No. 21-1217

IN THE

Supreme Court of the United States

COLUMBIA HOUSE OF BROKERS REALTY, INC., 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

RULE 15.8 SUPPLEMENTAL BRIEF

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RULE 15.8 SUPPLEMENTAL BRIEF

At any time while a petition for a writ of certiorari is pending in this Court, any party may file a supplemental brief addressing new matter not available at the time of that party's last filing. Sup. Ct. Rule 15.8.

Here, for the first time in their Reply, Petitioners asked for forms of alternative relief nowhere requested in their Petition, which had sought only certiorari. Specifically, Petitioners' Reply asked for a CVSG or for a GVR based on the discussion of *ejusdem generis* in Southwest Airlines Co. v. Saxon, No. 21-309 (June 6, 2022). Reply Br. 12.

Respondents take no position on a CVSG.

By contrast, Respondents believe that Petitioners' eleventh-hour GVR request should be denied. The GVR request is inapt because there is no tension between Saxon and the decision below and also because the decision below had alternative bases other than *ejusdem generis*. See Section I.A-B, *infra*. Furthermore, these independent legal bases for the Eighth Circuit's decision belie Petitioners' hyperbolic rhetoric that the opinion below is "indefensible" or "obviously wrong." See Section I.B, *infra*.

* * * * *

Pursuant to Supreme Court Rule 15.8, Respondents hereby respectfully submit this Supplemental Brief to respond to Petitioners' newfound request for relief, raised for the first time in Petitioners' Reply.

ARGUMENT

I. SAXON IS NOT A BASIS FOR GVR.

For the first time in their Reply, Petitioners asked this Court to GVR as an alternative form of relief to certiorari. Reply Br. 2-3 (discussing Saxon), 12 (GVR request). Yet Petitioners' GVR request is inapt for two basic reasons.

First, the Eighth Circuit's decision below is aligned with the principles applied in Saxon. Indeed, the very methods of statutory analysis applied in Saxon buttress the decision below. Furthermore, the Eight Circuit's application of *ejusdem generis* is faithful to the longstanding *ejusdem* principles applied by this Court in Saxon, *i.e.*, that imputed limitations upon a catchall provision must stem from a quality shared by all enumerated items in the list preceding that catchall. See Section I.A, *infra*.

Second, Petitioners overlook that *ejusdem* was but one of many different and independent legal bases for the decision below. Petitioners themselves even concede that *ejusdem* was not the Eighth Circuit's "lead argument." Simply put, the holding below does not rest upon *ejusdem*. And, Saxon's discussion of *ejusdem* does not even conceivably affect the vast majority of the Eighth Circuit's arguments supporting its decision below.

Petitioners fail to cite a single authority suggesting that the use of a GVR would be appropriate in such a situation. And, in discussing GVR standards, various Justices of this Court have indicated that GVR is not appropriate where the decision below has alternative bases, one or more of which are unaffected by the intervening higher authority.

For both reasons, Petitioners are wrong to suggest that Saxon warrants a GVR of the decision below—an undeveloped suggestion of alternative relief raised for the first time in Petitioners' Reply.

A. The decision below does not conflict with Saxon.

Southwest Airlines Co. v. Saxon, No. 21-309 (June 6, 2022), is a recent decision of this Court interpreting the Federal Arbitration Act's carveout for transportation workers in 9 U.S.C. § 1, as applied to an airline ramp supervisor.

Contrary to Petitioners' arguments in their Reply Brief, the methods of statutory analysis applied in Saxon actually buttress the decision below. For example, Saxon emphasizes the importance of statutory "**context**" to determining ordinary meaning. Saxon, Slip Op. 3 ("To discern that ordinary meaning, those words 'must be read' and interpreted 'in their *context*,' not in isolation.");[1] id. at 5 ("*Context* confirms this reading."). The decision below emphasizes statutory context as well. Pet. App. 6a ("When interpreting a statute, we must also consider the statutory *context* in which the words in question appear[.]").

Likewise, in Saxon, this Court touched upon the "**meaningful-variation** canon"—an interpretive canon that presumes legislatures do not engage in elegant variation. Slip Op. 5-6 ("[W]e applied the *meaningful-variation canon*. See, *e.g.*, A. Scalia & B. Garner, Reading Law 170 (2012) ('[W]here [a] document has used one term in one place, and a materially different term in another, the presumption is that the different term denotes a different idea[.]'"); id. at 6 (differentiating Congressional use of the phrase "'*involving*' commerce" from the phrase "'*engaged in* commerce'").

Meaningful variation is also one major basis for the Eighth Circuit's decision below. Pet. App. 6a-7a (distinguishing Congressional usage of the terms "*technical drawings*" and "*architectural plans*" from its usage of the term "*pictures*"). Petitioners simply overlook such meaningful variations—as well as the meaningful variation between "graphic" and "pictorial."

[1] All emphasis is supplied unless otherwise indicated.

Moreover, Saxon also applies the time-honored canon of ***ejusdem generis*** to deflect certain statutory readings advocated for by both sides in that case. Slip Op. 7-10. *Ejusdem generis* instructs that a catchall term appended to the end of a list should be interpreted in light of attributes that apply generally to enumerated items in the list. Id. at 6 ("[W]e applied the *ejusdem generis* canon, which instructs courts to interpret a 'general or collective term' at the end of a list of specific items in light of any "common attribute[s]" shared by the specific items.").

In Saxon, both petitioner and respondent attempted to construe the catchall phrase "any other class of workers" in 9 U.S.C. § 1. Id. Yet, both sides in Saxon made the error of attempting to construe that catchall phrase based upon a quality that only clearly applied to *one* of the enumerated items in the list. Id. at 10 ("*Ejusdem generis* neither demands nor permits that we limit a broadly worded catchall phrase based on an attribute that inheres in only one of the list's preceding specific terms.").

Petitioners argue that the Eighth Circuit below made the same mistake. Reply Br. 2-3. It did no such thing. Indeed, the Eighth Circuit expressly stated that the enumerated items—"pictures, paintings, photographs"—all "*have a certain quality in common*[.]" Pet. App. 8a ("We think that the terms Congress used in § 120(a) have a certain quality in common—they ***all*** connote artistic expression.").

Thus, Petitioners' argument cannot be that the Eighth Circuit's decision conflicts with Saxon's application of a longstanding aspect of *ejusdem generis*. For example, the Eighth Circuit did *not* hold that the catchall provision in Section 120(a)—"other pictorial representations"—should be limited on the basis of a quality that appears in only *one* of the enumerated items in the Section 120(a) list—"pictures, paintings, photographs."

Rather, the Eighth Circuit applied *ejusdem* because it determined that ***all*** of them shared a quality. Petitioners simply disagree with that analysis—but the Eighth Circuit did not contravene the time-honored aspects of *ejusdem* that were reiterated in Saxon. Moreover, the Eighth Circuit is correct: by ordinary meaning, a painting of a building, a photograph of a building, and a picture of a building are all images that convey that building's appearance. Architectural plans, by contrast, convey the building's latent structure.

Perhaps the strongest indication of the difference between the enumerated pictures, paintings, and photographs—versus floor plans—isn't conveyed by words but by images. The Eighth Circuit's use of images readily showed that enumerated types of works all share qualities that architectural floor plans simply do not have—and vice versa. Pet. App. 9a ("One of these images is not like the others.").

Thus, Saxon and the decision below are in alignment. Saxon's statutory analysis buttresses the decision below. And, although Petitioners (incorrectly) disagree that pictures, paintings, and photographs do share the qualities that the Eighth Circuit determined they share, Petitioners are emphatically wrong insofar as they suggest that the Eighth Circuit limited a catchall provision on the basis of a quality that ordinarily applied to only one enumerated item. As such, Saxon is no basis for GVR because the Eighth Circuit's analysis tracks the *ejusdem generis* principles applied in Saxon.

In truth, Petitioners aren't really arguing that the Eighth Circuit ***misstated*** any aspect of *ejusdem generis*, but rather they feel the Eighth Circuit ***misapplied*** a properly stated rule of law. They're wrong. See Pet. App. 9a. Yet, even if they were right, that's not a good basis for this Court's intervention: "***[C]ertiorari is rarely granted when the asserted error consists of […] the misapplication of a properly stated rule of law.***" Sup. Ct. Rule 10.

B. The decision below does not rest upon *ejusdem generis*.

Petitioners are quite wrong to think that Saxon is in tension with the decision below. See Section I.A, *supra*.

Yet, *arguendo*, suppose that Saxon's *ejusdem generis* analysis were in tension with the decision below. (It's not.) Petitioners' GVR request should ***still*** be denied because their argument entirely overlooks that the decision below does not rest upon *ejusdem generis* alone, but rather has numerous other independent bases. In fact, Petitioners all-but admit that GVR is an unsuitable fit here when they confess that *ejusdem generis* was ***not*** the Eighth Circuit's "***lead argument***[.]" Reply Br. 2. As such, Petitioners' GVR request is inapt.

Notably, Petitioners fail to cite a single authority suggesting that GVR would be appropriate in such a situation—let alone cite a legal standard for GVR whatsoever. Accordingly, it's worthwhile to point out that this Court uses GVR "***sparingly***": "all are agreed that our GVR power should be exercised ***sparingly***." Lawrence v. Chater, 516 U.S. 163, 173 (1996) (per curiam). Sparing and disciplined use of the GVR mechanism reflects a "respect for lower courts, the public interest in finality of judgments, and concern about [this Court's] own expanding certiorari docket[.]" Id. at 174.

Under this Court's GVR jurisprudence, a GVR may be "potentially appropriate" where there has been an "intervening development[]." Id. at 167. Yet, crucially, the intervening-development rationale for a GVR is only appropriate where "the decision below **rests upon** a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation[.]" Id.

By contrast, use of the GVR has been criticized as improper "where the decision below does not '*rest upon*' the objectionable faulty premise, but is independently supported by other grounds[.]" Wellons v. Hall, 558 U.S. 220, 227 (2010) (per curiam) (Scalia, J., with whom Thomas, J., joins, dissenting). In such a situation where the decision is independently supported by other grounds, "redetermination of the [allegedly] faulty ground will assuredly not 'determine the ultimate outcome of the litigation.'" Id.

Using GVR to reconsider a holding "on a question that is entirely independent of the ground for the GVR—is extraordinary and, in my view, improper." Id. at 232 (2010) (Alito, J., with whom The Chief Justice joins, dissenting).

Here, Petitioners all-but concede that this is what is happening here. In their Reply, Petitioners characterize as the "*lead argument*" the Eighth Circuit's view that "Congress could have, but did not, mention [architectural plans] specifically in the text of the provision." Reply Br. 2. By characterizing a ***non***-*ejusdem* argument as the lead argument, Petitioners' Reply "in effect concedes" that Eighth Circuit's opinion does not rest upon its *ejusdem* analysis. Cf. Saxon, Slip Op. 10 ("By recognizing that the term 'railroad employees' is at most ambiguous, Southwest in effect concedes[…]").

In other words, Petitioners' Reply all-but concedes that the opinion is independently supported by other grounds. And *that* is, in turn, essentially a concession that a GVR is not appropriate here.

Importantly, there is not just *one* other independent basis for the opinion below other than *ejusdem*. There are *many*:

(1) *The whole-text cannon*. Pet. App. 6a (citing Dolan v. U.S. Postal Serv., 546 U.S. 481, 486 (2006); Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997)).

(2) *Related statutory definitions*. Id. (citing 17 U.S.C. § 101's definition of "pictorial, graphic, and sculptural works" which expressly identifies "architectural plans" as a subset of "technical drawings").

(3) *Statutory usage of relevant terms*. Pet. App. 7a ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quoting Rodriguez v. United States, 480 U.S. 522, 525 (1987) (per curiam)).

(4) *Common sense and ordinary meaning*. Pet. App. 9a ("One of these images is not like the others.") (comparing visual image of painting of a building, photograph of a building, pictorial illustration of a building, and a floor plan of a building).

(5) *Noscitur a sociis*. Pet. App. 8a (citing Gustafson v. Alloyd Co., 513 U.S. 561, 575 (1995) and A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 196 (2012)).

(6) *Presumptions against superfluity*. Pet. App. at 10a (citing Yates v. United States, 574 U.S. 528, 546 (2015) (plurality opinion)).

(7) *Rejection of Petitioners' reliance upon legislative history*. Compare Pet. Br. 3, 16 & Reply Br. 7 (relying upon H.R. Rep No. 101-735) with Pet. App. 11a ("[F]or those who find legislative history relevant, the legislative history of § 120(a) supports our reading of the text rather than casting doubt on it.)

And, finally:

(8) *Ejusdem generis*. Pet. App. 9a-10 (citing Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 384 (2003) & A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 199 (2012)).

In sum, *ejusdem* was but one of many bases for the holding below. The decision below does not rest upon *ejusdem*.

As such, *even if* one were to think that the decision below has conflicting *ejusdem* analysis with Saxon's analysis (—which it does not, see Section I.A, *supra*), there would *still* be no basis for GVR because of the many independent legal bases for the decision below. Accordingly, GVR should be denied.

* * * * *

Below, the Eighth Circuit provided numerous legal arguments to support its holding that architectural floor plans are *not* covered by Section 120(a)'s statutory list—"pictures, paintings, photographs, or other pictorial representations." Petitioners and their amici clearly dislike this holding.

Yet, they protest too much when they claim that the decision below is "**indefensible**[,]" Reply Br. 1, and "**positively bizarre**[,]" Move Amicus Br. 3. They protest too much when they characterize a distinction between floor plans and photographs as "**schizophrenia**[.]" Reply Br. 6 n.3.

Such caustic rhetoric conjures up the adage that "[m]ore often than not, any writing's persuasive value is inversely proportional to its use of hyperbole and invective." Keohane v. Fla. Dep't of Corr. Sec'y, 981 F.3d 994, 996 (11th Cir. 2020) (Newsom, J., concurring in the denial of rehearing en banc).

"There are good reasons not to call an opponent's argument 'ridiculous'"—or, in this case, indefensible, bizarre, and schizophren[ic]. Bennett v. State Farm Mut. Auto. Ins. Co., 731 F.3d 584, 584 (6th Cir. 2013). Those reasons include the "near-certainty" of "overstatement" as well as basic "civility[.]" Id. at 585.

After all, "[c]ivility [...] is but the natural functioning of a legal profession in which we are all servants of that higher, nobler master, the Constitution and the law." Clarence Thomas, A Return to Civility, 33 Tulsa L. J. 7 (2013) at 11-12. To the civil advocate, "[t]he lawyer on the other side, or the judge, is not the enemy, but a fellow traveler on the journey toward discovering the correct legal answer." Id. at 12. By contrast, to the uncivil advocate, "the law is not a body of right and wrong answers, but simply another way of achieving one's policy preferences"—however extralegal they may be. Id.

Here, Petitioner's hyperbolic rhetoric appears motivated by strong policy preferences, rather than by a sober-minded assessment of the law. Perhaps that is why the Eighth Circuit advised Petitioners and their amici to direct their extralegal policy preferences "*to the political branches*." Pet. App. 14a; cf. Kouichi Taniguchi v. Kan Pac. Saipan, Ltd., 566 U.S. 560, 573 (2012) ("As for [Petitioners'] extratextual arguments, they are more properly directed at Congress.").

After all, the very distinctions that Petitioners readily dismiss as *indefensible*, *positively bizarre* and displaying *schizophrenia* find ample support throughout the text of the Copyright Act, multiple canons of statutory interpretation, and longstanding distinctions drawn throughout a century of judicial decisions and statutory enactments.

CONCLUSION

For the reasons given above, the GVR requested for the first time in Petitioners' Reply should be denied.

Respectfully submitted,

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