

No. 24-267

IN THE
Supreme Court of the United States

JOHN ABDELSAYED and
TRENDS REALTY USA CORP,
Petitioners,
v.

AFFORDABLE AERIAL PHOTOGRAPHY, INC.,
Respondent.

*On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Eleventh Circuit*

PETITION FOR REHEARING

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	i
TABLE OF CITATIONS.....	ii
PETITION FOR REHEARING	1
I. Two new petitions involving the same Respondent have been docketed which could potentially be controlling in this case	2
A. The <i>Property Matters</i> petition.....	2
B. The <i>WC Realty</i> petition	3
C. The <i>Abdelsayed</i> petition would likely be controlled by a decision in either <i>Property Matters</i> or <i>WC Realty</i>	3
II. The Court should hold this Petition for Rehearing until it considers the petitions for certiorari in <i>Property Matters</i> and <i>WC Realty</i>	5
CONCLUSION	6
CORPORATE DISCLOSURE STATEMENT	7
RULE 44.2 CERTIFICATION OF COUNSEL	7

TABLE OF CITATIONS

	Page(s)
Cases	
<i>Affordable Aerial Photography, Inc. v. Property Matters USA LLC</i> , 108 F.4th 1358 (CA11 2024).....	3
<i>Beach Blitz Co. v. City of Miami Beach</i> , 13 F.4th 1289 (CA11 2021).....	3
<i>Boumediene v. Bush</i> , 551 U.S. 1160 (2007)	1, 6
<i>CRST Van Expedited, Inc. v. EEOC</i> , 578 U.S. 419 (2016)	4
<i>Florida v. Rodriguez</i> , 461 U.S. 940 (1983)	5
<i>Florida v. Royer</i> , 460 U.S. 491 (1983)	5
<i>Hawkins v. United States</i> , 543 U.S. 1097 (2005)	5
<i>Levenson v. Conway</i> , 472 U.S. 1014 (1985)	5
<i>Martinez-Hidalgo v. United States</i> , No. 93-5551.....	6
<i>Property Matters USA LLC, v. Affordable Aerial Photography, Inc.</i> , No. 24-688.....	2, 3, 4
<i>Simmons v. Sea-Land Services, Inc.</i> , 462 U.S. 1114 (1983)	5
<i>United States v. \$70,670.00 in U.S. Currency</i> , 929 F.3d 1293 (CA11 2019)	3
<i>United States v. Booker</i> , 543 U.S. 220 (2005)	5

<i>United States v. Ohio Power Co.</i> , 353 U.S. 98 (1957)	1, 5
<i>WC Realty Group, Inc. v. Affordable Aerial Photography Inc.</i> , No. 24-825	3, 4
<i>Williams v. Jacksonville Terminal Co.</i> , 315 U.S. 386 (1942)	1
<i>Williams v. Vermont</i> , 472 U.S. 14 (1985)	5

Statutes

17 U.S.C. §505	1
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Rules

Rule 44.2	1
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Other Authorities

Katherine Shaw, Essay, <i>Friends of the Court: Evaluating the Supreme Court’s Amicus Invitations</i> , 101 CORNELL L. REV. 1533 (2016)	6
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PETITION FOR REHEARING

This petition presents an unusual circumstance of not one, but two petitions seeking writs of certiorari involving the same Respondent that were docketed after Petitioners' Reply. Both present the same core issue as the first question presented by Petitioners here: whether a defendant can be considered a "prevailing party" under 17 U.S.C. §505 where a plaintiff's action is voluntarily dismissed without prejudice.

Those petitions are "intervening circumstances of a substantial or controlling effect," R. 44.2, that justify rehearing because this Court's resolution of the question presented in those petitions is likely to clarify prevailing defendant status in a manner that controls this case. This Court has a long history of holding petitions that raise the same issue while either (A) accepting and deciding one that presents the cleanest vehicle for doing so, and then granting, vacating, and remanding the related petitions, or (B) granting and consolidating the related cases for plenary review.

The threshold issue, however, is this petition for rehearing. It should be deferred until the Court considers those related petitions for certiorari. Doing so would ensure "that this case might be disposed of consistently with the companion cases." *United States v. Ohio Power Co.*, 353 U.S. 98, 98 (1957) (granting rehearing). And it would ensure "uniformity in the application of the principles" this Court might "announce[] in th[em]." *Ibid*; see also *Boumediene v. Bush*, 551 U.S. 1160, 1160 (2007) (granting rehearing); *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386, 394 (1942) (granting rehearing "[b]ecause of the importance of the issues presented").

I. Two new petitions involving the same Respondent have been docketed which could potentially be controlling in this case

Three petitions seeking a writ of certiorari have been filed this term all involving Respondent Affordable Aerial Photography, Inc. and all raising substantially the same question. While the *Abdelsayed* petition for certiorari was the first of those three and prompted the Court to call for a response from Respondent but then denied certiorari on January 13, 2025, the two new petitions share a common legal question with strikingly similar factual and procedural postures all arising out of the Eleventh Circuit. In each, the Eleventh Circuit reasoned, contrary to commonsense, history, and text, that a voluntary dismissal without prejudice renders the defendant non-prevailing under §505.

Petitioners summarize them and show how they are related to and likely controlling of the first question presented here.

A. The *Property Matters* petition

After Petitioners' Reply brief was filed, a new petition was docketed on December 27, 2024, and presents one question: "Whether a defendant is barred from recovering attorney's fee under 17 U.S.C. §505 because a plaintiff's Rule 41(a)(1) voluntary dismissal is not a court-ordered dismissal." *Property Matters USA LLC v. Affordable Aerial Photography, Inc.*, No. 24-688 ("*Property Matters*").

It too involves a straightforward copyright infringement claim abandoned by Respondent. *Property Matters* App.3a. It obtained a "voluntary dismissal without prejudice" and "Property Matters then moved for attorney's fees under 17 U.S.C. § 505" asserting it was the prevailing party. *Id.* at 3a-4a. The Eleventh Circuit reasoned, just as

in *Abdelsayed*, that “a dismissal without prejudice places no judicial imprimatur on the legal relationship of the parties” and the dismissal “poses no legal bar precluding [the plaintiff] from refiling the same [] action in the future.” *Id.* at 9a; *see also id.* at 11a (“there is no judicial action preventing AAP from refiling its claim”). Like *Abdelsayed*, its decision in *Property Matters* relied extensively on its prior opinions in *United States v. \$70,670.00 in U.S. Currency*, 929 F.3d 1293 (CA11 2019) and *Beach Blitz Co. v. City of Miami Beach*, 13 F.4th 1289 (CA11 2021). Compare *Abdelsayed* App.7a-8a, with *Property Matters* App.8a-13a. But unlike *Abdelsayed*, the Eleventh Circuit published its decision. *Affordable Aerial Photography, Inc. v. Property Matters USA LLC*, 108 F.4th 1358 (CA11 2024).¹

B. The *WC Realty* petition

A third petition docketed February 4, 2025, presents the identical question as *Property Matters*. *WC Realty Group, Inc. v. Affordable Aerial Photography Inc.*, No. 24-825, Pet. at i (“*WC Realty*”). It also involves Respondent electing a nonsuit in the face of a dispositive motion. *WC Realty* App.2a. The Eleventh Circuit similarly concluded the defendant was not the prevailing party under §505, relying on *Property Matters*. *Id.* at App.5a.

C. The *Abdelsayed* petition would likely be controlled by a decision in either *Property Matters* or *WC Realty*

The petitions in *Abdelsayed*, *Property Matters*, and *WC Realty* each arrived in this Court from a copyright infringement action asserted by Respondent who

¹ It also presents a more direct split between the Ninth and Eleventh Circuits.

voluntarily-dismissed its claims under Rule 41 after facing a potentially case-ending challenge by each defendant, nominatively labeling its abandonment as “without prejudice.” Respondent never refiled any of its actions.

Each petition presents the question of the meaning of “prevailing party” for a defendant under §505 of the Copyright Act when a plaintiff voluntarily dismisses its action without prejudice.

The Eleventh Circuit held that the defendant cannot be a prevailing party upon a voluntary dismissal without prejudice. *Compare Abdelsayed* App.7a-8a (“a voluntary dismissal without prejudice places no judicial imprimatur on the legal relationship of the parties” and “[t]he order of dismissal does not prevent AAP from refiling its claims”), *with Property Matters* App.10a-11a (“a dismissal without prejudice places no judicial imprimatur on the legal relationship of the parties” and therefore “there is no judicial action preventing AAP from refiling its claim”), *and WC Realty* App.5a similar, citing its decision in *Property Matters*).

Given the identical reasoning of the Eleventh Circuit focusing on Respondent’s ability to refile its action (i.e. preclusive effect), both *Abdelsayed* and *Property Matters* (and in turn *WC Realty*) invite this Court to address the question reserved in *CRST Van Expedited, Inc. v. EEOC*, 578 U.S. 419 (2016). Consequently, the reasoning this Court might provide in *Property Matters* or *WC Realty* on plenary review is likely to directly control *Abdelsayed*. For example, if the Court held that preclusive effect or judicial imprimatur is not essential to a defendant’s status as a prevailing party, that would also control *Abdelsayed*. Whatever the Court’s rationale might be, an opinion in *Property Matters* or *WC Realty* has a substantial likelihood of controlling *Abdelsayed* due to how the Eleventh Circuit decided each case.

II. The Court should hold this Petition for Rehearing until it considers the petitions for certiorari in *Property Matters* and *WC Realty*

This petition for rehearing should be held and disposed of after addressing the petitions for certiorari in *Property Matters* and *WC Realty*, as this Court has done when presented with related cases.

For example, the Court had denied certiorari in a number of cases, but then held their petitions for rehearing for seven months while a controlling case, *United States v. Booker*, 543 U.S. 220 (2005), was accepted for plenary review and decided. *E.g.*, *Hawkins v. United States*, 543 U.S. 1097 (2005) (vacating order denying certiorari, and GVR'd in light of *Booker*). This Court has even held a petition for rehearing for two years before granting, vacating, and remanding. *Florida v. Rodriguez*, 461 U.S. 940 (1983) (GVR'd in light of *Florida v. Royer*, 460 U.S. 491 (1983)). Other examples exist in which the Court seeks to ensure uniformity of the principles it announces in its opinions. *E.g.*, *Leverson v. Conway*, 472 U.S. 1014 (1985) (holding petition for rehearing, and then GVR'ing in light of *Williams v. Vermont*, 472 U.S. 14, 17 (1985) (referring to *Leverson* as an “essentially identical case”)); *Simmons v. Sea-Land Services, Inc.*, 462 U.S. 1114 (1983) (same).

Those examples, as here, are precisely the kind of petitions which this Court seeks to “dispose[] of consistently with [] companion cases,” to ensure “uniformity in the application of the principles” in the case accepted for plenary review. *See Ohio Power*, 353 U.S. at 98. This is particularly apt where, if the earlier-filed petition for certiorari presents concerns about, *inter alia*, the vehicle or “level of

representation,”² then the Court can address the issue in the “right” case while holding and later disposing of the related case(s). Or it could simply vacate and consolidate the cases. *See Boumediene*, 551 U.S. at 1160.

CONCLUSION

The Court should hold this petition pending its disposition of the other two, and either grant, vacate, and remand in light of a merits decision in *Property Matters* or *WC Realty*, or vacate the denial of certiorari and consolidate the cases for plenary review.

Respectfully submitted,

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² *E.g.*, Prelim. Mem., *Martinez-Hidalgo v. United States*, No. 93-5551 (Dec. 20, 1993) (Gorsuch, clerk) (recommending denial, but suggesting, “[i]f the Ct were to consider plenary review, appointment of new counsel should be seriously considered”). To the extent such a concern exists in any of the petitions, the Court should invite an amicus to brief and argue the merits, as it occasionally does. *See* Katherine Shaw, Essay, *Friends of the Court: Evaluating the Supreme Court’s Amicus Invitations*, 101 CORNELL L. REV. 1533 (2016).

CORPORATE DISCLOSURE STATEMENT

The information in the corporate disclosure statement at page ii of Petitioners' petition for a writ of certiorari remains accurate, current, and complete.

RULE 44.2 CERTIFICATION OF COUNSEL

As counsel of record for the petitioners, I hereby certify that this petition for rehearing is restricted to the grounds specified in Rule 44.2 and is presented in good faith and not for delay.

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