

SPEAK NOW: A NEW PARADIGM FOR ASSESSING WEDDING VENDORS' FIRST AMENDMENT OBJECTIONS TO SAME-SEX WEDDINGS

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Speak now or forever hold your peace.

- Book of Common Prayer (1549)¹

A wedding traditionally ends with seven loaded words: “Speak now or forever hold your peace.”² Originally developed in medieval times as a mechanism for allowing objections to the marriage by attendees, the phrase was intended to ensure that neither party to the marriage was already married.³ A wedding has, therefore, historically included a space for speech by those other than the marrying couple at the conclusion of the ceremony.

But under modern Supreme Court jurisprudence, significantly more speech by participants in a wedding precedes these infamous seven words. As the Supreme Court intimated in a case about cake-baking, and more directly held in a case about website design, a panoply of wedding vendors engage in creative expression that ultimately becomes a part of a performative wedding event.⁴ Rather than expressing their objections at the end of the wedding ritual, these vendors may be speaking all along in

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¹ Sarah Zlotnick, *The History Behind “Speak Now or Forever Hold Your Peace”*, BRIDES, <https://www.brides.com/speak-now-or-forever-hold-your-peace-5100968> (last updated Sept. 27, 2023).

² *Id.*

³ *Ask the Editor, ‘Speak Your Peace’ and ‘Hold Your Peace’*, BRITANNICA DICTIONARY, <https://www.britannica.com/dictionary/eb/qa/speak-your-piece-and-hold-your-peace> (last visited Jan. 25, 2025); *Speak Now or Forever Hold Your Peace Wedding Script*, UNIVERSAL LIFE CHURCH, <https://www.ulc.org/wedding-ceremony-scripts/speak-now-wedding-ceremony-script> (last visited Jan. 25, 2025).

⁴ See 303 Creative LLC v. Elenis, 600 U.S. 570 (2023); Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm’n, 584 U.S. 617 (2018).

various ways, such as creating customized products, engaging in transactions for expressive purposes, or refusing to serve couples whose marriages the vendors deem offensive.

Same-sex weddings are one such example where certain wedding vendors desire to preemptively “speak now” rather than hold their peace. In the wake of *Obergefell v. Hodges*,⁵ which extended the right to marry to all couples regardless of sex, wedding vendors have increasingly asserted a legal right to object to the same-sex nature of the wedding.⁶ They claim a privilege to disregard anti-discrimination laws that protect sexual orientation by denying service at the point of sale rather than waiting until the end of the ceremony to state their objection.⁷

The Supreme Court has acknowledged that a custom wedding website creator cannot be compelled by state anti-discrimination laws to create speech for a same-sex couple’s wedding.⁸ The Court has also indicated that state administrative bodies must remain neutral to the religious perspectives that animate a wedding vendor’s objection.⁹ But in recognizing the First Amendment claims of wedding vendors, the Court has notably left unresolved significant questions about which wedding vendors in particular may assert a right to raise a religious objection to a same-sex wedding under the First Amendment right of free speech.¹⁰ Scholars have proposed multi-factored tests that examine the character of both the creative product, its process, and the legal claim being asserted to parse a strong free speech claim from a weak one.¹¹ These factors include the level of artistic control the vendor asserts,¹² the underlying message being conveyed,¹³ and how

⁵ *Obergefell v. Hodges*, 576 U.S. 644 (2015).

⁶ *See id.*; *see also* *Arlene’s Flowers v. Washington*, 585 U.S. 1013 (2018).

⁷ *Masterpiece Cakeshop, Ltd.*, 584 U.S. at 621. Interestingly, the website designer in *303 Creative* had not actually declined a requested sale, but rather had “decided to expand her offerings to include services for couples seeking websites for their weddings” and had yet to carry out her plans. *303 Creative LLC*, 600 U.S. at 579-80. The hypothetical nature of her objection is one basis of critique of the Supreme Court’s decision in *303 Creative*. *See, e.g.*, David Post, *The Volokh Conspiracy, Further Thoughts on Standing and the 303 Creative v. Elenis Case*, REASON (Mar. 29, 2024), <https://reason.com/volokh/2024/03/29/further-thoughts-on-standing-and-the-303-creative-v-elenis-case/>.

⁸ *303 Creative*, 600 U.S. at 597, 602-03.

⁹ *Masterpiece Cakeshop*, 584 U.S. at 638-40.

¹⁰ *See* Mark Strasser, *Masterpiece of Misdirection?*, 76 WASH. & LEE L. REV. 963, 1000 (2019) (“Regrettably, the Court [in *Masterpiece Cakeshop*] gave little direction about whether or why this case constitutes a new context in what ways our understanding of speech could or should be deepened.”).

¹¹ *See, e.g.*, Amy Sepinwall, *Free Speech and Off-Label Rights*, 54 GA. L. REV. 463 (2020).

¹² *Id.* at 486-87.

¹³ Chris Chung, *Baking a Cake: How to Draw the Line Between Protected Expressive Conduct and Something You Do*, 32 NOTRE DAME J.L. ETHICS & PUB. POL’Y 377, 380 (2018); *see also* *Spence v. Wash.*, 418 U.S. 405, 411 (1974) (focusing on whether expressive conduct conveys a “particularized message” as part of inquiry into whether conduct constitutes protected expression).

aligned the constitutional right being asserted is with the interest the vendor is trying to protect.¹⁴ Taken together, these factors focus on whether the vendor is sufficiently engaged in expressive activity or selling a speech-related product to assert a First Amendment free speech right to object.

But little attention has been paid to the objection side of the equation. In the article *Masterpiece of Misdirection?*, Mark Strasser questions whether inaction necessarily translates to a message of opposition.¹⁵ He points out that a person who does not pay their taxes because they object to a particular war initiative may not automatically be understood to be sending such a message.¹⁶ He contends that sincere belief coupled with inaction does not necessarily communicate objection.¹⁷ Thus, the existing judicial framework lacks a paradigm for assessing when wedding vendors' *refused* transactions send a message against the same-sex nature of a wedding.

To address this gap in the literature and jurisprudence, I propose adding three additional factors to the discussion: (1) the vendor's knowledge of the same-sex couple's gender identity at the time of the objection; (2) the likelihood that a message of endorsing the same-sex nature of the marriage will be attributed to the vendor's refused services; and (3) the necessity of the vendor's product to the wedding and its same-sex character. Rather than focusing on the expressive nature of the vendor's service or product, these factors hone in on the nature of the objection. Integral to a wedding vendor's claim that anti-discrimination laws unconstitutionally force objectionable expression is the vendor's right to express distaste in a particular wedding by declining a transaction.¹⁸ Thus, it is fair to consider whether the action taken by the vendor—rejecting a sale—actually communicates that message, or any message at all. These factors assist in making that inquiry.

This Article unfolds in three parts. Part One considers the Supreme Court's existing jurisprudence on wedding vendors' First Amendment free speech claims. Focusing on the Court's decision in *303 Creative LLC v. Elenis*,¹⁹ this section of the paper examines the assumptions and unanswered questions underlying the Supreme Court's recognition that performative

¹⁴ Sepinwall, *supra* note 12, at 497-98.

¹⁵ Strasser, *supra* note 11, at 1000-01.

¹⁶ *Id.*

¹⁷ *Id.* ("Even one's intending to send a message by performing an action is not along enough to make such an action speech or expressive conduct.").

¹⁸ See *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n*, 584 U.S. 617, 621 (2018) ("The shop's owner told the couple that he would not create a cake for their wedding because of his religious opposition to same-sex marriages . . .").

¹⁹ *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023).

aspects of a wedding by various vendors and participants involve expressive elements.

Part Two of the paper then explores the paradigms that others have proposed for determining which wedding vendors can validly assert that their services are entitled to First Amendment protection. These include the on-label versus off-label rights framework described by Amy Sepinwall,²⁰ the imbued and message tests culled by Chris Chung from the Supreme Court's decision in *Spence v. Washington*,²¹ and the context of the sale as highlighted by Caroline Mala Corbin.²²

Part Three then sets forth the three additional criteria I propose for examining wedding vendors' free speech claims. Focusing on the link between inaction and objection in the specific context of weddings, this part argues that requiring proof of a vendor's knowledge of the couple's gender identity, the likelihood that a vendor's creative work will be attributed to a message of support for same-sex weddings, and the necessity of vendor's service to the existence of the marriage will better sift out the claims of vendors entitled to First Amendment protection under prevailing Supreme Court doctrine.

The Article takes the jurisprudence as it finds it. This paper is neither a commentary on the correctness of the Supreme Court's wedding vendor cases nor a call to reform any particular aspect of the Court's existing body of law. Rather, by contributing additional factors for consideration, I seek to clarify the contours of what constitutes an objection in the specific context of services and products for wedding ceremonies. Other commentators have deftly discussed whether a vendor's work is sufficiently creative to warrant First Amendment treatment,²³ but questions remain as to when a vendor's rejection of a proposed transaction can be properly understood to communicate opposition to same-sex marriage. This paper explores that very limited topic.

I. WEDDINGS AND THE FIRST AMENDMENT: THE SUPREME COURT'S WEDDING VENDOR JURISPRUDENCE

On June 26, 2015, in the landmark case of *Obergefell v. Hodges*, the Supreme Court extended the right to marry to all persons regardless of sex.²⁴ Almost immediately, individuals whose services were necessary to a wedding, but who objected to same-sex marriage on religious grounds,

²⁰ Sepinwall, *supra* note 12, at 502-05.

²¹ Chung, *supra* note 14, at 402-06 (citing *Spence v. Washington*, 418 U.S. 405 (1973)).

²² Caroline Mala Corbin, *Speech or Conduct? The Free Speech Claims of Wedding Vendors*, 65 EMORY L.J. 241, 265-74 (2015).

²³ See *supra* notes 21-23.

²⁴ *Obergefell v. Hodges*, 576 U.S. 644 (2015).

began refusing to participate.²⁵ In one such case, a county clerk in Rowan County, Kentucky, Kim Davis, refused to issue marriage licenses at all, despite her statutory obligation to do so, because she objected to same-sex marriage.²⁶ She was ultimately enjoined by a federal district court from denying licenses to either heterosexual or same-sex couples.²⁷ In yet another case, Chief Justice of the Alabama Supreme Court Roy Moore issued an order instructing probate court judges in the state to withhold marriage licenses from same-sex couples.²⁸ He was suspended without pay for the remainder of his term for blatantly disregarding the Supreme Court's decision.²⁹

The issue ultimately reached the Supreme Court in a series of cases pitting the right to free exercise of religion and the right of free speech, on the one hand, against the right to marry on the other. The first such case was *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.³⁰ In *Masterpiece Cakeshop*, the Court overturned a decision of the Colorado Civil Rights Commission finding that a wedding cakebaker unlawfully discriminated against a same-sex couple by refusing to sell them a custom wedding cake.³¹ The Court did so based on comments made by commissioners at the administrative hearing that were hostile, rather than neutral, to the cakebaker's religious objections to same-sex marriage.³² In reaching this conclusion, the Court avoided answering what it characterized as "difficult questions" about whether the creation of a wedding cake is subject to free speech protection.³³

²⁵ Elizabeth Sepper, *Gays in the Moralized Marketplace*, 7 ALA. C.R. & C.L. L. REV. 129, 142-43 (2015) (cataloging instances of rejected transactions by wedding vendors involving same-sex weddings).

²⁶ See *Ermold v. Davis*, 963 F.3d 429, 432 (6th Cir. 2019) (describing clerk Kim Davis's refusal to issue marriage licenses in the wake of the *Obergefell* decision).

²⁷ *Id.*

²⁸ Camila Domonoske, *Alabama Chief Justice Orders Judges to Enforce Ban On Same-Sex Marriage*, NPR (Jan. 6, 2016) <https://www.npr.org/sections/thetwo-way/2016/01/06/462161670/alabama-chief-justice-orders-state-to-enforce-ban-on-same-sex-marriage> (attaching administrative order from Alabama Chief Justice Roy Moore requiring probate judges to deny marriage licenses to same-sex couples following *Obergefell*).

²⁹ Emma Margolin, *Roy Moore Suspended From Alabama Supreme Court For Anti-Gay Marriage Order*, NBC NEWS (Sept. 30, 2016), <https://www.nbcnews.com/feature/nbc-out/alabama-chief-justice-suspended-over-gay-marriage-stance-n657511>.

³⁰ *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n*, 584 U.S. 617 (2018).

³¹ *Id.*

³² *Id.* at 634 (indicating that one member of the Colorado Civil Rights Commission stated about the cake-baker: "he can 'believe what he wants to believe,' but cannot act on his religious beliefs 'if he decides to do business in the state'"); *Id.* at 634-635 (citing another Commission member as stating: "[I]f a businessman wants to do business in the state and he's got an issue with the—the law's impacting his personal belief system, he needs to look at being able to compromise."); *Id.* at 638-40.

³³ *Id.* at 624.

The Court had the opportunity to potentially answer those questions in *Arlene's Flowers, Inc. v. Washington*, a case in which a florist declined to sell flower arrangements to a gay couple for use in their wedding.³⁴ In reviewing whether Washington's anti-discrimination law could be constitutionally enforced against the florist, the Washington Supreme Court determined that the act of arranging flowers was not sufficiently expressive to trigger First Amendment free speech protection.³⁵ But rather than review this conclusion, the Supreme Court summarily reversed the Washington Supreme Court's decision and remanded the case for the lower court to consider the implications of *Masterpiece Cakeshop* on its holding.³⁶ Thus, the Supreme Court did not confront the question of whether florists' work is inherently expressive or whether it falls within the protection of the First Amendment's free speech clause.³⁷

The Supreme Court did, however, touch on this question in its most recent wedding vendor case, *303 Creative LLC v. Elenis*.³⁸ At issue in *303 Creative* was whether Colorado's anti-discrimination laws violated a website designer's free speech rights by compelling her to create a custom website for a same-sex wedding.³⁹ The Court concluded it did.⁴⁰ In reaching that conclusion, the Supreme Court made several important observations about the nature of the website designer's expression and its connection to her religious objection.

First, the Court determined that the website represented the designer's and not the married couple's expression.⁴¹ While acknowledging that the source material for the website would be the couple's story, the Court explained that the words and artwork on the website would be originally created by the designer.⁴² To the Court, this meant that the designer was the speaker, even though the specific website creator in *303 Creative* had never created such a custom wedding website before.⁴³ Thus, the Court assumed,

³⁴ *State v. Arlene's Flowers, Inc.*, 389 P.3d 543, ¶ 6 (Wash. 2017).

³⁵ *Id.* at 43-49.

³⁶ *Arlene's Florist, Inc. v. Washington*, 585 U.S. 1013 (2018).

³⁷ *Id.*

³⁸ *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023).

³⁹ *Id.* at 580-81.

⁴⁰ *Id.* at 602-03.

⁴¹ *Id.* at 588 ("[T]he wedding websites Ms. Smith seeks to create involve *her* speech . . . she will produce a final story for each couple using her own words and her own 'original artwork.'").

⁴² *Id.*

⁴³ *Id.* at 579 (noting that Lorrie Smith, the website designer who owned 303 Creative LLC, wanted to expand her website marketing business to include wedding websites and explaining how she envisions operating her wedding website business in the future); *Id.* at 580 ("While Ms. Smith has laid the groundwork for her new venture, she has yet to carry out her plans.").

in the absence of the actual website, that the ultimate creative product would reflect more of the designer's input than the couple's.

Next, the Court accepted at face value the designer's assertion that her creation of a custom website would be attributed to her personally.⁴⁴ This was the case, it held, because every website would display 303 Creative LLC's name and because the designer was the sole owner and operator of the company.⁴⁵ But the Court never explained how casual observers of the designer's custom websites were to associate 303 Creative LLC with her personally—by a Secretary of State business search? By a public records request? By internet sleuthing? Nor did it address the fact that the designer, as the creative agent of the website, could merely omit the corporate name if she was concerned about being associated with the marrying couple.

Finally, the Court laid out a series of hypothetical examples in which the government presumably could not compel a speaker to speak. For example, it considered the implications of allowing a state to force a male website designer married to another man to design a website for an anti-LGBTQ organization.⁴⁶ It pondered also a Muslim film director being forced to create a Zionist production under penalty of state law if he refused.⁴⁷ It concluded, without much discussion, that the First Amendment "tolerates none of that," meaning that those engaged in creative expression have a free speech right not to create a message with which they disagree.⁴⁸ But in examining these hypotheticals, the Court sidestepped obvious questions about whether wedding-related expression actually conveys a message that is in favor of marriage equality. Unlike a Zionist film that itself expresses a pro-Israel viewpoint or an anti-LGBTQ website that contains messages in opposition to the same-sex community, there is nothing inherent in a beautiful cake or an arrangement of flowers that conveys a position as to the morality of same-sex marriage. Rather, it is the association of the creative product with such a marriage and its placement in the wedding that presumably produces a supportive message. The Court did not explain if this distinction makes a difference.

This is but one of many questions that *303 Creative*, *Arlene's Florist*, and *Masterpiece Cakeshop* left unanswered, providing no clarity over which service providers for a wedding may claim a First Amendment-based right not to sell their services to a marrying couple. But at least two principles seem clear. One is that, in considering discrimination claims

⁴⁴ *303 Creative*, 600 U.S. at 579 (2023) ("Viewers will know, too, that the websites are [Ms. Smith's] original artwork, for the name of the company she owns and operates by herself will be displayed on every one.") (internal quotations omitted)

⁴⁵ *Id.*

⁴⁶ *Id.* at 589-90.

⁴⁷ *Id.* at 589.

⁴⁸ *Id.* at 590.

arising from same-sex weddings, administrative agencies must remain neutral toward vendors' claimed religious objections.⁴⁹ In other words, the fact that a vendor relies upon a sincerely-held religious belief to reject a transaction from a customer may not be denigrated or treated with hostility but must be weighed on equal footing to all other objections.⁵⁰ The other is that speech that is in some sense customized on a couple-by-couple basis, and that can also be attributed to the creator, cannot be required of a vendor under state anti-discrimination laws where the vendor asserts a religious objection to same-sex marriage.⁵¹ But exactly what constitutes customized expression in the context of a wedding and exactly which wedding vendors may assert the right to object under these two principles remains subject to debate.

II. WHEN IS A WEDDING SPEECH?

Following *Obergefell*, scholars have attempted to frame the inquiry into a wedding vendor's expression by focusing on both product and process. While commentators use varying nomenclature and approaches, there appears to be substantial agreement in the literature that both aspects of a vendor's work can matter in terms of assessing whether a transaction is sufficiently expressive to warrant First Amendment treatment. This section of the paper summarizes some of the approaches to determining when a wedding vendor's creative product constitutes protectable free speech.

A. On- versus off-label rights

In her article *Free Speech and Off-Label Rights*, Amy Sepinwall advocates for a congruity requirement between the constitutional right being asserted and the interest of the party asserting the right.⁵² Highlighting the fact that wedding vendors who advance a right of free speech to avoid creating works for same-sex couples are really advancing an interest in objecting rather than an interest in speaking, Sepinwall argues that so-called "off-label" assertions of constitutional rights, where the right and the interest are incongruous, dilute the value of free speech interests.⁵³ She therefore seeks to limit the assertion of a First Amendment free speech right by wedding vendors because they are "off-label."⁵⁴ Under Sepinwall's

⁴⁹ *Masterpiece Cakeshop v. Colo. Civ. Rights Comm'n*, 584 U.S. 617, 638-40 (2018).

⁵⁰ *Id.*

⁵¹ 303 *Creative*, 600 U.S. at 579, 589-90.

⁵² Sepinwall, *supra* note 12, at 498-99 ("A person exercises her constitutional rights off-label when she invokes a constitutional provision to protect an interest different from the one that the provision is designed to protect.").

⁵³ *Id.* at 509-10.

⁵⁴ *Id.* at 521 (arguing that wedding vendor claims are essentially religious objections better grounded in the free exercise clause rather than the free speech clause because they are off-label assertions of free speech rights).

argument, wedding vendors essentially claim a religious right to object rather than a free speech right not to produce speech with which they disagree, because their interest is grounded in objection rather than in avoiding a compelled created work.⁵⁵

Sepinwall's proposal is notable in that she describes the attributes of particular wedding services that make them more artistic and therefore more speech-like. For one, she argues that discretion in determining the end product is a defining feature of artistic work.⁵⁶ For another, she highlights that the artist retains the power of disavowal or the power to disassociate himself with his creative work.⁵⁷ Thus, in some sense, Sepinwall identifies power and control over the product as not only at the time of production, but over the full span of the work's existence.⁵⁸

B. The Imbued Test

In *Spence v. Washington*, the Supreme Court held that symbolic speech—such as, presumably, cake-baking—is protected by the First Amendment if the symbolic expression is “sufficiently imbued with elements of communication.”⁵⁹ In his article *Baking a Cake: How to Draw the Line Between Expressive Conduct and Something you Do*, Chris Chung identifies this as the imbued test for symbolic speech.⁶⁰ As Chung explains, whether a symbol takes on the attributes of communication depends on its nature, context, and environment.⁶¹ Although courts rarely apply the imbued standard, courts employing it to assess symbolic speech claims have determined that tattooing and nipple-piercing were not sufficiently imbued with elements of communication to constitute protected speech.⁶²

As applied to the speech of wedding vendors, Chung compares the act of cake-baking to expressive disciplines like painting and sculpting to argue that cake-baking is inherently communicative.⁶³ Chung highlights that each activity involves a significant investment of time by the creator and results

⁵⁵ *Id.* at 495-97.

⁵⁶ *Id.* at 488.

⁵⁷ *Id.* at 490.

⁵⁸ Sepinwall, *supra* note 12, at 490-91 (identifying examples of artist disavowal, including Richard Price's portrait of Ivanka Trump, which he disavowed as “fake art” following the first election of Donald Trump as president).

⁵⁹ *Spence v. Washington*, 418 U.S. 405, 409 (1974).

⁶⁰ Chung, *supra* note 22, at 379-80.

⁶¹ *Id.* at 380.

⁶² *Id.* at 392 (citing *State v. White*, 560 S.E.2d 420, 423 (S.C. 2002); *City of Albuquerque v. Sachs*, 92 P.3d 24, 30 (N.M. Ct. App. 2004)).

⁶³ *Id.* at 403-04.

in a unique product.⁶⁴ He also argues that the public nature of the cake-baking environment contributes to its communicative quality.⁶⁵

C. The Message Test

Chung also identified what he names “the message test,” a much more commonly applied standard derived from *Spence* for determining when expressive conduct constitutes speech protected by the First Amendment.⁶⁶ In addition to focusing on a symbol’s imbued attributes, *Spence* also indicated that expressive conduct could be deserving of First Amendment treatment if it expressed a “particularized message” and if “the likelihood was great that the message would be understood.”⁶⁷ Chung characterizes this as “a low bar” to establishing that expressive conduct is actually speech.⁶⁸

In the context of wedding vendors, Chung points out that the message test in particular does not separate the process by which a message is created from its ultimate product.⁶⁹ He therefore argues that the act of baking a cake, without regard to what the end product says, is itself a message. For example, when a mother bakes a cake for her child’s first birthday, he reasons, the mother sends a message of love and devotion to her child, even if the cake itself is ordinary and message-less.⁷⁰ Chung therefore concludes that under either the imbued test or the message test, cake-baking is an act of expression.⁷¹

D. The Special Context of Cake-Baking

Caroline Mala Corbin reaches a different conclusion. In *Speech or Conduct? The Free Speech Claims of Wedding Vendors*, she adopts a more contextual approach to cake-baking and photography.⁷² Corbin argues in favor of a message-based approach to free speech claims by wedding vendors that focuses on the end product rather than the artistic process.⁷³ She first rejects the idea that the sale of a mass-produced cake in and of

⁶⁴ *Id.*

⁶⁵ *Id.* at 404 (comparing cake-baking to a statement of values, similar to Chick-fil-A’s alignment with religious ideology).

⁶⁶ Chung, *supra* note 22, at 379-80.

⁶⁷ *Spence v. Washington*, 418 U.S. 405, 410-11 (1974).

⁶⁸ Chung, *supra* note 22, at 392-93. The Supreme Court’s decision in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), confirms the non-rigorous nature of this standard. In *Hurley*, the Court held that “a narrow, succinctly articulable message is not a condition of constitutional protection” when it comes to symbolic expression. *Hurley*, 515 U.S. at 569.

⁶⁹ Chung, *supra* note 22, at 392-93.

⁷⁰ *Id.* at 405.

⁷¹ *Id.* at 403-06.

⁷² Corbin, *supra* note 23, at 249-53.

⁷³ *Id.* at 244.

itself communicates a message.⁷⁴ She also disputes that the sale of an artisanal item—one made of enhanced ingredients with heightened standards—expresses any particular idea.⁷⁵ But she admits that compelling a baker to create a product that contains a message contrary to the baker’s viewpoint includes an expressive component.⁷⁶ This is because cakes containing express messages in essence speak through the messages they contain. Thus, Corbin advocates for focusing on the message of the produced product, separating out those creative works which themselves contain no overt messaging—like a cake with colored icing or a simple rose bouquet—from those that inherently communicate.⁷⁷

III. ADDITIONAL FACTORS FOR ASSESSING WEDDING VENDORS’ FREE SPEECH CLAIMS

Building from Sepinwall’s idea that vendors’ First Amendment speech claims are really conscious claims rather than expression claims, and Corbin’s end-product analysis, but also accepting the Court’s analysis in *303 Creative* under the speech clause of the First Amendment, I propose a framework that introduces additional factors to the existing free speech paradigm. These three factors are: (1) knowledge on the part of the wedding vendor of the couple’s gender identity; (2) the likelihood that the message expressed by the creative work will be attributed to the vendor; and (3) the necessity of the product or service to the wedding. These factors assist in determining which wedding vendors are actually speaking through their refusal to transact with same-sex couples.

A. Knowledge of Gender Identity

A pivotal aspect of any vendors’ First Amendment claim is advance knowledge that the wedding involves two participants of the same sex. In *Masterpiece Cakeshop*, for example, the cake-baker knew two men desired to purchase a cake because they physically came into his shop.⁷⁸ Similarly, the florist in *Arlene’s Flowers* also knew the couple’s gender identity; one of the engaged men knew the florist personally and had communicated that he was engaged to another man, and the florist communicated her religious objection to same-sex weddings as a basis to deny the sale.⁷⁹

To highlight the importance of knowledge, consider the meaning of a rejected transaction based on the possibility that a creative product will wind up placed in a same-sex wedding without the knowledge of the vendor.

⁷⁴ *Id.* at 257-58.

⁷⁵ *Id.* at 258-59.

⁷⁶ *Id.* at 260-63.

⁷⁷ *Id.*

⁷⁸ *Masterpiece Cakeshop v. Colo. Civ. Rights Comm’n*, 584 U.S. 617, 621 (2018).

⁷⁹ *State v. Arlene’s Flowers, Inc.*, 389 P.3d 543, at ¶ 4, 6 (2017).

Assume a songwriter refuses to write a song absent any particularized knowledge that a same-sex couple will use the song in their wedding ceremony. The songwriter nonetheless refuses to pen the tune on the possibility that the song will be sung someday at a wedding that the songwriter finds objectionable. The crux of the songwriter's objection is therefore to the loss of control, not to the same-sex nature of any particular wedding. Knowledge is therefore a critical component of expressing what can reasonably be understood as marriage equality opposition.

Knowledge of the same-sex nature of a wedding can be gleaned from several sources. For one, vendors whose participation necessarily involves being on-site at the wedding will presumably know the parties' gender identities at the time the service is provided. These vendors include the wedding planner or consultant, the clergyperson or officiant, musicians, DJs, limousine or other transportation providers, photographers, videographers, bartenders, servers, hairdressers, and makeup artists.⁸⁰ But they may not have knowledge of the married parties' gender identities at the time of booking.⁸¹ Courts adopting a knowledge factor for in-person vendors will therefore need to confront whether knowledge must occur at the time of transaction or the time the service is actually provided.

Vendors who are entirely off-site or provide their services in advance or remotely may not have knowledge of the couples' sex and would therefore lack a basis for objection. These vendors include calligraphers, invitation designers, supply rental companies, venue rental companies, insurers, online retailers, florists, caterers who do not directly serve food, and cake bakers.⁸² For these vendors, a refusal to provide service based on the speculative concern that a product may wind up being used in a same-sex wedding is actually an objection to lack of control. In other words, the vendor's rejection of a sale cannot be understood as an objection to marriage equality, because it is not particularized to a same-sex wedding.

To demonstrate the point, the opening sentence of the Court's decision in *Masterpiece Cakeshop* reads: "In 2012 a same-sex couple visited

⁸⁰ For a complete list of suggested wedding vendors, see *Checklist*, THE KNOT, <https://www.theknot.com/wedding-checklist> (last visited Jan. 26, 2025).

⁸¹ Note, for example, that the florist in *Arlene's Flowers* only knew that the client was engaged to another man because she had a preexisting personal relationship with the client and had provided flowers to him for a number of years before his engagement. *Arlene's Flowers*, 389 P.3d at ¶ 4.

⁸² *Id.* In *Masterpiece Cakeshop*, the soon-to-be-married couple went in person to the bakery and therefore revealed their gender identities to the vendor. *Masterpiece Cakeshop*, 584 U.S. at 621. So too did one of the engaged men reveal the same-sex nature of his engagement to the florist in *Arlene's Flowers*. *Arlene's Flowers*, 389 P.3d at ¶ 4, 6. But it is certainly possible for one engaged person, rather than two, to purchase a cake or flowers or for these items to be ordered over the phone or online. Thus, a florist or cake-baker may not always be aware of the identity of each party to the marriage prior to selling their products.

Masterpiece Cakeshop, a bakery in Colorado, to make inquiries about ordering a cake for their wedding reception.”⁸³ The physical presence of both participants to the marriage in person in the store therefore created knowledge of the parties’ gender identities on the part of the vendor. But in an increasingly online marketplace, or where in-person transactions are made by only one party to the marriage, advance knowledge is unlikely to exist.

Consider for example an online retailer who sells custom wedding napkins, centerpieces, party favors, signs and other paper products on Etsy.⁸⁴ The designs typically involve the use of two initials—one for each of the participants to the marriage—and the date of the wedding. Now consider a hypothetical couple, Riley and Taylor, both of whom are men. Nothing about use of the letters “R” and “T” in the design of the Etsy products would alert the vendor to the same-sex nature of the wedding, nor would disclosure of the names Riley and Taylor. Thus, the Etsy vendor likely lacks knowledge of the gender identity of the wedding party at the time the transaction is made.

Moreover, given the remote nature of the transaction, no one other than Riley and Taylor likely know the identity of the Etsy vendor in order to attribute a message of support to the supplier. In fact, Riley and Taylor would need to disclose to their guests and the public that they acquired products from the Etsy vendor in order for the association to be made. Thus, whether the Etsy vendor is aligned with a supportive message not only turns on the vendor’s knowledge of the wedding party’s gender, but also the attendees’ knowledge of the vendor’s identity as well.

Vendors who lack knowledge of a couples’ gender identity but desire that information may create a mechanism for unmasking as a part of the commercial transaction. For example, a florist or calligrapher who sells

⁸³ *Masterpiece Cakeshop*, 584 U.S. at 621.

⁸⁴ An example of such a vendor would be the Memorable Wedding vendor on Etsy. ETSY, *Memorable Wedding: Personalized Items for All Occasions*, https://www.etsy.com/shop/MemorableWedding?ref=shop-header-name&listing_id=1486166752&from_page=listing#items (last visited Jan. 25, 2025). It describes its services as follows:

Do you need personalized napkins or personalized cups in a hurry? We can ship in as little as 24 hours, please send us a message on Etsy prior to placing your rush order so that we can go over upgraded shipping options to meet your delivery date. We will then send you a custom listing on Etsy to place your order with a faster production time and upgraded shipping if needed. We print all of our personalized napkins and cups in our shop here in Florida. We look forward to working with you!

Id.

products online may include a questionnaire as part of the transaction that asks about the parties' sexes. But this choice comes with risks. For one, limiting a transaction on the basis of gender may create separate legal problems under public accommodation and anti-discrimination laws.⁸⁵ For another, even heterosexual couples may not want to reveal their genders as a prerequisite to buying flowers.⁸⁶ Thus, a business may reduce its revenue by making this choice.

B. Likelihood of Attribution

A second critical aspect of a wedding vendor's compelled speech claim is not necessarily that the vendor is opposed to the created speech—often, the expressive product will simply involve an artistic arrangement of flowers that expresses beauty or a decorative cake with edible designs that expresses nature—but is opposed to the association of the created product with a same-sex wedding.⁸⁷ Thus, the message to which the wedding vendor objects is one of support for marriage equality. Assessing a wedding vendor's claim therefore requires considering the likelihood that the vendor's work will be associated with support for the wedding, even where the creative product itself contains no such overt message.⁸⁸

The Court in *303 Creative* seemed to acknowledge this state of affairs. Integral to the Court's decision in that case was the fact that Smith's custom websites contain the name of her company and that their design would likely be imputed to her.⁸⁹ Setting aside the question of how a passing observer would know of Smith's association with her company, others have pointed out the unique connection between a corporation and its owner when the two are alter egos of one another.⁹⁰ But what happens when a corporate

⁸⁵ See, e.g., *Public Accommodations*, HUMAN RIGHTS CAMPAIGN, <https://www.hrc.org/resources/state-maps/public-accommodations> (last updated Nov. 14, 2024) (summarizing state laws that prohibit discrimination based on gender identity and/or sexual orientation).

⁸⁶ See, e.g., Mindaugas Dagutis et al., *Consumers' Willingness to Disclose their Personal Data in E-Commerce: A Reciprocity-Based Social Exchange Perspective*, J. OF RETAILING AND CONSUMER SERV. Vol. 74 (2023) (finding that customers tend to disclose personal data in online transactions when the vendor offers them a benefit or deal for doing so).

⁸⁷ See, e.g., *Arlene's Florist*, 441 P.3d at ¶ 16 (“[The florist] maintains that she would not sell [an engaged gay man] any arranged flowers for his wedding, even if he were asking her only to replicate a prearranged bouquet from a picture book of sample arrangements. She believes that participating, or allowing any employee of her store to participate, in a same-sex wedding by providing custom floral arrangements and related customer service is tantamount to endorsing marriage equality for same-sex couples.”).

⁸⁸ Corbin, for one, acknowledges the argument that compelled production might itself be interpreted as forced expression in favor of same-sex weddings. Corbin, *supra* note 23, at 249-50.

⁸⁹ *303 Creative LLC v Elenis*, 600 U.S. 570, 579 (2023).

⁹⁰ See, e.g., Mantas Grigorovicius, *303 Creative v. Elenis: Unresolved Conflict, Gay Rights, and a Future of Uncertainties*, 27 J. GENDER RACE & JUST. 423, 460 (2024).

wedding vendor is not owned by one person? If a custom cake is designed by the Kroger grocery department, is the message on the cake attributable to the Kroger Corporation and the thousands of people who work there?⁹¹ To the individual cake baker? To both? To neither? It is critical to question to whom the message of support, if conveyed at all, is likely to be attributed.

The nature of the message also impacts the subject of the attribution. For example, a customized wedding cake containing elaborate edible flowers and artistic icing designs that is commissioned by a same-sex couple is less likely to automatically convey a message of support for marriage equality than a cake covered with images of two men in tuxedos holding hands. In considering this distinction, Justice Kennedy explained the impact of context in this way:

If a baker refused to design a special cake with words or images celebrating the marriage—for instance, a cake showing words with religious meaning—that might be different from a refusal to sell any cake at all. In defining whether a baker’s creation can be protected, these details might make a difference.⁹²

Courts would therefore do well to examine the specific message that is being created to assess the likelihood that a creative work and its vendor will be sufficiently associated with support for same-sex weddings to warrant First Amendment protections.

C. Necessity

The level of necessity of a service to a wedding may also be a distinguishing factor in how strongly a vendor’s participation might convey a message of support for a same-sex wedding. As Amy Sepinwall rightly points out, same-sex marriages can and do occur without the trappings of a wedding.⁹³ Some services at a wedding are therefore more critical than others and, as such, may be more reasonably interpreted to convey support for the event. An officiant, for example, is essential to the performance of the ritual,⁹⁴ whereas the marriage could take place in the absence of a florist or bartender.

⁹¹ *Id.* Along this line of thinking, Grigorovicius queries whether a message produced by a single employee in a corporation can be attributed across the entire company when its employee base is large in number.

⁹² *Masterpiece Cakeshop*, 584 U.S. at 624.

⁹³ Sepinwall, *supra* note 12, at 474 (“[A] marriage does not require a wedding, let alone one with cake or flowers.”).

⁹⁴ *See Masterpiece Cakeshop*, 584 U.S. at 632 (“When 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

A vendor whose services are absolutely necessary to the performance of a wedding may be perceived as supporting the wedding by his participation. A clergy member, for example, undoubtedly supports a marriage by bringing it into existence through the performance of vows and rituals. And a wedding by definition cannot exist without an officiant.⁹⁵ The integral nature of the officiant's service therefore inherently connects the expressive activity to a message of support, and the officiant's withdrawal or refusal would accordingly more strongly signal disapproval. On the other hand, a wedding can go off perfectly well without hand-embroidered party favors, and a vendor's refusal to sell them to a same-sex couple may be less easily understood as an objection. The centrality, or lack thereof, of the creative work to the wedding therefore informs the strength of the objection's message.

IV. CONCLUSION

In concluding that the opportunity for wedding vendors to “speak now or forever hold their peace” is at the time of transaction, the Supreme Court has protected the ability of vendors to object to same-sex marriages. Scholars have heavily focused on when vendors engage in creative expression such that their works, rather than their objections, are entitled to free speech protection. They have proposed various tests for separating expressive wedding vendors like singers and photographers from those simply engaged in conduct-based services like limousine drivers. But if what is being protected is in essence the message of opposition rather than the underlying creative product, greater attention should be paid to the likelihood that an objection to the nature of the particular wedding will be understood from the vendor's non-participation.

I propose three criteria to assist with this function: knowledge of gender identity, likelihood of attribution, and necessity of service. Requiring that a vendor demonstrate knowledge of a same-sex couple's gender identity ensures that vendors are properly asserting a particularized objection that will translate through the transaction. Assessing the likelihood that the vendor's product or participation will be associated with support for the wedding, which requires that the vendor be identified, also limits the range

to the free exercise of religion. This refusal would be well understood in our constitutional order as an exercise of religion . . .”).

⁹⁵ See, e.g., *Respole v. Respole*, 70 N.E.2d 465, 467-68 (Ohio Com. Pl. 1946) (“Solemnization of marriage, or the celebration of the marriage ceremony or rites comprehends a personal appearance together by the contracting parties before one authorized by law to celebrate marriage ceremonies, and that the marriage ceremonies or rites be entered into and performed by the parties to such marriage together with the minister or other person authorized to perform such in the presence of each other and one or more witnesses, in order that the fact of the marriage contract may have due publication for the sake of notoriety, and the certainty of its being made.”).

of claims to those who convey a message. And separating services into those necessary for a wedding from those at the periphery further solidifies those vendors most at risk in the creative process. By utilizing these factors, courts can make a more robust inquiry into when cakes and their bakers may be deserving of First Amendment consideration in expressing objections to same-sex weddings.