

No. 24-825

In the Supreme Court of the United States

WC REALTY GROUP, INC., DBA CENTURY 21
WC REALTY,
Petitioner,

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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**PARTIES TO THE PROCEEDING AND
CORPORATE DISCLOSURE STATEMENT**

Petitioner's Statement pursuant to Rule 29.6 was set forth on page ii of the petition for a writ of certiorari, and there are no amendments to that Statement.

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PETITION FOR REHEARING

Petitioner WC Realty Group Inc. dba Century 21 WC Realty, understands that the Court grants Rule 44.2 rehearing petitions exceedingly rarely. But this petition presents one of those very rare circumstances where rehearing is warranted due to intervening circumstances of a substantial effect. See Rule 44.2.¹ On February 25, 2025, while the petition for a writ of certiorari was pending, this Court issued its decision in *Lackey v. Stinnie*, No. 23-621, Slip Op., 604 U.S. __, 145 S. Ct. 659 (2025), rejecting the premise of the Eleventh Circuit’s precedent and the decision below. Further, the decision in this case was based on the application of the Eleventh Circuit’s precedential decision in *Affordable Aerial Photography, Inc. v. Property Matters USA, LLC*, 108 F.4th 1358 (CA11 2024), cert. denied, __ S. Ct. __, 2025 WL 581646 (U.S., Feb. 24, 2025), petition for rehearing filed, No. 24-688 (Mar. 21, 2025) (“*Affordable Aerial*”), for which a rehearing petition was filed on March 21, 2025, requesting reconsideration and a “GVR” in light of *Lackey*.

The *Lackey* opinion addressed whether the plaintiff was a “prevailing party,” where the case becomes moot following preliminary injunctive relief. Slip Op., 1, 4. In holding that preliminary injunctive relief did not confer “prevailing party” status on a plaintiff, the Court was required to address and explain its body of caselaw for determining whether a plaintiff was a “prevailing party.” In so doing, the Court clarified that its body of caselaw addressing whether a *plaintiff* is a “prevailing party” is distinct from its body of caselaw addressing whether a *defendant* is a “prevailing

¹ A similar petition has been filed in *Property Matters USA, LLC v. Affordable Aerial Photography, Inc.*, No. 24-688.

party.” See *Lackey*, Slip Op., 9 and n.*. That clarification rejected the premise of the Eleventh Circuit’s decision below, highlighting the legal error.

Petitioner respectfully requests that this Court grant this petition for rehearing and the underlying petition for a writ of certiorari, vacate the Eleventh Circuit’s decision below, and remand (“GVR”) to allow the Eleventh Circuit the opportunity to revisit its decision in light of this Court’s intervening *Lackey* decision.

A. The Court’s Intervening *Lackey* Decision Clarified That the Body of Caselaw Addressing When a *Defendant* is the “Prevailing Party” is Distinct From the Body of Caselaw Addressing When a *Plaintiff* is the “Prevailing Party.”

In *Lackey*, the Court addressed its prevailing-*plaintiff* body of caselaw to explain why a plaintiff does not prevail following a preliminary injunction where the case is ultimately dismissed as moot. Slip Op., 5-9. Explaining that under the Court’s prevailing-*plaintiff* precedent, “a plaintiff ‘prevails’ when a court grants enduring relief that constitutes a ‘material alteration of the legal relationship of the parties.’” *Lackey*, Slip Op., 7 (quoting *Texas State Teachers Assn. v. Garland Indep. School Dist.*, 489 U.S. 782, 792-93 (1989)). This includes an award of nominal damages, *id.*, 7–8 (citing *Farrar v. Hobby*, 506 U.S. 103, 112 (1992)), “or a final victory on a material if not predominant claim,” *id.*, 8 (citing *Texas State Teachers Assn.*, 489 U.S. at 791-93).

But a plaintiff does not prevail under the “catalyst theory”—the theory that a plaintiff “prevails” when “he ‘achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s

conduct.” *Ibid.* (quoting *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 601 (2001)). The Court rejected the “catalyst theory” “because there had been no ‘judicially sanctioned change in the legal relationship of the parties,’ i.e., “[t]he defendant’s voluntary actions ‘lack[ed] the necessary judicial *imprimatur*.’” *Ibid.* (quoting *Buckhannon*, 532 U.S. at 605). The Court required “judicial relief” to prevent against a plaintiff “prevailing” on a “potentially meritless lawsuit.” *Ibid.* (citing *Buckhannon*, 532 U.S. at 606) (quoting *Buckhannon*, 532 U.S. at 634 (Ginsburg, J., dissenting))).

The *Lackey* opinion built on these prevailing-*plaintiff* precedents. Slip Op., 9. To prevail, a plaintiff must obtain an “enduring” change in the legal relationship between the parties. *Ibid.* (citing *Sole v. Wyner*, 551 U.S. 74, 77 (2007)). Further, “the change must be ‘judicially sanctioned.’” *Ibid.* (quoting *Buckhannon*, 532 U.S. at 605). *Lackey* established “that the enduring nature of the change must itself be judicially sanctioned,” making the transient nature of a preliminary injunction insufficient for a plaintiff to prevail. *Ibid.* “Rather, a plaintiff ‘prevails’ under the statute when a court conclusively resolves a claim by granting enduring judicial relief on the merits that materially alters the legal relationship between the parties.” *Ibid.*

But in the star footnote, the Court explained that while this clarifies the test for when a *plaintiff* prevails, “[a] different body of caselaw addresses when a *defendant* is a ‘prevailing party’ for the purposes of other fee-shifting statutes.” *Id.*, n.*. “Our decision today should not be read to affect our previous holding that a defendant need not obtain a favorable judgment on the merits to prevail, nor to address the question we left open of whether a defendant must obtain a

preclusive judgment in order to prevail.” *Ibid.*, n.* (citing *CRST Van Expedited, Inc. v. EEOC*, 578 U.S. 419, 431-34 (2016)).

B. The Eleventh Circuit’s Decision Imported Requirements From the Prevailing *Plaintiff* Body of Caselaw Into the Test for Determining Whether the *Defendant* Prevailed.

1. The Eleventh Circuit’s decision below imports the requirements of obtaining a “judicially sanctioned” change in the parties’ legal relationship, i.e. the prevailing *plaintiff* requirements from *Buckhannon* and *Texas State Teachers Assn.*, into the test for determining whether a *defendant* has prevailed. Pet. App. 3a-4a (quoting *Affordable Aerial*, 108 F.4th at 1362 (citing *Texas State Teachers Assn.*, 489 U.S. at 792-93 and quoting *CRST*, 578 U.S. at 422)). For a *defendant* to prevail in the Eleventh Circuit, “a ‘court itself must act to reject or rebuff the plaintiff’s claims.’” Pet. App. 4a (quoting *Affordable Aerial*, 108 F.4th at 1363).

That precedent from *Affordable Aerial*, however, was based on *Buckhannon*’s “requiring ‘a court-ordered “chang[e] [in] the legal relationship between [the plaintiff] and the defendant.”’” *Affordable Aerial*, 108 F.4th at 1363 (quoting *Buckhannon*, 532 U.S. at 604 (quoting *Texas State Teachers Assn.*, 489 U.S. at 792)) (alterations in original). “[S]ome judicial action rejecting or rebuffing a plaintiff’s claim is necessary to endow a defendant with prevailing party status” Pet. App. 4a (quoting *Affordable Aerial*, 108 F.4th at 1364 (citing *CRST*, 578 U.S. at 422, 431)).² In so doing, the Eleventh Circuit cited to both the body of

² The decision below miscited to page 1365 of *Affordable Aerial*, but that quoted material is found on page 1364. Compare Pet. App. 4a with *Affordable Aerial*, 108 F.4th at 1364.

caselaw for prevailing *plaintiffs*, *CRST*, 578 U.S. at 422, and the body of caselaw for prevailing *defendants*, *id.* at 431, unifying this Court’s distinct legal tests, Pet. App. 4a.

Incorporating those prevailing-*plaintiff* requirements in the test for whether a *defendant* prevails, the Eleventh Circuit held that a defendant which successfully prevents the plaintiff from materially altering the parties’ legal relationship, even if obtaining a preclusive dismissal, nevertheless does not “prevail” unless the dismissal “is owed to an[] action of the district court.” Pet. App. 4a-6a (citing *Affordable Aerial*, 108 F.4th at 1364-65). The Eleventh Circuit held that even dismissals “with prejudice,” if they does not satisfy the test for prevailing *plaintiffs*, “are ‘not the stuff of which [a defendant’s] legal victories are made.’” Pet. App. 6a (quoting *Affordable Aerial*, 108 F.4th at 1365 (quoting *Hewitt v. Helms*, 482 U.S. 755, 760 (1987))) (alterations in original). Again, the Eleventh Circuit relied on this Court’s prevailing-*plaintiff* body of caselaw from *Hewitt* to decide whether the *defendant* prevailed. Pet. App. 6a.

2. As in *Affordable Aerial*, the Eleventh Circuit’s decision unified this Court’s body of caselaw for prevailing *plaintiffs* with its body of caselaw for prevailing *defendants*, holding that “some judicial action rejecting or rebuffing a plaintiff’s claim is necessary to endow a *defendant* with prevailing party status,” see Pet. App. 4a (citing 108 F.4th at 1364 (citing *CRST*, 578 U.S. at 422, 431)) (emphasis added). But *CRST* only addressed the requirement of “some judicial action,” i.e., “judicial *imprimatur*,” in the context of explaining the Court’s prevailing *plaintiff* precedents. 578 U.S. at 422 (citing *Buckhannon*, 532 U.S. at 604-05). In *CRST* the Court drew a distinction between

prevailing *plaintiff* cases and its newly articulated test for whether a *defendant* prevailed. *Id.* at 423. Despite the contrast articulated by this Court, the Eleventh Circuit looked to the Court’s other statement that the term “prevailing party” should be interpreted in a consistent manner across various fee-shifting statutes as meaning that the Court’s “prevailing party” precedent was a unified body of caselaw. Pet. App. 3a-4a; see also *Affordable Aerial*, 108 F.4th at 1362 (citing *CRST*, 578 U.S. at 422 (citing *Buckhannon*, 532 U.S. at 603 and n.4)); *id.* at 1364-65 (requiring judicially sanctioned relief for a *defendant* to prevail).

The holding in *Affordable Aerial*, applied in the decision below, was based on unifying this Court’s prevailing *defendant* caselaw with its prevailing *plaintiff* caselaw. Pet. App. 4a-6a; *Affordable Aerial*, 108 F.4th at 1364-65. Under *CRST*, a *defendant* “prevails” “whenever the plaintiff’s challenge is rebuffed, irrespective of the reason for the court’s decision,” even for nonmerits reasons. 578 U.S. at 431. A *plaintiff*, however, must obtain a judicially sanctioned change in the parties’ legal relationship to prevail. *Id.* at 422 (citing *Buckhannon*, 578 U.S. at 604-05). The Eleventh Circuit’s holding in *Affordable Aerial* unified those two bodies of caselaw. 108 F.4th at 1364 (citing *CRST*, 578 U.S. at 422, 431).

The star footnote in *Lackey* rejects that underlying premise of the Eleventh Circuit’s precedent and the decision below, clarifying that there is not a unified body of caselaw for determining whether a party is a “prevailing party.” Slip Op. at 9 and n.*. Instead, there is a body of caselaw for determining whether a *plaintiff* is a “prevailing party,” and “[a] different body of caselaw” for determining whether a *defendant* is a “prevailing party.” *Lackey*, Slip Op., 9 and n.*. The

Eleventh Circuit did not have the benefit of the Court’s delineation of these two “different” bodies of caselaw when it decided the case below.

C. Rehearing and a “GVR” Should Be Granted to Allow the Eleventh Circuit to Reconsider Its Decision in Light of *Lackey*.

1. Because the Court’s intervening decision in *Lackey* rejects the premise of the Eleventh Circuit’s decision below, the Eleventh Circuit should be permitted to correct its precedent and reevaluate this matter with guidance from *Lackey*. Because the decision in *Affordable Aerial* is precedential, it has the potential to impact a significant number of cases within the Eleventh Circuit before another opportunity arises for the Eleventh Circuit to reevaluate that precedent in light of *Lackey*. A GVR here would provide the Eleventh Circuit with that opportunity.

2. Further, a petition for rehearing in *Affordable Aerial* was filed on March 21, 2025, that requested a GVR for the same reasons as addressed in this petition. No. 24-688 (U.S., Mar. 21, 2025). As addressed above, the Eleventh Circuit’s decision below was based on the application of *Affordable Aerial* and its unification of the prevailing *defendant* body of caselaw with the *distinct* prevailing-*plaintiff* body of caselaw for determining a prevailing party. A GVR in *Affordable Aerial* will remove the precedent upon which the Eleventh Circuit relied when deciding this case. In which case, a GVR would also be warranted here.

CONCLUSION

This Court should grant this rehearing petition and the petition for a writ of certiorari, vacate the Eleventh Circuit's decision below, and remand ("GVR") in light of *Lackey*.

Respectfully submitted,

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April 2025

CERTIFICATE OF COUNSEL

As counsel of record for the petitioner, 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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