

No. 21-1506

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

**ROBERT UPDEGROVE; LOUDOUN MULTI-IMAGES LLC, d/b/a
BOB UPDEGROVE PHOTOGRAPHY,**

Plaintiffs-Appellants,

v.

**JASON MIYARES, in his official capacity as Virginia Attorney
General; CHRISTINE LAMBROU JOHNSON, in her official capacity
as Director of the Office of Civil Rights,**

Defendants-Appellees.

**On Appeal from the United States District Court
for the Eastern District of Virginia (Alexandria)
The Honorable Claude M. Hilton
Case No. 1:20-cv-01141-CMH-JFA**

STIPULATED DISMISSAL

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Under Federal Rule of Appellate Procedure 42(b)(1), Plaintiffs Bob Updegrove and Loudoun Multi-Images LLC d/b/a Bob Updegrove Photography, and Defendants Jason Miyares and Christine Lambrou Johnson, agree to the dismissal of this appeal according to the settlement agreement attached as Exhibit A. The parties will each pay their own costs and expenses associated with litigating this case.

Dated: November 3, 2023

By: s/ Johannes Widmalm-Delphonse

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CERTIFICATE OF COMPLIANCE

This document brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using 14-point Century Schoolbook.

Dated: November 3, 2023

s/ Johannes Widmalm-Delphonse
Attorney for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

s/ Johannes Widmalm-Delphonse
Attorney for Plaintiffs-Appellants

EXHIBIT A

No. 21-1506

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SETTLEMENT AGREEMENT

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Attorneys for Plaintiffs-Appellants

Plaintiffs Bob Updegrove and Loudoun Multi-Images LLC d/b/a Bob Updegrove Photography, and Defendants Jason Miyares and Christine Lambrou Johnson, agree to the dismissal of this appeal according to the terms below.

WHEREAS, Plaintiffs brought a pre-enforcement challenge in the action *Updegrove, et al. v. Miyares, et al.*, E.D. Va. Case No. 1:20-cv-01141 (the “Action”), alleging that § 2.2-3904(B) of the Code of Virginia, as applied to their desired expressive activities, violates their constitutional rights.

WHEREAS, the district court granted Defendants’ motion to dismiss for lack of jurisdiction on the grounds that Plaintiffs had failed to establish standing to bring a pre-enforcement challenge due to the fact that “the VVA has never been enforced against anyone.” (J.A. 504).

WHEREAS, Plaintiffs appealed to United States Court of Appeals for the Fourth Circuit, and the appeal has been in abeyance pending a decision in *303 Creative LLC v. Elenis*, Supreme Court Case No. 21-476.

WHEREAS, the Supreme Court decided *303 Creative* on June 30, 2023, and held that being put to a choice between “speak[ing] as the State demands” or “fac[ing] sanctions for expressing [one’s] own beliefs” is “more than enough[] to represent an impermissible abridgement of the First Amendment’s right to speak freely.” *303 Creative LLC v. Elenis*, 600 U.S. 570, 589 (2023).

WHEREAS, in light of the *303 Creative* decision, the parties desire to avoid further costs and expenses of litigation and believe it is in the best interest of all concerned to settle any and all disputes under the terms set forth in this Settlement Agreement.

NOW, THEREFORE, in consideration of the mutual covenants and undertakings set forth herein, the parties agree as follows:

1. In light of *303 Creative*, Defendants agree not to enforce Va. Code § 2.2-3904 to:

- a. Force Plaintiffs to offer or provide photography celebrating same-sex weddings;
- b. Prevent Plaintiffs from asking prospective clients whether they seek photography services celebrating same-sex weddings or engagements;
- c. Prevent Plaintiffs from adopting or distributing their desired editorial policy (J.A. 61–62);
- d. Prevent Plaintiffs from posting their desired statement (J.A. 64) on their website.

2. For and in consideration of the agreements set forth in this Settlement Agreement, and except for the rights and obligations set forth in this Settlement Agreement, Plaintiffs, on behalf of themselves and their administrators, successors, and assigns (collectively, “Releasing Parties”), hereby release, acquit, and forever discharge Defendants together with all of their agencies, agents, departments,

instrumentalities, insurers, officers, employees, contractors, and all other entities required to be released under Va. Code § 8.01-195.8, and any other person or entity for which the Commonwealth may be liable, whether in an individual or official capacity, or any of them, or all of them (collectively, “Released Parties”) of and from any and all claims, actions, causes of action, demands, rights, damages, costs, agreements, grievances, obligations, loss of service, expenses and compensation whatsoever, direct or indirect, known or unknown, discovered or undiscovered, which Plaintiffs have in any way related to or arising out of the acts, transactions, occurrences, or omissions that are described, alleged, or contained in the Action (the “Released Claims”). To the fullest extent permitted by law, the Releasing Parties forever waive, release, and covenant not to sue or file or assist with suing or filing any lawsuit or claim against any of the Released Parties with any court, governmental agency, or other entity or in any other forum based on the Released Claims, whether known or unknown at the time of execution.

3. Plaintiffs voluntarily dismiss this appeal pursuant to and consistent with the terms of this Settlement Agreement. Dismissal is without prejudice to Plaintiffs bringing another action to challenge § 2.2-3904(B) of the Virginia Human Rights Act should Defendants or their successors threaten or attempt to enforce the challenged provisions of those laws against Plaintiffs in the future.

4. Defendants do not admit any liability in this case.

5. Each party acknowledges that it is not relying on the representations of any other party or the other party's counsel. All parties acknowledge that each has been directed to seek the counsel of its own attorney for advice regarding this Settlement Agreement.

6. This Settlement Agreement was entered into in good faith based upon arms-length negotiation between the parties and their counsel. The language in all parts of this Settlement Agreement shall be construed according to its fair meaning and not strictly for or against any party.

7. This Settlement Agreement constitutes the entire agreement between Plaintiffs and Defendants hereto pertaining to the Action, and supersedes and embodies, merges, and integrates all prior and current agreements and understandings of Plaintiffs and Defendants, whether written or oral, with respect to the Action and this Settlement Agreement, and may not be clarified, modified, changed, or amended except in a writing duly executed by Plaintiffs and Defendants or an authorized representative.

8. The terms of this Settlement Agreement shall be governed by and construed in accordance with, the laws of the Commonwealth of Virginia applicable to contracts to be performed wholly within the Commonwealth of Virginia, without regard to its conflict-of-laws or choice-of-law rules and principles.

9. Electronic signatures shall be deemed to be as valid and enforceable as original ink signatures.

Dated: November 3, 2023

By: s/ Johannes Widmalm-Delphonse By: s/ Andrew N. Ferguson

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