610–12 (1990).

46 *Wilder I*, 385 F. Supp. at 1025 (“This raises the question whether, since the religious-matching statutes were enacted in recognition of the rights of parents and foster children freely to exercise their religious beliefs, the public interest in free exercise of religion entitles them to be upheld despite their involvement of the state in religion.”).

47 268 U.S. 510 (1925). “The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.” *Wilder I*, 385 F. Supp. at 1025 (quoting *Pierce*, 268 U.S. at 535).

48 406 U.S. 205 (1972). “The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.” *Wilder I*, 385 F. Supp. at 1025 (quoting *Yoder*, 406 U.S. at 215).

49 *Wilder I*, 385 F. Supp. at 1025.

50 See *id.* at 1026. “[T]he state must wear two hats, one as a surrogate parent obligated to enforce the biological parent’s individual rights to provide religious direction and the other as a government obligated to refrain from use of its powers to further or inhibit religion.” *Id.*

51 *Id.*

52 *Walz v. Tax Comm’n*, 397 U.S. 664 (1970).

Since the Religious Clauses, when in conflict, must be interpreted flexibly so that “there is room for play in the joints productive of a benevolent neutrality,” we believe that laws which might otherwise be deemed violative of the Establishment Clause may be upheld where they appear reasonably necessary to satisfy Free Exercise rights and do not pose any serious danger to the public.⁵³

In subsequent litigation, after many of the religiously affiliated defendants were dismissed, the parties agreed to a settlement that attempted to mitigate some of the harms that were alleged to flow from the religious matching policy,⁵⁴ but the provisions themselves were allowed to stand.⁵⁵ In its opinion upholding the terms of the settlement, the Second Circuit stated that natural parents do not have the constitutional right to demand that the state provide foster parenting “under the religious auspices preferred by the parents,” but that the state must at least make “reasonable efforts to assure that the religious needs of the children are met” while in the state’s care.⁵⁶

C. What Does “Reasonable Efforts” Mean?

The state has virtually plenary control over the activities of a child in foster care, including the child’s ability to engage in religious practice and receive religious formation. A child’s moral and religious development depends on continuous formation as much as the child’s bodily development depends on proper nourishment and physical activity, and the family’s (or foster family’s) role in that process is indispensable.⁵⁷ The “reasonable efforts” test recognizes that

53 *Wilder I*, 385 F. Supp. at 1026 (citation omitted) (quoting *Walz*, 397 U.S. at 669).

54 *See Wilder v. Bernstein (Wilder III)*, 645 F. Supp. 1292, 1305 (S.D.N.Y. 1986) (detailing terms that prohibited agencies from reserving space for co-religionists and limited religious matching when necessary to ensure access to quality foster care); *see also* Guggenheim, *supra* note 45, at 622–24 (explaining the settlement and the problems it was intended to solve).

55 *Wilder v. Bernstein (Wilder IV)*, 848 F.2d 1338, 1349 (2d Cir. 1988) (“[T]he settlement on its face does not exceed an entanglement standard appropriate to the context of state-sponsored child care in substitution of the responsibilities of parents.”).

56 *Id.* at 1347.

57 *Moore v. City of E. Cleveland*, 431 U.S. 494, 503–04 (1977) (“It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.”); Guggenheim, *supra* note 45, at 612 (“It is not so simple, and perhaps impossible, to separate the bases on which children should be placed in certain foster homes from the underlying question of how they should be raised in those homes.”); *see also* Avila, *supra* note 7, at 16 (“Parental attitudes and life-style choices touching on fatherhood, motherhood, sexual identity and sexual behavior contribute to the moral formation that a child receives and necessarily influences the child’s attitudes and life-

the state may not hide behind the Establishment Clause and effectively truncate the formation of a child in its family's faith by refusing to provide for continuity of religious formation while under the state's supervision. After the *Wilder* decision, however, the actual content of the "reasonable efforts" standard remained somewhat unclear and was left to later decisions to interpret.

In *Pfoltzer v. County of Fairfax*,⁵⁸ a mother brought suit alleging that her and her children's free exercise rights were violated by a failure to provide sufficient religious training to the children.⁵⁹ The defendants provided evidence that two of the three children were placed with foster parents of the same faith, the foster parents were given instruction and reading materials regarding the accommodation of the children's faith, and they all made efforts to take the children to church and religious instruction.⁶⁰ The court granted summary judgment in favor of the defendants, satisfied that the mother's and children's rights were adequately observed.⁶¹

*Walker v. Johnson*⁶² also touched on the "reasonable efforts" standard. In that case a mother who was dissatisfied with the exposure of her children to the foster parents' faith brought an action to enjoin the foster parents from, *inter alia*, "promoting any religion [and] taking the children to church."⁶³ The court credited Walker's assertion that she had converted to Judaism after the children had been placed with the foster family,⁶⁴ but found that removing the children from the foster home would not be in their best interest even though the family made only slight effort to accommodate the mother's demands that they be raised in the Jewish faith.⁶⁵ The court affirmed that "[e]ven when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family

style choices."); Richard W. Garnett, *The Story of Henry Adams's Soul: Education and the Expression of Associations*, 85 MINN. L. REV. 1841, 1845 (2001) ("[F]amilies . . . are mediating institutions that form, shape, and *educate* us by their expression.").

58 775 F. Supp. 874 (E.D. Va. 1991).

59 *Id.* at 877-78.

60 *Id.* at 886. One of the children was even able to continue religious instruction and receive First Communion while in the care of the foster parents. *Id.*

61 *Id.*

62 891 F. Supp. 1040 (M.D. Pa. 1995).

63 *Id.* at 1043.

64 *Id.* at 1046. At the time of the children's placement with the foster family, their mother had disclaimed any religious belief, but later made various statements suggesting that she was Catholic, atheist, or followed the tenets of Druidism. *Id.*

65 *Id.* at 1049. The foster family gave the children food at Passover that was provided by the mother, but did not instruct the children in the Jewish faith. *Id.* at 1047.

life.”⁶⁶ It found, however, that the disruption involved in removing the children to a different foster home outweighed the mother’s interest in dictating that the children be instructed in her newfound religious beliefs,⁶⁷ and that the state had not violated her First Amendment rights.⁶⁸ Though the “reasonable efforts” considered sufficient by the court in *Walker* were vanishingly small, the fact that the mother’s religious beliefs were indecisive likely played a role in the decision. Additionally, the mother had declined to express any religious preference at the time the children were originally placed, as allowed by regulations promulgated by Children and Youth Services in keeping with Pennsylvania law.⁶⁹ While it is one thing for the foster care system to be responsive to parents’ and children’s religious wishes at the time of placement, it is another matter altogether for the children’s care to be interrupted by a parent’s indecision regarding religious matters.

A third case, *Bruker v. City of New York*,⁷⁰ emphasizes that the “reasonable efforts” test obligates child welfare agencies to take the free exercise rights of parents seriously. The plaintiff, Bruker, requested that her two daughters be placed through a Jewish foster agency, but the caseworker apparently disregarded the mother’s request and made the initial placement of her fifteen-year-old daughter, Elianne, with a Catholic foster parent.⁷¹ The foster parent encouraged Elianne to attend synagogue and to observe Jewish dietary laws.⁷² Apparently, the foster mother “displayed a woeful lack of knowledge with respect to Jewish dietary laws,” however, and failed to receive instruction on how to properly support Elianne’s faith.⁷³ Elianne was later placed in a Catholic foster facility.⁷⁴ The girl drifted from her faith and eventu-

66 *Id.* at 1048 (quoting *Santosky v. Kramer*, 455 U.S. 745, 753 (1982)).

67 *Id.* at 1049 (“[W]e do not read that [vital interest] as overriding the best interests of the child or endorsing a principle that would allow parental fiat to dictate that the child be raised in a particular faith . . . after he or she has been placed in foster care.”).

68 *Id.* at 1050 (granting summary judgment to defendants).

69 *Id.* at 1045. The foster care regulations provided: “If a parent and/or child, age 14 and older, states a religious preference at the time of placement, efforts will be made . . . to place the child in a foster home where the same religion is practiced.” *Id.* at 1046.

70 337 F. Supp. 2d 539 (S.D.N.Y. 2004).

71 *Id.* at 544.

72 *Id.* at 546.

73 *Id.* (quoting *In re Elianne Marcovitz*, N-6300-1/92, at 4 (Sept. 24, 1992)).

74 *Id.* at 546–47. The facility required its staff to encourage students to observe the faith specified by their parents, and Elianne was treated in keeping with that policy. *Id.* at 547–48. The facility inexplicably made the decision to send her to a Catho-

ally converted to Catholicism after attaining her majority.⁷⁵ The court discredited the defendants' claims that Bruker was not sincere in her religious beliefs and that Elianne, her daughter, was sufficiently mature to make her own choices regarding religious belief and practice.⁷⁶

In light of these three decisions, the "reasonable efforts" standard articulated in *Wilder* takes on some substance. Religious matching for foster children is not strictly required, though it is encouraged in the absence of significant obstacles.⁷⁷ The State may fulfill its duty—even without placing a child with a foster family or agency of the same faith—when it makes a genuine effort to provide instruction regarding the religious faith and practice of the child's natural family and ensures that the foster family or agency does make an effort to preserve the child's faith.⁷⁸ Finally, while the natural parent may not expect the State to "duplicate the standard of religious practice in the parents' home or satisfy the parents' every request with respect to the children's religious instruction,"⁷⁹ the State may not willfully disregard the parents' wishes, even if the child does not share the enthusiasm of the parents toward the family religion.⁸⁰ Most notable is the fact that the *Pfoltzer*, *Walker*, and *Bruker* courts delineated the requirements of "reasonable efforts" almost primarily by reference to the parents' First Amendment rights with only passing mention of the States' various religious matching regulations. The reasonable efforts stan-

lic high school, however, where she took classes in religion and morality and participated in a Christian volunteer program. *Id.*

75 *Id.* at 549.

76 *Id.* at 552. The court also noted that the assigned caseworker engaged in deception and displayed animus toward Bruker. *Id.*

77 In dicta that probably reflected a lack of religious pluralism in Fairfax County, Virginia in 1991, the *Pfoltzer* court noted that "a state has no duty to place a Buddhist child with a Buddhist foster family, a Quaker child with a Quaker family, or a Zoroastrian child with a Zoroastrian family, unless such a family is reasonably and immediately available." *Pfoltzer v. Cnty. of Fairfax*, 775 F. Supp. 874, 885 (E.D. Va. 1991) (emphasis added).

78 Compare *supra* note 60 and accompanying text, with *supra* notes 73–74 and accompanying text. See also *Bruker*, 337 F. Supp. 2d at 551 ("[T]o be reasonable, a state's efforts should also include some measure of supervision of the foster family's success in enabling the child's religious practices, particularly if an in-religion placement is not possible.").

79 *Pfoltzer*, 775 F. Supp. at 885 (citing *Wilder v. Bernstein (Wilder III)*, 848 F.2d 1338, 1346–47 (2d Cir. 1988)); see also *Walker v. Johnson*, 891 F. Supp. 1040, 1049 (M.D. Pa. 1995) ("[T]he parent . . . certainly does not retain an absolute right to dictate, at whim, that the child be placed in a setting where he or she will receive instruction in a particular religion.").

80 See *supra* note 76 and accompanying text.

dard, protecting parents' and children's free exercise rights, both reinforces and stands independent of a State's religious matching statutes.

Considering the significant number of entangling issues that may arise as the State makes reasonable efforts to provide for the religious formation of children in its care, the ideal solution is for a State to contract with religious foster care agencies. Religious agencies, standing independent from the State, have both the competence and flexibility needed to consider religious matters in making decisions regarding the care of children belonging to their own faith community. The fact that most states have statutes providing for religious matching of children with social service agencies is a legislative nod to the veracity of this proposition.⁸¹ A religious agency can more easily assess the spiritual needs of the children of its faith community and provide for their formation while they reside in a facility under the agency's control. The religious agency is also uniquely qualified to determine through the process of a home study whether a particular household will be conducive to the continued healthy development—both spiritual and otherwise—of such a child. Most importantly, a religious foster care agency is able to strike a proper balance between the temporal and spiritual needs of children according to the religious values embraced by a particular faith community, a task that a state agency or an agency under the control of persons of a different

81 The mutual dependence of the state and the religious social service agency is confirmed by the following excerpt from the introduction to the New York Family Court Act:

The landmark 1877 [Act for Protecting Children] legislation also encouraged the growth of child care agencies, whether religious based or nonsectarian. By the mid-1870s each of the three major religions had received legislative charters for child care agencies, completing New York's amalgam of sectarian and nonsectarian organizations devoted to receiving and caring for children via voluntary surrender or judicial commitment. The unique partnership between private child care agencies, which render services, and the state, which provides funding and oversight, has been a child protective hallmark for the past century and a half.

The paramouncy of the religious based organizations was strengthened by an 1878 Act stipulating that children “. . . shall, if practicable, be committed to an asylum or reformatory that is governed or controlled by persons of the same religious faith as the parents of such child.” The religious “matching” provisions continues [sic], in modified form, today

Merril Sobie, *Introductory Practice Commentaries*, N.Y. FAM. CT. ACT, art.10 (McKinney 2009) (citations omitted).

faith, no matter how well intentioned, could fail to perform adequately.⁸²

III. CONSIDERING APPLICATION OF RELIGIOUS VALUES IN THE FOSTER CARE CONTEXT

The plaintiffs in the *Catholic Charities* cases, as in other similar actions, requested that they be allowed to continue taking religious values into consideration in placing children. The State of Illinois criticized the religious agencies for taking a binary approach: the religious agencies wanted to screen prospective foster parents using certain disapproved criteria or they would not provide services.⁸³ On the other hand, the State offered its own binary solution: agencies must either agree to stop using criteria that has the effect of discrimination—even if it is appropriate for the children in their care—or be barred from caring even for children of their own faith on behalf of the State.⁸⁴

Both sides miss a legitimate middle ground. Religious social service agencies may continue serving those who share their religious values while remaining faithful to those values. The State, for its part, may decide whether or not such policies' costs outweigh the benefits for children from families not requesting religious placements with those agencies.⁸⁵ As explained in Part III.A, such a solution bridges the gap between religious matching statutes and the “reasonable efforts” standard on the one hand, and the concerns raised by the State in *Catholic Charities* on the other. It also has the benefit of avoiding a constitutional collision, as discussed in Part III.B.

82 *Cf. Bruker*, 337 F. Supp. 2d at 555–56 (discussing the inexplicable decision by an agency to enroll a Ms. Bruker's daughter in a Catholic high school even while making efforts to preserve her Jewish identity).

83 In one very real sense, Catholic Charities has no other option between screening unmarried couples and not placing children. Under Canon Law, Catholic Charities is a part of the juridic person of the diocese and is bound to comply with the directives of the local bishop. The bishops in all of the dioceses involved with the Illinois cases have barred Catholic Charities from placing children with same-sex couples in keeping with the church's teaching. *See supra* note 10.

84 Summary Judgment Order, *supra* note 12, at 1–2.

85 This is a question of policy beyond the scope of this Note.

A. *How the Arguments Fit with “Reasonable Efforts” and Religious Matching Statutes*

1. Whether State Actors Are Barred from Acting upon Religious Belief

Even assuming *arguendo* that religious foster agencies that contract with the State *are* State actors it does not necessarily follow that they may be barred from acting upon their religious beliefs. Under a number of circumstances, State actors are allowed to engage in activities that would otherwise be impermissible under the Establishment Clause. The *Wilder I* court discussed such situations:

There are certain practices, conceivably violative of the Establishment Clause, the striking down of which might seriously interfere with certain religious liberties also protected by the First Amendment. Provisions for churches and chaplains at military establishments for those in the armed services may afford one such example. The like provision by state and federal governments for chaplains in penal institutions may afford another example. It is argued that such provisions may be assumed to contravene the Establishment Clause, yet be sustained on constitutional grounds as necessary to secure to the members of the Armed Forces and prisoners those rights of worship guaranteed under the Free Exercise Clause.⁸⁶

Religious foster care agencies serve a purpose under religious matching statutes and the “reasonable efforts” test, and a key part of that purpose is guarding the free exercise rights of the children in their care.⁸⁷ The State is encouraged to engage their services specifically so they may exercise their religious judgment. Even if they are State actors, religious foster agencies not only *may* make decisions influenced by the religious values of the children of the same faith entrusted to their care, but under religious matching statutes and the reasonable efforts test they are implicitly *required* to do so.

2. Whether Contracts to Provide Foster Care Are a Generally Available Benefit

Under most circumstances, contracting to provide social services is not a generally available benefit, as pointed out by the State of Illinois in *Catholic Charities*.⁸⁸ The operation of a job training center,

⁸⁶ *Wilder v. Sugarman (Wilder I)*, 385 F. Supp. 1013, 1027 (S.D.N.Y. 1974) (quoting *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 296–97 (1963) (Brennan, J., concurring)).

⁸⁷ See *supra* Part II.

⁸⁸ *Supra* note 23 and accompanying text.

soup kitchen, or non-sectarian youth residence can be handled by the State, or contracted out to a private agency. No particular claimant, sectarian or otherwise, has a presumptive right to a government contract to perform such services. Contracting for foster care services under religious auspices is not the same as contracting with agencies for other social services because the services offered in the latter case are largely secular, whereas the relationship of a religious foster agency vis-à-vis the persons it serves will very likely involve questions of a sectarian nature.⁸⁹

The question is not whether contracts to provide foster care are a generally available benefit to the agencies, but whether contracting with religious agencies is a generally available benefit to the children in the agencies' care. As has been explained, the State is obligated to make reasonable efforts to guard parents' and children's free exercise

89 It is worthwhile to quote *Wilder I* at length on this point:

Even assuming non-sectarian agencies were located or constructed, new constitutional problems would be encountered. Plaintiffs argue that, if foster children were placed in such homes and agencies, the state could satisfy the religious rights of the children and their parents by arranging, according to each child's religious needs, for the child to attend religious services and obtain religious instruction at an outside church, synagogue or other place of worship. Although this simplistic proposal may appear at first blush to have some merit, further consideration discloses serious problems, due principally to the radically differing needs of the thousands of foster children who are the beneficiaries of state aid. The parents of a child brought up as a Congregationalist, for instance, might be satisfied with a "weekly session" of [S]unday school followed by a short service, even though the tendency of many Protestant sects has been toward an increase in communal religious activities. But a child raised as a Hassidic Jew would demand a far more pervasive religious upbringing of the type associated with orthodox Judaism, including observance of dietary rules, the Sabbath, attendance at Temple, and continued close affiliation with others of his same religious persuasion. It requires no imagination to appreciate that Quakers, Moslems, Seventh Day Adventists and those of many other religious persuasions would undoubtedly assert perfectly reasonable demands necessitating wide variation in the handling by the state of children of these religions if the state were to satisfy their needs, which far exceed the normal requirements of an adult, since the child, in addition to its participation in the practice of religion, usually receives religious education. In our view, the state, if it were required in each case to be responsible for such "custom-tailoring" of each child's religious training, determining the extent of a child's participation in communal religious activities of his persuasion and supervising the child's transportation to and custody at such activities, would be hopelessly entangled in religion, far beyond its existing simple relationship with foster parents and religious institutions, under which the latter assume all of these responsibilities for the child's religious education.

Wilder I, 385 F. Supp. at 1028–29.

rights while children are in state custody,⁹⁰ and the placement of a child with an agency unequal to the religious needs of a child could constitute a constitutional violation.⁹¹ The case is even stronger when there is an explicit provision in state law providing for the safeguarding of children's and their parents' free exercise rights through religious matching. The State may not evade its responsibility through selective contracting or by imposing regulations that create a burden for certain religious believers because of the disapproval of particular doctrines or religious practices.⁹² The State is also prohibited from purposely contracting only with secular private agencies so as to avoid the problem altogether.⁹³

3. Whether the Consideration of Marital Status in Placement Constitutes Discrimination

One of the most contentious issues—the very wellspring from which the *Catholic Charities* dispute arose—is the question of whether the consideration of marital status is relevant to a foster placement decision. As alluded to in the introduction to this Part, the two camps have staked out differing positions. The defendant in *Catholic Charities* holds the view that the use of religious criteria to screen out same-sex or unmarried cohabitants in selecting foster parents is invidious discrimination that must be forbidden, alleging that marital status has no role in determining whether a person will make a good foster parent.⁹⁴ Implicit in the plaintiffs' argument is the contention that the marital status of those who care for children is relevant to their interests, and that they are bound in conscience to act in keeping with that belief. Setting to one side the question of whether marital status is relevant in all cases, another reasonable question to ask is not whether foster placement with a same-sex or unmarried cohabiting couple will be harmful to the development of a generic child, but whether such a

90 See *supra* Part I.

91 See *supra* notes 71–77 and accompanying text.

92 See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (“At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken *for religious reasons*.” (emphasis added)); *Larson v. Valente* 456 U.S. 228, 246 (1982) (“The State may not adopt programs or practices . . . which ‘aid or oppose’ any religion. . . . This prohibition is absolute.” (quoting *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968))).

93 “The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.” *Epperson*, 393 U.S. at 104 (1968) (citing *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947)).

94 Intervenors' Memorandum, *supra* note 15, at 7–8.

placement is consistent with the needs of a *particular* child, and conducive to eventual family reunification.

The parents' inability to care for the child does not eliminate all of their rights as parents.⁹⁵ As discussed in Part II, *supra*, the right to direct the child's religious upbringing is among the rights that are not abandoned by the parents when the State takes custody of the child. The child also has an independent right to seek accommodation from the State for his or her spiritual needs.⁹⁶ For children generally, appropriate religious formation could include instruction in the religious view of the family and the respective obligations of family members. For adolescents, it could include instruction in the religious understanding of marriage and the marital relationship.⁹⁷ The State cannot fulfill its duty to make reasonable efforts to safeguard the child's faith by placing a child whose religion holds certain lifestyles as contradictory to its teachings in a foster household that espouses such a lifestyle and then offering materials to the foster parents regarding the tenets of that faith which they are likely to find offensive.⁹⁸ To do so would make a mockery of the reasonable efforts standard.

95 *Walker v. Johnson*, 891 F. Supp. 1040, 1048 (M.D. Pa. . 1995) ("A parent's right to rear her children as she sees fit is not eviscerated solely because she has not been a model parent or has temporarily lost custody of her children to the state.").

96 *Wilder I* states:

A further duty assumed by the state as a surrogate parent is that of fulfilling the child's Free Exercise rights This [is] accomplished by providing such spiritual and moral training as is appropriate or desired. To deny the child this education, which is necessary for his enjoyment of Free Exercise rights, would represent the very 'governmental interference with religion' that is barred by the First Amendment.

Wilder v. Sugarman (Wilder I), 385 F. Supp. 1013, 1026 (S.D.N.Y. 1974) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970)).

97 For Catholics in particular, a proper understanding of the Church's teaching regarding the ends of marriage is essential in order to enter into a valid Christian marriage. See CATECHISM OF THE CATHOLIC CHURCH §§ 1625–32, 1662–63 (2d ed. 2000) (explaining that in order for a marriage to be valid the spouses' consent must have as its object "true Matrimony" as taught by the church). Catholic belief counsels that "the 'sexual dimension of the person and his or her ethical values' are closely linked. Thus, children should be taught to know and respect moral norms, enabling them to enjoy 'responsible growth in human sexuality,'" and that "[n]o one is capable of giving moral education in this delicate area better than *duly prepared* parents." Avila, *supra* note 7, at 16. (citations omitted). Avila also notes that a Catholic agency may decline to facilitate placement with a same-sex couple "based, in effect, on a determination that the couple is not 'duly prepared' to provide a child with proper moral formation." *Id.* The same concern would extend to any unmarried cohabiting couple, regardless of orientation.

98 The court in *Bruker* was critical of the State's lack of intervention due to the foster mother's "woeful lack of knowledge" regarding Jewish religious observance.

Additionally, it must be remembered that the goal of foster care is usually to provide care for a child pending reunification with the parents.⁹⁹ It goes without saying that the State must avoid exacerbating any injury that has already accrued to the child or creating new obstacles to family cohesion. Though the State cannot be expected to create a foster care setting that reproduces the child's family in every detail, it should not deviate more than necessary.¹⁰⁰ A significant part of a child's home setting may be religious observance (or the absence thereof), and so this should be considered in choosing a foster home setting. Placing a child in a foster home with different religious practices or values inimical to the child's upbringing could further traumatize an already vulnerable child.

Depending on the length of stay and the age of the child, given the subtle influence—whether intentional or not—that a foster parent can exercise over a young, impressionable child's thinking, living with a foster family with different values could also engender ambivalence or hostility toward the parents' values that could cause additional familial discord upon reunification.¹⁰¹ Imagine if a child—who was particularly susceptible to suggestion due to displeasure over troubles at home—was placed with a family with strong, religiously motivated values different from the legal parents. The child might associate the affection of the foster parents and the relative tranquility of the foster household with the beliefs of the foster parents. When the time came for reunification, the child might take a critical stance toward the legal parents' beliefs or even refuse to return home. As the court in *Walker* remonstrated “[e]ven when blood relationships

Bruker v. City of N.Y., 337 F. Supp. 2d 539, 546 (S.D.N.Y. 2004) (citation omitted). A court should likewise be unimpressed with the meager efforts by a state which places a child with a foster family modeling behavior directly contradictory to the child's religious faith and directs them to “accommodate” the child's beliefs.

99 See *supra* note 3 and accompanying text; Guggenheim, *supra* note 45, at 610 (“[F]oster care involves the temporary care of someone else's children with the ultimate goal of reuniting parent and child.”); see also WASH. REV. CODE ANN. § 13.32A.210 (West 2011) (“In an attempt to minimize the inherent intrusion in the lives of families involved in the foster care system and to maintain parental authority where appropriate, the department, absent good cause, shall follow the wishes of the natural parent regarding the placement of the child.”).

100 See *supra* notes 77–80 and accompanying text. But see Guggenheim, *supra* note 45, at 610 (“Since foster care is expressly meant to be temporary, parents ought to be able to insist that the conditions upon which their children are kept in foster care are consistent with the values of the family with which they will ultimately be reunited.”).

101 The situation in *Walker* apparently created significant friction between the mother and her children. *Walker v. Johnson*, 891 F. Supp. 1040, 1046–47 (M.D. Pa. 1995).

are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life.”¹⁰²

It does no good to simply consider screening for marital status a mere matter of religious judgment that constitutes invidious discrimination. The State itself should be mindful of the marital status of prospective foster parents, if only in the sense that they would consider dietary preferences when placing an Orthodox Jewish child, or a proclivity for ostentatious living when placing an Amish child.¹⁰³ If the State should consider marital status in the case of certain religiously observant children, there is no reason the State should deny a contract with a religious agency that applies the same standards when caring for those children.

4. Whether Public Confidence Will Be Undermined by Allowing Religious Agencies to Screen Candidates Based on Religious Criteria

The fourth argument advanced by the intervenors is that, by allowing religious agencies to use criteria that have a discriminatory effect, public confidence in the State will be undermined. As discussed in Part III.A.3, *supra*, the State may have an obligation to examine marital status in placing children from certain religiously observant households in a way that will result in the same outcome as if a religious agency was engaged to make the placement. Since it will be more difficult for the State to explain its deference to religious values if it takes such actions directly,¹⁰⁴ it would create less of an appearance of entanglement if the State simply fulfills its duty under the reasonable efforts test or a religious matching standard by entrusting the children to the care of a religious agency that is presumed to have the latitude to consider religious values. In protecting free exercise rights, as in protecting free speech rights, the government will often end up in the awkward position of looking like it is endorsing a particular view, when it is merely facilitating a fundamental constitutional right.¹⁰⁵ The government, however, cannot be squeamish

102 *Id.* at 1048 (quoting *Santosky v. Kramer*, 455 U.S. 745, 753 (1982)).

103 See Catherine L. Hartz, *Arkansas's Unmarried Couple Adoption Ban: Depriving Children of Families*, 63 ARK. L. REV. 113, 129 (2010) (“Sexual orientation is not irrelevant and neither is a couple’s marital status. These factors should be considered in placing the child with the best fit—just like education level, income, and other lifestyle considerations.”).

104 See *supra* note 89.

105 Cf. Volokh, *supra* note 4, at 698–99 (“We may generally speak even if our speech undermines others’ enjoyment of their rights: For instance, people have a Free Speech Clause right to urge a boycott of a newspaper, so as to pressure the

about offending the uninformed observer and thereby trample genuine rights.¹⁰⁶

5. Whether by Considering Marital Status, Religious Agencies Stigmatize Those Whose Lifestyles Contradict Their Teachings

As suggested above, if the State finds that the harm that flows to the children not sharing the faith of a religious agency outweighs the benefits of placing a child with such an agency, it is free to contract with that agency only to care for children of the same faith. An Evangelical family is not likely to apply to foster a child through an agency specializing in observant Jewish children, understanding that the agency would wish to find a kosher household in which to place its charges. Likewise, a same-sex or unmarried co-habiting couple can be expected to understand that some religious agencies have specific standards when placing children and that their household would not be suitable.¹⁰⁷

The real problem seems to be that some states have changed their policies regarding the recognition of different types of living arrangements, while continuing to depend heavily on religious social service agencies whose longstanding religious beliefs conflict with such arrangements.¹⁰⁸ The State, if it feels compelled to encourage

newspaper to fire a columnist, even though this speech is intended to stop others from exercising their own free speech rights. Likewise, people have a Free Speech Clause right to criticize religions and their adherents, speak out against the war effort, urge racial, religious, or sexual discrimination, and so on. Though such speech may undermine constitutional ‘values,’ such as religious freedom, the war power, or equality, it doesn’t literally violate constitutional rights (since constitutional rights can generally be violated only by the government). There’s no real conflict between constitutional provisions in such cases, only an argument that restricting a constitutional right is justified by some interest that echoes a right constitutionally protected against government suppression, or echoes a constitutionally granted federal power—and the Court has generally rejected this argument.”).

106 “[T]he District was bound to take account of the fact that he was exercising a constitutional right and that accommodation of uninformed and prejudiced persons was not a compelling state interest outweighing that exercise.” *Peterson v. Minidoka Cnty. Sch. Dist. No. 331*, 118 F.3d 1351, 1357 (9th Cir. 1997).

107 See Paul Vitello, *Faith Groups Campaign to Block Gay Marriage*, N.Y. TIMES, (May 5, 2011) at A23, available at <http://www.nytimes.com/2011/05/06/nyregion/new-york-faith-groups-work-to-block-gay-marriage.html#> (quoting Senator Liz Krueger as saying “[m]y guess is that most same-sex couples skip over the Catholic adoption services in the Yellow Pages”).

108 Catholic Charities in Illinois seems to have become a victim of its own success. If it had not provided superior service and support for foster children and families, see *supra* note 11, or expanded its facilities to accommodate children of all faiths, ending

alternative family forms, should not “throw the baby out with the bathwater” by cutting off the availability of religiously sensitive foster care for certain religious observers, but rather reduce its dependency on religious agencies for out-of-religion placement if it so desires. Given that a large proportion of existing foster providers are probably already willing to work with same-sex or unmarried cohabitant households,¹⁰⁹ the benefits that would come from forcing religious agencies out of business are far outweighed by the detrimental effect on the children and families interested in their services.

B. Constitutional Considerations in Denying Contracts on the Basis of Religious Belief

While much of the back and forth in the *Catholic Charities* case revolved around the free exercise rights of the religious agency itself, as is apparent from the discussion in Parts II and III.A, *supra*, the free exercise rights of parents and children are also implicated. When the State refuses to contract with a religiously affiliated agency, in the long run it is the families that belong to the religious community that supported the agency that suffer the most.¹¹⁰ Unfortunately, both parties to this action failed to adequately address this important issue.

As explained in Part III.A.2, *supra*, if a state contracts with private foster care providers, that state may not refuse to contract with religious agencies in an attempt to evade its duty under the reasonable efforts standard. Not only would such a course of action be unconstitutional, but the State would have to undertake the burden of making appropriate matching decisions itself, possibly applying the same standards it finds unacceptable.¹¹¹ More importantly, while a state may

up with contracts to handle a large proportion of DCFS’s cases, they may have been able to remain in service, at least caring for Catholic families.

109 Cf. DAVID M. BRADZINSKY & EVAN B. DONALDSON ADOPTION INST., EXPANDING RESOURCES FOR CHILDREN III, at 15 (2011), available at http://adoptioninstitute.org/publications/2011_10_Expanding_Resources_BestPractices.pdf (last visited Sept. . 10, 2012) (relating the results of studies that show that “a substantial percentage of [adoption] agencies are interested in working with lesbian and gay clients”).

110 Press Release, Diocese of Springfield in Illinois, Statement of Most Reverend Edward K. Braxton, Bishop of Belleville, Most Reverend R. Daniel Conlon, Bishop of Joliet, and Most Reverend Thomas John Paprocki, Bishop of Springfield in Illinois Regarding the Ending of Appeals of Foster Care Litigation (Nov. 14, 2011), available at <http://www.thomasmoresociety.org/docs/Statement-re-end-of-appeals-Springfield-11-14-2011.pdf> (“While the State has forced the Catholic Church out of state-supported foster care and adoption services, the losers will be the children, foster care families and adoptive parents who will no longer have the option of Catholic, faith-based services.”).

111 See *supra* Part III.A.3.

condition the receipt of some benefits on compliance with certain standards,¹¹² it may not do so without considering whether there are countervailing factors that balance the harm sought to be remedied by attaching those conditions.¹¹³ The countervailing factors in this case are the child's free exercise rights and parents' right to guide the child's formation.

The constitutionality of religious matching statutes, in spite of their tension with a literal interpretation of the Establishment Clause, demonstrates that the protection of free exercise rights is a compelling interest that overbalances other significant constitutional concerns in the foster care context.¹¹⁴ It is insufficient to say that the interest in outlawing invidious discrimination justifies a blanket ban on the consideration of marital status even when it is relevant to protecting the free exercise rights of children in the foster care system and when such limited consideration has only an incidental discriminatory effect. The State can surely find a more narrowly crafted remedy that will not impinge on other fundamental rights.¹¹⁵ The State certainly may not go so far as to interfere with religious observance by preventing children from being formed in the religious beliefs of their parents while in foster care because it disapproves of their religious doctrine. But that is precisely the outcome that will be allowed if the State is permitted to discriminate against selected religious foster care based only on their adherence to religious values when caring for children.

The policy of barring any consideration of marital status, which itself discriminates on the basis of religious doctrine, not only tends to

112 Cf. *Bob Jones Univ. v. United States*, 461 U.S. 574, 592 (1983) (stating that the government may decline to extend a benefit—in that case, a tax deduction—to a charitable institution whose purpose is “so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred”).

113 Cf. *id.* (“[A] declaration that a given institution is not ‘charitable’ should be made only where there can be no doubt that the activity involved is contrary to a fundamental public policy.”).

114 *Wilder v. Bernstein (Wilder III)*, 848 F.2d 1338, 1349 (2d Cir. 1988); see also *Wilder v. Sugarman (Wilder I)*, 385 F. Supp. 1013, 1025 (S.D.N.Y. 1974) (“The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.” (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972))).

115 For example, limiting the use of religious agencies that apply such screens to children of the same faith. The problem faced by the court in *Wilder III*—the lack of access to quality care in other agencies, see *supra* note 54—is apparently absent in recent cases where the state has been able to quickly transition children to other institutions upon terminating existing contracts. See *After 90 Years, Catholic Charities Foster Care Will Cease in Illinois*, *supra* note 11.

coerce religious agencies to conform to the State's preferred "doctrine," but it has a punitive effect on members of select religions. It denies them access to a generally available state benefit, namely the right to have the State make reasonable efforts to safeguard their free exercise rights when their children are in state custody. In a state with religious matching statutes in place, discrimination against a religious body on the basis of its beliefs is all the more blatant for its violation of explicit public policy. Parents and children of the targeted faith are burdened in their free exercise rights because they are unable to rely on the services of the agency that is best able to safeguard their interests—not because an agency is not reasonably and immediately available, but because the State has foreclosed its use based on religious criteria, leaving those families with unequal access to state services. These families must trust that the State which has exhibited animus toward their religious values will adequately protect their right to guide the religious formation of their children while in foster care.

It should not be forgotten that the home is one of the key places where religious freedom and counter cultural norms flourish. Children are already exposed to government sponsored speech in public schools and through the media. Allowing the State to manage the upbringing of children by approving or disapproving of religious beliefs gives the State plenary control over the influences that will guide the formation of children. This is a power that the government should not be permitted to wield, even over the relatively small number of children in foster care.¹¹⁶ As Judge Posner admonished in *Rodriguez v. City of Chicago*,¹¹⁷ there will be a "loss of public confidence in governmental protective services if the public knows that its protectors are at liberty to pick and choose whom to protect."¹¹⁸

IV. A MODEL RELIGIOUS MATCHING STATUTE

Religious matching statutes are imbued with the spirit of the First Amendment, but only rarely is that explicit in the actual text of the statute. This section, drawing on the discussion in Part III, *supra*, suggests a model statute that will clarify the assumptions that underlie such statutes to allow for easier interpretation and enforcement.

116 Cf. Volokh, *supra* note 4, at 681 ("Government power to coercively restrict parental speech, on top of its power to engage in its own speech in public schools, would tend to cement existing orthodoxies and suppress potentially valuable but unpopular ideas.").

117 156 F.3d 771 (7th Cir. 1998).

118 *Id.* at 779 (Posner, J., concurring).

Model Act for Religious Matching in Foster Care Placement

- § 1. Purpose. – When selecting appropriate foster placement for children in the custody of the State, the determination of a child’s best interests presupposes a consideration of many aspects of a child’s development. Religious identity may have a strong influence on various facets of a child’s family life and upbringing. The purpose of this Act is to help minimize the disruption in family life that may be caused by involvement with the foster care system by ensuring a child’s right to free exercise of religion while cared for by foster care providers in this State, as well as to ensure the parents’ right to have a voice in their child’s moral and spiritual formation during the duration of their separation from their child.
- § 2. Religious Matching.
- (a) Placement.
- (1) Religious Placement. – In placing a child in foster care, as far as is practicable, a child shall be placed in the custody or care of an agency, institution, facility, or group home affiliated with the same religion as that of the child, or in the custody or care of an individual or family practicing the same religion as that of the child.
- (2) Non-religious placement. – If the child’s legal parents so request, the child shall be placed in the custody or care of a secular agency, institution, facility, or group home, or in the custody or care of a non-religiously-observant individual or family.
- (b) Exceptions.
- (1) The provisions in paragraph (a) of this section shall not apply if the child is placed with a relative within the second degree.
- (2) The child’s legal parents may waive the requirements in subsection (a) of this section in their entirety through a signed writing.
- (c) Notification. – In the case that the exceptions listed in subsection (b) of this section are inapplicable, if the child is not placed in accordance with the requirements in subsection (a) of this section, then the parents of the child and the court having jurisdiction over the child shall be notified in a writing that shall recite the facts which impelled such disposition to be made contrary to the religious faith of the child.
- (d) Reasonable Efforts. – In all cases, reasonable efforts shall be made to ensure that the child is provided appropriate relig-

ious formation and the free exercise of religion, including the right to engage in worship.

§ 3. Impermissible Conditions.

- (a) No court or agency of this State, as a condition of placing a child in the custody or care of a religiously affiliated foster care agency, institution, facility, or group home, or individual or family, under the requirements of this Act, shall compel such agency, institution, facility, group home, individual, or family to undertake any course of action which is contrary to the religious beliefs of such entity or individual.
- (b) No court or agency of this State may refuse, or promulgate regulations which effectively prevent, the placement of a child in the custody or care of a religiously affiliated foster care agency, institution, facility, or group home, or individual or family, under the requirements of this Act, because of the religious beliefs of such entity or individual.

§ 4. Interpretation.

- (a) For purposes of this Act, the term “non-religiously-observant individual or family” shall be interpreted to mean an individual or family that expresses no particular religious affiliation.
- (b) The provisions of this Act shall be enforceable against the State and its agents only, and shall not be construed to create a right of action against any private entity.
- (c) The provisions of this Act shall be interpreted, and any regulations in relation to this Act shall be formulated, so as to assure the furtherance of the purposes stated in section 1 of this Act.

This model statute is intended to provide robust protection for free exercise rights—including deference to the wishes of parents, whether religiously observant or not—while maintaining flexibility for the State. It guides the relationship between the State and care providers by encouraging cooperation, but discouraging unnecessary entanglement. It explicitly promotes the right of children and families to have access to facilities that are sensitive to their religious needs and allows such facilities to have recourse to religious criterion when caring for and placing children, but allows the State to restrict its cooperation with such agencies, if desired, to caring for children of the same faith.

CONCLUSION

Parents are presumed to know what is best for their own children. Even when the State must take custody of a child due to the inability

or failure of parents to provide for a child's temporal wellbeing, the State must show respect for the parents' right to direct the religious and moral formation of that child. This is especially true in the case of foster care, where reunification with the family is the ultimate goal. Many states have religious matching statutes demonstrating recognition of the importance of respecting both parents' and children's free exercise rights. But even in the absence of such a provision, the State must make reasonable efforts to accommodate the foster child and his or her parents in the exercise of their First Amendment rights. Religious foster agencies play an invaluable role in assisting the State not only in caring for large numbers of foster children of all religions and no particular religion, but also, when requested, in caring especially for co-religionists by safeguarding their free exercise rights.

States have found it convenient, because of the high quality of care that religious agencies provide, to contract a large proportion of their cases with them. With the proliferation of non-traditional households in twenty-first-century America, states are faced with a dilemma. Though societal mores have shifted somewhat, many religious communities have held fast to their perennial teachings regarding the religious and moral implications of different lifestyles. Religious agencies associated with those communities often adhere to those traditional values and desire to guard children from what they view as the negative formational influence of households composed of same-sex couples or unmarried co-habitants and will not place foster children in such households. At the same time, the State would like to please advocates of alternative lifestyles who wish for greater participation in the foster care system, as well as expand the pool of eligible foster parents by disallowing consideration of marital status.

This Note suggests that states can limit contracting with selected religious foster agencies, if that is consistent with the States' view of the best interests of some children, but that they may not deny contracts altogether based on the agencies' religiously motivated policies. Religious foster agencies have a distinctive role under religious matching statutes and the reasonable efforts test, both of which exist to safeguard the free exercise rights of legal parents and children who find themselves involved with the foster care system, for whatever reason. By making available a range of services, both sectarian and non-sectarian, the government simply acknowledges the fact that "[t]he child is not the mere creature of the State; those who nurture him and direct

his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”¹¹⁹

119 *Wilder I*, 385 F. Supp. at 1025 (quoting *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925)).

