

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

---

**REPLY BRIEF FOR THE PETITIONERS**

---

Patrick D. Kuehl, Jr.  
RIMON, P.C.  
633 E. 63d Street  
Suite 220  
Kansas City, MO 64110  
(816) 839-7471

Kevin K. Russell  
*Counsel of Record*  
Daniel Woofter  
Erica Oleszczuk Evans  
GOLDSTEIN & RUSSELL, P.C.  
7475 Wisconsin Ave.  
Suite 850  
Bethesda, MD 20814  
(202) 362-0636  
kr@goldsteinrussell.com

---

---

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

REPLY BRIEF FOR THE PETITIONERS..... 1

I. Respondents’ Limited Defense Of The  
Decision Below Is Unpersuasive ..... 2

II. The Court Should Not Delay Review ..... 7

III. If The Court Does Not Grant Plenary  
Review, It Should Summarily Reverse,  
Remand For Reconsideration In Light Of  
*Southwest Airlines Co. v. Saxon*, Or Call  
For The Views Of The Solicitor General..... 12

CONCLUSION ..... 13

## TABLE OF AUTHORITIES

### Cases

<i>Nucor Corp. v. Tenn. Forging Steel Serv., Inc.</i> , 476 F.2d 386 (8th Cir. 1973).....	6
<i>Sw. Airlines Co. v. Saxon</i> , No. 21-309 (June 6, 2022) .....	2, 3, 12

### Statutes

17 U.S.C. § 101.....	3, 5
17 U.S.C. § 102(a)(5).....	3, 4, 5
17 U.S.C. § 120.....	11
17 U.S.C. § 120(a) .....	<i>passim</i>
17 U.S.C. § 1310.....	4
17 U.S.C. § 1310(h) .....	4

### Other Authorities

<i>Graphic</i> , Merriam-Webster, <a href="https://tinyurl.com/4j34da8x">https://tinyurl.com/4j34da8x</a> (last visited June 8, 2022).....	5
H.R. Rep. No. 101-735 (1990).....	7

## **REPLY BRIEF FOR THE PETITIONERS**

The petition demonstrated that the Eighth Circuit's interpretation of Section 120(a) was indefensible, upending the careful calibration of rights Congress enacted when it extended limited copyright protection to architectural works. The petition further explained the immediate, severe, and intolerable consequences the ruling would have on important businesses ranging from real estate marketing to mortgage and tax appraisals and insurance. The outpouring of amicus briefs subsequently confirmed those impending harms and explained why the Court should not wait for the inevitable circuit split to develop before nipping the Eighth Circuit's err in the bud.

For their part, respondents acknowledge that “[g]iven the importance of the statutory question, [Supreme Court] Rule 10(c) is a pathway to granting certiorari should this Court wish to consider the question presented at this time.” BIO 7. Their reasons for nonetheless denying the writ have no merit. Respondents say the decision below is correct, but they decline to defend the bulk of the Eighth Circuit's reasoning, opting instead to put forward an even more convoluted and unconvincing theory that no court has ever accepted. They attempt to downplay the harmful consequences of the court's errant interpretation, but in doing so only confirm the need for immediate review. The petition should be granted.

## **I. Respondents' Limited Defense Of The Decision Below Is Unpersuasive.**

1. Respondents' brief is perhaps most notable for how much of the Eighth Circuit's rationale it leaves undefended. Respondents make no mention of the court of appeals' lead argument that Section 120(a) cannot encompass floor plans because Congress could have, but did not, mention them specifically in the text of the provision. *See* Pet. 10-12 (addressing Pet. App. 6a-9a). They do not even attempt to explain why it makes any difference that creating a floor plan requires access to the interior of a building. *See* Pet. 15-16 (addressing Pet. App. 10a). And respondents do not defend the Eighth Circuit's reading of the legislative history. *See* Pet. 16-17 (addressing Pet. App. 10a-11a).

In fact, the only part of the rationale respondents really embrace is the court's invocation of the *noscitur a sociis* and *eiusdem generis* canons to limit "pictorial representation" to artistic or "aesthetic" works. BIO 27. But as the petition explained, the premise of that argument—that "pictures, paintings, [and] photographs" refers exclusively to artistic and not utilitarian works—is wrong. Pet. 12-16. The opposition offers the only response that it can—none at all. *See* BIO i, 27. Indeed, the opposition confirms that "photographs" includes "functional photographs," not simply fine art photography. BIO 14.

That concession is fatal to respondents' invocation of the canons. Just this week, in *Southwest Airlines Co. v. Saxon*, No. 21-309, this Court clarified that "[*eiusdem 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.” Slip op. 10 (June 6, 2022). As in this case, the defendant in *Saxon* argued that a characteristic of one item in a list (the fact that “seamen” work aboard an instrumentality of interstate commerce) should be applied to limit to another item on the list (“railroad employees”) and then “engraft[ed] . . . onto the catchall provision” at the end of the clause (“workers engaged in . . . interstate commerce”). *Id.* at 9. But this Court found that it was “at most ambiguous” whether railroad employees shared the allegedly common characteristic with seamen (rail baggage handlers would seem to be “railroad employees” but do not ride the trains). *Id.* at 10. And as a consequence, the canon did not apply. *Ibid.*

The same reasoning dooms respondents’ appeal to the same canon here. Even if “painting” might connote artistic expression, the other terms do not and, hence, the court had no license to give “picture” and “pictorial representation” anything less than their normal, ordinary meaning, which encompasses floor plans.

2. Unable to defend the decision the Eighth Circuit wrote, respondents focus instead on an argument that no court, including the Eighth Circuit, has ever accepted. The argument is convoluted, but it appears to run as follows:

Step 1: the phrase “pictorial representation” in Section 120(a) “is a cross-reference to a broader category of works, i.e., ‘pictorial, graphic, and sculptural works’ in Section 102(a)(5). BIO 25 (citing 17 U.S.C. §§ 101, 102(a)(5)).

Step 2: That cross-reference supposedly makes clear that Congress views “pictorial” and “graphical”

works as distinct and mutually exclusive categories. Therefore, “pictorial representation” in Section 120(a) must *exclude* anything that would count as a “graphical” work under Section 102(a)(5). BIO 25.

Step 3: A floor plan is a “graphical” work within the meaning of Section 102(a)(5) and, therefore, cannot be a “pictorial representation” under Section 120(a). BIO 26.

This reasoning fails at every step.

Step 1: Respondents cite no basis for claiming that Section 120(a)’s use of “pictorial representation” is a cross-reference to Section 102(a)(5)’s “pictorial, graphical, and sculptural works,” much less one intended to constrain the meaning of the former provision. The two sections were enacted decades apart, serve different purposes, and use different language. *See* Copyright Scholars Br. 4-7; *compare* 17 U.S.C. § 120(a) (“pictorial *representations* of an [architectural] work”) (emphasis added), *with id.* § 102(a)(5) (“pictorial . . . *works*”) (emphasis added). If Section 120(a)’s reference to “pictorial representations” cross references anything, it is the statute’s use of the identical phrase in Section 1310, where the term refers to the kind of utilitarian depiction respondents would treat as a graphic work. *See* Pet. 9.<sup>1</sup>

Step 2: It would be particularly odd for Congress to have expected courts to read limitations into Section 120(a) based on the Act’s supposed distinction between

---

<sup>1</sup> Respondents oddly contend that Section 1310 “uses the phrase ‘pictorial’ standing alone,” BIO 30, when the provision quite plainly uses the exact same phrase as Section 120(a)—“pictorial representation,” 17 U.S.C. § 1310(h).

“pictorial” and “graphic” works in Section 102(a)(5) when the statute provides no definition of either phrase. *See* 17 U.S.C. § 101. Congress instead defined the collective term “pictorial, graphic, and sculptural works” through a non-exclusive list of examples without bothering to say whether any given illustration constituted a “pictorial” work, a “graphic” work, or both. *See ibid.* That is unsurprising because nothing in Section 102(a)(5) turns on whether a particular work is “pictorial” or “graphic” or both—the statute simply declares that all “pictorial, graphic, and sculptural works” are copyrightable. *See id.* § 102(a)(5).

Nor is there anything in the ordinary meaning of “pictorial” or “graphic” that suggests they are mutually exclusive. In fact, in ordinary usage, they overlap. *Graphic*, Merriam-Webster, <https://tinyurl.com/4j34da8x> (last visited June 8, 2022) (defining “graphic” as “of or relating to the pictorial arts[;] *also*: PICTORIAL”).

Consequently, it would make no difference even if respondents could convincingly show that a floor plan is a “graphic” work; even if that were so, floor plans also fall within the ordinary meaning of a “picture” or “pictorial representation,” which is all that matters under Section 120(a).

Step 3: Finally, respondents’ only basis for claiming that Congress considered a floor plan to be a “graphic” work and not a “pictorial” work is their own say so. BIO 28. Respondents claim that “[p]rior to the implementation of the AWCPA and Section 120(a), courts viewed floor plans as technical works.” *Ibid.* But their only authority for that claim is a footnote in a single case, which simply said in passing that an



“architectural plan” (not a floor plan<sup>2</sup>) is a “technical writing” (not a “graphic work”), while ruling on an unrelated question of Arkansas (not federal) copyright law for which the specific terminology made no difference. *See ibid.* (citing *Nucor Corp. v. Tenn. Forging Steel Serv., Inc.*, 476 F.2d 386, 391 n.8 (8th Cir. 1973)). That respondents must stretch so far to prove so little tells the Court all it needs to know about this argument.

3. Respondents also have no reasonable explanation for how their interpretation is consistent with the policy and design of the Copyright Act. *See* Pet. 19.

Respondents accuse petitioners of unfairly exploiting and profiting from the creative effort of home designers. BIO 2-3. But they ultimately recognize that Congress did not afford creators of architectural works a right to preclude all depictions of their works. Indeed, respondents take pains to emphasize that Section 120(a) allows homeowners and real estate agents to *photograph* the copyrighted elements of architectural works. BIO 13. Respondents cannot explain why Congress nonetheless would have intended to subject the same people to severe civil, and even potentially criminal, penalties for conveying the same information by sketching a floor plan of the same work for the same purpose.<sup>3</sup>

---

<sup>2</sup> *See* CMLS Br. 4-5 (explaining difference).

<sup>3</sup> At one point, respondents tried to justify this schizophrenia by claiming that floor plans are different because they facilitate building infringing copies of the work. Pet. 17-18. But that assertion has no foundation, *see ibid.*; CMLS Br. 4-5, and respondents have abandoned it in this Court.

In truth, a floor plan is valuable not because it recreates the creative expression of the original architect, but because it, like a functional photograph, conveys factual information—the layout and basic dimensions of the rooms—over which the designer holds no lawful monopoly. *Contra* BIO 2. Congress intended Section 120(a) to make clear that although the public may not recreate the architectural work, they are allowed to make pictorial *representations* of that work because doing so does “not interfere with the normal exploitation of architectural works.” H.R. Rep. No. 101-735, at 22 (1990). Home designers have always been able to obtain full and fair compensation for their work when a home is first built and sold. The Eighth Circuit’s decision provides designers an occasional windfall that is entirely unnecessary to encourage creation of new works, at enormous social costs Congress could not have intended to impose.

## **II. The Court Should Not Delay Review.**

Accordingly, the decision below is egregiously and obviously wrong. Respondents furthermore do not dispute that nothing short of review from this Court will change the Eighth Circuit’s position. *See* Pet. 28. That being so, it is only a matter of time before this Court will be forced to grant review of the question presented. Other circuits will sensibly reject the Eighth Circuit’s position. And if they don’t, that would only provide *greater* reason for this Court to intervene to prevent the continued, harmful misapplication of this important federal law.

So why wait? Respondents offer no support for their throw-away invocation of the benefits of percolation. BIO 9. The question is completely

straightforward, requiring only the basic application of settled principles of statutory interpretation to this particular statute. And aside from noting the absence of a circuit conflict—which is not a prerequisite for this Court’s review of important copyright questions, *see* Pet. 27-28; NAR Br. 14-15—respondents offer little to dispute the certworthiness of the question presented.

To start, there’s no denying the question’s recurring importance. Respondents say that the issue arises “only 65,000” times per year, as if that were a point in their favor. BIO 12 (cleaned up). But this Court routinely decides questions that arise far less often. Moreover, even 65,000 times a year is a gross underestimate: It accounts only for floor plans used in marketing real estate, and respondents don’t deny that the question also arises in connection with appraisals, mortgage approvals, home improvement, tax assessments, insurance, and other activities. *See* Pet. 24-27; NAR Br. 8 (describing “floorplan creation services” from “Crate & Barrel, the Home Depot, IKEA, and Wayfair”); *ibid.* (a single floor plan app “is used by over 10,000 companies and has produced over 1 million floorplans to date”).

Furthermore, the broad amicus support for the petition—from realtors, appraisers, property owners, online real estate sites, and scholars—illustrates the breadth of the harm that will flow from the decision below each time the question arises, unless and until this Court steps in to reverse.

Start with using floor plans to market real estate. Respondents acknowledge that providing potential buyers floor plans is an efficient means of conveying valuable information. BIO 2. That, no doubt, is why “79% of consumers expect digital floor plans of listings

online.” CMLS Br. 7. But the Eighth Circuit’s ruling will inevitably reduce availability of that useful information. As amicus CMLS explains, the principal databases used by real estate agents across the country will not post floor plans unless the agent provides a warranty that the picture does not infringe a copyright and promises to indemnify the listing service if any copyright claims are brought. *Id.* 9. After the decision in this case, providing such indemnification would be foolish—the benefit to the listing agent is dwarfed by the financial risk of having to pay for litigation and a potential judgment under the authority of the decision below.

Respondents say that homeowners and real estate agents can simply pay a small fee to acquire a license. BIO 15. But “there is no market in which to obtain these licenses.” CMLS Br. 8. And for reasons the petition explained in detail, and to which respondents offer no meaningful response, it will frequently be impossible—and always will be time consuming and expensive—to determine whether a particular floor plan implicates a copyrightable architectural work, identify the copyright holder, and then negotiate a license fee. Pet. 19-20.

Respondents point out that when Steven Spielberg wants to use a piece of music in a Hollywood film, he “knows [how] to procure a license for that use.” BIO 17. But it is one thing to ask a film producer with a \$100 million budget and an “administrative staff” to track down a composer, *ibid.*, and quite another to expect a homeowner or a real estate agent working on commission to do the same work to improve the marketing materials for a \$150,000 ranch house. Moreover, if a film producer is unable to find the

author for one piece of music, he can use another. Here, if the home's designer cannot be found, there is no substitute floor plan that can be used.

Respondents suggest that the real estate industry should develop some unspecified "technology to streamline and ease the process of obtaining licenses," "use standardized contracts," and develop insurance products to pay for litigation and judgments when those efforts fail. BIO 17. How, exactly, a computer is supposed to decide whether a particular triangular atrium is sufficiently original to be copyrightable, or figure out who designed it and what their current contact information is when even the copyright registry lacks that information, respondents do not say. But even setting aside feasibility, the suggestions starkly illustrate the enormous reordering of the real estate industry the decision below will require unless this Court immediately intervenes.

The problems do not stop with real estate marketing. As amici explain, and respondents do not contest, floor plans are required in a range of other important fields as well. For example, without a floor plan, a buyer sometimes cannot get the appraisal needed in order to secure a mortgage. NAR Br. 6-7. And many construction companies would consider it "malpractice" to remodel a home or business without a floor plan of the existing layout. *Id.* 9.

And then there is the prospect for massive retroactive liability for the millions of floor plans already distributed during the Copyright Act's flexible limitations period. *See* Pet. 23-24. Respondents do not deny the possibility; indeed, they complain that courts are not doing enough to facilitate such litigation. *See* BIO 33-34.

Respondents do note that the statute provides “a series of incredibly intricate and painstakingly detailed codified affirmative defenses, both complete and partial.” BIO 19. But they do not claim that any would provide a complete or partial defense in a case like this or in any of the other important circumstances described in the petition and amicus briefs. And, as the Eighth Circuit acknowledged but respondents ignore, Congress enacted Section 120(a) precisely to avoid putting those who make pictures of architectural works to the uncertainty and expense of litigating the Act’s other defenses. Pet. App. 12a.<sup>4</sup> And, as a practical matter, few homeowners or small brokerage firms are likely to roll the dice with a fair use defense, making them easy targets for copyright trolls seeking quick settlements for less than the cost of defending against a meritless claim. *See, e.g.*, Move Br. 15-16; NAR Br. 10 (describing design firm that filed more than 100 infringement suits in a decade).

---

<sup>4</sup> Respondents separately insist that even if Section 120 applies, it does not protect those who make pictures, paintings, or photographs of architectural works from suits for damages. BIO 20-21. But respondents cite no court ever adopting that view, and petitioners are aware of none. If this Court suspected that the lower courts are mistaken in thinking that Section 120(a) creates a complete defense to infringement claims, that would be another reason to grant review in this case and resolve that question as well.

**III. If The Court Does Not Grant Plenary Review, It Should Summarily Reverse, Remand For Reconsideration In Light Of *Southwest Airlines Co. v. Saxon*, Or Call For The Views Of The Solicitor General.**

If despite all this, the Court remains uncertain whether immediate plenary review is warranted, there are several options the Court could consider short of allowing the decision below to persist.

First, the question is so simple and the answer so clear, the Court could consider summary reversal.

Second, the Court may wish to call for the views of the Solicitor General and obtain the benefit of the experience and insight of the Copyright Office. *See, e.g., Google v. Oracle*, No. 18-956.

Finally, given the centrality of the *ejusdem generis* canon to the Eighth Circuit's decision, this Court could decide to vacate and remand the case for reconsideration in light of the Court's recent clarification of the doctrine in *Southwest Airlines Co. v. Saxon*. *See supra* 2-3.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Patrick D. Kuehl, Jr.  
RIMON, P.C.  
633 E. 63d Street  
Suite 220  
Kansas City, MO 64110  
(816) 839-7471

Kevin K. Russell  
*Counsel of Record*  
Daniel Woofter  
Erica Oleszczuk Evans  
GOLDSTEIN & RUSSELL, P.C.  
7475 Wisconsin Ave.  
Suite 850  
Bethesda, MD 20814  
(202) 362-0636  
kr@goldsteinrussell.com

June 8, 2022