No. 21–1217

IN THE
Supreme Court of the United States

COLUMBIA HOUSE OF BROKERS REALTY, INC., ET AL.,
Petitioners,

V.

DESIGNWORKS HOMES, INC., ET AL.,
Respondents.

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

BRIEF OF *AMICUS CURIAE* COUNCIL OF MULTIPLE LISTING SERVICES, INC., IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Council of Multiple Listing Services, Inc. (CMLS), is a trade association founded in 1957 that represents 221 real estate multiple listing services (MLSs) and 69 related businesses. CMLS is the largest association of MLSs in the world, and its members provide services in every major residential real estate market in the United

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than the *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record received timely notice of the intent to file this brief under Rule 37.2(a), and all parties have given their consent to the filing of this brief.

States. An MLS is a facility that allows real estate brokers and appraisers to share detailed information about properties to sell them and assess their value. MLSs thus facilitate transparency and liquidity in real estate markets.

The home-buying information in the MLS databases of CMLS's members is accessible to more than 1.7 million subscribers, real estate brokers and salespeople who represent listed properties to each other.[2] These brokers and salespeople serve homebuyers and sellers in most of the estimated six million U.S. residential real estate transactions per year.[3] Buyers nationwide also access MLS data for themselves by visiting the real estate portals that pull information from MLSs, such as Zillow.com and REALTOR.com.

Consumers, brokers, and the MLSs that serve them are at risk from the Eighth Circuit's decision in *Designworks Homes, Inc. v. Columbia House of Brokers Realty, Inc.,* 9 F.4th 803 (2021). Every consumer, broker, and MLS that creates, posts, or uses a floor plan now faces a potential copyright infringement lawsuit. The text of Title 17 does not bear this reading or this result. This Court should intervene to correct both.

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[2] Some brokers and salespeople participate in more than one MLS, resulting in some duplication in subscribers between MLSs. *Cf.* Nat'l Ass'n of REALTORS®, *Monthly Membership Report*, https://perma.cc/T8A8-WWYL (reporting more than 1.5 million members as of February 2022).

[3] *See* Press Release, Nat'l Ass'n of REALTORS®, Existing-Home Sales Fade 7.2% in February, March 18, 2022, https://perma.cc/K87R-ZVTV.

INTRODUCTION AND SUMMARY OF ARGUMENT

Visual images are essential for marketing real estate in the United States. On CMLS's member MLSs, listing brokers represent properties with videos, photographs, and floor plans, which supplement numerical and textual information, such as numbers of bedrooms and descriptions of amenities. More than helping consumers crunch numbers or discern the price per square foot, these images—and particularly floor plans—help consumers see what they are getting in a real estate transaction. Figure 1 shows what a typical floor plan looks like on an MLS:

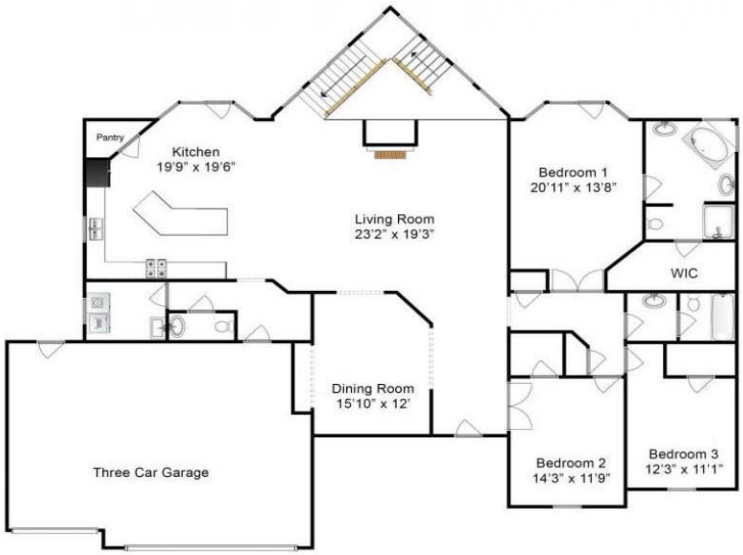

Figure 1 Floor plan subject to suit in Designworks v. Columbia House.[4]

[4] J.A. at 22, *Designworks Homes, Inc. v. Columbia House of Brokers Realty, Inc.*, No. 19-3608 (8th Cir. May 4, 2018).

Brokers and their service providers prepare floor plans like this for homeowners and appraisers, a service that the Eighth Circuit's interpretation of copyright law would much inhibit. The Architectural Works Copyright Protection Act (AWCPA) makes it copyright infringement to reproduce an architectural work, which is a "design of a building." 17 U.S.C. § 101. The structure and text of Title 17 show that Congress intended diminished protection for architectural works, akin to that provided for copyrights in useful articles. So, for example, section 120(a) provides as follows:

> *Pictorial Representations Permitted.*—The copyright in an architectural work that has been constructed does not include the right to prevent the making, distributing, or public display of pictures, paintings, photographs, or other pictorial representations of the work, if the building in which the work is embodied is located in or ordinarily visible from a public place.

The Eighth Circuit misread section 120(a)'s exemption, leaving floor plans out of its scope, wrongly equating floor plans like those in Figure 1 with detailed architectural plans like those in Figure 2:

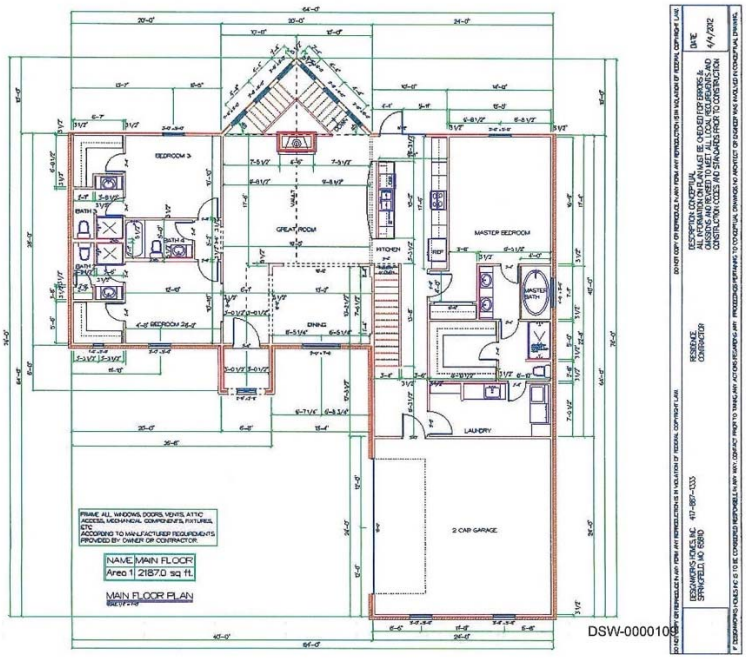

Figure 2 Technical drawing of one of Respondents' architectural works.[5]

This grave misconception comes at the expense of consumers and brokers. They will bear the cost of locating anyone who might assert copyright in a home for sale *and* the responsibility for drumming up a licensing market for floor plans. If these efforts fail, all participants in a real estate transaction risk infringement suits. Multiplied across transactions, these business and legal costs will exceed what the real estate market can bear, with little corresponding benefit to architectural authors.

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[5] J.A. at 22, *Designworks Homes, Inc. v. Columbia House of Brokers Realty, Inc.*, No. 19-3608 (8th Cir. May 4, 2018).

This Court's intervention is needed to avert this outcome and to restore a sensible, textually grounded reading of Title 17 and its 1990 AWCPA amendments. In subjecting real estate floor plans to infringement claims, the Eighth Circuit ignored Title 17's statutory scheme and the plain language of section 120(a)'s exemption. Furthermore, the court suggested that floor plans would not be the only targets of infringement litigation: It fashioned an untenable "inside/outside" distinction in section 120(a) that threatens liability for *all interior pictures* used to market real estate.

This Court should grant certiorari, reverse the Eighth Circuit, and reinstate the judgments of the trial court below.

ARGUMENT

I. The Eighth Circuit's Decision Threatens Real Estate Markets And Does Little To Protect Architectural Authors.

Courts have long recognized the important role MLSs play in facilitating markets for residential real estate. *E.g., United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1368 (5th Cir. 1980). MLSs make real estate transactions transparent and efficient by providing access to floor plans and interior photographs, among other data. MLSs are also critical sources of data for real estate portals like REALTOR.COM and Zillow.com. Thanks to MLSs, with a tap or click, these interior depictions give consumers a clear sense of a home's features and therefore its value. In the wake of the Eighth Circuit's decision, MLSs, along with the consumers,

appraisers, and brokers they serve, may forgo these visual markers of worth. That will leave buyers less informed and sellers without their most potent marketing tools. At a minimum, consumers will have to absorb millions of dollars in new costs.

The importance of access to floor plans and other digital tools in buying and selling real estate is ever-growing. A recent study by Zillow.com reported that 79% of consumers expect digital floor plans of listings online.[6] This is unsurprising given that physical open houses are becoming less common.[7] Photographs are even more nearly ubiquitous in real estate marketing than floor plans. Consider that Zillow alone "receives *millions of photos each day* through feeds provided by real estate brokers, multiple listing services . . . and other sources." *VHT, Inc. v. Zillow Grp., Inc.*, No. C15-1096JLR, 2017 WL 2654583, at *2 (W.D. Wash. June 20, 2017) (emphasis added). But as many are interior depictions of buildings, the Eighth Circuit's inside-outside distinction threatens them, too. The decision below will compound the cost of buying and selling homes and diminish the transparency and liquidity that MLSs seek to enhance.

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[6] Manny Garcia, *Americans Want Digital Tools to Complement Traditional Home Shopping*, Zillow (Mar. 10, 2021), https://perma.cc/3UTE-X5FB.

[7] Dan Handy, *Virtual Home Selling Tools Benefit Buyers & Sellers—And Are Here to Stay Post-Pandemic*, Zillow (June 21, 2021), https://perma.cc/3QAQ-CWYX.

A. The Eighth Circuit's Opinion Increases Costs And Reduces Information Available To Consumers.

If the Eighth Circuit's refusal to exempt floor plans from infringement stands, it will inundate the real estate market with new costs. Petitioners have detailed many of these costs in their brief. Pet. for Cert. 19–21. CMLS writes to emphasize three: (1) the prohibitive cost of obtaining licenses and the lack of a market for them; (2) a slew of responsibility-shifting efforts among market players; and (3) more expensive appraisals.

1. The cost of securing licenses from owners of copyrights in architectural works will exceed what brokers and sellers are willing to pay. Right now, Matterport, one provider of floor plan services, makes software available to brokers that generates floor plans based on measurements made with the broker's camera or phone for $13 per listing.[8] Another vendor, VHT, will send a photographer to the home to capture data and prepare floor plans for $160 per listing.[9] A third, Cubicasa, provides services to photographers, allowing them to create floor plans for as little as $24.43 per scan.[10] In this product-pricing context, there is little room for licensing fees to be paid to architects for floor plans.

Worse, there is no market in which to obtain these licenses. Though CMLS's members facilitate a

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[8] *Take Axis for a Spin*, Matterport, https://perma.cc/KCX6-6CUA.

[9] *New Floor Plans,* VHT Studios, https://perma.cc/E3AE-54J3.

[10] *Pricing*, Cubicasa, https://perma.cc/SV5X-CLLJ.

market for *buying buildings* embodying architectural works, there is no MLS for *licensing rights* in them. Seeking and obtaining licenses for floor plans would cost real estate brokers—per property listed—days of waiting and hours of labor.

2. The dollar cost of these efforts and licenses, assuming they are forthcoming, is not the only thing shifted to consumers under the Eighth Circuit's floor-plan ban. MLSs regularly seek warranties and indemnifications from brokers who supply media for distribution. Many already require brokers to warrant that their data contributions do "not infringe or violate any patents, copyrights . . . or other proprietary rights of any third party," indemnifying the MLS in case of a breach.[11]

The brokers, in turn, will seek warranties from sellers that they have the rights to permit floor plans. They have already done so with photos. For example, a recent version of a broker's listing agreement form provides that "Seller warrants that Seller has the necessary rights in the photographs" and "Seller agrees to indemnify and hold . . . harmless" the broker and other MLS participants against infringement claims.[12] These warranties and indemnifications for their breach will multiply under the Eighth Circuit's opinion, extending liability for floor plans to consumers.

3. These costs will diminish availability of floor plans on MLSs, leading to a third cost to consumers:

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[11] *E.g., Triangle MLS, Inc., Participant Agreement* ¶¶ 16, 41, Triangle MLS, Aug. 3, 2016.

[12] *E.g., Exclusive Sale and Listing Agreement* ¶ 7, Northwest Multiple Listing Service, 2021.

pricier appraisals. MLSs are a primary data source for residential real estate appraisers, who are "thrilled with more robust information in the MLS," according to the president of the Appraisal Institute.[13] Traditionally, appraisers must measure interior property dimensions for appraisals, but Fannie Mae now permits "desktop appraisals," if they "include [a] floor plan with interior walls and exterior dimensions."[14] With access to MLS floor plans, an appraiser need not visit the seller's home. Without them, appraisers' home visits, and therefore appraisal costs, will only increase.

In sum, the Eighth Circuit's decision will introduce prohibitive and unwarranted costs for all real estate transaction participants, and it will gum up the works of real estate transactions. The holding also provides little corresponding benefit to rightsholders in architectural works.

B. Floor Plans Are A Lesser Threat To Architectural Authors Than "Pictures, Paintings, [And] Photographs."

In the proceedings below, Respondents made the untenable claim that real estate floor plans facilitate infringement of architectural works—that a competitor could "build an imitating house from these floor plans alone."[15] In reality, floor plans

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[13] Press Release, Appraisal Institute, Appraisal Institute Praises 'Green' Multiple Listing Service Tool Kit (Apr. 21, 2010).

[14] *About Desktop Appraisals*, Fannie Mae, Mar. 2022.

[15] Br. Appellant at 12, *Designworks Homes, Inc. v. Columbia House of Brokers Realty, Inc.*, No. 19-3608 (8th Cir. Mar. 11, 2020).

present less of a threat than section 120(a)'s three specified exemptions: "pictures, paintings, [and] photographs" of architectural works. These three representational forms capture distinctive elements that an infringer could use to reproduce a building. Floor plans, standing alone, cannot.

Consider Figure 3 from the Eighth Circuit's opinion, which juxtaposes a photograph, a pencil drawing, and a painting of the Supreme Court building with a floor plan:

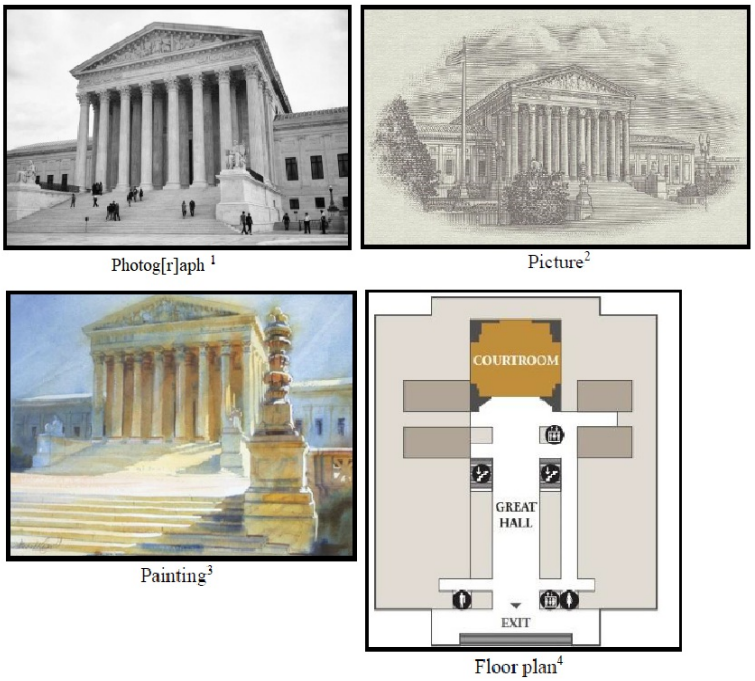

Figure 3 Representations of the Supreme Court building. 9 F.4th at 809.

Were architect Cass Gilbert's design of the Supreme Court's home subject to copyright as an architectural work, the picture, photograph, and painting would

each provide critical information—subtly different in each case—that a potential infringer could use to reproduce the building. But the floor plan alone would be *less useful* to the infringer than any of the other representations. That is because it captures fewer distinctively expressive elements of the underlying work that make it recognizable *as* an architectural work. Given the floor plan in Figure 3, a would-be infringer would know only that a courtroom lies at the end of a hall, with bathrooms and staircases to either side. These are the "individual standard features" that the definition of an architectural work excludes from copyright protection. 17 U.S.C. § 101 (defining "architectural work").

It is illogical to make "pictures, photographs and paintings" exempt representations, while subjecting floor plans to infringement claims. Floor plans are manifestly permissible as "other pictorial representations" of architectural works under Title 17's structure and the plain text of section 120(a).

II. The Eighth Circuit Grounded Its Construction Of Section 120(a) In Speculation, Not The Statute's Structure And Text.

Compared to nearly every other original work of authorship covered by Title 17, architectural works enjoy *fewer* protections, not more. Halting the use of floor plans to sell real estate is not one of those protections. The opinion below misreads the AWCPA's statutory scheme and its relation to the rest of Title 17 and substitutes speculation for textual analysis.

This loose and misguided approach produced three errors. The first was to ignore Title 17's diminished protection for works of architecture. This lapse led the court to equate infringing *reproductions* of architectural works with permissible pictorial *representations*. The second error was to shrink the infringement exemption for pictorial representations in section 120(a). The court further confused the scope of section 120(a)'s broad *exemption* with the narrower scope of architectural works' *protection*. The third, and perhaps worst, error was to rewrite section 120(a), suggesting the removal of *all interior* building depictions from its reach. With this judicial revision, infringement would lie not just against the creation of floor plans, but also against the nearly ubiquitous use of interior pictures to sell and buy homes.

A. Within Title 17's Statutory Scheme, Section 120(a) Reflects The Limited Protection For Architectural Works.

Title 17 defines baseline copyright protections for original works of authorship in paradigmatic categories, such as literary works, musical compositions, and pictorial, graphic, and sculptural works. Authors of these works have the exclusive right to reproduce them. 17 U.S.C. §§ 106, 113(a). From this baseline, Title 17 departs upward with augmented protections for "works of visual art." Conversely, it departs downward with diminished protections for works embodied in useful articles—

works people use, not just admire[16]—such as architectural works. This graduated protection scheme makes all the statutory difference, but the Eighth Circuit ignored it.

At the baseline, Title 17 uses a three-word package to define and denote protections for paradigmatic visual works. It calls these works "pictorial, graphic, and sculptural" (PGS), and links them to the exclusive right of reproduction. *See* 17 U.S.C. § 101;[17] *id.* § 106 (defining exclusive rights); *id.* §§ 107–122 (delineating exceptions and limitations to those rights). When Congress enacted the Visual Artists Rights Act in 1990, it bundled this right of reproduction with additional rights for "visual works of art." *See* 17 U.S.C. § 106A(a)(3)(B) (including a right to attribution and a right to "prevent any destruction of a work of recognized stature"). But VARA did not confer these enhanced rights on the full PGS triad. It reserved them for a narrowly circumscribed subset of PGSs: paintings, drawings, prints, sculptures, and photographs *embodied in a single copy or in 200 or fewer limited, numbered, signed copies*. Here, Congress made fine distinctions, focusing on the number of copies as a

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[16] "A 'useful article' is an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information." 17 U.S.C. § 101.

[17] It is rare for Title 17 to use a subset of the PGS triad. In two instances, neither of which defines the scope of copyright protection for PGS works, "graphic" and "pictorial" appear together without "sculptural." 17 U.S.C. §§ 101, 108(i). "Pictorial" is used without "graphic" in only four places. §§ 101, 120(a), 121; Ch. 13 (addressing original designs in useful articles).

heuristic for those works that likely do and do not exhibit the expressiveness expected of fine arts and reflecting the ways in which different types of fine arts are produced and disseminated.[18]

For both PGSs and works of visual art, neither of which are useful articles, *reproduction* is linked to *representation*. At and above this baseline, the rightsholder has the exclusive right not just to copy the work but to represent it in other media. If a person represents the contents of a photo in sculptural form, it is copyright infringement. *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992). So is displaying a poster of an author's work on the set of a TV series. *Ringgold v. Black Ent. Television, Inc.*, 126 F.3d 70 (2d Cir. 1997). At this level of protection, depicting the work is the same as copying it.

Traditionally, architectural works had less protection. Before the AWCPA in 1990, duplicating architectural plans that the author had registered was copyright infringement, but using those plans to build a copy of a building was not. So, for example,

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[18] VARA distinguishes *among* PGS works based on manner of production and distribution: "a painting, drawing, print, or sculpture . . . in a limited edition of 200 copies or fewer . . . signed and consecutively numbered by the author" versus "multiple cast, carved, or fabricated sculptures of 200 or fewer . . . numbered . . . and bear[ing] the . . . identifying mark of the author" versus a "photographic image . . . for exhibition purposes only, existing in . . . a limited edition of 200 copies or fewer . . . signed and . . . numbered by the author." 17 U.S.C. § 101. Further narrowing the protected works, Congress delineated an array of exclusions—"any poster, map, globe, chart, technical drawing, diagram," etc., *id.*—not because these forms are not graphic or pictorial, but because they are not fine art of the kind VARA sought to protect.

Scholz Homes, Inc. v. Maddox, 379 F.2d 84, 86 (6th Cir. 1967), affirmed the trial court's finding that "there was no evidence from which it might be inferred that . . . defendant had utilized plaintiff's copyrighted plans *in planning or constructing a house,*" while *Imperial Homes Corp. v. Lamont*, 458 F.2d 895, 899 (5th Cir. 1972), held that "no copyrighted architectural plans . . . may clothe their author with the exclusive right to reproduce the dwelling pictured . . . . [but] nothing . . . prevents such a copyright from vesting the . . . *exclusive right to make copies of the copyrighted plans*" in the copyright owner (emphasis added in both quotations).[19]

When Congress finally granted copyright protection for architectural works, it limited the protection by distinguishing representations—which section 120(a) permits—from reproductions—which section 106 does not. The representation carve-out appears in the text of the AWCPA. While that text clarified that it is infringement to copy buildings, not just architectural plans, it simultaneously exempted pictorial representations from claims of infringement. Under this exemption, a rightsholder cannot prevent "the making, distributing, or public display of pictures, paintings, photographs, or other pictorial representations of the work . . . ." 17 U.S.C. § 120(a). With these words,

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[19] The distinction is comprehensible in light of *Baker v. Selden*, 101 U.S. 99 (1879), which these courts cited to explain that a "descriptive copyright may not extend an exclusive right to the use of the described art itself lest originality of description should preempt non-novel invention." *Imperial Homes*, 458 F.2d at 899.

Congress disconnected infringing reproductions from permissible representations in architectural works. And in doing so it "protect[ed] the public as well as the interests of the real estate industry." H.R. Rep. No. 101-735, at 11 (1990). This exemption parallels another for designs in useful articles.[20]

Section 120(a)'s bright-line exemption for pictorial representations recognizes that architecture as art "plays a central role in our daily lives," but it also understands architecture as a "form of shelter," indeed, the "only form of copyrightable subject matter that is habitable." H.R. Rep. No. 101-735, at 12, 13. The exemption accounts for the fact that people live and congregate in the buildings that architects design, and they adapt these works to their own purposes with their own pictorial depictions of these works—both the outside and the inside. And when they do, whether by photograph or drawing, painting or CAD rendering, section 120(a) relieves them from having to prove a fair use defense on a case-by-case, fact-intensive basis, instead favoring a threshold determination of these rights.

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[20] Section 113(c) provides:

> In the case of a work lawfully reproduced in useful articles that have been offered for sale or other distribution to the public, copyright *does not include any right to prevent* the making, distribution, or display of pictures or photographs of such articles in connection with advertisements or commentaries related to the distribution or display of such articles, or in connection with news reports.

The Eighth Circuit's exclusion of floor plans from section 120(a) rests on a false premise: that architectural works command the same baseline protections as PGSs and visual works of art and are not akin to less-protected useful articles. From the PGS triad and the definition of visual works of art, the court pulled out the statutory example of "technical drawings," then characterized floor plans "more comfortably" as technical drawings rather than exempt "pictures" or "pictorial representations." Only by resorting to this sleight of hand with the PGS baseline could the court elevate architectural works to a level where simply *representing* a work constitutes an infringing *reproduction*.

From this fundamental misconception flow the Eighth Circuit's two remaining errors: (1) holding that floor plans are not "other pictorial representations" under section 120(a); and (2) suggesting that pictorial representations made from inside buildings—as opposed to those made from the vantage of a "public place"—are not subject to section 120(a).

B. Floor Plans Are "Other Pictorial Representations" Under Section 120(a).

On its face, the phrase "pictorial representation" refers to images that use any visual medium to *represent* an architectural work rather than *reproduce* it, and section 120(a) preserves those representations from claims of infringement. And that includes floor plans made to show what the interior of a home looks like. Floor plans are "other pictorial representations" because this construction

is consistent with the ordinary meaning and statutory phrasing of section 120(a) and with Title 17's only other use of the expression.

1. In the absence of a statutory definition, the ordinary meaning and statutory phrasing of "pictorial representation" show that this language has everything to do with referential *function*, and nothing to do with the level of detail or the medium in which the representation appears. *Merriam Webster* defines "pictorial" with reference to "picture." *Pictorial*, Merriam-Webster, https://perma.cc/FAD5-885E. It defines "picture," in turn, by its *representational function* irrespective of what means or media are used to create the image. *Picture*, Merriam-Webster, https://perma.cc/B6G5-ZMHY (defining a "picture" as "a design or *representation made by various means* (such as painting, *drawing*, or photography)") (emphasis added). The ordinary meaning of a "pictorial representation," then, is simply an image that serves to depict something else.

Likewise, the statutory focal point of "pictorial representation" is the noun "representation."[21] That word describes what the user is doing with an architectural work: depicting, describing, or identifying it rather than reproducing it. "Pictorial" is an adjective that, consistent with the three preceding nouns—"pictures," "paintings," and "photographs"—confines the exemption to *visual* representations, i.e., images. Both ordinary meaning and statutory phrasing are in accord: A "pictorial

[21] Section 120(a) and Chapter 13 are the only places where "representation" is used in this sense.

representation" is any *image* that serves to *represent* the original architectural work.

2. This "image that serves to represent" interpretation also squares with Title 17's only other references to "other pictorial representation," which appear in Chapter 13's registration and recording provisions for useful articles. First, sections 1310(h), 1314, and 1315(a) consistently use the phrase "*drawing* or other pictorial representation" (emphasis added), expressly placing drawings among "pictorial representations." Second, the phrase "other pictorial representation" works in Chapter 13 the same as it does in section 120(a). Applicants who seek to register copyright in original designs in useful articles must submit "deposit material" that contains "a drawing *or other pictorial representation* of the useful article embodying the design." § 1310(h). The accompanying regulations' examples of these pictorial representations run the gamut of images and media: "photographic prints, transparencies, photostats, drawings, or similar two-dimensional reproductions or renderings of the work . . . ." 37 C.F.R. § 202.21(a). The point is that the deposit material must depict the original work well enough for the Copyright Office to decide whether that work merits protection and to give notice to others of the author's claim in the work. A pictorial representation of a building's interior serves a similar referential purpose. It shows the viewer what the rooms look like so that the viewer can decide what to do with them.

Thus, floor plans fit comfortably within section 120(a)'s exemption for "other pictorial

representations" and should not be treated as infringing reproductions.

3. In holding that floor plans are not "pictorial representations" exempt from copyright infringement, the Eighth Circuit conflated the scope of *protection* with the scope of an *exemption*. Specifically, the court incorrectly reasoned that by protecting works in the form of "technical drawings, including architectural plans" in section 101, but omitting the same language from section 120(a), Congress meant to exclude floor plans from that section's permissible representations. *Designworks*, 9 F.4th at 807 ("The floorplans here certainly could be characterized more comfortably as 'technical drawings' or 'architectural plans' than as 'pictures.' . . . Congress therefore had more appropriate terms at the ready but did not use them."). This reasoning ignores the statutory fact that section 101 captures how *architectural authors* reduce their creative expressions to tangible form, not how *members of the public* act to depict such works. There is no statutory basis for inferring Congress's intent about acts of representation from its words defining acts of authorship.

For the same reason, the Eighth Circuit used the wrong through-line to unify section 120's exemption language. Relying on two canons of statutory construction,[22] the court reasoned that the words "pictures, paintings, photographs" preceding "other pictorial representations" share a common thread of artistic expression. 9 F.4th at 808. Therefore, said

[22] The cited canons are *noscitur a sociis* and *ejusdem generis*. 9 F.4th at 808–09.

the court, "other pictorial representations" also refers exclusively to expressive representations, not functional depictions like floor plans. *Id.* But while artistic expression is the touchstone for defining the protected elements of architectural works, expressiveness has no bearing on what is exempt from infringement under section 120(a). By making the wrong cut, the Eighth Circuit read in a new, unsupported requirement that representational images be "expressive," not functional.

Read properly, section 120(a) exempts the photographer, the painter, and the selling homeowner alike. Under this section, Chicago photographers may take and sell pictures of Jeanne Gang's famous Aqua Tower[23] without her permission, just as plein-air artists are free to render that building in paint and display it among their works. Similarly, Aqua Tower condominium owners may photograph the interior rooms of their residences for remodeling purposes, or they may engage contractors to render floor plans to sell their homes. All four are alike in creating images that represent architectural works, avoiding the primary evil that the AWCPA was designed to prevent: reproduction of a building or architectural plans themselves.

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[23] *See Aqua Tower,* Studio Gang, https://perma.cc/R6MX-SUXA.

C. The Eighth Circuit Erred By Potentially Removing All Interior Depictions From Section 120's Infringement Exemption.

In placing floor plans beyond section 120(a)'s reach, the Eighth Circuit misread another statutory phrase. The section's ending proviso exempts pictorial representations "if the building in which the work is embodied is located in or ordinarily visible from a public place." 17 U.S.C. § 120(a). On its face, this language denotes where the *building must stand*, not the vantage point from which the *representation must be created*. Yet the Eighth Circuit suggested a "creation" or "viewing location" requirement, reasoning "it would be quite difficult to *create* a floorplan of a building simply by *viewing* it from a public place." 9 F.4th at 810 (emphasis added). This extra-textual reading potentially subjects pictorial representations to infringement unless they are taken or made from the vantage point of a public place outside the building—a nonsensical "inside/outside" distinction contrary to section 120(a)'s text and Title 17's statutory scheme.

Section 120(a) applies to the location of the building, not to the vantage point from which pictorial representations are made. Right after the phrase "the building in which the work is embodied" comes the word "is," a term of equivalence that refers back to "the building." What must be true of "the building" comes next: It must "be located" in a particular setting, one that is "in" or "ordinarily visible from" a "public place." In contrast, the "representations" mentioned in 120(a) need only be "pictorial" in nature. Their place of creation is unspecified. Under section 120(a), then, so long at

the building is visible from a public place, a photograph taken from—or of—the outside of a building and a floor plan made from—or of—the inside of a building are treated the same: Both are exempt from infringement claims.

The Eighth Circuit's opinion can be read effectively to rewrite section 120(a) to cover only "pictures, paintings, photographs, or other pictorial representations of the work *made from*" a location that is public or visible to the public. Those are not the words Congress chose, and that is not the purpose evident in the text. The legislative precursors to section 120(a) confirm what is apparent from the text: Congress meant its final proviso to designate *buildings* visible from a public vantage point, not *representations* created from such vantage points, and not representations of publicly visible *aspects* of a building. The bills that introduced this exemption stressed that it "[p]ermits pictorial representations of the work when the *work is erected in* a publicly accessible location." H.R. 2962, 100th Cong. (1987); S.1971, 100th Cong. (1987) (emphasis added).[24]

On its face, section 120(a)'s "publicly visible" language makes no inside-outside distinction. The

[24] The final version's swap of "publicly accessible" for "publicly visible" does not alter this analysis. The phrase "building in which the work is embodied" does not support an inside-outside cut either. By speaking of "buildings" that "embody" architectural works, section 120(a) merely reinforces that a protected building must "embody" a work of architecture. It does not limit pictorial representations to any aspects of the embodied work; both the outside and outside are fair game.

Eighth Circuit's reading to the contrary carries dire consequences for the entire real estate industry, potentially "reaching the interior photos that accompany virtually every real estate listing." Pet. for Cert. at 15. This a-textual, far-reaching interpretation requires correction.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari.

RESPECTFULLY SUBMITTED,

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