

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

BRIEF IN RESPONSE

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QUESTION PRESENTED

The question presented is whether 17 U.S.C. § 120(a) applies to architectural floor plans, made from a structure built in a publicly visible place. In its implications, the question is whether the mere construction of a building in a publicly visible place, such as from a public street, radically diminishes the intellectual-property rights—and wholesale eliminates the privacy interests—in architectural floor plans for tens of millions of homes and other copyrighted architectural structures within the United States.

Section 120(a) applies only to four listed types of representations of a building—“pictures, paintings, photographs, or other pictorial representations[.]” Because Section 120(a) list of aesthetic visual representations is a statutory list, the well-worn canons of *ejusdem generis* and *noscitur a sociis* apply. Thus, the question presented is not whether an architectural floor plan is a pictorial representation, understood in isolation, but whether a floor plan shares core similarities to the ordinary meaning of a photograph of, a painting of, or a picture of a building—all aesthetic presentations of a building usually presented as through the naked eye—and far afield from the technical and graphical nature of a floor plan.

Likewise, the Copyright Act protects visual works through a defined category of “[p]ictorial, graphic, and sculptural” works, but clarifies through statutory usage that pictorial works, graphic works, and sculptural works are distinct. Thus, another way to phrase the question presented is whether an architectural floor plan is pictorial (to which Section 120(a) applies) or graphic (to which it doesn’t). Although the Act never expressly defines the difference, nearly a hundred years of statutory enactments and case law indicate that Section 120(a)’s pictorial representations means fine art, photographs, prints, art reproductions, *etc.* By contrast, Section 120(a) does not apply to graphic representations, *i.e.*, maps, globes, charts, diagrams, models, and technical drawing, including *architectural plans*.

CORPORATE DISCLOSURE STATEMENT

Respondent Charles James is a natural person. His home-design-and-build company, Respondent Designworks Homes, Inc., declares (i) that it is a corporation that has no parent corporation, and (ii) that no publicly held company owns 10% or more of its stock.

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BRIEF IN RESPONSE

Respondents Charles James and Designworks Homes, Inc, respond to the Petition in this case as follows:

STATEMENT OF THE CASE

I. LEGAL BACKGROUND

1. In the late 1980s, Congress wanted to clarify that buildings were eligible for copyright protection, just as floor plans had been for many decades. Protecting architects and constructed architectural art, *i.e.*, buildings, through intellectual property-rights would further the Constitutional purposes underlying the Copyright Clause. H.R. Rep. 101-735, at 12 (1990). It would also make good on the treaty obligations stemming from President Reagan’s decision to join the “world’s most important copyright treaty.” *Id.* at 8.

2. Initial legislative proposals included provisions to protect the “interests of the real estate industry.” *Id.* at 11, 11 n.21. Then, Congress decided realtors didn’t need special exemptions. Later bills, namely the enacted one, didn’t have any. See generally H.R. 3990, 101st Cong. (1990); H.R. 5498, 101st Cong. (1990) (enacted text). Markets and licensing for copyrighted expression would work for realtors seeking to use architectural plans, just as markets work for all other manner of copyrighted works.

3. Such markets for creative products incentivize the most productive use and allocation of society’s limited artistic and creative resources. They are also the legal means by which artists and creators get fairly compensated for the value that they give to society, for the original expressions they provide that in turn advance “the Progress of Science and useful Arts”—as the Founders envisioned. Art. I, § 8, cl. 8.

4. In this sense, and despite Petitioners' hyperbolic rhetoric, the decision below is par for the course. Through copyright law, Congress created private property rights, which in turn generate markets for the creative works protected by those rights. As a result, copyright's markets have the byproduct of supporting a professional creative class and of productively allocating such creative talent and resources both vis-à-vis other creative markets and vis-à-vis other non-creative opportunities.

5. Then, as the Constitution's Copyright Clause foreshadows, the ultimate byproduct is the advancement of the state of the arts. It's artistic advancement that, because of the relatively democratized nature of copyrighted markets, is directed by the people in the wisdom of their collective market decisions. As history has shown, it's a better system than the others tried—be they royal commission, government grant, wealthy patronage, or complete neglect of the social value of the arts.

6. It's no different here. Indeed, Petitioners and Petitioners' amici readily acknowledge that there is a lot of value, beyond the constructed home itself, to the use of floor plans. In their telling, expression of home designs via floor plans is enormously valuable. They just don't want to share any of that value with the original creators who've generated the design. Yet they give no reason for—let alone justify the fairness of—systematically excluding the architects from the additional value stemming from the architect's creative labor.

7. Petitioners and Petitioners' amici desire to never pay a penny to an architect for a profit-generating commercial exploitation of architects' creative works is especially unreasonable because they are *already* paying third parties to generate floor plans off of architect-designed buildings and, then, profiting handsomely from it.

8. In that sense, the issue here is not *whether* the real-estate industry pays for the use of floor plans, but rather *who* they pay, *i.e.*, whether realtors and associated technology companies can systematically exclude architects from the added value and profit generated by the commercial exploitation of the architects' plans when placed online.

* * * * *

9. The instant question of statutory interpretation is whether architectural floor plans are encompassed within the meaning of the statutory list set forth in Section 120(a): “pictures, paintings, photographs, or other pictorial representations[.]” 17 U.S.C. § 120(a). Floor plans aren't a painting of a building. And, floor plans aren't a photograph of a building. So, the question boils down to two of those categories: “pictures” and “other pictorial representations” as listed in Section 120(a).

10. Three interpretative considerations are highly pertinent to this question. *First*, the well-established canons of statutory interpretation that pertain to the statutory construction of lists and the catch-all provisions provided in them, *noscitur a sociis* and *eiusdem generis*, are highly relevant here. *Second*, the Copyright Act has a highly pertinent distinction between different types of visual expression—pictorial works, graphic works, and sculptural works. The pictorial-graphic distinction employed by the statute is highly pertinent to avoiding the problems of statutory construction done in a vacuum—and critically, floor plans are graphic and not pictorial under this distinction. *Third*, nearly a century of authorities—statutory usage, statutory enactments, statutory context, and judicial decisions, *etc.*—give credence to the longstanding views that floor plans are technical, not pictorial, in nature.

11. Each consideration taken separately, and more so taken together, provides strong justification for the conclusion that floor plans are not encompassed within Section 120(a)'s list.

II. FACTUAL BACKGROUND.

12. Respondent Charles James has devoted his life to the creation of unique and innovative residential home designs, most recently under the auspices of his home design-and-build company, Respondent Designworks Homes, Inc. In the late 1990s, Mr. James created an innovative and award-winning home design that featured a prominent triangular-atrium feature quite unlike any feature he had ever witnessed in a home design beforehand. Seen from the moment one enters the house, his triangular-atrium feature captures a viewer's attention from the get-go. Not many homes have *any* triangular design—let alone a design centered around a triangular-atrium feature.

13. This triangular-atrium feature became the centerpiece of many houses that Mr. James built and sold (for above-market prices) in and around Columbia, Missouri. In 2004, Mr. James applied for copyright registration and the U.S. Copyright Office issued a registration certificate that included his triangular-atrium design. He considers this award-winning design to be his life's greatest accomplishment.

14. Around 2017, he came across houses designed and built by prominent builders in and around Kansas City, Missouri, that used a highly similar triangular-atrium feature—a feature that he had never seen in any other homes except the ones he himself had designed and built. (This discovery led to litigation that it not at issue in this case. Rather, that litigation is the subject of a separate petition pending before this Court as No. 21-8001.)

15. Mr. James' discovery left him concerned about the potential for infringement of award-winning designs and plans. He was especially troubled to find, upon Internet research, that his plans—what he considers to be his life's biggest achievement—were being continually displayed online at Petitioners' websites, globally, without artistic attribution to him, and without any restriction, such as a password or otherwise, in a manner that would permit theft of his plans.

16. Mr. James and his company sued to try to get their award-winning architectural designs off the Internet. A few factual aspects of the case are worth emphasizing:

17. As Petitioners themselves admit, the floor plans at issue were left online for years after any prospect of a home sale was in play.

18. Petitioners invoke the mantle of the homeowner to suggest that this case is between homeowners' rights and architects' rights. Not so. Although at the time of sale, the realtors here may have had authorization to post the floor plan, there is no indication that the homeowners wanted floor plans of their dwellings posted online for the world to see permanently. Indeed, Petitioners take positions that would make it nearly impossible for a homeowner interested in privacy against online stalking to get it taken off the Internet. By contrast, copyright law provides a tailor-made way to get floor plans off the Internet, 17 U.S.C. § 512(c), and provide incentives against unauthorized posting in the first place.

19. Likewise, Petitioners give no reasons that they could not have just as successfully used a floor plan by limiting the distribution to those who demonstrated an interest in purchasing the home, such as a password protection for the floor plan or email distribution of it upon request by interested purchasers.

20. Importantly, some of the realtors here paid a third party to create the floor plan and some of them internalized the time and labor cost of doing so. There is no indication they did not know who the architect was or how to contact him to obtain a floor plan and authorization to show it to potential buyers (or to facilitate a transfer of the rights in the floor plan to the home buyers). Likewise, the architect's provision of a floor plan for use in the sale would have avoided the social costs and waste of reinventing the wheel.

21. Finally, NAR financed defense of this case as policy-driven impact litigation to use the courts in a failed attempt to achieve policy goals that were unattainable from Congress.

RESPONSES TO THE PETITION

I. THE PETITION DOES NOT MEET THE STANDARDS FOR CERTIORARI STATED IN RULE 10(a) AND GRANTING CERTIORARI UNDER RULE 10(c) WOULD BE PREMATURE PRIOR TO MEANINGFUL FURTHER PERCOLATION THROUGH THE COURTS OF APPEALS.

22. This Court’s Rule 10 lays out the general character of the “considerations governing review on writ of certiorari[.]” Sup. Ct. R. 10. Rule 10 makes clear that “a writ of certiorari will be granted *only for compelling reasons*.” *Id.*¹ Here, the Petition plainly does not meet Rule 10(a)’s or Rule 10(b)’s standards. Given the importance of the statutory question, Rule 10(c) is a pathway to granting certiorari should this Court wish to consider the question presented at this time. However, given the relative dearth of appellate authorities addressing the question presented (just what’s been decided below), Respondents respectfully submit that denying the Petition and permitting meaningful percolation is preferable.

23. Rule 10(a) sets forth two potential reasons for granting certiorari to review a federal appellate decision.² The first reason is a Circuit split, *i.e.*, if one Court of Appeals produces a “decision in conflict with the decision of another United States court of appeals on the same important matter[.]”³ Sup. Ct. R. 10(a). The second reason relates to supervisory power, *i.e.*, where a Court of Appeals “has so far departed from the accepted and usual course of judicial proceedings [...] as to call for an exercise of this Court’s supervisory power.” *Id.* Neither of these reasons under Rule 10(a) is remotely present here.

¹ All emphasis supplied unless otherwise indicated.

² Supreme Court Rule 10(b) is plainly inapplicable because it applies by its plain terms to review of judgments of *state* courts of last resort. This instant Petition comes to this Court from a judgment of the *U.S.* Court of Appeals for the Eighth Circuit.

³ Likewise, Rule 10(a) also applies in general to splits between a U.S. Court of Appeals and a state court of last resort. Yet, because copyright claims are nearly universally decided in federal courts, 28 U.S.C. § 1338(a), this is not a realistic scenario.

24. First, there is no Circuit split. See Section I.A, *infra*. Petitioners concede as much. Pet. 27 (“Petitioners acknowledge that there is **no circuit conflict**.”). After all, the Eighth Circuit, in the opinion below, was the first and only appellate decision to address the discrete question of statutory interpretation (involving a remote and rarely litigated section of the Copyright Act) at issue here.

25. Second, there was no departure from any “accepted and usual course of judicial proceedings” in the Eighth Circuit’s decision below. Sup. Ct. R. 10(a). Rather, the Eighth Circuit engaged in straightforward statutory interpretation when reviewing and reversing the District Court’s cursory and perfunctory interpretation of Section 120(a). Clearly, Petitioners and their amici strongly disagree with the Eighth Circuit’s interpretation of Section 120(a). Pet. 8 (“the decision below is indefensible”); Move, Inc. Pet. Amicus Br. 3 (“positively bizarre”). However, the Eighth Circuit’s interpretation that architectural floor plans do not qualify as “pictorial representations” within the meaning of Section 120(a) is entirely justifiable, far from bizarre, and readily supported by:

- The whole-text cannon, construing Section 120(a) in light of the Copyright Act’s overall structure and the usage of terms of art throughout the Act;
- Especially applicable canons of statutory construction including *ejusdem generis* and *noscitur a sociis*;
- The Copyright Act’s undeniable distinction between “pictorial” works and “graphic” works;
- Copyright law’s longstanding tradition of treating floor plans as technical works rather than pictorial works; and

- Section 120(a)'s conspicuous absence of any of the statutory terms that have historically been used to refer to floor plans in copyright statutes.

In light of the foregoing bullet points, Respondents strongly disagree with Petitioner's overstated and unsupported position that the Eighth Circuit rendered an "indefensible" interpretation of Section 120(a). To the contrary, the Eighth Circuit's decision finds ample support in well-worn canons of statutory interpretation, multiple amendments to the Copyright Act, and the longstanding judicial characterization of floor plans. Plainly, this Court's supervisory powers are not invoked by such a well-founded decision.

26. Admittedly, one clause of Rule 10(c) does set forth one possible ground upon which to grant the Petition. Rule 10(c) applies where the court of appeal's opinion "*decided an important question of federal law that has not been, but should be, settled by this Court[.]*" Sup. Ct. R. 10(c). Yet, given the lack of appellate authorities analyzing the question presented, it is arguably premature to decide this issue prior to percolation through more than one Courts of Appeals.⁴

27. Finally, as explained in more detail below, Petitioners' hyperbolic policy gripes are vastly overstated and simply do not provide a basis for challenging the Eighth Circuit's interpretation of Section 120(a). As an initial matter, the Eighth Circuit properly advised Petitioners and their amici to direct their policy concerns to Congress. Pet. App. 14a. (correctly instructing Petitioners and their amici that they "should direct its argument to the political branches.").

28. But beyond that, Petitioner's policy arguments fall flat on multiple notes.

⁴ Indeed, if Petitioners and their amici were correct that the Eighth Circuit's interpretation of Section 120(a) is "indefensible" and "bizarre", then a Circuit split should arise upon the very next case on the issue to reach the Courts of Appeals, at which time this Court will be better positioned to resolve this admittedly important question of federal law.

29. First, Petitioners’ *own* amici readily demonstrate that the implications of the Eighth Circuit’s holding below would be marginal. See Section I.B, *infra*. Second, Petitioners’ *ipse dixit* assertion that it would be impossible to procure licenses from the architectural rightsholder is purely speculative, wholly unsupported, and should not be believed. See Section I.C, *infra*. Finally, Petitioner’s self-serving policy prognostications simply ignore various provisions of the Copyright Act, including other portions of Section 120(a) itself, and how they affect various stakeholders here. See Section I.D, *infra*.

30. Despite Petitioners’ impassioned rhetoric and policy hyperbole, the Petition fails to present any compelling reasons for granting certiorari rather than to permit the question presented to percolate up through the Courts of Appeals.

* * * * *

31. In sum, none of Rule 10(a)’s considerations favor granting certiorari. Rule 10(c) may provide a basis for granting certiorari, should this Court wish to exercise its discretion and address the question presented. Nevertheless, it is submitted that the more prudent approach might be to simply permit the issue to percolate up through the Courts of Appeals and to address the question if and when the courts of appeals produce a circuit split on how to interpret Section 120(a). And Petitioners’ hyperbolic policy gripes provide no basis for prematurely interfering with that percolation.

A. Petitioners acknowledge that there is no Circuit split.

32. One consideration that should weigh against granting the Petition is that there is no split of appellate authority on the issue at hand, as the Petition readily acknowledges. Pet. 27 (“**no circuit conflict**”). Yet Petitioner’s concession regarding the lack of a Circuit split does not fully capture just how unsupported Petitioner’s position is.

33. Not only has no Court of Appeals ever sided with Petitioners on its preferred interpretation of Section 120(a), not a single appellate judge has ever supported Petitioner's preferred reading of Section 120(a). Below, the Eighth Circuit Panel issued a unanimous opinion. And, Petitioners failed to garner a single vote from any Eighth Circuit judge when seeking a petition for rehearing. Thus, despite repeated attempts, Petitioners have failed to get any support from appellate judges on their preferred reading (and/or their asserted policy magnitude) of Section 120(a) and floor plans.

34. Admittedly, there are a couple of district courts that have adopted Petitioners' interpretation of Section 120(a), holding that the term "pictorial representations" includes floor plans. But those district court decisions result from cursory analysis of the statutory question. Moreover, those district court decisions have a common, but fundamental, flaw in their textual analysis by violating the whole-text canon:

*Perhaps no interpretive fault is more common than the failure to follow the **whole-text canon**, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts.*

Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts 167 (2012).

* * * * *

35. There is no Circuit split. In fact, no Court of Appeals and no Circuit judge has ever endorsed Petitioners' preferred reading of Section 120(a). And below, the Eighth Circuit saw Petitioners' arguments for what they were: policy preferences. As such, they rightly rejected Petitioners' self-serving attempts to transform Section 120(a) into a blank check for realtors to do whatever they wanted with architectural floor plans. Given the lack of a Circuit split and given the lack of any appellate support whatsoever for Petitioner's preferred reading of Section 120(a), the Petition should be denied.

B. Petitioners' own amici undermine claims of national importance.

36. The Petition relies heavily on banal observations and generic statements about the real estate industry to insinuate some broad sweeping consequences attributable to the Eighth Circuit's narrow holding on a discrete question of statutory interpretation. For example, the Petition emphasizes that “[*m*]illions of existing homes are sold every month.” Pet. 22 (citing NAR CA8 Amicus Br. 8) The Petition also stresses that “there are more than 100,000 real estate brokerage firms in the United States, and more than *3 million real estate agents*.” Pet. 23 n.10. The implication is that if the Eighth Circuit's interpretation stands, the national housing market will somehow suffer irreparable damage.

37. But a careful review of the briefs by Petitioners' own amici quickly puts things into proper perspective and reveals that the actual implications of the Eighth Circuit's holding regarding architectural floor plans would be quite marginal. Amicus Realtor.com explains that “Between 2021 and 2022, Realtor.com had approximately 8,500,000 for sale listings.” Move, Inc. Br. 19. Realtor.com also explains that during that same time period only “65,000 property listings on Realtor.com (including off-market and recently-sold properties) include floor plans.” Move, Inc. Br. at 12. Thus, by Realtor.com's own empirics, *floor plans are used in fewer than one percent of all online sale listings on Realtor.com.*

38. Assessing their numbers with attention to the actual issue at hand, therefore, shows that very few online listings would be affected by the Eighth Circuit's holding that architectural floor plans do not count as pictorial representations under Section 120(a). While it may be true that millions of homes may be sold every month, evidently very few of those sales actually rely on online displays of floor plans to effectuate those sales. Indeed, Petitioners' own amici demonstrate the limited scope of the floor plan practice.

39. Moreover, Petitioners and their amici tip their hand that the real concern here stems from some misplaced fear that the Eighth Circuit’s narrow holding will somehow affect—*i.e.*, undercut—the use of interior photography in the provision of home sales. Indeed, Petitioners and their amici express much consternation that the Eighth Circuit’s holding about floor plans will somehow exclude photographs, which is a strange concern because photography of buildings is expressly covered by Section 120(a)’s list.

40. The briefs stress how many interior photographs they fear will somehow be affected by the Eighth Circuit’s opinion. Realtor.com discusses that while fewer than 1% of Realtor.com for sale listings included floorplans, “nearly 92% of Realtor.com’s for sale listings—comprising over 8,500,000 listings— included at least one interior photograph.” Move, Inc. Br. at 19. Another amici, worries that “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.” Multiple Listing Services Brief 7.

41. Simply put, their animating concern here appears to be over the use of interior photographs—a use that is completely unaffected by the Eighth Circuit’s opinion below because that holding pertains only to floor plans. Petitioners’ and their amici’s fears are entirely misplaced. Of course, nothing in the Eighth Circuit’s holding or the rationale supporting that holding threatens Section 120(a)’s express application to photographs of buildings. Indeed, Petitioners’ and their amici’s fears regarding photographs appear entirely unfounded and to result from a simple point of confusion. The Eighth Circuit made various considerations in figuring out how to apply *ejusdem generis* to Section 120(a)’s list of “pictures, paintings, photographs, and other pictorial representations” to determine its breadth.

42. But Petitioners and amici seem to erroneously think that the Eighth Circuit was erecting a series of necessary conditions required of anything to qualify for Section 120(a)'s exception, even where expressly mentioned. As a result, far too much ink is unnecessarily spilled explaining why functional photographs are photographs within the meaning of Section 120(a). Pet. 12-13. This case is about floor plans, not photographs.

* * * * *

43. Below, the Eighth Circuit issued a narrow ruling on a discrete question of statutory interpretation regarding an obscure, seldom litigated provision of the Copyright Act. Specifically, the Eighth Circuit held that architectural floor plans are not "pictorial representations" within the meaning of Section 120(a).

44. A careful review of the briefs supporting certiorari reveals that:

- The percentage of online home listings featuring floorplans is shockingly low (a mere 1% in the case of industry leaders like Realtor.com).
- The real concern motivating the chorus of policy gripes, is some unfounded fear that the Eighth Circuit decision that Section 120(a)'s term "pictorial representations" does not include architectural floor plans will somehow mean that Section 120(a)'s term "photographs" will exclude photographs, an unfounded concern that entirely misreads what the Eighth Circuit was saying.

45. Thus, Petitioners and their amici seem centrally concerned that the decision below won't let them show interior photography of homes online. That's entirely wrong. The case is about floor plans, a surprisingly marginal tool in the home-sale process as assessed from amici's own data.

C. Petitioners' impossibility theory is wholly unsupported.

46. Petitioners argue that absent interpreting Section 120(a) as a blank check for realtors (or anyone) to make unlimited, global, unconditional, for-profit uses of architectural floor plans, it would be functionally impossible for realtors and homeowners to use floor plans to sell homes. But Petitioners simply neglect the possibility of **getting a license** from the architect. Instead, Petitioners simply *ipse dixit* suggests that it would be remarkably arduous, if not downright impossible, to procure a license from the rightsholder. Pet. 20 (“the penalty for failing to **do the impossible**”).

47. In the case at hand, we won't know if it would have been “impossible” because there is **no record evidence that Petitioners even tried**. Petitioners neither attempted to license the floor plan from Mr. James nor asked permission to post copies of these floorplans online, even though he was a well-known home designer in the area and had been for decades. Moreover, Petitioners' arguments suggesting that procuring a license from an architectural rightsholders would border on the impossible relies heavily on trying to rehash with settled policy determinations made by Congress:

- Petitioners think copyright's term of protection is too long. Pet. 20 (“architectural copyrights run the life of the author plus 70 years”).
- Petitioners dislike that copyright registration, *i.e.*, artist needing to wade through bureaucracy and legal minutia, is not mandatory for the artist to have ownership rights in her art. *Id.* (“[A]n architect need not register a copyright to obtain copyright protection for an architectural work”).⁵

⁵ It's worth reflecting that copyright *registration* differs significantly from a patent *application*. A patent has a much broader scope than a copyright and is a government granted monopoly. Likewise, in copyright, multiple persons can own the rights different copyrights in very similar expressions as long those persons did not copy from each other but came up with themselves.

- Petitions dislike copyright's lack of scienter requirements. Pet. 21 (“infringement is a strict liability tort.”).
- Petitions dislike that through statutory damages the law will protect artists from exploitation and abuse through infringement of their works even when damages are hard to prove. Id. (“[O]nce infringement is proven, the statute authorizes ‘actual damages and any additional profits of the infringer,’ or statutory damages[.]”).

48. Petitioners’ generic disagreements with the basics of copyright protection and the U.S. copyright system does not provide any reason for any court to adopt Petitioners’ preferred reading of Section 120(a) and wholesale wipe out the economic interests of architects in the public display of their floor plans. If anything, Petitioners’ gripes suggest that its preferred copyright system is quite divorced from copyright law as it actually exists. And merely reciting various provisions of the Copyright Act (term duration, permissive registration, and statutory damages) is no argument in favor of Petitioners’ preferred reading of Section 120(a)’s application to floor plans.

49. Indeed, all these types of disputes with settled copyright principles could be made by any person wishing to exploit other types of copyright protected work as well, not just architectural copyrights. And yet, nearly all industries relying on those works and making use of those intellectual properties simply get a license and pay the creators. That’s the point of copyright, at its core. Sure, getting a license may not always be easy, but it’s often both necessary and valuable to do so, so the market and market participants figure out a way to expeditiously get it done.

50. Indeed, many markets use technology to streamline and ease the process of obtaining licenses and use standardized contracts to limit transactions costs and ensure that artists can get a fair return.

51. As any copyright lawyer knows, it's not always easy to track down the proper rightsholder. For example, if a director wants to use a piece of music in a movie, that director knows to procure a license for that use. That a movie director's administrative staff need to track down *two* types of rightsholders (the singer and the songwriter) has not left American movies without licensed music.

52. Moreover, if some error does happen to occur, well that's what errors-and-omissions insurance policies are for. Given the incredible value generated by using floor plans to facilitate home sales, it is very likely someone would be willing to insure realtors—possibly policies facilitated by none other than the National Insurance of Realtors—against the risk that they make a mistake in identifying the rightsholders to the floor plans. Indeed, procuring licenses for desired uses and insurance for occasional oversights or errors in the clearance process is table stakes for various industries that rely on and make commercial uses of copyrighted works.

53. Petitioners offer no serious reason why the real estate industry can't do what every other industry manages to do: get a license where use of another's intellectual property would prove valuable and mutually beneficial.

54. Indeed, realtors and industry leaders like NAR are perfectly situated as transactional specialists already facilitating and streamlining the many permits, inspections, contracts, *etc.*, that go into buying and selling homes to also facilitate the licensing process for floor plans. In fact, this would help the public interest by helping the homeowner.

55. Moreover, the Eighth Circuit properly “disregarded all of this as legally irrelevant to the proper interpretation of the Section 120(a) exemption.” Pet. 21 (citing Pet. App. 14a). Indeed, the Eighth Circuit told Petitioners to go talk to Congress if they had disagreements with the current copyright system. That Petitioners dislike or find inconvenient certain basic aspects of the U.S. copyright system (and the Berne International Treaty) is simply immaterial to the proper statutory interpretation of Section 120(a).

56. And, Petitioners really scratch the bottom of the barrel when they suggest that a temporary pandemic like COVID-19 should influence a court’s interpretation of terms of art employed Section 120(a)—a statutory provision enacted in 1990. Pet. 23 (stressing that floor plans “have been particularly important during the COVID pandemic”).

57. Petitioners’ policy preferences or disagreements with Congress’ copyright system are simply immaterial to the question of proper statutory interpretation of Section 120(a). And although Petitioners and their amici do an excellent job explaining why floor plans are valuable and desirable to the real estate industry, they simply fail to provide any reason why they should not do what every other copyright industry manages to do: negotiate a license that pays a reasonable royalty to the creators.

58. After all, realtors are already paying for the creation of the floor plans, so the only question is why they shouldn’t pay some of that money to the persons—architects—who generated that value.

D. Petitioners' policy hyperbole ignores other provisions of the statute.

59. Petitioners advance a series of impassioned policy concerns. Below, the Eighth Circuit properly advised Petitioners and their realtor amici to direct their policy concerns to Congress. Pet. App. 14a. (instructing Petitioners and NAR that they “should direct its argument to the political branches.”).

60. In doing so, the Eighth Circuit emphasized this Court’s clarification that when interpreting the Copyright Act a court’s task “is not a free-ranging search for the best copyright policy, but rather depends solely on statutory interpretation.” Id. (citing Star Athletica, L.L.C. v. Varsity Brands, Inc., 137 S. Ct. 1002, 1010 (2017)). Indeed, this Court has been clear that courts “are not at liberty to second-guess congressional determinations and policy judgments” no matter how “debatable or arguably unwise they may be.” Eldred v. Ashcroft, 537 U.S. 186, 208 (2003). Therefore, Petitioner’s policy arguments, no matter how persuasive, are simply not a legitimate basis for usurping the text enacted by Congress or for departing from proper statutory interpretation.

61. Yet, Petitioner’s policy arguments are not persuasive. Petitioners and their amici recast their policy preferences as a pending policy catastrophe unless the courts adopt their preferred reading of Section 120(a). But Petitioners’ policy concerns are hyperbolic and overstated.

62. First, Petitioners could and should get a license if they find it lucrative to use floor plans to sell homes. See Section I.C, supra.

63. Second, Petitioners simply overlook that Section 120(a) does not need to operate as a panacea for each and every concern about copyright law’s potential overbreadth. After all, Section 120(a) operates as merely one defense in a series of incredibly intricate and painstakingly detailed codified affirmative defenses, both complete and partial. 17 U.S.C. §§107-122.

64. Below, the Eighth Circuit narrowly ruled that architectural floorplans are not pictorial representations of a building within the meaning of Section 120(a). Nothing in that ruling precludes a realtor or homeowner from making certain limited uses of architectural floorplans if those uses qualify for any other defense or limitation on a copyright holder's exclusive right. Thus, much of Petitioner's policy catastrophizing simply ignores the defenses and limitations provisions of the Act. 17 U.S.C. §§ 107-122.

65. But perhaps the most glaring oversight is that Petitioner's ignore a crucial portion of Section 120(a) itself: Section 120(a) uses the phrase "does not include the right to prevent" while other provisions definitively state that an act is "not an infringement of copyright." In other words, Section 120(a) is not a complete defense to copyright infringement and does not provide a license to make unfettered free uses of a floor plan without any compensation or attribution to a rightsholder. Emphatically, even if floorplans were pictorial representations, that does not mean realtors get carte blanche to do as they please with floor plans with not obligations to the rights holders.

66. Thus, Petitioner's policy arguments overlook that *even if* an appellate court were to ever adopt Petitioners' preferred reading of Section 120(a) that simply does not settle the matter or assuage Petitioner's policy concerns. Below the Eighth Circuit did not need to wade into this issue because it ruled that floor plans did not qualify as pictorial representations and therefore Section 120(a) wasn't implicated at all. But even if a court were to agree that floor plans qualify for a Section 120(a) exemption, by its plain terms Section 120(a) simply affects a rightsholders "right to prevent" uses of their work. It does not say anything about not being entitled to compensation or attribution for unauthorized uses of the rightsholders floorplan when the unauthorized user is making commercial, for-profit uses of the work.

67. Thus, no matter how one interprets the phrase pictorial representation, that does not mean that Section 120(a) operates as the blank check to make completely unfettered use of floor plans that Petitioners and amici desire. Rather by its plain terms, where Section 120(a) applies it simply denies a rightsholder of the right to prevent unauthorized uses.

68. Critically, the statutory language of Section 120(a) stands in stark contrast to the numerous provisions found throughout the Copyright Act which plainly state that certain uses are “not an infringement”. Throughout Chapter 1 of the Copyright Act, when Congress wants to provide a complete defense to infringement, it does clearly by employing a straightforward phrase: “not an infringement of copyright.” E.g., 17 U.S.C. §§ 107 (“not an infringement of copyright”); 108(a) (“not an infringement of copyright”); 110 (“not infringements of copyright”); 111 (“not an infringement of copyright”); 112 (“not an infringement of copyright”); 114(d)(3)(D) (“not an infringement ”); 117(a) (“not an infringement”); 121(a) (“not an infringement”); 121(c) (“not an infringement”). Notably, Congress has employed this most straightforward phrase “not an infringement” in provisions of the Act that both pre-date and post-date the enactment of Section 120(a) in 1990. Compare 17 U.S.C. § 107 with 17 U.S.C. § 121.

69. This Court “ha[s] stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.” Flute, 929 F.3d at 590 (emphasis added) (quoting Conn. Nat’l Bank v. Germain, 503 U.S. 249, 253-54, (1992)). So too here. When Congress decides that a particular use is not an infringement, it says what it means quite plainly with the phrase “not an infringement.” By contrast, the absence of such language in Section 120(a) betrays that Section 120(a) is not a complete defense to infringement, but rather a partial one.

70. As such, Petitioners' policy concerns aren't really driven singularly by the question presented but rather by another statutory question that can only be answered in a manner adverse to Petitioners' interests in an absolute right to use other person's floor plans to make profits for them.

* * * * *

71. Petitioners and their amici would recast their rather mundane policy preferences as a pending policy catastrophe unless the courts adopt their preferred reading of Section 120(a). But even if a court were to agree with Petitioners that floor plans were pictorial representations, that would not really give them what they are asking for here, which is the absolute and unencumbered right to an architect's intellectual property for their profit. Petitioners drastically overread the effects and scope of Section 120(a), which by its plain terms simply clarifies that a copyright does not include "a right to prevent" certain uses where Section 120(a) applies. It says nothing about a lack of entitlement to compensation or attribution for unauthorized commercial uses of the copyrighted work.

II. THE EIGHTH CIRCUIT CORRECTLY HELD THAT A FLOOR PLAN IS NOT A PICTORIAL WORK.

72. There is an understandable, knee-jerk instinct to look at the phrase “other pictorial representations” and simply assume that floorplans are included in Section 120(a)’s use of that phrase.

73. Indeed, Petitioners and their amici suggest such a simplistic approach to statutory interpretation. Petitioners reach for the dictionary definition of “picture” and suggest that when interpreting Section 120(a) “that should have been the end of the case.” Pet. 9-10; see also Move, Inc. Amicus at 5 (assuming that a floor plan “is either a ‘picture,’ or an ‘other pictorial representation,’ of that work. End of case.”)

74. But one cannot simply look at Section 120(a) in isolation, open a dictionary to discern a plain meaning divorced from the statutory usages, ignore the statute’s other provisions and the statute’s usage of terms, and then simply pat yourself on the back saying “end of case.” That’s a caricature of textualism, not a proper method of statutory interpretation. Indeed, such a simplistic approach to statutory interpretation commits two fundamental errors of statutory interpretation.

75. First, it misapprehends plain meaning: “In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.” K Mart Corp. v. Cartier, 486 U.S. 281, 291 (1988). That’s because “[t]he starting point in statutory interpretation is ‘the language [of the statute] itself.’” Ardestani v. INS, 502 U.S. 129, 135 (1991). Indeed, “statutory language must always be read in its proper context.” McCarthy v. Bronson, 500 U.S. 136, 139 (1991). After all, “statutory language cannot be construed in a vacuum[.]” Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv., 139 S. Ct. 361, 368 (2018).

76. Rather, Section 120(a)'s phrase other pictorial works must be considered "in its statutory context." Id. That's because "Congressional intent or meaning is not discerned by considering merely a portion of a statutory provision in isolation, but rather by reading the complete provision in the context of the statute as a whole." Doe v. Gillespie, 867 F.3d 1034, 1043 (8th Cir. 2017).

77. One cannot simply look at the term "pictorial" in a vacuum divorced from its statutory context and usage. That's not how a statutory term's plain meaning is derived.

78. Second, to view Section 120(a) in isolation commits the cardinal sin of statutory interpretation. This "whole-text canon" is among the most "basic rules of statutory interpretation":

Perhaps no interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts.

Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts 167 (2012).

79. Thus, to derive the meaning of pictorial in Section 120(a), one must carefully examine the statute as a whole and the statute's usage of terms throughout the Copyright Act. Petitioners and their amici suggestion that interpreting 120(a) is a simple matter of opening the dictionary up to the word "pictorial" leads them astray. And it causes them to misunderstand why the Eighth Circuit's holding that floor plans are not pictorial representations within the meaning of Section 120(a) is well-supported.

80. Simply put, courts do "not construe statutory phrases in isolation; [they] read statutes as a whole." Samantar v. Yousuf, 560 U.S. 305, 319 (2010) (ellipsis omitted).

A. Petitioners ignore the Copyright Act’s critical distinction between pictorial and graphic works

81. One glaring oversight in Petitioner’s position is that Petitioner simply fails to take account of Congress’ distinction between pictorial works and graphic works throughout the Copyright Act.

82. The use of the word “pictorial” in Section 120(a) is a cross-reference to a broader category of works, i.e., “pictorial, graphic, and sculptural works.” Compare 17 U.S.C. § 101 (defining “[p]ictorial, graphical, and sculptural works”), 102(a)(5) (granting copyright protection to “pictorial, graphic, and sculptural works”) with 17 U.S.C. § 120(a) (applying only to “pictorial representations”).

83. Critically, the Copyright Act defines a broad category of works: “pictorial, graphic, and sculptural works.” 17 U.S.C. § 101. But, by its plain terms, Section 120(a) applies to only one of those three: Section 120(a) applies to pictorial works but Section 120(a) does not apply to graphic works or sculptural works.

84. Thus, that raises the interpretative question of whether floor plans are pictorial works or graphical works. Petitioners simply glide over this interpretive question when arguing that the Eighth Circuit’s holding below—that floor plans were not pictorial representations within the meaning of Section 120(a)--was “indefensible.”

The Copyright Act makes clear that Congress knew to use the phrase ‘pictorial, graphic, or sculptural works’ when it meant to refer to such works, see, e.g., 17 U.S.C. §§ 106(5), 108(i), yet it did not do so in Section 120(a).

Park v. Skidmore, Owings & Merrill LLP, 2019 U.S. Dist. LEXIS 171566, *27 (S.D.N.Y. Sept.

30, 2019) (Sullivan, J.). By the statutory canon of *expressio unius*, only pictorial works are eligible for the defense in Section 120(a) because Congress used that term to the exclusion of the terms “graphic” and “sculptural” there. 17 U.S.C. § 120(a).

85. Discerning the distinction between graphic and pictorial works is the key to properly determining whether floor plans count as pictorial representations pursuant to Section 120(a). Pictorial works include “fine art” and “photographs, prints and art reproductions.” See 17 U.S.C. § 101 (listing pictorial works in the definition of “pictorial, graphic, and sculptural works”). By contrast, graphic works include maps, globes, charts, diagrams, [two-dimensional] models and *technical drawings, including architectural plans.*” See *id.* (emphasis added, listing graphic works that are not listed in Section 120(a)).

86. Thus, Section 120(a) permits the public to make “pictures, paintings, photographs, or other pictorial representations” of buildings but nowhere applies to graphic works such as technical drawings and architectural floor plans.

B. Petitioners ignore the effect of the doctrine of *noscitur a sociis* and *eiusdem generis* upon Section 120(a)'s list.

87. Two fundamental canons of statutory interpretation help resolve the question of what's included and what's not included in Section 120(a)'s catchall term "other pictorial representations"—*noscitur a sociis* and *eiusdem generis*. Courts "look to *noscitur a sociis* to tell us that statutory words are often known by the company they keep[.]" Lagos v. United States, 138 S. Ct. 1684, 1688-1689 (2018). Indeed, this canon is helpful to choose "between those competing definitions[.]" McDonnell v. United States, 136 S. Ct. 2355, 2368-2369 (2016). Thus, in a list of words, *noscitur* can "cabin the contextual meaning" and "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress." Yates v. United States, 574 U.S. 528, 543-544 (2015).

88. Likewise, a "canon related to *noscitur a sociis*, *eiusdem generis*, counsels: 'Where general words follow specific words in a statutory enumeration, the general words are usually construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.'" Id. at 545 (cleaned up). The statutory context, especially Section 101's definitions of pictorial, graphic, and sculptural works and the definition of work of visual art clarifies that the distinction between pictorial and graphic works draw a line between aesthetic pictorial works and functional, utilitarian, graphic works.

89. Photographs and paintings and aesthetic drawing are pictorial. A "poster, map, globe, chart, technical drawing, diagram"—including the ones at issue here—are graphic. 17 U.S.C. § 101. Considering all these relevant legal authorities, it becomes clear that architectural floor plans are graphic works to which Section 120(a) does not apply.

90. The Eighth Circuit reasoned that a floor plan was simply not like the other works expressly contemplated by Section 120(a): a photograph, a picture, a painting. Pet. App. 9a.

C. Petitioners ignore the longstanding treatment of floor plans as technical and not pictorial in nature.

91. Petitioners also overlook that there is a longstanding tradition of treating floor plans as technical works, not pictorial works. While the AWCPA extended copyright protection to buildings, copyright laws protection of floor plans has a more storied history. Until 1990, building designers could obtain a copyright in their plans and drawings, but “architectural structures themselves were afforded virtually no protection.” Scholz Design, Inc. v. Sard Custom Homes, LLC, 691 F.3d 182, 188 (2d Cir. 2012).

92. Prior to the implementation of the AWCPA and Section 120(a), courts viewed floor plans as technical works. See, e.g., Nucor Corp. v. Tenn. Forging Steel Serv., 476 F.2d 386, 391 n.8 (8th Cir. 1973) (“An architectural plan is a technical writing.”) (quoting with approval Katz, Copyright Protection of Architectural Plans, Drawings and Designs, 19 Law & Contemp. Prob. 224, 236 (1954)).

93. This common law treatment of floor plans as graphic and technical drawings was not disturbed by subsequent amendments to the Copyright Act; indeed, to the contrary, subsequent iterations of the Copyright Act codified the longstanding common law treatment of floor plans as technical, graphic works rather than as pictorial illustrations.

94. Thus, Amendments to the Copyright Act that have consistently reinforced Congress’ continued understanding of floor plans as technical, graphic works not pictorial works. See 17 U.S.C. § 101 (referring to architectural plans as a subset of technical drawings.). And today, Section 120(a) bears a conspicuous absence of any of the statutory terms that had historically been used to refer to architectural floor plans.

* * * * *

95. In arguing that floor plans are plainly and obviously “pictorial illustrations” as that term is used in Section 120(a) of the Copyright Act, Petitioners commit several basic errors: the whole-text cannon, construing Section 120(a) in light of the Copyright Act’s overall structure and the usage of terms of art throughout the Act; canons of statutory construction including *ejusdem generis* and *noscitur a sociis*; the Copyright Act’s express distinction between “pictorial” works and “graphic” works; there is a longstanding tradition of treating floor plans as technical, not pictorial.

96. Subsequent amendments to the Copyright Act since 1976 have reinforced that Congress continues to understand floor plans as technical. Section 120(a) has a conspicuous absence of any indication that it applies to technical drawings in addition to pictorial ones. For these reasons, floor plans are not pictorial and the Eighth Circuit’s decision was certainly not “indefensible” or “bizarre” as the Petition and the amici suggest. See Petition at 8; *Move, Inc.* Petition at 3.

D. Petitioners repeatedly beg the question and their subset theory, their best argument, fails.

97. Petitioners' positions and arguments repeatedly beg the question. Their arguments follow but only if you already assume that their statutory interpretation is correct. The clearest example of this is their repeated use of the legislative history to suggest that should not have to rely on fair use to justify use of putting floor plans online for commercial purposes. Another example where Petitioners beg the question is in their argument regarding Section 1310 of the Copyright Act. Petitioners assume that because §1310 uses the phrase "pictorial" standing alone that it helps them in their belief that floor plans are pictorial.

98. But if you don't assume that pictorial includes technical drawings, then §1310 is merely permitting a lower requirement to meet.

99. Admittedly Petitioners' best argument is their subset theory—i.e. that technical drawings are a subset of drawings and that in turn, if floor plans as technical drawings would be a subset of general drawings, which they assume to be synonymous with pictorial illustrations. Yet that ignores that technical drawings and pictorial illustrations have been and continue to be treated differently in copyright law and throughout the Copyright Act because they are different types of visual representations, used for different purposes and serving different audiences.

100. As the Eighth Circuit acknowledged, far from indefensible, such a distinction is common-sensical.

III. THE POLICY BALANCE DECISIVELY SUPPORTS THE EIGHTH CIRCUIT'S DECISION.

A. Petitioners' position undermines privacy and safety interests of homeowners.

101. Petitioners and their amici rely heavily on the idea that their preferred interpretation of Section 120(a) is necessary for home owners to be able to use floor plans to sell their homes. But Petitioners' attempt to co-opt the interests of homeowners for their own purposes moves too fast.

102. *First*, this case isn't about what a homeowner can or cannot do with their house or the floorplans to their house. As the Eighth Circuit properly acknowledged this case turns on whether Section 120(a) "a defense to a claim of infringement for real estate companies, their agents, and their contractors" who make unauthorized use of a copyrighted floor plan. A home owner's own personal use to sell their own home might very well avail itself of a separate defense that is simply unavailable to real estate companies make large scale public uses and engaging in unfettered worldwide online public distributions—public distributions that remain online for many years after the sale by Petitioners own admission. Petition at 24 ("[I]mages of floor plans can survive on the internet at sites like Zillow.com for years *after the listing is over*.").

103. Simply put, homeowners may have unique defenses apart and separate from large scale commercial uses by real estate companies. *See, e.g.*, §120(b) (expressly applying to homeowners but not realtors).

104. *Second*, Petitioners tell a nice story about what happens under their theory when the realtors' interests and the homeowners' interest happen to align. But what about when the realtor's interest and the homeowners' interest diverge?

105. It is worth contemplating what about the homeowner who does not want realtors widely disseminating a homeowner's floor plans, publicly broadcasting those floorplans worldwide across the internet, against that homeowner's wishes. Under Petitioners' reading of Section 120(a), that homeowner would be left without any recourse.

106. Homeowners may very well have privacy and safety interests in not wanting their homes' floor plans posted online for anyone and everyone to see. But under Petitioners' radical reading, Section 120(a) gives realtors a blank check to post anyone's floor plans online for any reason whatsoever or no reason at all. Indeed Section 120(a) would give anyone a blank check to post any floor plan online for any purpose whatsoever under Petitioner's theory.

107. By contrast, under the Eighth Circuit's reading of 120(a), a privacy-sensitive homeowner could negotiate with the architect to purchase or license the copyrights to the floor plans along with the home itself. And the homeowner could use those copyrights to ensure that undesired postings of the floor plans to their house be removed from sites they are uncomfortable with.

108. In short, Petitioner simply does not account for the privacy and safety interested homeowner who would be left without any recourse whatsoever under Petitioners' reading of Section 120(a) if they wanted their home's floor plans removed from an internet site.

B. Petitioners' amici have the means and influence to go to the political branches to make their case and drastically overestimate the ability of architects to access legal remedies.

109. Congress considered multiple proposals to give realtors the rights to do what they are asking for from this Court—and Congress rejected them before. Yet, Petitioners and their amici—in demonstrating the size and clout and spread of their industries—are also making the case that they have wherewithal to genuinely advance their interests in Congress.

110. Smaller architects don't.

111. Furthermore, Petitioners erroneously suggest that their reading of Section 120(a) will leave the architects' interests undisturbed, despite permitting widespread and completely unfettered unauthorized online public distributions of an architects' floor plans. Petitioners also argue that the direct protection against floor plan infringements is unnecessary because "if someone used a floor plan or other picture to make a copy of a building, the creation of the building would independently infringe the copyright and the author could pursue a claim against the builder." Pet. 17.

112. But that suggestion is cold comfort as a practical reality for an architect's works are being exploited online, at scale, for profit, and without receipt of any compensation or attribution. After all, consider Petition No. 21-8001 before this Court and involving Respondents as a case in point explaining the difficulties the American architect faces in trying to protect their copyright interests in their architectural works.

113. The Courts have created an extratextual architect-specific standard of similarity that sets a very high bar that makes it nearly impossible to win a case of architectural copyright infringement. That extratextual, architect-specific standard of protection takes copyright law's traditional similarities test that credits similarities and flips it on its head—dismissing cases based on minor differences despite objective similarities.

114. No other type of copyrighted work is subject to such an exacting test. And as the Petition in that case points out that is why architects are the least successful copyright plaintiffs, prevailing in fewer than 10% of their cases.

115. Worse, after losing under that unfair standard, district courts are far too quick to hammer unsuccessful architectural copyright plaintiffs with substantial or ruinous fees—often under a presumption to fees approach that completely runs afoul of this Court’s clear holdings in Fogerty and Kirtsaeng.

116. So, Petitioners’ suggestion that architects like Respondents can simply wait to sue until someone builds an infringing home after viewing the unauthorized online floor plans is not a serious suggestion and drastically underestimates the burdens facing an architect going to court to protect their intellectual property. See generally Pet. in Case No. 21-8001.

117. As such, Petitioners’ worries here about “*in terrorem*” effects of Copyright fees are misplaced. Pet. 30. As the Petition in Case No. 21-8001, it is the architect-plaintiff not the realtor who is at risk for *in terrorem* fees under the judiciary’s current approach to and treatment of architectural copyrights should their lawsuits lose.

118. Moreover, there is a simple and fundamental unfairness to arguing that realtors and realtor associations should be able to freely and handsomely profit off the intellectual property of an architect without sharing any of that economic value derived from the architect’s creations.

CONCLUSION

For the reasons given above, Respondents do not believe that Rule 10(a)'s standards for certiorari are satisfied or that Rule 10(c)'s standards indicate that the time is now, after only one appellate decision on the issue.

This Court can, of course, grant certiorari as it wishes. Yet, it is submitted that the better path would be to permit percolation. To date, no appellate judge has agreed with Petitioners' reading of Section 120(a). If the Eighth Circuit's decision is truly as "indefensible" as Petitioners and their amici say, then they should have no problem convincing any of the other Courts of Appeals of their preferred reading. If they achieve that, then there would be a Circuit split. Right now, there isn't.

Respectfully submitted,

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