Detachable Speech:
Artistic Expression, Same-Sex Weddings, and the First Amendment

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In the last decade, courts have consistently upheld objections to public accommodation laws that would obligate unwilling vendors to provide services for same-sex weddings. At the heart of these disputes is the claim that, when they are required to provide wedding services to same-sex couples, vendors who oppose same-sex marriage are unconstitutionally forced to endorse them. These cases typically classify wedding content, such as photography and wedding cakes, as a form of artistic, personal, and ideological speech that endorses same-sex weddings. In this paper, I argue that wedding content not only isn't a form of endorsement, but that it is altogether devoid of political, religious, and ethical values attributable to the service provider. Rather than personal and ideological speech, wedding content is a form of speech that I call detachable speech—that is, speech which is intentionally designed for adoption by another party, and, conversely, isn't meant to convey the creator's personal ideology. From advertisements and marketing materials to sitcoms and commissioned film screenplays, content generators who work in creative industries routinely and voluntarily create expression that doesn't reflect their personal values. Indeed, in some cases, detachable content—e.g., a greeting card or a sign meant for the front lawn—is fungible and arguably doesn't even become speech until it's adopted by another party. Similarly, wedding content is not designed to convey the service provider's values any more than a greeting card reflects the manufacturer's personal point of view. Wedding content, rather than ideological speech, is a form of speech widget produced to specification. The recognition that wedding content is not an endorsement substantially weakens the First Amendment challenge to public accommodation laws in connection with same-sex weddings.

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INTRODUCTION

When Justice Kagan's senior undergraduate thesis, entitled "To The Final Conflict: Socialism in New York City, 1900–1933," came to light shortly after her nomination to the Supreme Court, some opponents of her appointment seized the opportunity to characterize her as a raging and incorrigible socialist unsuitable for the country's highest court.[1] The most pithy objection came from Michael Savage, a radio commentator: "She's a New York City radical, Marxist lawyer through and through."[2] On the other side of the skin-deep and short-lived debate, a *Los Angeles Times* opinion piece pointed out that Chief Justice Roberts had written a senior thesis entitled "Marxism and Bolshevism: Theory and Practice" without generating any opprobrium.[3] More to the point, Professor Sean Wilentz, Justice Kagan's college-thesis advisor at Princeton, clarified for the *New York Times* what pundits chose to ignore, viz., that writing a college paper on a topic is not quite the same thing as embracing it: "She was interested in it," he said. "To study something is not to endorse it."[4]

A parallel failure to differentiate endorsement from other forms of engagement underlies the recent spate of public accommodation cases that have validated some contractors' refusal to provide services to same-sex couples. Parties who challenge public accommodation laws routinely cloak their legal arguments in artistic expression rhetoric. In a recent Second Circuit case, for example, the plaintiff alleged "that the wedding photographs she creates for her customers are

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1. *See* Hendrik Hertzberg, *Elena Kagan's Not-So-Final Conflict,* NEW YORKER (June 3, 2010), https://www.newyorker.com/news/hendrik-hertzberg/elena-kagans-not-so-final-conflict [https://web.archive.org/web/20250918153343/https://www.newyorker.com/news/hendrik-hertzberg/elena-kagans-not-so-final-conflict]; Andrew Leonard, *Elena Kagan's "Socialist" College Thesis*, SALON (May 17, 2010), https://www.salon.com/2010/05/17/elena_kagan_socialist_college_thesis/ [https://web.archive.org/web/20250918153824/https://www.salon.com/2010/05/17/elena_kagan_socialist_college_thesis/] ("This has led, predictably, to an uproar on right-wing blogs, where it is being argued with great passion that 'To the Final Conflict: Socialism in New York City, 1900–1933' is proof that Elena Kagan is herself a living, breathing socialist.").

2. Robert Farley & Angie Drobnic Holan, *Taking Stock of Elena Kagan's Scholarly Work*, POLITIFACT (May 18, 2010), https://www.politifact.com/article/2010/may/18/elena-kagan-scholarly-work/ [https://web.archive.org/web/20250918160053/https://www.politifact.com/article/2010/may/18/elena-kagan-scholarly-work/].

3. Johanna Neuman, *Socialism and the Supreme Court—Kagan, Roberts, and the Search for College Papers*, L.A. TIMES: VOICES (May 17, 2010), https://www.latimes.com/archives/blogs/top-of-the-ticket/story/2010-05-17/opinion-socialism-and-the-supreme-court-kagan-roberts-and-the-search-for-college-papers [https://web.archive.org/web/20250918160741/https://www.latimes.com/archives/blogs/top-of-the-ticket/story/2010-05-17/opinion-socialism-and-the-supreme-court-kagan-roberts-and-the-search-for-college-papers].

4. Sheryl Gay Stolberg, Katharine Q. Seelye & Lisa W. Foderaro, *A Climb Marked by Confidence and Canniness*, N.Y. TIMES (May 10, 2010), https://www.nytimes.com/2010/05/10/us/politics/10kagan.html [https://web.archive.org/web/20251004045444/https://www.nytimes.com/2010/05/10/us/politics/10kagan.html].

customized expressions of her own artistic vision."[5] Ostensibly neutral but ideologically allied amicus briefs have followed suit—one, for example, called wedding-cake bakers "cake artists."[6]

By invoking cultural associations with art and artists, the argument that the disputed content is a work of art emphasizes the personal aspect of the disputed expression—artists speak their minds, after all, and they resent government interference with their message.[7] The artistic expression classification is not only an effective rhetorical device, however, but also—so far—a winning litigation tactic, for the characterization elevates the nature of the content to expression protected by the First Amendment.

This rhetorical and theoretical maneuver—i.e., the emphasis on the expressive aspect of otherwise commercial services—validates an anxiety that Justice O'Connor voiced many years ago in the context of a freedom-of-association dispute, viz., "that certain commercial associations, by engaging occasionally in certain kinds of expressive activities, might improperly gain protection for discrimination."[8] The emphasis on artistic expression makes it easier for putative speakers to challenge public accommodation laws, on the theory that public accommodation laws require artists to generate messages that, against their will, suggest an endorsement of same-sex marriage—which, in turn, amounts to compelled speech, and therefore a violation of the First Amendment. According to Judge Tymkovich: "Taken to its logical end, the government could regulate the messages communicated by *all* artists, forcing them to promote messages approved by the government."[9]

The emphasis on personal and ideological expression has allowed courts to place wedding content squarely in the line of cases that start with *Minersville Sch. Dist. v. Gobitis*[10] *and Barnette*,[11] two Supreme Court opinions that, nearly a century ago, turned on the requirement that school children salute the American flag. *Barnette* (which overturned *Minersville* after widespread criticism) provides the clearest—and, arguably, the most egregious—example of speech compulsion, one that not only forces someone to speak against their will in a purely mechanical sense, but also reaches into the depths of one's belief system. The requirement infringes on personal autonomy, and, when the speech is a forced and false affirmation, compromises freedom of thought and belief.[12]

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5. Emilee Carpenter, LLC v. James, 107 F.4th 97, 97 (2d Cir. 2024).

6. Brief for Cake Artists as Amici Curiae in Support of Neither Party at 1, Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617 (2018) (No. 16-111).

7. *See, e.g.*, Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998).

8. Roberts v. U.S. Jaycees, 468 U.S. 609, 632 (1984) (O'Connor, J., concurring).

9. 303 Creative LLC v. Elenis, 6 F.4th 1160, 1204–1205 (10th Cir. 2021) (Tymkovich, J., dissenting), *rev'd*, 303 Creative LLC v. Elenis, 600 U.S. 570 (2023).

10. Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940), *overruled*, W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

11. W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

12. Wooley v. Maynard, 430 U.S. 705, 714 (1977) ("The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" (quoting *Barnette*, 319 U.S. at 637)).

Courts have placed same-sex wedding cases in the *Barnette* framework on the grounds that public accommodation laws force service providers to endorse same-sex weddings. Just last year, the Supreme Court reasoned that "Colorado does not just seek to ensure the sale of goods or services on equal terms. It seeks to use its law to compel an individual to create speech she does not believe."[13] Another opinion reasoned that the "[o]rdinance, as applied by the City, compels Plaintiffs to express a message celebrating same-sex marriage that violates their religious belief."[14] And another concluded that because "the government can't force" service providers of faith to "create an artistic expression that celebrates a marriage that their conscience doesn't condone," we have a First Amendment violation.[15]

But placing wedding cases in the *Barnette* framework is predicated on the erroneous view that wedding content is the service provider's ideological expression. Below, I challenge the notion that wedding content is personal, value-laden, artistic speech that forces some service providers to express their viewpoints against their will.

In Part I, I argue that wedding content, rather than a vehicle for personal expression, is a form of speech which is by design generated for adoption by another party. Creative industries routinely rely on content creators to generate material that doesn't reflect the creator's personal values, and, conversely, creators routinely and willingly generate materials that don't reflect their personal values. Service providers voluntarily enter the open market to generate foreseeable types of content that will subsequently be used by other parties.

In Part II, I argue that wedding content is devoid of the service provider's personal values. In *Barnette*, the affected parties had "been forced to affirm or reject" a belief.[16] Service providers do neither. Wedding content is closer to what I call a speech widget—a largely generic and fungible speech object designed for adoption by another party rather than for the expression of the service provider's personal ideology.

In Part III, I address the endorsement argument in particular, and argue that equating wedding content with endorsement is just as exaggerated as the argument that Justice Kagan was a budding socialist because she chose to research the subject. Service providers don't endorse a wedding simply because they document it through photos of it or because they provide cakes for the event.

In Part IV, I argue that wedding content, as a voluntarily generated, non-ideological speech widget, should be subject to—and survive—intermediate scrutiny.

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13. *303 Creative*, 600 U.S. at 578–79.

14. Brush & Nib Studios, LC v. City of Phx., 247 Ariz. 269, 301 (2019).

15. Chelsey Nelson Photography LLC v. Louisville/Jefferson Cty. Metro Gov't, 479 F. Supp. 3d 543, 548–49 (W.D. Ky. 2020), *vacated and remanded sub nom.* Nelson v. Louisville-Jefferson Cnty. Metro Gov't, No. 22-5884, 2024 WL 1638860 (6th Cir. Apr. 16, 2024).

16. Wooley v. Maynard, 430 U.S. at 720.

I. DETACHABLE AND ADOPTABLE SPEECH

Two features of wedding content and its production are significant to note at the outset. First, wedding content is deliberately generated on behalf of the commissioning party. Second, service providers who generate wedding content voluntarily participate in the applicable market. Both aspects of wedding content undermine the compelled-speech challenge.

A. CONTENT GENERATORS

When I hold a sign at a parade,[17] or when I put a sign on my front lawn,[18] I am clearly speaking. In contrast, when I make a sign that I know someone else will hold to express an opinion, I am creating content that a third party will use to speak. I myself am not speaking. Instead, I am generating content that will become someone else's speech. I might or might not agree with whatever the sign says, but the sign isn't meant to express my opinion. I create it without adopting it as my own speech. In this sense, my speech is detachable and detached from me.

Moreover, until someone takes up the sign, it's arguably not speech at all, but merely an object with words on it. If I see a sign lying on the ground, I'll assume someone somewhere at some time expressed an opinion, but I won't know *whose* opinion it is. It's speech without a speaker. A birthday card is adopted as speech by the person who buys its, signs it, and gifts it. It becomes the adopting entity's speech. It's my cousin wishing me a happy birthday, not Hallmark. While on the shelf, the greeting card is adoptable speech in search of a speaker.

Viewed this way, detachable speech is a product generated for adoption by another person or entity. From marketing materials to wedding cakes, a whole array of content is routinely generated for someone else's use. The principle can be applied to a whole range of commissioned work.

Of course, it's easy enough to imagine a financial sponsor who allows the creator to exercise unbounded expressive discretion. In that case, however, the generated content is not detachable speech at all, but personal speech facilitated through a grant or private investment—essentially no different than a research grant given to support an academic project. In other words, it's not speech-for-hire, but speech that, while dependent on the sponsor's economic support in the sense of enabling the researcher to generate it, nevertheless remains the speaker's property and essentially a personal project and fully personal expression.

In a commissioned work scenario, moreover, the *carte blanche* arrangement is rare. Whether the detachable speech sees light of day is often decided by the commissioning entity. Studios, for instance, can simply refuse to release a film that's

17. *See, e.g.*, Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557 (1995).

18. *See, e.g.*, Baldwin v. Redwood City, 540 F.2d 1360, 1364 ("Baldwin and Cannon were supporters of Melvin Kerwin, candidate for the Redwood City Council in the 1974 election, and were prevented by the challenged ordinance from erecting signs of the size and at the locations they desired in support of Kerwin's candidacy.").

finished.[19] (Indeed, film contracts often contain language that makes it clear the production company is under no obligation to use the provided content.) Until such imprimatur, at least vis-à-vis the rest of the world, detachable speech arguably isn't even speech yet, but raw material that might become speech in the future, if and when it is released into the wild.

A recent same-sex wedding case emphasized contractual language that ostensibly granted the service provider absolute artistic freedom: "Although a client may ultimately reject Plaintiffs' work, the contract states that Brush & Nib 'retains complete artistic freedom with respect to every aspect of the design's and artwork's creation.'"[20] But the artistic freedom argument is undermined in the same sentence, which acknowledges that the commissioning party holds ultimate veto power. Just as Ford let folks have their cars painted any color they liked as long as it was black, the commissioning party lets the artist speak freely—as long as the speech is in line with the commissioning party's values.

Production companies not only decide whether a film will see the light of day, moreover, but typically retain final cut over the film. In effect, even if other people generate the actual content, the production company decides what the finished work looks like—which may include rejecting raw footage, rejecting works in progress, or combining different edits. Discussing copyright's widely used work-for-hire doctrine,[21] here is how the president of the Dramatists Guild of America explained the arrangement in the context of theater: "A screenwriter is an employee. The work he does is work for hire. From the beginning, he understands that everything he writes will immediately become the property of the studio which employs him. As legal author of the film, that studio can change the content of the screenwriter's script at will. His pirate captain can become a teenage runaway, his teenage runaway a Cocker Spaniel, his original story, set in Boston during the War of 1812, can be moved to the fifth moon of Jupiter."[22]

Courts recognize that commissioned content necessitates leaving room for speech that doesn't reflect the content-generator's views. A state court addressing a workplace harassment claim reasoned that "[w]hen, as here, the workplace product is the creative expression itself, free speech rights are paramount. The *Friends* writers were not renting cars and talking about sex on the side. They were

19. *See* T.M. Brown, *"Want to See This Film? Movie Studios Won't Let You*," N.Y. TIMES MAG. (Apr. 9, 2024), https://www.nytimes.com/2024/04/09/magazine/why-coyote-vs-acme-was-not-released.html [https://web.archive.org/web/20251004052411/https://www.nytimes.com/2024/04/09/magazine/why-coyote-vs-acme-was-not-released.html].

20. Brush & Nib Studios, LC v. City of Phx., 247 Ariz. 269, 276 (2019).

21. The work-for-hire doctrine, via an employment arrangement or written contract, transfers ownership from the creator to the commissioning entity. *See* U.S. COPYRIGHT OFF., *Circular 30: Works Made for Hire* (Aug. 2024), https://www.copyright.gov/circs/circ30.pdf [https://web.archive.org/web/20251007002418/https://www.copyright.gov/circs/circ30.pdf].

22. John Weidman, *The Seventh Annual Media and Society Lecture: Protecting the American Playwright*, 72 BROOKLYN L. REV. 639, 641 (2007).

writing adult comedy; sexual repartee was an integral part of the process."[23] Speech that would be harassment in a workplace if it truly reflected the speaker's values became tolerable creative fancy—and subject to a different legal standard—when it was generated as part of the creative process. In other words, writers were expected to put their personal values aside precisely to participate in the generation of detachable speech.

The generation of detachable speech is thus predicated on the creator's willingness to surrender personal values in the service of creating content that the commissioning party requests or approves. The distinction is important, for even if the content of a sign remains the same, the relationship of each entity to the sign's message is not. It's the difference between a church posting signs to promote itself and a company creating signs for an organization that supports a political candidate.[24] In *Members of City Council v. Taxpayers for Vincent*, the Court addressed the constitutionality of a municipal code that regulated the posting of signs on public property.[25] Taxpayers for Vincent, "an unincorporated political association formed to support the candidate," lost the right to advocate on behalf of a politician whom it endorsed.[26] The Candidates' Outdoor Graphics Service (COGS)— "a political sign service company" that over the years had created signs for hundreds of candidates—lost the right to engage in its sign-manufacturing business.[27] While COGS' business involved speech, it wasn't speech that reflected COGS' political position. It was detachable speech generated for another party's use. Taxpayers for Vincent supported their candidate. COGS, on the other hand, made the sign that Taxpayers for Vincent used to express its viewpoint.[28] Arguably, moreover, the signs didn't become speech until they were used by Taxpayers for Vincent to endorse its candidate.[29]

Establishment Clause case law provides another useful parallel. Here, for the purposes of sending a message, the government—rather than the content creator—is the speaker. "The purpose prong of the endorsement test focuses on the intent of the government actor in displaying a particular work of art, not on the intent of the artist in creating the work."[30] In other words, the party that displays the content supplants the party that creates the content.

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23. Lyle v. Warner Bros. Television Prods., 38 Cal. 4th 264, 297 (2006) (Chin, J., concurring).

24. *See, e.g.,* Reed v. Town of Gilbert, Ariz., 576 U.S. 155 (2015).

25. Members of City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789 (1984).

26. Brief for Appellee at 4, Members of City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789 (1984) (No. 82-975). .

27. *Id*.

28. *See* Candidates' Outdoor Graphic Serv. v. City & Cnty. of San Francisco, 574 F. Supp. 1240, 1242 (N.D. Cal. 1983) (After San Francisco "informed COGS that it would remove any signs found to be in violation of the ordinance and would impose civil and criminal sanctions on the individuals responsible for posting such signs," COGS challenged its inability to distribute the signs, not its inability to endorse specific candidates.).

29. *See, e.g.,* Baldwin v. Redwood City, 540 F.2d 1360 (9th Cir. 1976).

30. O'Connor v. Washburn Univ., 416 F.3d 1216, 1225 n.3 (10th Cir. 2005).

It's easy enough to think of other—more banal—examples. Marketing content that extols a product's features reflects the company's marketing preferences rather than the values of the advertising agency's employees or independent contractors. A film editor working on a movie trailer might not agree with the premise, the storyline, the cinematography, or the quality of the acting. But the editor would nevertheless be expected to put those views aside to generate a compelling trailer for the project. There is no expectation or obligation that the editor believe in any aspect of the film, or that the trailer reflect the editor's personal views. The goal is to create the most compelling—and, presumably, marketable—version of the trailer, not to convey the editor's beliefs. In some instances, moreover, the content might have no values at all, such as the design for a bar of soap or a soda bottle.

Detachable speech doesn't mean the creator can't include subjectively satisfying and personal content or personal ideology. "It would be of course ridiculous to suppose that Gogol spent ten years merely in trying to write something that would please the Church. What he was really trying to do was to write something that would please both Gogol the artist and Gogol the monk."[31] But the content creator, as a condition of engaging in the transaction, voluntarily surrenders its vision to satisfy the commissioning entity's preferences. The final work may contain personal preferences and values, but solely at the commissioning party's pleasure. Despite the inclusion of personal preferences, the speech remains detachable by virtue of the relationship between the parties.

B. MARKET PARTICIPATION AND FORESEEABLE SPEECH

From a robust free speech perspective—i.e., one that maximizes unfettered speech—the idea of detachable speech looks like a compromise, or a mild form of compulsion. After all, I might still be saying something I don't want to say, or not saying everything I want to say, or not saying something in the way I'd like to say it—and the commissioning entity might veto some, most, or all of what I say. But detachable speech is inherently neither compulsion nor compromise. We routinely join organizations—e.g., churches and workplaces—and participate in events—e.g., parades—that either limit what we can say or require us to say some things. In other words, we often voluntarily enter situations where expression is regulated, either negatively (a restriction) or positively (a requirement). Similarly, the generation of speech is a widespread and voluntary form of free market participation. In those scenarios, the speech isn't compelled, since we've chosen to participate in those regulated speech environments. Put another way, while "all speech inherently involves choices of what to say and what to leave unsaid," and while ideally that choice would always be solely ours, periodically we voluntarily choose to say what someone else wants to hear.[32]

31. VLADIMIR NABOKOV, NIKOLAI GOGOL 114 (Penguin Classics, 2011).
32. Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n., 475 U.S. 1, 11 (1986).

The production of wedding content therefore differs markedly from the scenario in *Barnette*, which turned, in part, on the fact that the salute was an unavoidable requirement.[33] Participating in the open market for wedding content is entirely elective. A service provider chooses to enter the market for wedding content and, by virtue of such entry, chooses to create content for someone else's use. Since the service provider makes a free choice, there is no infringement on the service provider's personal autonomy. On the contrary, participation in the market is itself an exercise of personal autonomy. It may be true "that the government cannot compel an artist to paint."[34] In the context of wedding cases, however, service providers freely choose to engage in that very activity.

Participation in the market, in turn, requires compliance with applicable regulatory frameworks, including "neutral and generally applicable public accommodations law."[35] The Supreme Court affirmed almost a century ago that voluntary but conditioned participation is not compulsion, and courts have kept this strand of reasoning alive since then.[36] Compliance with public accommodation laws—not unlike, for instance, compliance with financial regulatory requirements[37]—is simply a condition of participating in the market.

Participation in the wedding content market also means working with foreseeable types of speech. If I elect to make a commissioned documentary about a politician, I will reasonably anticipate the need to address topics relevant to that person's time in office. Whether I agree with the official's policies doesn't matter. I will set aside my personal beliefs so I can cover those foreseeable elements of the story. Similarly, if I elect to enter the wedding content market, I can expect to work with heterosexual couples and same-sex couples, just like I might reasonably expect some couples to want color photographs and some couples to want black and white photographs. This is all, in short, foreseeable speech.

Thomas v. Review Bd. of Ind. Emp. Sec. Div. offers an illustrative counterpoint.[38] In *Thomas*, a Jehovah's Witness who had taken a job in a roll foundry was subsequently transferred to a department that produced materials used in

33. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 631 (1943) ("In the present case attendance is not optional.").

34. Telescope Media Grp. v. Lucero, 936 F.3d 740, 752 (8th Cir. 2019).

35. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n., 584 U.S. 617, 631 (2018).

36. Hamilton v. Regents of Univ. of Cal., 293 U.S. 245, 265 (1934) ("[T]here is no ground for the contention that the regents' order, requiring able-bodied male students under the age of twenty-four as a condition of their enrollment to take the prescribed instruction in military science and tactics, transgresses any constitutional right asserted by these appellants."); Keeton v. Anderson-Wiley, 664 F.3d 865, 878 (11th Cir. 2011) ("ASU has conditioned participation in the clinical practicum and graduation on compliance with the ACA Code of Ethics, and Keeton, having voluntarily enrolled in the program, does not have a constitutional right to refuse to comply with those conditions.").

37. *See, e.g.*, 15 U.S.C. § 78o(a)(1) (making it unlawful for "any broker or dealer . . . to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) unless such broker or dealer is registered in accordance with subsection (b) of this section.").

38. Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707 (1981).

warfare.[39] In other words, there was a material and unexpected pivot in the type of work Thomas was expected to do: He signed up for one thing but ended up doing something else. Courts treat same-sex weddings as if they, too, amounted to a material departure from the type of services that content providers are expected to perform. But wedding content service providers know in advance that same-sex couples may want to hire them. The suggestion that public accommodation laws "compel a business owner to engage in activity she would not otherwise engage in" may be true if service providers hadn't chosen to participate in the wedding-content market in the first place.[40] Precisely by virtue of participating in the market, however, providers have voluntarily chosen to engage in this very activity.

Voluntary market participation doesn't create a limitless obligation to create any requested content. We can reasonably argue there is compulsion if the service provider were asked to create something unlawful.[41] If I demand that a baker make a cake designed to conceal cocaine, for example, the service provider has a reasonable basis for objecting. We can also reasonably argue there is compulsion if the content is clearly beyond expected limits. For example, a doctor might object to speech that requires taking an ethical—rather than purely medical—position on a procedure.[42] But same-sex weddings are an expected part of the market for wedding content. They are, in other words, well within the scope of foreseeable transactions and foreseeable speech.

Voluntary market participation overrides the arguments that the service provider is forced to talk about something that the service provider considers distasteful,[43] or that public accommodation laws violate the service provider's right

39. *Id.* at 709 ("Thomas terminated his employment in the Blaw-Knox Foundry & Machinery Co. when he was transferred from the roll foundry to a department that produced turrets for military tanks.").

40. Emilee Carpenter, LLC v. James, 107 F.4th 92, 106 (2d Cir. 2024).

41. This issue was raised in passing in *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n.*, 584 U.S. 617, 633 (2018) ("Since the State itself did not allow those marriages to be performed in Colorado, there is some force to the argument that the baker was not unreasonable in deeming it lawful to decline to take an action that he understood to be an expression of support for their validity when that expression was contrary to his sincerely held religious beliefs, at least insofar as his refusal was limited to refusing to create and express a message in support of gay marriage, even one planned to take place in another State.").

42. Stuart v. Camnitz, 774 F.3d 238, 246 (4th Cir. 2014) ("The Requirement is quintessential compelled speech. It forces physicians to say things they otherwise would not say. Moreover, the statement compelled here is ideological; it conveys a particular opinion.").

43. *See, e.g.,* 303 Creative LLC v. Elenis, 600 U.S. 570, 589 (2023) ("Taken seriously, that principle would allow the government to force all manner of artists, speechwriters, and others whose services involve speech to speak what they do not believe on pain of penalty. The government could require 'an unwilling Muslim movie director to make a film with a Zionist message,' or 'an atheist muralist to accept a commission celebrating Evangelical zeal,' so long as they would make films or murals for other members of the public with different messages" (quoting 303 Creative LLC v. Elenis, 6 F.4th 1160, 1199 (10th Cir. 2021) (Tymkovich, J., dissenting)); Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 573 (1995) (affirming the principle that "the speaker has the right to tailor the speech" isn't limited to a specific opinion, and "applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid"). Parallel reasoning comes up in same-sex wedding cases. *See, e.g.*, .Telescope Media Grp. v. Lucero, 936 F.3d 740, 753 (8th Cir. 2019) ("By treating

to silence.[44] The First Amendment discretion "to choose when to speak and what to say" includes the discretion to participate in contexts that shape the contours of our speech.[45] If I choose to teach First Amendment law, I can't, on the grounds that it's compelled speech, skip over cases whose content or outcome I don't like. Voluntary market participation also undermines the argument that public accommodation laws require service providers "to, at the very least, acknowledge that same-sex weddings are 'weddings' and suggest that they should be celebrated."[46] Acknowledging something is not compulsion. If I work in a car factory and help manufacture airbags, I have to acknowledge that car accidents happen, even if, for obvious reasons, I dislike them. The First Amendment doesn't sterilize exposure and protect people from unwanted realities, especially those people who voluntarily participate in an open market that generates content connected to those realities. So, that perspective simply doesn't provide a persuasive theoretical basis for a compulsion argument.

In short, because I, as a wedding vendor, voluntarily participate in the open market for wedding content, I've chosen to speak on these foreseeable topics. I am not, as the majority suggested in *303 Creative*, conscripted to convey the government's message.[47] I am merely required to comply with the regulatory framework that applies to the market in which I've freely chosen to participate. Put another way, there is no infringement on my autonomy. On the contrary, I exercised my autonomy precisely by participating in the market. The generation of wedding content for same-sex weddings is foreseeable speech that the provider elects to produce by virtue of participating in the market in the first place. The fact that a provider dislikes an aspect of a freely chosen vocation is not a cognizable legal harm. The remedy, of course, is not to participate in the market at all. As then-Judge Holmes put it, "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[48]

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the Larsens' choice to talk about one topic—opposite-sex marriages—as a trigger for compelling them to talk about a topic they would rather avoid—same-sex marriages—the MHRA does both at once.").

44. *See* Prudential Ins. Co. of Am. v. Cheek, 259 U.S. 530, 538 (1922) (referencing "the general private right of silence"); *see also* Est. of Hemingway v. Random House, Inc., 23 N.Y.2d 341, 348 (1968) ("The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas; it shields the man who wants to speak or publish when others wish him to be quiet. There is necessarily, and within suitably defined areas, a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.").

45. *Telescope Media Grp.*, 936 F.3d at 747.

46. *Masterpiece Cakeshop*, 584 U.S. at 660–61.

47. *303 Creative*, 600 U.S. at 592 ("Were the rule otherwise, the better the artist, the finer the writer, the more unique his talent, the more easily his voice could be conscripted to disseminate the government's preferred messages. That would not respect the First Amendment; more nearly, it would spell its demise.")

48. McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220 (1892).

II. VALUE NEUTRALITY

Below, I argue that wedding content is devoid of the service provider's personal ideology. Detachable speech may contain creative speech and ideological speech, as in the case of a commissioned film that reflects the filmmaker's personal political and ethical positions on any range of topics. But wedding content doesn't fall into the category of ideological speech. To the extent service providers generate what courts have called artistic expression, such expression is limited to design, aesthetics, and fact, none of which is ideological.

A. ARTISTIC EXPRESSION

The argument that wedding content is a form of artistic expression has been widely embraced by judges and, in some cases, by the plaintiffs and defendants themselves. As the Second Circuit summed up *303 Creative*, "the parties had all but agreed that Smith was an artist and that her websites were her artistic mediums of expression."[49] Indeed, opinions on both sides of the debate default to the categorization: "florists use artistic skills and training to design and construct floral displays. Bakeries also offer services for hire, and wedding cakes are famously intricate and artistic."[50]

Courts haven't provided a very robust basis for the classification. One opinion asserts that "the First Amendment 'unquestionably' protects art, music, and literature. And among those expressive art forms, long-protected by the First Amendment, is photography."[51] But, of course, the fact that some photography might be art protected by the First Amendment doesn't mean all photographs protected by the First Amendment are art. Something can't be art simply by virtue of its genre. Notably, legislation that looks at photography specifically—viz., the Visual Artists Rights Act—doesn't take such a broad view of photography. On the contrary, VARA limits its reach to photographs "produced for exhibition purposes only."[52] Wedding photographs are mementos that live in our home archives, not artworks destined for museum walls.

Another opinion makes a weak attempt at providing a basis by referencing the photographer's artistic skill.[53] But artistic skill itself is nowhere defined. What is it? How do we identify it in wedding content? Is artistic skill—whatever it is—enough to turn something into art? Yet another opinion bases the categorization partly on the provider's self-perception: "Phillips considers himself an artist. . . . Behind the

49. Emilee Carpenter, LLC v. James, 107 F.4th 92, 104 (2d Cir. 2024).

50. Elane Photography, LLC v. Willock, 309 P.3d 53, 71 (N.M. 2013).

51. Chelsey Nelson Photography LLC v. Louisville/Jefferson Cty. Metro Gov't, 479 F. Supp. 3d 543, 557 (W.D. Ky. 2020), *vacated and remanded sub nom.* Nelson v. Louisville-Jefferson Cnty. Metro Gov't, No. 22-5884, 2024 WL 1638860 (6th Cir. Apr. 16, 2024) (quoting Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 569 (1995)).

52. 17 U.S.C. § 101.

53. *Chelsey Nelson Photography*, 479 F. Supp. 3d at 549 ("She takes engagement and wedding photos with artistic skill.").

counter Phillips has a picture that depicts him as an artist painting on a canvas."[54] Of course, except under the loosest—and therefore meaningless—standard, identifying as an artist doesn't make you one.

More generally, even if we concede that wedding content requires some creativity, the presence of minimal creative choices doesn't *ipso facto* convert a work to artistic expression. The distinction between creative content and art has been deeply entrenched in copyright law since, in 1903, Justice Holmes warned against the risks that come with judges having the power to decide whether something qualifies as a work of art.[55] And, as one court observed, "not everything labeled or hawked as art falls within it."[56] Or, as an earlier—and less charitable—opinion framed it, "[t]he commercialized exploiter of cheap, unartistic material can often be found concealed behind a shield of art."[57] While it would be unduly harsh to categorize all wedding content as "cheap, unartistic material," calling it art quickly starts to look like an exaggeration.

And the deeper suggestion that artistic content is inherently ideological expression irrevocably tethered to one's core values also doesn't withstand closer scrutiny. Art *may* reflect personal values. Charles Mingus said, "I'm trying to play the truth of what I am. The reason it's difficult is because I'm changing all the time."[58] And in the sense that a photograph I take reflects the way I see something, the image is, of course, personal. Robert Mapplethorpe said, "I'm looking at things the way I look at them, no matter what they are."[59] But that doesn't automatically mean I'm revealing my deepest thoughts or values. When I take a photo of something, I am taking it from my perspective, but I'm not telling you what I think about its content. As someone who studied socialist thought might know, in his 1888 letter to Margaret Harkness (colloquially known as his "realism letter"), Friedrich Engels wrote that "the more the opinions of the author remain hidden, the better for the work of art."[60] To sustain realism, Engels reasoned, Balzac "was compelled to go against his own class sympathies and political prejudices," an aspect of his writing that Engels thought was "one of the greatest triumphs of Realism, and one of the grandest features in old Balzac."[61] In other words, creators

54. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617, 658 (2018).

55. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.").

56. Mastrovincenzo v. City of N.Y., 313 F. Supp. 2d 280, 287 (S.D.N.Y. 2004), *vacated and remanded*, 435 F.3d 78 (2d Cir. 2006).

57. Commonwealth v. Blumenstein, 153 A.2d 227, 241 (Pa. 1959) (Bell, J., dissenting).

58. NAT HENTOFF, AT THE JAZZ BAND BALL: SIXTY YEARS ON THE JAZZ SCENE 214 (2010).

59. Gary Indiana, *Robert Mapplethorpe: Intimacy, Comfort, and the Erotic in Portrait Photography*, INTERVIEW MAG. (Jan. 1, 1988) https://bombmagazine.org/articles/1988/01/01/robert-mapplethorpe [https://web.archive.org/web/20251004063848/https://bombmagazine.org/articles/1988/01/01/robert-mapplethorpe].

60. Tony Davies, *Marxist Aesthetics, in* LITERARY THEORY AND CRITICISM: AN OXFORD GUIDE 140, 144 (2006).

61. GEORG LUKÁCS, GERMAN REALISTS IN THE NINETEENTH CENTURY xxv (Jeremy Gaines & Paul Keast trans., Rodney Livingstone & MIT Press eds. 1993).

routinely distance themselves from their personal ideologies in order to generate content that conveys other values or no values at all.

Even if we accept the view that *some* wedding content is a form of artistic self-expression, moreover, for compelled speech purposes the classification is doctrinally irrelevant. To the extent there is any artistic self-expression in wedding content, it occurs at the level of non-ideological design, aesthetics, and fact.[62] The choices that service providers make are decorative (in connection with cakes), aesthetic (in connection with photographs and videos), decorative and factual (in connection with wedding websites and invitations), and aesthetic and factual (in connection with videography). None of these aspects of wedding content seeks to inform or persuade in connection with "particular views on economic, political, or social issues,"[63] which means the service provider isn't compelled to engage in speech to which the provider ideologically objects.[64] Of course, the service provider doesn't like the subject matter, but, as noted earlier, wedding content generators voluntarily choose to provide services that extend to same-sex couples, which undermines the compulsion argument.

1. Photographs, Videos, and Personal Narratives

Photographers and videographers choose what to shoot, how to shoot it, and how to put it all together. "They exercise creative control over the videos they produce and make 'editorial judgments' about 'what events to take on, what video content to use, what audio content to use, what text to use . . . , the order in which to present content, [and] whether to use voiceovers.'"[65] In other words, putting together a photo edit or a video of a wedding requires a multitude of personal choices. Superficially, wedding photography and videography fit into the same tier as a commissioned film that reflects the filmmaker's point of view. But that categorization overlooks a critical distinction between them. A film, even a commissioned one, leaves ample room for ideological expression. Indeed, the reason why some directors are hired is precisely because of their ability to bring that unique personal vision. In contrast, while wedding photography (including videos) is personal speech in the sense of aesthetics (i.e., how to frame the images)

62. The Ninth Circuit made the distinction between aesthetics and ethical views as distinct forms of expression in *White v. City of Sparks*, 500 F.3d 953, 956 (9th Cir. 2007) ("A painting may express a clear social position, as with Picasso's condemnation of the horrors of war in *Guernica*, or may express the artist's vision of movement and color, as with 'the unquestionably shielded painting of Jackson Pollock'" (quoting Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 569 (1995).). *See also* Bikram's Yoga Coll. of India, L.P. v. Evolation Yoga, LLC, 803 F.3d 1032, 1040 (9th Cir. 2015) (finding that "some elements in Choudhury's Sequence may reflect his aesthetic preferences").

63. *See* Robert Post, *Public Accommodations and the First Amendment:* 303 Creative *and "Pure Speech"*, 2024 SUP. CT. REV. 251, 290–300 (2024) (arguing that the wedding website at the heart of the *303 Creative* litigation is not designed to contribute to public discourse).

64. *See* Cressman v. Thompson, 798 F.3d 938, 951 (10th Cir. 2015) ("[I]n order to make out a valid compelled-speech claim, a party must establish (1) speech; (2) to which he objects; that is (3) compelled by some governmental action.").

65. Telescope Media Grp. v. Lucero, 936 F.3d 740, 747–48 (8th Cir. 2019).

and presentation (i.e., which images to include and in what order), it's not self-expression that conveys the provider's ideological—i.e., ethical, political, or religious—viewpoints. Wedding images, as noted above, simply document an event.

Indeed, photography as a medium makes it difficult to convey an ethical stance. Consider, for example, a photo of two advertisements in 1920:[66]

Did the photographer like or dislike Coca-Cola? We have no idea. Moreover, how would a photo that disapproves of these two trademarks be different from a photo that approves of them?

66. [Sign by water] (photograph 1920), https://idn.duke.edu/ark:/87924/r4610xj8g [https://web.archive.org/web/20251004103546/https://repository.duke.edu/id/ark:/87924/r4610xj8g] (last visited Oct. 7, 2025).

In contrast, consider contemporary caricatures of Lincoln, and the variance in northern and southern drawings—for example, his inauguration:[67]

The image from the South was decidedly different from its northern counterpart. What would a comparable shift in perspective look like in the context of wedding images? On what basis could a court differentiate an approving image from one that condemns the event? How could a wedding photo ever approximate the vicious messages in *Snyder v. Phelps*, or convey milder forms of disapproval?[68]

One could argue that these are isolated images, and that a larger edit would convey a larger message and create more room for the provider's views. But that argument goes too far, too. The narrative conveyed by wedding images mirrors the structure of the event. Wedding photographers and videographers don't have the freedom to tell a story that goes beyond industry parameters and the shape of the ceremony. A larger edit might convey more details about the wedding, but it will not convey more—or any—insight about the service provider's own ideology.

Of course, aesthetics can convey a personal and ideological message.[69] But wedding photography and videography, as a matter of genre, require allegiance to

67. Thomas Nast, *The President's Inaugural* (cartoon, 1861), https://www.lincolncollection.org/collection/creator-author/item/?cs=T&creator=Thomas+Nast&item=109019 [https://web.archive.org/web/20251007175527/https://www.lincolncollection.org/collection/creator-author/item/?cs=T&creator=Thomas+Nast&item=109019] (last visited Oct. 7, 2025).

68. Snyder v. Phelps, 562 U.S. 443 (2011) (addressing the right to picket at a U.S. Marine's funeral).

69. *See* WASSILY KANDINSKY, CONCERNING THE SPIRITUAL IN ART 29 (Hilla Rebay ed., Solomon R. Guggenheim Foundation pub. 1946) ("It is never literally true that any form is meaningless and 'says nothing.' Every form in the world says something. But its message often fails to reach us, and even if it does, full understanding is often withheld from us.").

a set of visual industry norms.[70] Rather than experimenting with aesthetics or challenging established artistic discourse, providers deliberately operate within those industry parameters. If I were to take photos from highly unusual angles or ship wedding photos through x-ray machines around the world—to highlight the fragility of marriage and love, for example, or to suggest that a couple's marriage is tarnished in some way—most couples would be disappointed in the results. (Indeed, couples have complained about far less; in one instance, a dispute erupted over the photographs' tint.)[71] Deviation from industry norms would not only be market suicide, moreover, but, if a wedding photographer or videographer were to step outside of industry conventions, the result would arguably no longer be wedding content at all, but, as a genre, something altogether different.

In sum, because of constraints imposed by convention, industry norms, and the event itself, wedding photographers don't have the discretion to convey a personalized message that reflects approval, disapproval, or any other ideological stance. Judicial suggestions to the contrary notwithstanding, wedding

70. For some examples of what happens when photographers don't quite meet those standards, see D.L. Cade, *Insurance Company Cites Photography as Most Common Wedding Vendor Issue*, PETAPIXEL (Apr. 18, 2013), https://petapixel.com/2013/04/18/insurance-company-finds-photography-is-most-common-wedding-vendor-issue [web.archive.org/web/20250920004743/https://petapixel.com/2013/04/18/insurance-company-finds-photography-is-most-common-wedding-vendor-issue/]; *Are These the Worst Wedding Pictures Ever?*, TELEGRAPH (Apr. 20, 2012), https://www.telegraph.co.uk/news/picturegalleries/howaboutthat/9216685/Are-these-the-worst-wedding-pictures-ever.html?frame=2198771 [web.archive.org/web/20250920004713/https://www.telegraph.co.uk/news/picturegalleries/howaboutthat/9216685/Are-these-the-worst-wedding-pictures-ever.html?frame=2198771]; Alicia Tan, *Singaporean Bride Posts Terribly Shot Wedding Pictures, Hilarious Memes Ensue*, MASHABLE (Apr. 12, 2016), https://mashable.com/article/singapore-bad-wedding-pics#x4mxRWCB7uqq [web.archive.org/web/20250920004655/https://mashable.com/article/singapore-bad-wedding-pics#x4mxRWCB7uqq]; D.L. Cade, *Couple Pays £750 for "The Worst Wedding Photos Ever,"* PETAPIXEL (Apr. 23, 2012) https://petapixel.com/2012/04/23/couple-pays-750-for-the-worst-wedding-photos-ever [web.archive.org/web/20250920004720/https://petapixel.com/2012/04/23/couple-pays-750-for-the-worst-wedding-photos-ever/]. .

71. Amaris Encinas, *"Sepia Bride" Photography Goes Viral on Social Media, Sparks Debate About Wedding Industry*, USA TODAY (Jul 5, 2024) https://www.usatoday.com/story/life/fashion/2024/07/05/sepia-bride-wedding-photographer-explained/74295124007/ [web.archive.org/web/20250920004220/https://www.usatoday.com/story/life/fashion/2024/07/05/sepia-bride-wedding-photographer-explained/74295124007/]; u/Puzzleheaded-Bid-963, REDDIT (r/photography), *"Sepia" bridal photography drama*, (Jun, 28, 2024 at 13:34 ET), https://www.reddit.com/r/photography/comments/1dqny5x/sepia_bridal_photography_drama/?rdt=46236 [web.archive.org/web/20250920004150/https://www.reddit.com/r/photography/comments/1dqny5x/sepia_bridal_photography_drama/?rdt=46236]; Sophie Sahara, *The Sepia Bride Controversy: A Lesson for Photographers*, NARRATIVE (Aug. 9, 2024) https://narrative.so/blog/the-sepia-bride-controversy-a-lesson-for-photographers [https://web.archive.org/web/20250920004043/https://narrative.so/blog/the-sepia-bride-controversy-a-lesson-for-photographers].

photographers and videographers are not auteurs who generate unique and personal narratives.[72]

2. Invitations, Websites, and Information

Rather than artwork imbued with the service provider's values, invitations and websites are closer to what the Second Circuit called "dry information, devoid of advocacy, political relevance, or artistic expression."[73] Invitations and wedding websites might reflect choices about design choices—color scheme, font—but those electives don't rise to the level of personal ideology. Content on wedding websites may be assembled by the service provider, in turn, but the information is factual and doesn't convey the service provider's personal point of view. In that sense, wedding websites are not much different from the *New York Times* wedding announcements—which themselves *are* categorically different from opinion pieces that exist precisely to reveal the writer's ideological stance. Both invitations and wedding websites follow convention by virtue of including categories of information, and neither leaves room for personal ideology. Moreover, no visitor to a wedding website reads about the couple out of curiosity about what the service provider thinks. It's simply detachable speech that, with the couple's imprimatur, will be made public on the couple's behalf.

3. Cakes and Cultural Meanings

In the case of cakes, the informational dimension found in photographs, videos, wedding websites, and invitations is altogether missing. Instead, we are left with pure design choices. In *Masterpiece Cakeshop*, the Court aggressively advanced the argument that wedding cakes are nevertheless primarily expressive because they are dense with symbolism.[74] The dubious suggestion to the contrary notwithstanding, wedding cakes are designed to be eaten as part of the ceremony.[75] Even though wedding cakes may be expressive, they are inescapably and primarily functional. As one article put it, "[a] wedding cake should be two

72. *See*, *e.g.*, *303 Creative LLC v. Elenis*, 600 U.S. 570, 579, (2023) ("All of the text and graphics on these websites will be 'original,' 'customized,' and 'tailored' creations.").

73. Universal City Studios v. Corley, 273 F.3d 429, 446 (2d Cir. 2001).

74. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617, 659 (2018) (Thomas, J., concurring in part) ("[A] wedding cake inherently communicates that 'a wedding has occurred, a marriage has begun, and the couple should be celebrated.' Wedding cakes do, in fact, communicate this message. A tradition from Victorian England that made its way to America after the Civil War, '[w]edding cakes are so packed with symbolism that it is hard to know where to begin.'" (quoting MICHAEL KRONDL, SWEET INVENTION: A HISTORY OF DESSERT 321 (2011)).

75. *Id*. at 659 ("Although the cake is eventually eaten, that is not its primary purpose.").

things: delicious *and* beautiful,"[76] while another listed recommended flavors.[77] Unlike a painting, no one takes a wedding cake home to display it as an artwork. Of course, some cake might end up in someone's fridge, but a next-day sugar fix only underscores the fact that cakes are functional objects whose function persists well beyond the day of the celebration. The suggestion that cakes are primarily expressive or works of art is, well, hard to swallow.

Even if we agree with the claim that cakes are more expressive than edible, however, the meaning of wedding cakes is cultural, and something that inheres in the wedding cake by virtue of it being a wedding cake, not something that a service provider creates and adds to the cake along with flour and sugar. In other words, cultural meaning is distinct from personal meaning. The fact that I personally manufacture something with cultural meaning doesn't mean the meaning is personal or that I embrace whatever values such cultural object contains. Unless altered[78] or presented in specific contexts,[79] the American flag symbolizes the nation no matter who stitches it together. Similarly, an engineer who designs an ambulance siren—which has a clear symbolic message, too—is not communicating a personal message, or speaking every time the siren turns on. A bouquet of flowers thrown at a wedding has traditional symbolism, too, but we couldn't persuasively argue that it's the florist's speech. Creating an object that is imbued with cultural meaning is not the same thing as conveying your personal ideology. Because a cake conveys a cultural message rather than the service provider's own view, it's not "his message."[80]

In *Masterpiece Cakeshop*, the Supreme Court noted that "the baker likely found it difficult to find a line where the customers' rights to goods and services became a demand for him to exercise the right of his own personal expression for their message."[81] Since there is no personal, ideological expression here at all, however, the line simply doesn't exist—which may account for the difficulty.

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76. Gabriella Rello Duffy, *Sixty-five Beautiful Wedding Cake Ideas to Inspire Your Own Big-Day Dessert*, BRIDES (Mar. 28, 2025), https://www.brides.com/gallery/the-50-most-beautiful-wedding-cakes [web.archive.org/web/20250920003937/https://www.brides.com/gallery/the-50-most-beautiful-wedding-cakes].

77. Cathryn Haight, *Your Guide to Foolproof Wedding Cake Flavors (and the Best Fillings)*, THE KNOT (Sept. 26, 2025), https://www.theknot.com/content/wedding-cake-flavors [https://web.archive.org/web/20251007183019/https://www.theknot.com/content/wedding-cake-flavors].

78. *See, e.g.*, Spence v. Washington, 418 U.S. 405, 405 (1974) ("Appellant displayed a United States flag, which he owned, out of the window of his apartment. Affixed to both surfaces of the flag was a large peace symbol fashioned of removable tape.").

79. *See, e.g.*, Jasper Johns, *Flag* (painting 1954–55), https://www.moma.org/collection/works/78805 (last visited Oct. 7, 2025).

80. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617, 660 (Thomas, J., concurring in part).

81. *Id.* at 633.

4. Customization

In *Masterpiece Cakeshop*, the Court noted that the plaintiff "sits down with each couple for a consultation before he creates their custom wedding cake. He discusses their preferences, their personalities, and the details of their wedding to ensure that each cake reflects the couple who ordered it."[82] The judicial emphasis on customization superficially sustains the argument that the service provider is endorsing a particular wedding and a particular couple. Indeed, that's the argument that the Supreme Court embraced in *303 Creative*: "Ms. Smith does *not* seek to sell an ordinary commercial good but intends to create 'customized and tailored' expressive speech for each couple."[83] Customization also implies that the content is individualized and therefore personal and artistic speech. As the Second Circuit described *it*, the "factual stipulations confirmed that Smith was not merely selling off-the-shelf commercial products. Instead, she was creating original, tailored, and expressive works that all parties agreed communicated Smith's particular personal views."[84]

But the suggestion that customization turns wedding content into personal ideological speech is grossly exaggerated. Speech and objects can be personalized—in the sense of addressing someone's needs or preferences or in the sense that suits the circumstance—without being personal—in the sense of reflecting someone's values. Financial advice is personalized, for instance, but, rather than the advisor's ideology, the personalization reflects the advisee's priorities, the advisor's expertise, and market realities.[85] Similarly, wedding content is personalized in the sense that it refers to a particular couple, but it's not personalized in the sense that it reflects the provider's viewpoints. Indeed, customization provides additional support for the view that wedding content reflects the couple's preferences rather than the provider's personal ideology.

Customization also points to another, noteworthy feature of wedding content—viz., the reusability of many of its constituent elements. Invitations of necessity include standard types of information—date, time, location—and wedding websites emphasize the same categories of facts—for example, when the couple met. Wedding photography and videos document the same types of content—e.g., a close-up of the wedding rings—and leverage industry standard visuals. Wedding cakes routinely rely on recycled designs and content; indeed, one article identified and recommended eighty common wedding cake phrases.[86] This practice is no

82. *Id.* at 658 (Thomas, J., concurring in part).

83. 303 Creative LLC v. Elenis, 600 U.S. 570, 593 (2023).

84. Emilee Carpenter, LLC v. James, 107 F.4th 92, 104 (2d Cir. 2024).

85. *See, e.g.*, CFTC v. Vartuli, 228 F.3d 94, 107 (2d Cir. 2000) ("The advice was not personal in the sense that the defendants learned about the needs, resources and sophistication of individual clients and gave individualized advice based upon that information.").

86. Ariel Taranski, *Eighty Wedding Cake Quotes to Make Your Cake Even Sweeter*, THE KNOT (Jan. 2, 2025), https://www.theknot.com/content/word-cake-toppers [https://web.archive.org/web/20250919185154/https://www.theknot.com/content/word-cake-toppers].

different than reusable code—an aspect of software that is often captured by "pre-existing technology" clauses in technology services agreements.[87] Or, to use an example closer to home, it's no different than lawyers using templates when drafting agreements.[88]

In effect, service providers often simply adjust pre-existing models to generate customized content. Like a personalized Christmas stocking that uses the same design but changes the name stitched on to it, wedding content is routinely (re)created with templates that are tweaked to reflect each couple's specific details. Even though it is customized for a particular couple, however, wedding content is still a form of generic manufacture. In this sense, wedding content is closer to Levittown than it is to ideological and highly individualized self-expression.

B. SPEECH WIDGETS

If wedding content is neither art nor personal expression, what type of speech is it? It's not commercial speech, at least in the sense that it's not an invitation to an economic transaction, or information about a product.[89] Professional speech—to the extent it's recognized as a category at all—may be the wrong categorization if professional speech requires the provision of sound advice by a licensed profession.[90] A commissioned artist is not licensed, and not only doesn't give advice that has to be sterilized for dangerous misinformation (contrary to bad lawyers and bad doctors).[91] It's not speech meant to contribute to public discourse and influence public opinion, which would provide a basis for its "pure speech" classification.[92] Nor is it a question of disclosure, since there is nothing for service

87. *See, e.g.*, Env't Tectonics Corp. v. Walt Disney World Co., No. 05-6412, 2008 WL 821065, at *10 (E.D. Pa. 2008) ("By suggesting that Article 28 confers 'unfettered' ownership rights to Disney, however, defendant ignores the provision in Article 28(e) expressly reserving ownership of pre-existing concepts and technology to ETC.").

88. *See, e.g.*, Sullivan as Tr. of Sylvester L. Sullivan Grantor Retained Income Tr. v. Max Spann Real Est. & Auction Co., 251 N.J. 45, 53 (2022) ("A blank template of the Contract for Sale of Real Estate included in the Property Information Package reiterates information provided in the Bidder Registration Form.").

89. *See* Zillow, Inc. v. Miller, 126 F.4th 445, 460 (6th Cir. 2025) ("[W]hen determining whether speech is properly characterized as 'commercial,' we consider whether the speech involves an advertisement, whether it references a product, and whether the motivation for speaking is economic.").

90. *See, e.g.*, Moore-King v. Cnty. of Chesterfield, Va., 708 F.3d 560, 569 (4th Cir. 2013) ("[T]he relevant inquiry to determine whether to apply the professional speech doctrine is whether the speaker is providing personalized advice in a private setting to a paying client or instead engages in public discussion and commentary.").

91. *See, e.g.*, Conant v. McCaffrey, No. C 97-00139 WHA, 2000 WL 1281174, at *13 (N.D. Cal. Sept. 7, 2000), *aff'd sub nom.* Conant v. Walters, 309 F.3d 629 (9th Cir. 2002) ("A lawyer, for example, may not counsel a client to violate the law or to commit perjury. The First Amendment would not prohibit the lawyer's disbarment for doing so. A doctor, to take another example, may not counsel a patient to rely on quack medicine. The First Amendment would not prohibit the doctor's loss of license for doing so.").

92. *See* Post, *supra* note 63, at 3.

providers to disclose.[93] So, where—if anywhere—in the closed First Amendment universe of speech types does it fit?

In *Stevens*, the Supreme Court expressed a lack of appetite for creating new categories of speech,[94] but we can fit wedding content into one that's been identified by lower courts, viz., as non-ideological expressive merchandise.[95] In *Muhammad Temple of Islam-Shreveport v. Shreveport*, the court reasoned that, unlike newspapers, "the sale of fish by plaintiffs is a purely commercial activity, designed to provide a means of support to themselves and to their creed, rather than a religious activity designed only to spread the word of their religion."[96] Service providers don't generate wedding content "to spread the word of their religion"[97] or to promote any point of view—against their will or otherwise. To the extent a speech widget conveys any values at all—e.g., the message on top of a cake or its cultural meaning—it reflects the values of the commissioning couple, not the values of the service provider. Given the nature and means of production, we can think of wedding content as speech widgets—viz., expressive objects that contain fungible elements, are devoid of the service provider's personal ideology, and are designed for (sometimes expressive) use by the adopting party. In other words, despite its expressive dimension, wedding content is quite the "ordinary commercial good" after all.[98]

III. THE ENDORSEMENT FALLACY

The majority of same-sex wedding opinions embrace the view that service providers generate wedding content which celebrates—and therefore endorses—marriage. In *Masterpiece Cakeshop*, the vendor, a cake baker, "explained his belief that 'to create a wedding cake for an event that celebrates something that directly goes against the teachings of the Bible, would have been a personal endorsement and participation in the ceremony and relationship that they were entering into.'"[99] In another case, the photographer's "Complaint explains several messages of her wedding photography. For example, she "'believes that by capturing and conveying engagements, weddings, and marriages between one man and one woman, she can show the beauty and joy of marriage as God intends it and she can convince her clients, their friends, and the public that this type of marriage should be pursued

93. Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio, 471 U.S. 626, 651 (1985) (describing "a requirement that appellant include in his advertising purely factual and uncontroversial information about the terms under which his services will be available").

94. United States v. Stevens, 559 U.S. 460, 465 (2010).

95. Mastrovincenzo v. City of N.Y., 435 F.3d 78, 85 n.4 (2d Cir. 2006) ("The term 'expressive merchandise' was used by the *Bery* Court as a kind of shorthand for the larger First Amendment question presented in that case—namely, whether the sale or dissemination of certain merchandise was predominantly expressive." (citing Bery v. City of N.Y., 97 F.3d 689, 695 (2d Cir. 1996)).

96. Muhammad Temple of Islam-Shreveport v. City of Shreveport, La., 387 F. Supp. 1129, 1136 (W.D. La. 1974).

97. *Id*.

98. 303 Creative LLC v. Elenis, 600 U.S. 570, 593 (2023).

99. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617, 627 (2018).

and valued.'"[100] The Eighth Circuit adopted the same argument about narrative endorsement in connection with wedding videos: "The Larsens, who own and operate Telescope Media Group, use their 'unique skill[s] to identify and tell compelling stories through video,' including commercials, short films, and live-event productions."[101] And, of course, that's the sticking point when it comes to same-sex weddings: "It is precisely that approval that Mr. Phillips intended to withhold in keeping with his religious faith."[102]

These arguments, like the argument that a service provider "exercises artistic license to create customized and original images that express her religious views about marriage," are exaggerated.[103] As I argued in Section I, from the voluntary market participation perspective, even if wedding content is an endorsement, it's an endorsement I've agreed to generate, simply by virtue of my market participation. In that sense, there is no compulsion. But, as I argued in Section II, the ideologically empty nature of wedding content is incompatible with the endorsement argument—content that is ideologically neutral *ipso facto* can't be an endorsement. Below, I look at the endorsement argument from a number of other perspectives, and argue that, in each instance, the equivalency between wedding content and endorsement doesn't withstand closer scrutiny.

A. THE IDIOSYNCRASY OF THE ENDORSEMENT QUESTION

Art debates typically turn to familiar topics: interpretation and meaning, or the importance of the audience's interaction with the work. The question of endorsement, in contrast, is not one that attracts much—if any—attention. When, in the 1980s, the Guerrilla Girls challenged the Metropolitan Museum of Art's gender-biased curation via massive billboards, they asked pointedly whether "women have to be naked to get into the Met. Museum," not whether the Met endorses female nudity.[104] When David Hammons, also in the 1980s, installed "How Ya Like Me Now?", an image that showed Rev. Jesse Jackson as a white man, no one asked if Hammons's art endorsed racism. Indeed, when the Mnuchin Gallery held a five-decade retrospective of his work, the press release mentioned Hammons's examination of "the role that race plays in American society," but—conspicuously, from our perspective—said nothing about endorsement.[105]

100. Chelsey Nelson Photography LLC v. Louisville/Jefferson Cty. Metro Gov't, 479 F. Supp. 3d 543, 557–58 (W.D. Ky. 2020), *vacated and remanded sub nom.* Nelson v. Louisville-Jefferson Cnty. Metro Gov't, No. 22-5884, 2024 WL 1638860 (6th Cir. Apr. 16, 2024).

101. Telescope Media Grp. v. Lucero, 936 F.3d 740, 747 (8th Cir. 2019).

102. *Masterpiece Cakeshop*, 584 U.S. at 650.

103. Emilee Carpenter, LLC v. James, 107 F.4th 92, 101 (2d Cir. 2024).

104. *See* Guerrilla Girls, *Do Women Have to Be Naked to Get into the Met. Museum?* (lithograph 1989), https://www.metmuseum.org/art/collection/search/849438 [https://web.archive.org/web/20251008014704/https://www.metmuseum.org/art/collection/search/849438] (last visited Oct. 7, 2025).

105. *See* Press Release, Mnuchin Gallery, David Hammons: Five Decades (March 15, 2016), https://www.mnuchingallery.com/exhibitions/david-hammons#tab:slideshow;tab-1:slideshow

Nor do scholars who focus on art look for endorsement. Indeed, long ago Immanuel Kant argued that art as art shouldn't have a function.[106] On this view, to be appreciated as art something must be appreciated for its inherent aesthetic qualities, not for its practical purpose.[107] Art pieces are seen as autonomous aesthetic objects, not as objects that serve a purpose, whether that purpose is to light a room, enhance the flavor of our foods, or, most to the point, endorse an idea or an event.

In short, the question of endorsement, at least in connection with art, is not a question that hangs in the air outside of courtrooms. On the contrary, it's a specifically jurisprudential line of inquiry. Even in the context of legal disputes, moreover, the question of endorsement is rare, and no less so in the context of compelled-speech cases. Endorsement is a key variable in the *Barnette* scheme, where the specific question was whether the government had forced Jehovah's Witnesses to engage in speech that betrayed their core values, in violation of the principle, to use a more-recent formulation, that the government can't "force persons to express a message contrary to their deepest convictions."[108] But the question of endorsement doesn't surface in other compelled-speech cases. Some compulsion cases turn on the requirement to disclose information,[109] for example, or on the question of financial enablement,[110] control over property,[111] or control

[https://web.archive.org/web/20250919185709/https://www.mnuchingallery.com/exhibitions/david-hammons#tab:slideshow;tab-1:slideshow].

106. The concept is known as "disinterestedness." Like virtually all else in art theory, this view has been challenged. *See, e.g.*, Nicholas F. Stang, *Artworks Are Not Valuable for Their Own Sake*, 70 J. AESTHETICS & ART CRITICISM 271, 271 (2012).

107. As one commentator summarized Kant's position, "[i]n a judgment about the beauty of a particular rose, for instance, I do not take into consideration its possible usefulness to me." *See* Jane Kneller, *Kant's Concept of Beauty*, 3 HIST. PHIL. Q. 311, 317 (1986).

108. Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 585 U.S. 755, 780 (2018) (Kennedy, J., concurring); *see also* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

109. *See, e.g.*, CFTC v. Vartuli, 228 F.3d 94, 108 (2d Cir. 2000) ("The disclosure requirement at issue here was reasonably related to the government's interest in preventing consumers from being deceived by misleading hypothetical statistical presentations that, as Congress observed, could lead to inefficiencies in the commodities markets that are contrary to the public interest.").

110. *See, e.g.*, Abood v. Detroit Bd. of Educ., 431 U.S. 209, 211 (1977) ("[E]very employee represented by a union—even though not a union member—must pay to the union, as a condition of employment, a service fee equal in amount to union dues."); Keller v. State Bar of Cal., 496 U.S. 1, 4 (1990) ("Petitioners, members of the State Bar of California, sued that body claiming its use of their membership dues to finance certain ideological or political activities to which they were opposed violated their rights under the First Amendment of the United States Constitution."); Janus v. AFSCME, Council 31, 585 U.S. 878, 884–85 (2018) (concerning forced union subsidization by employees "even if they choose not to join and strongly object to the positions the union takes in collective-bargaining and related activities").

111. *See, e.g.,* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 76 (1980) (deciding "whether state constitutional provisions, which permit individuals to exercise free speech and petition rights on the property of a privately owned shopping center to which the public is invited, violate the shopping center owner's property rights").

over an event,[112] none of which ask whether the speaker is forced to endorse something.

Legal disputes that do consider the question of endorsement, in turn, whether in compelled speech cases or otherwise, typically don't center on artworks. Endorsement is usually expressed through sponsorships,[113] commentary,[114] fundraising,[115] signs,[116] or campaigns.[117] Even when photographs are implicated in some form of endorsement analysis, artworks are not.[118] Cases that focus on art *per se* might ask about a work's meaning, as was the case in *Warhol*,[119] or on whether something is defamatory or obscene, as was the case with Robert Mapplethorpe's photographs,[120] but they don't try to determine whether the work itself endorses a particular point of view.

There is one notable exception—viz., cases that center on the Establishment Clause. At least until its official doctrinal funeral in 2022,[121] under the *Lemon* test in general[122] (and Justice O'Connor's endorsement test in particular)[123] courts looked for the government's endorsement of religion, which, in some instances, could be

112. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 572–73 (1995) ("Since every participating unit affects the message conveyed by the private organizers, the state courts' application of the statute produced an order essentially requiring petitioners to alter the expressive content of their parade.").

113. *See, e.g.*, Timothy Karoff, *In "Very Abnormal" Development, Longtime Sponsors Bail on San Francisco Pride*, SFGATE (Mar. 17, 2025), https://www.sfgate.com/sf-culture/article/longtime-sponsors-bail-on-sf-pride-20226582.php [https://web.archive.org/web/20250320220635/https://www.sfgate.com/sf-culture/article/longtime-sponsors-bail-on-sf-pride-20226582.php#expand].

114. *See, e.g.*, Jordan Valinsky, *Ben & Jerry's Says Its CEO Was Fired for the Company's Political Posts*, CNN BUSINESS (Mar. 19, 2025), https://www.cnn.com/2025/03/19/food/ben-and-jerrys-ceo-lawsuit/index.html [https://web.archive.org/web/20250918000034/https://www.cnn.com/2025/03/19/food/ben-and-jerrys-ceo-lawsuit/index.html].

115. *See, e.g.*, Protectmarriage.com v. Bowen, 830 F. Supp. 2d 914, 917 (E.D. Cal. 2011) ("In support of the Proposition 8 campaign, such committees raised in excess of $42 million from more than 46,000 individual contributors.").

116. *See, e.g.*, Members of City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789 (1984).

117. *See, e.g.*, Republican Party of Minn. v. White, 536 U.S. 765 (2002) (determining constitutionality of a state law prohibiting candidates for judicial office from announcing views on disputed legal or political issues).

118. *See, e.g.*, Downing v. Abercrombie & Fitch, 265 F.3d 994, 1008 (9th Cir. 2001) (Abercrombie included in its catalog a photo of two surfers who took issue with the inclusion of their image in the publication. The Ninth Circuit thought that "[a] jury could reasonably find that Abercrombie intended to indicate to consumers that these legendary surfers were endorsing Abercrombie's merchandise.").

119. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508 (2023) (deciding whether Andy Warhol's appropriation of a photograph conveyed new meaning under the fair use doctrine).

120. City of Cincinnati v. Contemp. Arts Ctr., 566 N.E.2d 207 (Ohio Mun. Ct. 1990).

121. Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 534 (2022) ("[T]his Court long ago abandoned *Lemon* and its endorsement test offshoot.").

122. Lemon v. Kurtzman, 403 U.S. 602 (1971).

123. *See* Lynch v. Donnelly, 465 U.S. 668 (1984).

through artworks.[124] Beyond the Establishment Clause cases, however, when the question of endorsement comes up in connection with art, it's usually not a question of whether the artist, work, or owner endorses a particular point of view, but whether someone else endorses the work itself.[125] If someone's mural is included in a film,[126] for example, or if someone's name is in a movie's title,[127] have those individuals endorsed the movie?

By asking whether an artist or artwork endorses a particular viewpoint, same-sex wedding cases ask a unique and odd question. And the odd question has produced odd answers.

B. THE ILLUSION OF ENDORSEMENT

An act which is politically neutral—such as solicitation for political donations[128]—may become politically charged by virtue of its association with political speech. While a signature itself is not ideological, it may become ideological by virtue of being tethered to a political petition.[129] In *McIntyre v. Ohio Elections Comm'n*, the Supreme Court struck down a requirement to attach one's name to leaflets precisely to avoid linkage between political speech and the speaker's

124. *See* Weinbaum v. City of Las Cruces, N.M., 541 F.3d 1017, 1021 (10th Cir. 2008) ("Paul Weinbaum, a resident of the Las Cruces area, brought two separate suits under 42 U.S.C. § 1983 claiming that Las Cruces, New Mexico (the 'City') and the Las Cruces Public School District (the 'District') have violated the Establishment Clause of the First Amendment by displaying, in various forms, three crosses on public property.").

125. *See, e.g.*, Rogers v. Grimaldi, 875 F.2d 994, 1001 (2d Cir. 1989) (asking whether the real people named in the title of a film could be understood to endorse the movie); Kirby v. Sega of Am., Inc., 50 Cal. Rptr. 3d 607, 618 (2006) ("[A]ny public confusion that Kirby endorses SC5, based on similarities between her and Ulala, would arise from a false assumption that the game could not contain a character resembling Kirby without her imprimatur."); Downing v. Abercrombie & Fitch, 265 F.3d 994 (9th Cir. 2001) (finding that inclusion of a photograph in a catalogue could lead consumers to believe that the surfers in the image endorsed the clothing line); O'Connor v. Washburn Univ., 416 F.3d 1216 (10th Cir. 2005) (asking whether a university endorsed the artwork, not whether the artwork endorsed a particular point of view); LMNOPI v. XYZ Films, LLC, 449 F. Supp. 3d 86, 95 (E.D.N.Y. 2020) ("Plaintiffs have not alleged a single plausible fact that the inclusion of the Mural in the Film would serve to confuse consumers that Plaintiffs sponsored, endorsed, or were otherwise associated with the Film.").

126. *LMNOPI*, 449 F. Supp. 3d at 95.

127. *Rogers*, 875 F.2d 994.

128. Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 632 (1980) ("Soliciting financial support is undoubtedly subject to reasonable regulation but the latter must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease. Canvassers in such contexts are necessarily more than solicitors for money. Furthermore, because charitable solicitation does more than inform private economic decisions and is not primarily concerned with providing information about the characteristics and costs of goods and services, it has not been dealt with in our cases as a variety of purely commercial speech.").

129. Doe v. Reed, 561 U.S. 186, 194–95 (2010) ("The compelled disclosure of signatory information on referendum petitions is subject to review under the First Amendment. An individual expresses a view on a political matter when he signs a petition under Washington's referendum procedure.").

identity.[130] Unlike the political leaflets in *McIntyre*, however, same-sex weddings are simply weddings. They are not inherently political or controversial. But they can be—and, of course, have been—politicized. So much so, in fact, that, to some observers, any engagement short of express disapproval appears to be implicit approval. Below, I offer two arguments against the suggestion that providing services in connection with a wedding amounts to endorsement.

1. Participation versus Proximity

Does the fact that I'm at a wedding taking photos of the wedding or making a cake for the wedding mean that I like and support the couple? In other words, does my apparent immersion in the event make a doctrinal difference? The Supreme Court thought that might be the case, at least in some instances. In *Masterpiece Cakeshop*, the Court reasoned that the cake baker "is an active participant in the wedding celebration," and that "[w]hen it comes to weddings, it can be assumed that a member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony without denial of his or her right to the free exercise of religion."[131] Other plaintiffs have expressed a reluctance to attend a same-sex wedding: "Carpenter also alleges that the challenged laws violate the Establishment Clause by forcing her to attend and participate in religious ceremonies to which she objects."[132]

But the generation of wedding content is not participatory in the same sense that presiding over a wedding is participatory. A member of the clergy is an indispensable part of a traditional Christian wedding. The priest's speech act—i.e., the pronouncement that the couple are now married—is what J.L. Austin categorized as an illocutionary act, or speech that generates a practical result.[133] Indeed, Austin himself uses wedding vows as an example of an illocutionary act.[134] The priest is essential to the ceremony, much as signatures on a marriage license are necessary for legal recognition of a marriage. In contrast, nothing that service providers do is essential to the outcome or validity of a wedding.[135]

A photographer's presence at the wedding is proximity, not participation, and the provider's service is an ancillary activity rather than an act integral to the event.

130. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995).

131. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617, 632, 658 (2018).

132. Emilee Carpenter, LLC v. James, 107 F.4th 92, 111 (2d Cir. 2024).

133. *See generally*, J.L. AUSTIN, *Lecture VIII*, in HOW TO DO THINGS WITH WORDS: THE WILLIAM JAMES LECTURES DELIVERED AT HARVARD UNIVERSITY IN 1955, at 94 (J.O. Urmson & Marina Sbisà eds., 2d ed. 1975) (ebook).

134. *Id.* at 12–13 (*Lecture II*) ("One of our examples was, for instance, the utterance 'I do' (take this woman to be my lawful wedded wife), as uttered in the course of a marriage ceremony. Here we should say that in saying these words we are *doing* something—namely, marrying, rather than *reporting* something, namely *that* we are marrying.").

135. It's important to note, too, that, despite being central to the wedding, a priest need not actually endorse the couple by virtue of marrying them. Refusing to do so may be a form of disapproval, but the converse is not necessarily true; a priest marrying the couple may not object to the wedding, but it would be a leap to say that the priest *ipso facto* endorses the couple or any aspect of their relationship.

In *Masterpiece Cakeshop*, the Court tried to fuse the two by noting that in "addition to creating and delivering the cake—a focal point of the wedding celebration—Phillips sometimes stays and interacts with the guests at the wedding."[136] But hanging out with the cast after a play doesn't make you part of the show or a Broadway star. Proximity—i.e., photographing a wedding in person—and manufacture—i.e., making cakes or invitations—are not participation or, by vague implication, a form of endorsement.

The fundamentally non-participatory aspect of wedding services is clear when we compare wedding photography to pornography and crush videos.[137] In the case of the last two examples, the goal of production is to generate a specific type of content; the videographer is part of the group of people who orchestrate a production scenario precisely to generate pornographic or abusive material. The generation of specific content requires the videographer's participation. (Whether such participation is endorsement is a separate question; one might simply do it for the commercial gain, or some other reason that is not endorsement *per se*.) The purpose of a wedding, in contrast, isn't to generate content—be it photographs or wedding cakes—but to achieve a specific outcome, i.e., to marry two people. And that result does not in any way depend on the presence or participation of a wedding photographer or any other service provider. If a wedding cake is destroyed, after all, the wedding can—and likely will—go on.[138] And while it is self-evident that a wedding "cake's purpose is to mark the beginning of a new marriage and to celebrate the couple," it's not the service provider celebrating the couple.[139] The couple, their friends, and their family are using the service provider's detachable speech to communicate their own celebratory message. It's thus inaccurate to say that "creating a wedding cake for a same-sex wedding would be equivalent to participating in a celebration that is contrary to his own most deeply held beliefs."[140]

Put yet another way, service providers are not participating in the causal chain that leads to a specific outcome, which distinguishes wedding services from cases like *Thomas*, *Hobby Lobby*, and *Janus*, where the compulsion turned on the requirement to support—practically or financially—a contested issue or result.[141]

136. *Masterpiece*, 584 U.S. at 658 (Thomas, J., concurring in part).

137. United States v. Stevens, 559 U.S. 460 (2010). Crush videos, which are films of extreme animal abuse, depict women in stilettos crushing small animals to death in order to satisfy the viewer's sexual fetish.

138. *See* u/Plastic-Tension-8973, REDDIT (r/cakedecorating), *I destroyed a wedding cake*, (Sep. 1, 2024), https://www.reddit.com/r/cakedecorating/comments/1f6g0xn/i_destroyed_a_wedding_cake [https://web.archive.org/web/20240929132753/https://www.reddit.com/r/cakedecorating/comments/1f6g0xn/i_destroyed_a_wedding_cake/].

139. *Masterpiece*, 584 U.S. at 659 (Thomas, J., concurring in part).

140. *Id.* at 626.

141. Thomas v. Rev. Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 709 (1981) (manufacture of items used in warfare); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 689–90 (2014) (provision of "health-insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies' owners"); Janus v. AFSCME, Council 31, 585 U.S. 878, 884–85 (2018) (union subsidization by

In a word, there is no enablement. Unlike the couple and the clergy, who are integral parts of the event and necessary to the success of the intended outcome, the photographer and the baker are conceptually and practically outside the ceremony.[142]

2. Mistaken Motivation

Courts overlook the simple fact that the couple selects the content creator rather than the other way around. On that basis alone, it would make sense to say that the couple endorses the provider. The converse, however, is an illogical leap. Similarly, courts overlook the primary purpose of wedding services. While "the degree of First Amendment protection is not diminished merely because . . . speech is sold rather than given away," for compelled-speech analysis the purpose of the speech is significant.[143] The provider's personal ideology simply isn't part of the commercial arrangement. Service providers generate content which is meant for adoption by the commissioning party not only in the purely mechanical sense—e.g., I pick up the sign that I find lying on the ground—but also in the deeper sense that it's meant to convey the adopting party's values—i.e., I pick up the sign because I believe in what the sign says and I want everyone to know it. Conversely, couples don't engage the service provider for the provider's endorsement or expression of personal views. Indeed, it's unlikely that any couple would give a baker the discretion to decide what message to include on the wedding cake. The suggestion that service providers generate wedding content as a form of endorsement thus places wedding content entirely outside its intended purpose and ignores its commercial context.

The incongruity of framing a primarily commercial transaction as an exercise in self-expression is underscored when, if only as a thought exercise, we look at weddings from a freedom of association perspective. In *Roberts v. U.S. Jaycees*, the Court noted that family relationships receive a higher degree of constitutional protection because of their unique relational aspects: "Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life."[144] Professional relationships, in contrast, receive a much lower degree of

employees, "even if they choose not to join and strongly object to the positions the union takes in collective bargaining and related activities").

142. Courts have largely and inexplicably overlooked this line of argument, even though a New Mexico district court made a similar distinction years ago, in *Elane Photography, LLC v. Willock*, No. CV-2008-06632, 2009 WL 8747805, at *8 (N.M. Dist. Dec. 11, 2009) ("Plaintiff and its owner-operator is not being forced to participate in any ceremony or ritual; the only requirement is that she photograph the event. This is no different from the caterer or florist attending the ceremony in order to provide its commercial service; they attend it, not participate in it.").

143. Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 756 n.5 (1988).

144. Roberts v. U.S. Jaycees, 468 U.S. 609, 619–20 (1984).

constitutional deference precisely by virtue of those aspects' absence.[145] Unlike the local chapters in *Jaycees*, which had virtually no selection criteria,[146] wedding events are generally selective, and, more to the point, based on personal relationships. The couple and their guests are part of the "special community of thoughts, experiences, and beliefs," albeit one that is wider than the immediate family circle.[147] Service providers, on the other hand, don't attend weddings or generate wedding content for personal reasons. They provide an ancillary service—either directly and in real time (as with photography), or indirectly by providing accessories for use in and in connection with the wedding (as with invitations and cakes).

3. Mistaken Attribution

In connection with images, the endorsement argument is fundamentally predicated on the idea that documenting a same-sex wedding is tantamount to its endorsement. But the view that content aligns with the author's personal belief, even if that content is a work of art, is misplaced. The fundamental message of Magritte's *The Treachery of Images* is that art can't be trusted, after all, and Jean-Jacques Rousseau famously complained precisely about this aspect of theater: "What is the talent of the actor? It is the art of counterfeiting himself, or putting on another character than his own, of appearing different than he is, of becoming passion in cold blood, of saying what he does not think as naturally as if he really did think it, and, finally, of forgetting his own place by dint of taking another's."[148]

None of that means art doesn't reveal deeper truths about the proverbial human condition, about politics, and so on. "Seriously, the theater is a most useful political tool; it's a place where we go to hear the truth."[149] Even if the ultimate message reveals something about society, however, we can't be sure that it reflects the artist's personal viewpoint. Levin may or may not represent Tolstoy's views—there is no way for us to know.[150] The author of *Anne of Green Gables* complained that

145. *Id.* at 620 ("Conversely, an association lacking these qualities—such as a large business enterprise—seems remote from the concerns giving rise to this constitutional protection. . . . Determining the limits of state authority over an individual's freedom to enter into a particular association therefore unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments.").

146. *Id.* at 621 ("[T]he local chapters of the Jaycees are neither small nor selective.").

147. *Id.* at 620.

148. René Magritte, *La trahison des images [The Treachery of Images]* (painting, 1929), https://collections.lacma.org/node/239578 [https://web.archive.org/web/20251008141332/https://collections.lacma.org/node/239578] (last visited Oct. 8, 2025); JEAN-JACQUES ROUSSEAU & JEAN LE ROND D'ALEMBERT, LETTER TO D'ALEMBERT AND WRITINGS FOR THE THEATER 309 (DARTMOUTH COLL. 2004).

149. Steven Dzielak, *I Just Kept Writing*, in DAVID MAMET IN CONVERSATION 33 (Leslie Kane, ed., UNIV. OF MICH. PRESS 2001).

150. LEO TOLSTOY, ANNA KARENINA (Richard Pevear & Larissa Volokhonsky trans., Penguin Books ed. 2001).

readers equated her with the character. "People were never right in saying I was 'Anne,'" she told a fellow writer, Ephraim Weber, in a 1921 letter, "but, *in some respects*, they will be right if they write me down as *Emily*," referring to *Emily of New Moon*, a later novel.[151] In other words, the content of a work and the author's actual ideology are distinct and independent of one another.

A handful of images illustrate this distinction and underscore the analytical frailty of equating the portrayal of something with the author's endorsement. When the Brooklyn Bridge opened to the public in 1883, New York City celebrated the event with a massive display of fireworks. Currier & Ives, the company behind countless images of early United States, issued a chromolithograph of the event:[152]

The image is replete with fireworks and festivity, and the chromolithograph appears to be a celebration of the celebration. But is this a fair reading? The opening itself was not without controversy. The bridge opened on Queen Victoria's birthday, and, in protest, New York City's sizable Irish, working-class population—responsible for the lion's share of construction—refused to attend.[153] Refusal to attend—as the

151. V.M. Braganza, *The Author of "Anne of Green Gables" Lived a Far Less Charmed Life than Her Beloved Heroine*, SMITHSONIAN MAG. (Apr./May 2023), https://www.smithsonianmag.com/arts-culture/lm-montgomery-anne-green-gables-life-180981839 [https://web.archive.org/web/20250919014054/https://www.smithsonianmag.com/arts-culture/lm-montgomery-anne-green-gables-life-180981839/].

152. Currier & Ives, *The Grand Display of Fireworks and Illuminations at the Opening of the Great Suspension Bridge between New York and Brooklyn on the Evening of May 24, 1883* (color lithograph, 1883), https://www.metmuseum.org/art/collection/search/341752 [https://web.archive.org/web/20251008142850/https://www.metmuseum.org/art/collection/search/341752] (last visited Oct. 8, 2025).

153. *See* Richard Haw, *The Opening of the Brooklyn Bridge: Consensus or Exclusion?*, 84 N.Y. HIST. 152, 159 (2003) ("The trustees . . . believed that the conflict in dates was unimportant and declared

refusal to provide services—is a clear message of disapproval. But does merely portraying the event send a message of endorsement or any other ideology? Is it fair to assume that just because the image is celebratory the people behind it endorsed the event, the bridge, or the fireworks? Or is this an unjustified analytical leap?

Let's consider a less happy event. Jacques-Louis David drew this image of Marie Antoinette on October 16, 1793:[154]

themselves happy with their original decision. In protest, New York's Irish population staged a boycott and did not attend the bridge's opening.").

154. Jacques-Louis David, *Marie Antoinette on Her Way to the Guillotine* (drawing, 1793), https://commons.wikimedia.org/wiki/File:Jacques-Louis_David_-_Marie_Antoinette_on_the_Way_to_the_Guillotine.jpg [https://web.archive.org/web/20251008143123/https://commons.wikimedia.org/wiki/File:Jacques-Louis_David_-_Marie_Antoinette_on_the_Way_to_the_Guillotine.jpg] (last visited Oct. 8, 2025).

The image shows the queen of France in plain garb with her hands behind her back. It's a somber moment; she is on her way to the guillotine. But it's not something we'd know from the image, which shows her in a decontextualized vacuum. More to the point, we can't, simply from looking at the image, determine David's opinion about the queen, the trial, the execution, or the French Revolution. The image, in other words, reveals nothing about the artist's ethical position.

Since the queen has been sent to her death, though, should we assume that the image condemns the event? Can we automatically assume that something is not an endorsement simply because the imagery depicts unethical, ugly, unhappy, or controversial content? Conversely, should we assume something is an endorsement because it is a happy event?

The opacity of the photographer's ideology is highlighted by the well-known Alfred Eisenstaedt photograph taken on V-J Day in Times Square:[155]

155. Alfred Eisenstaedt, *V-J Day in Times Square* (photograph, 1945), https://www.life.com/history/v-j-day-kiss-times-square/

We can be sure that Eisenstaedt documented a simple fact: a man dressed as a sailor kissing a woman dressed as a nurse as they appear to celebrate America's victory over Japan in New York. But we can't be sure that he, too, was celebrating. The precariousness of any interpretation is further underscored by the fact that, contrary to longstanding narratives, not only was the woman in the photograph *not* a nurse (she was a dental assistant wearing a nurse's outfit), but, according to some, she was an unwilling participant in the moment.[156]

Abraham Zapruder's film of John F. Kennedy's assassination in Dallas brutally highlights the incongruity of the endorsement equivalency. The film was meant to be a memento, something for his family to cherish.[157] It would be nonsense on stilts to assume that he endorsed Kennedy's assassination. If filming or photographing something were inherently its endorsement, undercover images of agricultural facilities would have to be categorized that way, too—which, of course, would be contrary to their purpose of exposing animal abuse.[158]

It's easy enough to think of other examples. Is Warhol's *White Disaster (White Car Crash 19 Times)* an endorsement of the car accident?[159] If I took photos of signs in the parade contested in *Hurley*, would I be endorsing their messages?[160] Did WeeGee approve of the crimes he documented?[161] Did Donna Ferrato, who

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[https://web.archive.org/web/20251008143703/https://www.life.com/history/v-j-day-kiss-times-square/] (last visited Oct. 8, 2025).

156. *See* Eli Rosenberg, *Greta Friedman, Who Claimed to Be Nurse in V-J Day Photo, Dies at 92*, N.Y. TIMES (Sep. 10, 2016) (discussing the view that the kiss was actually an assault), https://www.nytimes.com/2016/09/11/nyregion/greta-friedman-who-claimed-to-be-the-nurse-in-a-famous-v-j-day-photo-dies-at-92.html
[https://web.archive.org/web/20250911112649/http://www.nytimes.com/2016/09/11/nyregion/greta-friedman-who-claimed-to-be-the-nurse-in-a-famous-v-j-day-photo-dies-at-92.html?_r=0]; Brooke L. Blower, *WWII's Most Iconic Kiss Wasn't Romantic—It Was Terrifying*, WASH. POST (Feb. 22, 2019), https://www.washingtonpost.com/outlook/2019/02/22/wwiis-most-iconic-kiss-wasnt-romantic-it-was-assault
[https://web.archive.org/web/20250919020221/https://www.washingtonpost.com/outlook/2019/02/22/wwiis-most-iconic-kiss-wasnt-romantic-it-was-assault/]; Eliza Berman, *More from the Scene of That Famous V-J Day Kiss in Times* Square, LIFE (https://www.life.com/history/v-j-day-kiss-times-square/ [https://web.archive.org/web/20251008143703/https://www.life.com/history/v-j-day-kiss-times-square/] (last visited Oct. 8, 2025).

157. *See* A.O. Scott, *Footage of Death Plays on in Memory*, N.Y. TIMES (Nov. 15, 2013) https://www.nytimes.com/2013/11/17/movies/abraham-zapruder-and-the-evolution-of-film.html [https://web.archive.org/web/20251008145458/https://www.nytimes.com/2013/11/17/movies/abraham-zapruder-and-the-evolution-of-film.html].

158. *See* Animal Legal Def. Fund v. Herbert, 263 F. Supp. 3d 1193 (D. Utah 2017).

159. Molly Enking, *Andy Warhol's Twelve-Foot-Tall "White Disaster" Could Sell for $80 Million*, SMITHSONIAN MAG. (Nov. 2, 2022), https://www.smithsonianmag.com/smart-news/andy-warhols-white-disaster-not-seen-in-15-years-is-now-on-auctionand-could-go-for-more-than-80-million-180981056 [https://web.archive.org/web/20250714192933/https://www.smithsonianmag.com/smart-news/andy-warhols-white-disaster-not-seen-in-15-years-is-now-on-auctionand-could-go-for-more-than-80-million-180981056/].

160. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557 (1995).

161. *See WeeGee*, INT'L CTR. OF PHOTOGRAPHY, https://www.icp.org/browse/archive/constituents/weegee

extensively documented domestic violence, endorse abuse?[162] These are rhetorical questions, of course. Photographers consistently cover materials they find to be "repugnant to their moral, religious, and political beliefs."[163] Finding endorsement in those photos would be illogical.

Consider these two examples from case law.

> In the course of the investigation following the events of June 11, 2001, it was determined that the defendants' mobile home was maintained in a deplorable condition. Garbage and clothes, including dirty diapers, were strewn throughout the home. Animal feces were in the living area. Broken glass and numerous small items were all over the floor. Dirty dishes were piled up and the floor was filthy. Photographs were taken depicting the residence in this appalling condition.[164]

> Women in the mental health pods have been excluded, due to their disabilities, from programs and services that are generally available to nondisabled women, and, as such, have nothing to occupy their time . . . As a consequence, women with serious mental illness languished inside empty isolation cells, day after day, with nothing to do but stare at the cinderblock walls. As reflected in photographs taken during recent visits conducted in the middle of the day, person after person in the mental health pods can be observed lying prone and motionless on her bed or on the floor.[165]

Would it be fair to argue that the person who took the photos endorsed the living conditions? The more reasonable view is that the images are documents rather than endorsements. Similarly, photographing a wedding is not an endorsement any more than taking photos of deplorable prison conditions is an endorsement. As David Goldblatt, a South African photographer, noted, "photographers, by virtue of being there and 'recording' the scene, are witnesses and their work becomes evidence in an almost forensic sense."[166] Wedding photographs appear celebratory because the event is celebratory and because of industry standards that dictate common stylistic forms. But in themselves wedding photographs are nevertheless value-neutral documents rather than personal, ideological expression.

In short, the endorsement equivalency—i.e., the suggestion that documenting a wedding is endorsing it—is erroneous. The photographer is not communicating an endorsement by virtue of documenting an event—whatever that event may be. Fundamentally, a photographer documenting a wedding is no different than a

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[https://web.archive.org/web/20251008150306/https://www.icp.org/browse/archive/constituents/weegee] (last visited Oct. 8, 2025).

162. *See Donna Ferrato—Living with the Enemy*, INT'L CTR. OF PHOTOGRAPHY, https://www.icp.org/browse/archive/collections/donna-ferrato-living-with-the-enemy [https://web.archive.org/web/20251008150727/https://www.icp.org/browse/archive/collections/donna-ferrato-living-with-the-enemy] (last visited Oct. 8, 2025).

163. Wooley v. Maynard, 430 U.S. 705, 707 (1977).

164. Grammer v. Commonwealth, No. 2002-CA-000530-MR, 2003 Ky. App. Unpub. LEXIS 1150, at *2 (Ct. App. Aug. 8, 2003).

165. Ga. Advoc. Off. v. Jackson, No. 1:19-CV-1634-WMR-JFK, 2019 U.S. Dist. LEXIS 238805, at *11–12 (N.D. Ga. Sep. 23, 2019).

166. David Goldblatt, *Interview with Mark Haworth-Booth*, in DOCUMENTARY 49 (Julian Stallabrass, ed., WHITECHAPEL GALLERY & MIT PRESS 2013).

police officer writing an accident report. It may be unpleasant to some, but it's not advocacy. In effect, then, the endorsement argument is not predicated on photographic practice (since it's not inherently an endorsement) or on authorial intent (since photographers, even those who aren't opposed to same-sex marriage, are simply documenting rather than endorsing the wedding). Which leaves only one other basis for finding endorsement—i.e., audience interpretation. If, in other words, photographing an event is not endorsement, and if the photographer doesn't intend to endorse the event, the only other basis for finding endorsement is the appearance of endorsement.

For compelled speech purposes, however, audience perception is irrelevant. In the context of trademark law, Establishment Clause case law, and defamation jurisprudence, confusion about the message is important because of the message's impact on the audience. In the case of trademark law, the customer is confused and misled, which itself is a cognizable harm.[167] In the context of the Establishment Clause, the nonadherent is made to feel left out of the wider community.[168] In the case of defamation, the audience believes a falsehood about someone, and that person's reputation suffers as a result.[169] In those situations, what the speaker believes doesn't much matter because the harm results from what the audience (wrongly) believes.[170] In the case of compelled speech, however, the antipodes are reversed. In the paradigm compelled-speech scenario, the harm flows from the speaker's forced speech, not from the audience's lack of comprehension or misunderstanding. It's the forced salute to the flag rather than the perception of the salute that matters. If a bystander misunderstands the salute (maybe I am being ironic, for instance), I haven't been compelled to speak—I've just been misunderstood. Audience perception, in other words, can't be the basis of an endorsement claim. If it were, my speech would be compelled whenever someone misunderstood me.

As a doctrinal matter, *Wooley* appears to provide a counterargument.[171] After all, in that case George and Maxine didn't agree with the message, but the fact that they were effectively broadcasting it to the world created the impression that they did.[172] *Wooley* is open to the same criticism as the wedding endorsement argument—viz., the fact that some people may have attributed that meaning to the Maynards isn't tantamount to compelled speech. But, in addition, there are two critical differences between the license plate scenario and wedding photos. First,

167. *See* 15 U.S.C. § 1125.

168. *See* Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring) ("Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.").

169. *See, e.g.*, Celle v. Filipino Reporter Enters. Inc., 209 F.3d 163, 177 (2d Cir. 2000).

170. Actual malice requires an assessment of the speaker's state of mind, but the harm itself flows from the reader's interpretation. *See id.* at 334.

171. Wooley v. Maynard, 430 U.S. 705 (1977).

172. *Id.* at 715 ("New Hampshire's statute in effect requires that appellees use their private property as a 'mobile billboard' for the State's ideological message or suffer a penalty.").

unlike the New Hampshire imperative to "Live Free or Die," a wedding photograph is not an expression of an ideology. It's a value-neutral document rather than the expression of a moral position. Second, unlike Maxine and George, who were obligated to carry the message around with them whenever they drove their car, the photographer isn't required to broadcast the photos to the public. On the contrary, the detachable photographic message is created for the couple, who, like the front lawn sign, may then elect to broadcast it themselves—on behalf of themselves, not the photographer.

The argument that wedding photographs are an endorsement is thus predicated on an illusion. First, photos are not inherently (or at all) an endorsement or expression of an ideology. Second, a photographer isn't forced to display the photos with apparent approval (or at all). Third, audience perception and misunderstanding of the photos is immaterial. By any relevant measure, there is no endorsement in wedding photographs. And since there is no endorsement, there is no compulsion to endorse.

C. THE IRONY OF THE ENDORSEMENT ARGUMENT

In *303 Creative*, the plaintiff "alleged that, if she enters the wedding website business to celebrate marriages she does endorse, she faces a credible threat that Colorado will seek to use CADA to compel her to create websites celebrating marriages she does not endorse."[173] This way of framing the dispute assumes the very thing that courts have yet to prove—i.e., that documenting an event or providing content for the event is the same thing as endorsement. The illusion of endorsement is substantively sustained only if courts create room for discretion in the first place—i.e., if they allow service providers to pick and choose the couples that they deem acceptable.

Put another way, the argument that providing wedding services is an expression of a political view becomes feasible only if courts allow service providers to pick and choose their clients in the first place. If service providers don't have the option to pick and choose, however, they're merely following the law, much as I'm just following the law—rather than endorsing it—when I drive the speed limit on a highway. In other words, it's precisely by allowing service providers to select their favorite couples that courts have created space for the very endorsement the opinions erroneously suggest is already present in the images themselves.

The illusion of endorsement argument evaporates if the discretion to choose clientele is removed. If I drive 55 miles per hour, do I endorse the speed limit? Maybe, if—as was the case before the 1960s—the speed limit is "reasonable and proper," and I have the option of choosing how fast to drive.[174] Once there are

173. 303 Creative LLC v. Elenis, 600 U.S. 570, 581 (2023).

174. *See, e.g.*, *Iowa Used to Have No Limit on Highway Speed*, RADIO IOWA (July 1, 2005), https://www.radioiowa.com/2005/07/01/iowa-used-to-have-no-limit-on-highway-speed/ [https://web.archive.org/web/20251104175747/https://www.radioiowa.com/2005/07/01/iowa-used-to-have-no-limit-on-highway-speed/].

mandated speed limits, however, the most that can be said is that I am staying within the bounds of the law—not that I endorse the law in any way by virtue of complying with it. In *Lehman v. Shaker*, the Supreme Court worried that, if a city were allowed the discretion to permit advertising by some political candidates but not by others, it could be accused of favoritism.[175] The city's option to pick and choose created the illusion of endorsement. But a service provider who is obligated to treat all clients equally *ipso facto* can't approve or disapprove specific cultural praxes any more than a public transport agency can approve certain candidates and reject others. Endorsement—actual or imagined—simply doesn't enter the picture.

Once the false equivalency is dismantled and the endorsement variable is removed, we end up largely in the theoretical space that the Supreme Court identified in 2006 in connection with the Solomon Amendment, which denied certain federal funds to universities whose law schools prohibited military on-campus recruiting "because of [their] disagreement with the Government's policy on homosexuals in the military."[176] In that opinion, the Court reasoned that "[n]othing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military's policies."[177] We can persuasively make the parallel argument that nothing in standard wedding content suggests that wedding service providers agree with or otherwise endorse the couple or the marriage.

IV. JUDICIAL REVIEW

As a genre, wedding content is not artwork, an op-ed piece, creative fiction, or any other content designed "to editorialize on any subject, cultural, philosophical, or political."[178] Wedding content is not "persuasive speech" that aims to convince the reader of something or to convey the service provider's "opinion and political attitude."[179] Vendors do not communicate personal ideological beliefs, aim to "inform the public about [their] beliefs," or set out to "inform individuals of their causes through distributing their literature, engaging in persuasive speech, and selling merchandise with messages affixed to the product."[180] In *Emilee*, the Second Circuit asked whose speech is implicated in wedding content.[181] "To state a compelled speech claim, it is not enough for a plaintiff to show that the service at

175. Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (1974) ("There could be lurking doubts about favoritism.").

176. Rumsfeld v. Forum for Acad. & Inst. Rights, Inc., 547 U.S. 47, 51 (2006).

177. *Id.* at 65.

178. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 761 (1976).

179. Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 632 (1980) ("persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues"); R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1217 (D.C. Cir. 2012) ("They are unabashed attempts to evoke emotion (and perhaps embarrassment) and browbeat consumers into quitting."); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 636 (1943).

180. Gaudiya Vaishnava Soc'y v. City & Cnty. of S.F., 952 F.2d 1059, 1060, 1064 (9th Cir. 1990).

181. Emilee Carpenter, LLC v. James, 107 F.4th 92 (2d Cir. 2024).

issue involves a medium of expression. The plaintiff must also demonstrate that the expressive activity is her own—that is, she created the expressive content herself or, by compiling or curating third-party content in some forum, she is also engaged in her own expressive activity."[182] Since wedding content is not ideological, personal speech but made-to-order detachable speech, however, for compelled speech purposes the answer doesn't much matter. We could argue that the service provider is "really a conduit or an agent for its clients," as a New Mexico court did in 2009.[183] Even if we accept that wedding content is the service provider's speech, however, because it's detachable speech that doesn't communicate the provider's personal views, it doesn't convey endorsement or any other ethical position. Wedding content is ideologically neutral speech generated for commercial reasons rather than as a means of self-expression. And since there is no requirement to express values in violation of the First Amendment "principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence," there is no compulsion to betray one's personal values.[184]

Public accommodation laws, in turn, in no way interfere with a provider's discretionary creation of wedding content. They don't require service providers to portray one group one way and another group another way,[185] or, indeed, to portray couples in any particular way. Instead, they simply demand equal treatment[186]—not with regard to content, but with regard to the provider's client base. Rather than a content-based compulsion to speak, public accommodation laws regulate an economic activity—i.e., the selection of clientele. The claim the public accommodation laws regulate speech at all is erroneous.[187]

In effect, public accommodation laws—because they regulate conduct rather than speech, and because the type of speech they impact is non-ideological—don't require vendors to endorse or communicate any values. And once we do away with the artificial elevation of wedding content to the status of ideological artistic expression and personal speech, the compulsion argument disappears. In its wake, we are left with laws whose incidental impact on speech touches genres of content that have—uncontroversially—survived lower levels of review. Invitations may be

182. *Id.* at 104.

183. Elane Photography, LLC v. Willock, No. CV-2008-06632, 2009 WL 8747805 (N.M. Dist. Dec. 11, 2009).

184. Turner Broad. Sys. v. FCC, 512 U.S. 622, 641 (1994).

185. Reed v. Town of Gilbert, Az., ,576 U.S. 155, 156 (2015) ("The Sign Code, a paradigmatic example of content-based discrimination, singles out specific subject matter for differential treatment, even if it does not target viewpoints within that subject matter.").

186. *See, e.g.*, Zillow, Inc. v. Miller, , 460 (6th Cir. 2025) ("KORA's differential treatment does not reflect favor or disfavor toward the content of a requestor's message . . . The distinction drawn has nothing to do with the actual content created by the requestor.").

187. *See* 303 Creative LLC v. Elenis, 600 U.S. 570, 604 (2023) (Sotomayor, J., dissenting) (finding that "the law in question targets conduct, not speech."). With some variation, the Second Circuit picked up this thread last year. *See* Emilee Carpenter, LLC v. James, 107 F.4th 92, 104 (2d Cir. 2024) ("[W]hether Carpenter's actual wedding photography services constitute expressive conduct is an open threshold question.").

more aesthetically appealing than signage above a moving company's front,[188] for instance, but they both convey the same basic types of information—and signage regulations routinely survive intermediate scrutiny.[189] Cakes might be expressive, but, contrary to the *303 Creative* majority's dubious attempt to say otherwise, they are primarily functional. In *Kleinman*, the Fifth Circuit ruled that a junked car that was turned into a painted planter was nevertheless subject to reasonable state regulation precisely because it was primarily functional rather than expressive.[190] Drone photography and videography, too, have been subordinated to significant state interests.[191]

In sum, the "seriousness of the actual burden on First Amendment rights" in same-sex wedding cases is much weaker than courts have suggested.[192] Public accommodation laws don't target speech, and public accommodation law's incidental impact on speech affects content that is non-ideological and doesn't endorse couples, weddings, or marriage in general. In effect, there is no compulsion to say anything at all, much less to say something that endorses false values. As content-neutral laws, in turn, public accommodation requirements should be subject to intermediate rather than strict scrutiny, and they should easily withstand a First Amendment challenge. The significant governmental interest in preventing "the evil of private prejudice"[193] outweighs the incidental speech burden on reusable content that barely, if at all, rises above the status of "an ordinary commercial product."[194]

V. CONCLUSION

The speech–commercial product dichotomy tilts toward speech when we assume the speech is artistic expression imbued with personal ideology.[195] While it

188. *See* Peterson v. Vill. of Downers Grove, 150 F. Supp. 3d 910 (N.D. Ill. 2015).

189. *See, e.g.*, City of Austin v. Reagan Nat'l Advert. of Austin, LLC, 596 U.S. 61, 64 (2022) ("[T]he City of Austin, Texas (City), regulates signs that advertise things that are not located on the same premises as the sign, as well as signs that direct people to offsite locations. These are known as off-premises signs, and they include, most notably, billboards. The question presented is whether, under this Court's precedents interpreting the Free Speech Clause of the First Amendment, the City's regulation is subject to strict scrutiny. We hold that it is not.").

190. Kleinman v. City of San Marcos, 597 F.3d 323, 327–28 (5th Cir. 2010) ("When the 'expressive' component of an object, considered objectively in light of its function and utility, is at best secondary, the public display of the object is conduct subject to reasonable state regulation.").

191. *See, e.g.*, 360 Virtual Drone Servs. LLC v. Ritter, 102 F.4th 263, 280 (4th Cir. 2024) (holding that a state agency's requirement that surveyors be licensed did not violate a drone operator's free speech rights).

192. Davis v. FEC, 554 U.S. 724, 744 (2008).

193. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 492 (1989). For more about the impact of such discriminatory practices, see Craig Konnoth, *Discrimination Denials: Are Same-Sex Wedding Service Refusals Discriminatory?*, 124 COLUM. L. REV. 2003 (2024).

194. 303 Creative LLC v. Elenis, 600 U.S. 570, 593 (2023).

195. *Id.* ("Instead, Colorado says, this case involves only the sale of an ordinary commercial product and any burden on Ms. Smith's speech is purely 'incidental.' On the State's telling, then, speech more or less vanishes from the picture—and, with it, any need for First Amendment scrutiny . . . This alternative

may be expressive, however, wedding content does not convey the service provider's personal ideology. As shown above, photographers and videographers, rather than expressing personal points of view, document wedding ceremonies. Invitations and wedding websites, rather than personal viewpoints, communicate standard categories of information about the wedding and about the couple. And even if we agree with the Supreme Court's dubious claim that wedding cakes are primarily expressive, cakes, like the other categories of wedding content, are not personal ideological speech—they simply leverage traditional symbolism to convey cultural rather than personal meaning. Nor do aesthetic choices that providers make when assembling wedding content translate to ideology. Finally, wedding content, rather than being a unique artwork created *ex nihilo*, is routinely assembled through the reuse of templates that reflect industry norms. In short, wedding content is devoid of personal ideology and manufactured in line with market standards and according to specifications dictated by the commissioning entity. Wedding content may be protected speech by virtue of communicating an idea, but it is not a vehicle for the provider's personal viewpoints. The claim that service providers are forced to endorse same-sex weddings by virtue of providing services is therefore inaccurate. As Professor Elizabeth Sepper has noted, engaging in an economic activity is not tantamount to endorsement or disapproval.[196] And being part of an event or creating content for that event doesn't amount to endorsement, either. Just as you can photograph a political rally without supporting the candidate or cater a party you dislike, you can provide wedding services without taking—or communicating—an ethical position on the wedding.

theory, however, is difficult to square with the parties' stipulations. As we have seen, the State has stipulated that Ms. Smith does *not* seek to sell an ordinary commercial good but intends to create 'customized and tailored' speech for each couple.").

196. For more about this point, see Elizabeth Sepper, *Free Speech and the "Unique Evils" of Public Accommodations Discrimination*, 2020 U. CHI. LEGAL F. 273, 290 ("The fact that a business sells an item to someone does not imply its endorsement.").