No. 21-1217

IN THE
Supreme Court of the United States

COLUMBIA HOUSE OF BROKERS REALTY, INC., D/B/A HOUSE OF BROKERS, INC., D/B/A JACKIE BULGIN & ASSOCIATES, ET AL.,
Petitioners,

v.

DESIGNWORKS HOMES, INC. & CHARLES LAWRENCE JAMES,
Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Eighth Circuit

BRIEF OF MOVE, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

DAVID R. SINGER
JENNER & BLOCK LLP
515 S. Flower Street,
Suite 3300
Los Angeles, CA 90071
(213) 239-2206

ADAM G. UNIKOWSKY
Counsel of Record
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

Counsel for Amicus Curiae

QUESTION PRESENTED

Whether floor plans constitute "pictures, paintings, photographs, or other pictorial representations" of an architectural work within the meaning of 17 U.S.C. § 120(a).

CORPORATE DISCLOSURE STATEMENT

Move, Inc. ("Move") is a subsidiary of News Corp. REA Group Limited owns more than 10% of Move's stock.

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INTEREST OF *AMICUS CURIAE*[1]

Move, Inc. ("Move") provides real estate information, tools and professional expertise across a family of websites and mobile experiences for consumers and real estate professionals. The Move network includes Realtor.com©, a tool for home buyers, sellers, landlords, and tenants which contains a comprehensive set of for-sale and for-rent listings. It also includes Avail, a platform that provides online tools for landlords and tenants to navigate all aspects of the rental process, including listings, rental applications, leases, monthly rent payments, and maintenance tickets.

Real estate listings on Realtor.com© frequently include floor plans. Floor plans are particularly common for new construction and for rental properties, but they may appear in any real estate listing. The Eighth Circuit's decision may induce sellers and agents to remove floor plans from real estate listings, thus reducing the utility of those listings to prospective homeowners and tenants. In addition, the Eighth Circuit's decision may expose users of Move's platform—both on the sell side and on the buy side—to

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[1] Pursuant to this Court's Rule 37.2(a), *amicus* timely notified all parties of its intention to file this brief. Counsel for all parties have consented to the filing of this *amicus* brief. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

unpredictable copyright infringement liability for the innocuous act of uploading or downloading a floor plan. Although Realtor.com© does not itself post floor plans or engage in potentially infringing activities, the Eighth Circuit's decision may lead to Move receiving takedown notices under the Digital Millennium Copyright Act. Further, Move has an interest in ensuring that its platforms are valuable for those who use it. Therefore, Move has a strong interest in ensuring that the Eighth Circuit's decision is reversed.

SUMMARY OF ARGUMENT

The Eighth Circuit reached the remarkable conclusion that people who create their own floor plans of their own houses infringe the architect's copyright. That holding is irreconcilable with the statutory text, is disconnected from the purposes of copyright law, and will yield catastrophic consequences.

Under the Copyright Act, "[t]he 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." 17 U.S.C. § 120(a). As a textual matter, this case is easy: a floor plan is either a "picture," or an "other pictorial representation," of an architectural work.

The Eighth Circuit did not explain how the words "picture" and "pictorial representation" could somehow exclude a floor plan. Instead, it believed that delicate negative inferences from separate provisions of the

Copyright Act required altering the plain meaning of "picture" and "pictorial representation." Even assuming it is ever permissible to rewrite a statute in this manner, none of the purported contextual clues supported the Eighth Circuit's interpretation in the slightest. Indeed, several of the Eighth Circuit's interpretive leaps were positively bizarre, such as its assumption that "photographs" are invariably created for artistic rather than functional purposes. Really?

The Eighth Circuit gave no reason its interpretation would advance the Copyright Act's purposes, and none exists. Copyright protects the public interest by ensuring that authors have an incentive to create works, while also safeguarding the public's ability to engage in fair use of those works. But the Eighth Circuit's decision does not incentivize creative works: no one designs a building based on the expectation of an income stream when home owners create floor plans, and floor plans do not compete in the same market as houses. Nor is the public interest served if homeowners are forbidden from drawing floor plans of their own homes.

The Eighth Circuit's decision will gravely harm the real estate market. Floor plans are often instrumental in listings for new homes and regularly appear in listings for existing homes, especially rental listings. Floor plans allow prospective homeowners and renters to get a sense of the overall configuration of the home and determine whether their furniture will fit. They convey purely factual, utilitarian information that is necessary to home buyers.

If the Eighth Circuit's opinion stands, sellers and agents will pull floor plans off the Internet, which benefits no one. And all market participants—sellers and buyers, landlords and tenants—face the risk of massive, unpredictable copyright liability for the innocuous act of preparing or sharing a floor plan of their homes. The Court should grant certiorari and reverse.

ARGUMENT

I. The Eighth Circuit's Decision is Wrong.

This Court should grant certiorari because the Eighth Circuit's decision is indefensible. The Copyright Act could not be clearer that the copyright on an architectural work does not extend to a floor plan. Moreover, even the Eighth Circuit could not come up with a reason that Congress could have desired that outcome. The Court should not condone a decision that *both* nullifies a statute's plain terms *and* makes no sense.

A. The Plain Text of Section 120(a) Forecloses the Eighth Circuit's Interpretation.

Under 17 U.S.C. § 120(a), "[t]he 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." This provision unambiguously covers floor plans. A floor plan is pictorial—it is not, for instance, a written description of

a building. It represents the architectural work. Therefore, it is either a "picture," or an "other pictorial representation," of that work. End of case.

In what can generously be described as an understatement, the Eighth Circuit acknowledged that floor plans "might possibly fit within the … literal limits" of a "picture." Pet. App. 6a. And it acknowledged that "floorplans might possibly qualify as 'picturial representations' according to the contemporary definitions of those terms." Pet. App. 7a. The Eighth Circuit should have omitted the words "might possibly" from those sentences and ended its opinion without further analysis.

Instead, the Eighth Circuit proceeded to give several completely unpersuasive justifications for construing the statute to mean something it clearly does not say. The Eighth Circuit first pointed to 17 U.S.C. § 101, which defines "pictorial, graphic, and sculptural works" to include "technical drawings, including architectural plans." Pet. App. 6a. Because § 120(a) does not explicitly use the phrase "technical drawings, including architectural plans," the Eighth Circuit inferred that "other pictorial representations" excludes floor plans. Pet. App. 6a-7a.

This inference does not follow. The portion of § 101 on which the Eighth Circuit relied is an unrelated enactment that is worded differently and enacted at a different time for a different purpose. Any negative inference to be drawn from that phrasing is far too weak to overcome the plain text of § 120(a). Moreover, to the extent the definition of "[p]ictorial … works" sheds any light, it supports Petitioners'

interpretation—it states that "[p]ictorial … works" *includes* "technical drawings, including architectural plans," 17 U.S.C. § 101, which implies that technical drawings *are* "other pictorial representations" under 17 U.S.C. § 120(a).

Next, the Eighth Circuit noted that the statutory definition of "architectural work" states that the "design of a building" may be "embodied in" "architectural plans[] or drawings." Pet. App. 7a. This shows that if an architect creates architectural plans, then a competing architect cannot copy those architectural plans to create a similar building. This sheds no light on whether people may face infringement liability for creating floor plans of their own living rooms, bedrooms, and bathrooms.

Even less persuasive is the Eighth Circuit's reliance on the statutory definition of "work of visual art," which *excludes* "technical drawings." Pet. App. 7a. To the extent that provision has any relevance, it supports the exact opposite inference from what the Eighth Circuit drew. That definition shows that when Congress intends to *exclude* "technical drawings" from a general term, it states so clearly. 17 U.S.C. § 101. Hence, the absence of such an exclusion from § 120(a) shows that § 120(a) *does* encompass technical drawings, not that it *doesn't*.

Turning to Petitioners' argument regarding "other pictorial representations," the Eighth Circuit concluded that this phrase excludes "[f]loorplans" because they are "functional." Pet. App. 8a. The Eighth Circuit believed that "other pictorial representations" only encompasses pictorial representations made "for

artistic purposes." *Id.* This is because, in the Eighth Circuit's view, the enumerated items in §120(a)—"pictures, paintings, photographs"—are inherently made for artistic purposes. *See* Pet. App. 8a-10a.

They are? Paintings, perhaps. But many "photographs" are not created for artistic purposes. Indeed, a brief glance at the photo log of one's smartphone will confirm that the vast majority of photographs are not created for purposes of creating artwork. People take photos of dents on their cars, vaccine cards, shopping lists, items they are trying to sell, letters received in the mail, and street crossings where they parked, among innumerable others. Similarly, people take pictures of their home interior or exterior for functional purposes all the time, for appraisals, remodelings, to document damage or repairs, and countless other reasons.

In an effort to show that photographs are inherently artistic and floor plans are not, the Eighth Circuit contrasted a photograph of the Supreme Court taken from the Court's website with a floor plan of the Supreme Court. Pet. App. 9a. However, a professional photograph of perhaps the most beautiful building in Washington is not characteristic of the types of "photographs" covered by the statute. A better comparison would have been between a photograph of an empty room in a single-family house and a floor plan of that same room. There is no rational explanation for why copyright law would treat those two images differently.

The Eighth Circuit also expressed the concern that Petitioners' position would "render the specific

enumerations superfluous." Pet. App. 10a. It would not. Assuming floor plans are not "pictures," Petitioners' position would ensure that "other pictorial representations" is *not* superfluous because it would cover, well, floor plans. It is the Eighth Circuit's view that would render "other pictorial representations" an empty category.

The Eighth Circuit "glean[ed] one more clue from the statutory text": Section 120(a) applies when the building is visible from a public place. Pet. App. 10a. And so, the Eighth Circuit thought, floor plans are not covered because they cannot be created from outside a building. *Id.*

But what about pictures, paintings, and photographs? The statute, by its terms, covers all pictures, paintings, and photographs, not only those created outside a building. Hence, Congress anticipated that *some* interior images would be covered. Why not interior floor plans?

The Eighth Circuit should have interpreted "pictorial representations" to mean what it means. Floor plans are "pictorial representations" and are therefore categorically non-infringing.

B. The Eighth Circuit's Interpretation Conflicts with the Statutory Purpose.

There is no rational explanation for banning people from creating floor plans of their living rooms, bedrooms, and bathrooms. The purpose of copyright law is to create an incentive for people to create original works. For architects, that incentive is protected by a copyright on the building itself, not to

mention the payment by whoever commissioned the building. No architect designs a building in reliance on a future income stream from hapless homeowners who naively think they can create floor plans of their own houses.

Copyright law protects creators from unfair competition by people who copy their work and take advantage of their labors. That interest is a powerful justification for barring the creation of knock-off *buildings*—and, indeed, Congress has done just that. But it is not a justification for barring the creation of floor plans. No one chooses to buy a 2-D floor plan instead of hiring an architect to design a house.

Indeed, that is why §120(a) exempts pictures, photographs, and paintings: "These uses do not interfere with the normal exploitation of architectural works" and do not cause "harm to the copyright owner's market." H.R. Rep. No. 101-735, at 22 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 6935, 6953. The exact same thing can be said about floor plans.

Exempting photographs and pictures but not floor plans leads to inexplicable outcomes. Under the Eighth Circuit's view, a homeowner can take a photograph of a room with a text box underneath describing the room's dimensions in prose. But a floor plan is off-limits. Why would that be?

The Eighth Circuit did not identify any rational justification for its approach. Instead, it declared that its task was to focus on "statutory interpretation" rather than "the best copyright policy." Pet. App. 14a (quotation marks omitted). This type of reasoning is

defensible when courts stick to literal interpretations of statutes regardless of the harmful effects those interpretations may yield. But the Eighth Circuit did not stick to a literal interpretation. To the contrary, it unapologetically declared itself "unmoved by the argument that the floor plans fit within the literal definitions of 'pictures' and 'other pictorial representations.'" Pet. App. 11a. The Eighth Circuit's approach of adopting a *non-literal* interpretation for purposes of *creating* nonsensical outcomes—when simply following the text would avoid those outcomes—has nothing to recommend it.

The Eighth Circuit urged Petitioners to "direct [their] argument to the political branches." Pet. App. 14a. The political branches have already been persuaded by Petitioners' argument. That is why Congress enacted a statute that plainly exempts Petitioners' activities from liability. Petitioners should not have to re-persuade Congress of that conclusion.

II. Review is Warranted Because the Eighth Circuit's Decision Will Cause Grave Practical Harm.

In addition to being egregiously wrong, the Eighth Circuit's decision will cause serious practical harm if allowed to stand. This Court's review is urgently needed.

The Eighth Circuit's decision will have three primary practical consequences in real estate markets. First, sophisticated home sellers and landlords will be forced to pull floor plans off the Internet. This will make it harder for prospective home buyers and

tenants to find places to live (or to find the *right* places to live) and will increase the risk of confusion and deception. Second, people who do not retain sophisticated copyright lawyers, but merely want to sell, lease, buy, or rent a home, face the risk of lawsuits and statutory damages for engaging in conduct that is—to any ordinary person—totally innocuous. Third, anyone who has ever posted or downloaded a picture of a floor plan will face the risk of chilling retroactive liability, even if they promptly remove such floor plans in response to the Eighth Circuit's decision. By contrast, the Eighth Circuit's rule will have no counterveiling benefits but will instead be a random windfall for builders who have already been compensated for their work.

A. Floor Plans Are Crucial Resources for Prospective Home Buyers and Tenants.

Millions of Americans buy or rent homes every year. Overwhelmingly, they start their search for a new home on the Internet. Sites like Realtor.com© are indispensable tools that allow sellers and buyers, landlords and tenants, to efficiently find each other. Prospective sellers and landlords use these sites to convey information about the location, features, and price of dwellings for sale or rent. Prospective homeowners and tenants use these sites to look at available inventory, analyze recent home purchases, contact real estate agents, and obtain all the information they need for navigating one of the most consequential transactions of their lives.

Indeed, for many home buyers and renters, Internet real estate listings provide the *sole* information about

their new home before they move in. A person moving to a new city may not have the time or money to travel to that new city for purposes of inspecting a new house or apartment, especially if the person is moving for a temporary period. Or, in a period where house inventories are low, a prospective buyer may have to make an immediate offer to have any chance of obtaining a house in a desirable area—even before having the opportunity to tour the house in person.

Real estate listings regularly include floor plans. Between 2021 and 2022, approximately 65,000 property listings[2] on Realtor.com© (including off-market and recently-sold properties) include floor plans.

Most obviously, floor plans are ubiquitous for houses under construction. When the house has not been built, it is impossible to take photographs of the house interior, so the floor plan is needed to convey information about the house.

Even in listings for houses that have already been built, floor plans are common. Floor plans are useful because they convey the position of all the rooms relative to each other. A floor plan is needed to convey to the prospective homeowner that, for instance, the living room faces the front, the kitchen faces the yard, and the two upstairs bedrooms share a bathroom. Photographs of individual rooms might not convey the overall configuration of the house.

Moreover, floor plans convey the precise dimensions of the house, which may be particularly important to

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[2] Here and throughout this brief, the figures are approximate.

people bringing large items of furniture to their new homes. A person who plans to move a piano needs to know whether the piano will fit in the living room. A floor plan, not a photograph, is needed to make this determination.

Floor plans are particularly common for condominium, townhome, and rowhome properties. Indeed, between 2021 and 2022, approximately 20,000 listings on Realtor.com© for such properties include floor plans.

Floor plans are useful in such listings because there are often multiple condominums, townhomes, and rowhomes in close proximity with the same floor plan. In that scenario, a floor plan is the most efficient and accurate way of conveying information about all those units simultaneously. It may be overkill for the seller or landlord to post photographs of every unit. Meanwhile, if a landlord posts photographs of only one unit, prospective buyers or tenants might be confused and think that the photographs refer to *their* prospective unit, rather than another unit with the same floor plan. This error may be consequential when different units with the same floor plan have varying interiors—either because they have different finishes or because they have different degrees of wear and tear. Floor plans ensure that a single image can accurately convey information about multiple units simultaneously.

Floor plans are useful for condominiums within multiunit buildings for an additional reason: it is impossible to determine the dimensions of an individual unit merely by observing the building from the outside.

For a single-family house, a prospective purchaser can get a sense of how spacious the interior is merely by looking at how big the house is from the outside (or even at a picture of the house). By contrast, for a multi-unit building, looking at the building from the outside is uninformative, so prospective buyers or tenants need a floor plan to assess the unit's size.

B. The Eighth Circuit's Decision Will Impede the Housing Market and Create Massive Unexpected Liability for Innocent Actors.

If the Eighth Circuit's decision stands, many negative consequences loom.

First, agents and sellers—or at least those sophisticated enough to learn of the Eighth Circuit's ruling—will pull floor plans off the Internet. It is unrealistic to expect them to pay the builder a license. Typically, the builder will be impossible to track down, especially if the builder has not registered his copyright.

This will increase the confusion associated with the already stressful process of buying or renting a new home. People who lack a clear idea of the dimensions of their new homes may face an unpleasant surprise when they move in and realize their furniture does not fit.

Of course, not every agent, seller, and landlord is sophisticated enough to obtain legal advice regarding the Eighth Circuit's opinion. And anyone unburdened by a lawyer would perceive no problem with measuring the size of their own living room and writing it down.

Those people may unwittingly step into a copyright infringement trap.

It is important to recognize that, on websites such as Realtor.com©, the websites do not themselves collect, curate, or post information about real estate listings. Instead, those websites act as a platform for sellers and agents to post information regarding homes for sale or rent. If a seller or agent posts a floor plan, it is the seller or agent—not Realtor.com©—who faces the risk of a copyright infringement lawsuit. Most sellers and agents are not lawyers and would have no idea that their activities implicate copyright law.

It is not only sellers who face such unexpected liability. Buyers do, too. Any would-be homeowner or tenant who merely downloads a floor plan to his computer is making a copy, and hence potentially liable for infringement. Moreover, that same homeowner or tenant who forwards a copy of the floor plan to a family member or roommate might be committing a second act of copyright infringement. If the family member or roommate asks the original downloader to send a copy, the family member or roommate might be liable for induced copyright infringement. Ordinary people trying to find a new place on the Internet would lack the slightest idea that they might be breaking the law.

The availability of a fair use defense will not deter such lawsuits. Ordinary people faced with a demand letter might not be aware of such a defense or might not have the resources to hire an attorney to pursue it. That is why Congress created a categorical rule that pictorial representations are not subject to liability—

and that is why the Eighth Circuit was so misguided in excluding floor plans from that categorical rule.

Moreover, if the Eighth Circuit's decision stands, *everyone* who has downloaded or uploaded a floor plan—whether they read the Eighth Circuit's decision or not—will face threats of massive *retroactive* copyright infringement liability. The Copyright Act provides a three-year statute of limitations, and laches is not a defense to an infringement suit. *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 668 (2014). This means that any uploading or downloading of a floor plan within the last three years—including uploading and downloading that preceded the Eighth Circuit's unexpected ruling—could potentially trigger the threat of liability.

Such lawsuits are not far-fetched. It is easy to imagine an architect, armed with the Eighth Circuit's opinion and down on his luck, serving subpoenas seeking the identity of anyone who ever uploaded or downloaded a floor plan. As the Petition points out, such lawsuits are already abundant and will explode if certiorari is denied. Pet. 23.

Of course, in any such lawsuit by an architect, proving actual damages would be impossible. An architect is not harmed when a homeowner draws a floor plan of a house the homeowner has already purchased. But Congress permits, and indeed requires, awards of statutory damages even without any proof of actual damages. 17 U.S.C. § 504(c). Statutory damages are generally subject to a mandatory minimum of $750 per violation and a maximum of $30,000 per violation—or $150,000 per violation for willful infringement. *Id.*

Proof that the defendant was "not aware and had no reason to believe that his or her acts constituted an infringement of copyright" is not a defense to copyright infringement liability. 18 U.S.C. § 504(c)(2). Instead, such proof merely gives the district court discretion to lower the per-violation mandatory minimum from $750 to $200. *Id.* That may not seem like a lot, but for a defendant who repeatedly uploaded, downloaded, or shared one or more floor plans, the mandatory minimum can quickly increase. Someone hit with a demand letter would have a powerful incentive to settle. The Eighth Circuit's decision will yield copyright lawsuits that are annoying at best—and predatory at worst.

And for what? If protecting copyright served some useful purpose in this context, then perhaps the nuisance litigation could be tolerated. But as already explained, these lawsuits will not stimulate creativity, promote innovation, or protect architects from unfair competition. The Eighth Circuit's rule is therefore the rare case of a rule that will cause significant harm with *no* offsetting benefits.

C. The Eighth Circuit's Decision Creates Uncertainty on Whether Interior Photographs Can be Infringing.

In ruling that floor plans are not "other pictorial representations," the Eighth Circuit observed that § 120(a) "applies only when 'the building in which the work is embodied is located in or ordinarily visible from a public place.'" Pet. App. 10a. The court stated that "it would be quite difficult to create a floorplan of a building simply by viewing it from a public place." *Id.*

"Floorplans typically stem from someone's access to the interior of a building, though perhaps some interior features of a building are discernible from the outside." *Id.*

This reasoning immediately prompts a question: do *photographs* of a home interior, that would be impossible to create from a public place, fall within Section 120(a)'s exemptions?

In *amicus*'s view, regardless of the outcome of this case, all photographs, whether interior or exterior, fall within Section 120(a)'s exemptions and cannot be the basis for a copyright infringement suit by an architect. Section 120(a) says "photographs." There is no possible way to interpret this word to exclude interior photographs.

To be sure, the Eighth Circuit interpreted "pictorial representations" to exclude floor plans. But the Eighth Circuit believed the phrase "pictorial representations" to be ambiguous as to whether it covered floor plans, thus warranting analysis of surounding statutory provisions as a tool to resolve that ambiguity. It then believed that Section 120(a)'s reference to buildings "visible from a public place" was evidence that the ambiguity in "pictorial representations" should be resolved in Respondents' favor.

The same methodological approach would not work for "photographs." The word "photographs" is not even *arguably* ambiguous. Even if there is some theoretical wiggle room to interpret "pictorial representations" to exclude floor plans, there is *no* wiggle room to interpret "photographs" to exclude interior photographs.

That said, the Eighth Circuit's decision does not resolve all doubt on this issue. If in fact interior photographs might infringe an architect's copyright, the consequences on the real estate market would be devastating. Imagine trying to search for houses online without having access to any photographs of any house interiors.

Between 2021 and 2022, approximately 150,000,000 interior photographs appeared on Realtor.com©. During that time, nearly 92% of Realtor.com©'s for-sale listings—comprising over 8,500,000 listings—included at least one interior photograph. If these interior photographs infringed the architect's copyright, the amount of retroactive liability could be staggering.

Architects, emboldened by the Eighth Circuit's decision, may bring suits under this theory, which will send shockwaves across the real estate industry and many others industries. This Court should grant review and nip this prospect in the bud.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID R. SINGER
JENNER & BLOCK LLP
515 S. Flower Street,
Suite 3300
Los Angeles, CA 90071
(213) 239-2206

ADAM G. UNIKOWSKY
Counsel of Record
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

Counsel for Amicus Curiae