



# **SPEAK NOW: A New Paradigm for Assessing Wedding Vendors' Objections to Same-Sex Weddings**

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**“Speak Now or  
Forever Hold  
Your Peace”**



# The Legal Landscape

- ***Obergefell v. Hodges***: marriage equality is protected by substantive due process regardless of sex
- ***Masterpiece Cakeshop v. Colorado Civil Rights Comm'n***: Commission's overt hostility to religion was grounds to reverse finding that bakery's refusal to bake a cake for same-sex customer's wedding violated state anti-discrimination law
- ***Arlene's Flowers v. Washington***: Washington Supreme Court's finding that flower arrangement is not sufficiently expressive to trigger a First Amendment right to object summarily reversed
- ***303 Creative v. Elenis***: Colorado's anti-discrimination laws violated website designer's free speech rights by compelling her to create a custom wedding website for a hypothetical same-sex couple



**Which wedding vendors have a First Amendment right to object?**

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# Existing Paradigms

- 1) **On vs. off label rights: exercise of rights defines the right**
- 2) **Inaction vs. action: objection must be actively communicated**
- 3) **The imbued test: is the wedding product sufficiently imbued with elements of communication?**
- 4) **The message test: what message is understood from the wedding product?**



# Proposed Paradigm

## Factor One: Knowledge of Identity

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- **Definition:** how aware of a couple's same-sex identity is the vendor
- **Rationale:** vendor's refusal to provide service cannot be understood as an objection absent knowledge
- **Support:** In *Masterpiece Cakeshop* and *Arlene's Flowers* the vendors personally knew and directly interacted with the customers and had specific knowledge of that their products would be placed in a same-sex wedding.
- **Application:** Some vendors will always have knowledge (i.e., officiants, on site providers). Others who sell non-personalized products remotely may never have knowledge.

# Proposed Paradigm

## Factor Two: Likelihood of Attribution

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- **Definition:** how likely is a vendor's product or service to be understood as communicating support for the idea of marriage equality
- **Rationale:** vendor's withdrawal of service does not communicate an objection if vendor's participation does not communicate support
- **Support:** In *303 Creative*, the Court cited the fact that Smith's company was identified on the custom website as a factor in protecting the company's free speech rights.
- **Application:** The less integral a product or service is to a wedding (i.e., transportation from the ceremony to the reception, napkins), the less likely the product or service is to communicate a message of support.

# Proposed Paradigm

## Factor Three: Necessity

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- **Definition:** how necessary is a product or service to the carrying out of a wedding ceremony
- **Rationale:** the withdrawal of necessary products or services impedes the ability of wedding to occur and therefore directly imposes an objection
- **Support:** In *Masterpiece Cakeshop*, the Court observed that officiants could not be compelled to perform a wedding if they objected under their First Amendment right to exercise their religion.
- **Application:** Those core services and products that are absolutely necessary to a wedding ceremony (i.e., officiants) most directly implicate speech and religious rights.





**Questions?**