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

BRIEF FOR *AMICI CURIAE* NATIONAL ASSOCIATION OF REALTORS® ET AL. IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The National Association of REALTORS® (NAR) is the country's largest membership organization for residential and commercial real estate professionals, representing over 1.5 million members through approximately 1,200 state and local associations.

The American Property Owners Alliance is a nonprofit advocacy organization dedicated to representing the rights and interests of property owners throughout the country.

The American Society of Appraisers is a multi-disciplinary professional organization representing appraisers, with over 5,500 members in 75 countries.

The Appraisal Institute is a global professional association of real estate appraisers, with over 16,000 professionals in nearly 50 countries.

Clear Capital is a national real estate valuation technology company that serves the mortgage and lending industries through field valuation services and property-data analytics tools.

The CCIM Institute is an international brokerage network, with 13,000 commercial real estate professionals in over 30 nations worldwide.

CoreLogic is a leading property information, analytics, and services provider in the United States, with over 5,000 employees worldwide.

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[1] All parties have consented to the filing of this brief and received timely notice of *amici*'s intent to file as required by Rule 37. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

CubiCasa is a company focused on providing value for real estate professionals through their floorplan-generation software.

The International Association of Assessing Officers is a nonprofit, educational, and research association of government assessment officials and others interested in the administration of the property tax, with over 8,500 members worldwide.

The International Council of Shopping Centers is the global trade association for the shopping center industry, and represents over 70,000 shopping center owners, developers, managers, investors, retailers, brokers, lawyers, academics, and officials.

The Massachusetts Board of Real Estate Appraisers is an organization dedicated to serving real estate valuation professionals since 1934.

The Real Estate Valuation Advocacy Association is an advocacy group for the residential real estate valuation industry.

The REALTORS® Land Institute is a real estate membership organization serving practitioners specializing in land transactions, with over 1,800 professionals as members.

Redfin is a technology-powered real estate company that helps people find a place to live in more than 100 real estate markets across the United States and Canada with brokerage, instant home-buying (iBuying), rentals, lending, title and renovations services.

The Residential Real Estate Council is a national organization of residential real estate agents, with nearly 28,000 members across the country.

The Society of Industrial and Office REALTORS® is a global professional office and industrial real estate association, with over 3,600 members in 45 countries.

The Women's Council of REALTORS® is an organization of more than 12,000 real estate professionals dedicated to advancing women as professionals and leaders in business, the industry, and the communities they serve.

Zillow Group, Inc. and its affiliates provide mobile applications and websites that help high-intent movers find and win their home through digital solutions, first class partners and easier buying, selling, financing, and renting experiences.

Collectively, *amici* represent a broad swath of stakeholders in the real estate industry and regularly file *amicus* briefs in cases, like this one, that raise significant concerns for that industry. In the decision below, the Eighth Circuit held that real estate professionals, along with the homebuyers and homeowners they represent, now run the risk of burdensome copyright litigation and severe liability for making or displaying a floorplan of a home. That ruling threatens not only crippling damages for *amici* and their members or users, but substantial disruption to the many national industries related to the acquisition, enjoyment, and disposition of real property.

SUMMARY OF ARGUMENT

It is a safe bet that most Americans would be startled to hear they could be sued for copyright infringement for making floorplans of their own homes. Many homebuyers rely on floorplans in real estate listings to decide whether to purchase a

residence, and their ability to secure financing for that transaction is often contingent on an appraisal that requires the creation of a floorplan. After acquiring a dwelling, homeowners will often make floorplans to tackle installations, arrange furniture, and complete do-it-yourself projects. On top of that, many localities require homeowners to submit floorplans before they can renovate their property. And when it comes time to sell, many Americans expect they will be able to use floorplans to secure the maximum value possible. The notion that all this conduct and more would flout the Copyright Act might cause even the mildest of homeowners to wonder what Congress was thinking.

Those homeowners who took the time to read the Copyright Act would be relieved to learn that Congress said no such thing. Turning to 17 U.S.C. § 120(a), they would discover that Congress had instead sensibly permitted homeowners and their agents to create "pictures" or "other pictorial representations" of architectural works without fear of liability—language one would think naturally included floorplans of a dwelling.

Despite these common-sense and textual clues, the Eighth Circuit became the first court in the country to hold that homeowners and their agents risk copyright litigation and severe liability for creating floorplans. This Court should ensure it is the last. The decision below threatens not only homeowners with sanctions for the use, enjoyment, and disposition of their property, but the many sectors of the economy linked to real estate as well. And it does so based not on the operative text—the court of appeals never denied that floorplans fit within the ordinary meaning of "pictures" or "pictorial representations"—but on a misguided

chain of inferences from statutory context. Yet nothing in the reasoning below justifies replacing the most natural meaning of the Copyright Act with an esoteric one—especially a reading that threatens to upend the use of floorplans that are critical to the nation's trillion-dollar real estate industry. This Court should grant certiorari and reverse.

ARGUMENT

The Eighth Circuit's understanding of the Copyright Act threatens to impose massive liability across multiple industries and to sharply restrict the rights of Americans to buy, enjoy, and sell real property. These significant consequences underscore not only why this Court's review is needed, but also why the court of appeals was badly mistaken.

I. THE DECISION BELOW MERITS FURTHER REVIEW.

A. Floorplans Are Critical to the Purchase, Sale, and Enjoyment of Real Property.

1. A quick perusal through the real estate listings on the many websites devoted to the subject—those of *amici* Redfin and Zillow included—reveals that floorplans have become a common feature in real estate transactions. According to one recent survey, among homebuyers who use the internet to shop for homes—a category covering 95% of all homebuyers—over two-thirds found floorplans to be "very useful," ranking behind only photos and detailed property information.[2] Consistent with that interest, *amicus* Zillow reports that the listings on its platform with floorplans attract the most views and that 81% of

[2] NAR Research Group, *2021 Home Buyers and Sellers Generational Trends Report* 59 (2021), https://bit.ly/36mwPTL.

homebuyers in a national survey responded that they are more likely to tour a home if its listing includes a floorplan they like.[3]

None of this should be surprising. Floorplans convey information about properties that written descriptions, photographs, and videos simply cannot capture, such as the dimensions of various rooms in the home. Whether the furniture fits, for instance, can be just as important as whether the room looks nice. And during the COVID-19 pandemic, floorplans became even more critical, as various jurisdictions restricted or even prohibited homebuyers from visiting properties in person.[4]

Even those Americans willing to buy a home without viewing a floorplan may not be able to do so without creating one. Mortgage lenders typically insist on appraisals before they will provide a home loan, and that process frequently involves the creation of a floorplan. *See, e.g.*, *Boyd v. Bank of Am. Corp.*, 109 F. Supp. 3d 1273, 1280 (C.D. Cal. 2015) (discussing appraisal guidelines mandating the inclusion of "floorplans" "in the appraisal report"). Notably, Fannie Mae and Freddie Mac often require appraisers to include floorplans or similar drawings

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[3] *See* Edward Berchick & Manny Garcia, *Buyers: Results from the Zillow Consumer Housing Trends Report 2021* (Sept. 1, 2021), https://bit.ly/3Jcssbn; Katie Deighton, *Zillow Rolls Out Interactive Floor Plans as Video Tours Fall Flat*, WALL ST. J. (Feb. 19, 2021), https://on.wsj.com/3LF1wnb.

[4] *See, e.g.*, Ind. Exec. Order No. 20-18, at 9 (Apr. 6, 2020) (requiring real estate services to be conducted virtually), https://bit.ly/357nWNk; N.H. Emer. Order No. 17, Ex. A, at 11 (Mar. 26, 2020), https://bit.ly/3I0Gu0g (prohibiting open houses).

with their reports.[5] Given that their rules govern roughly half of all residential mortgages in the country, "the terms they dictate to banks and mortgage companies become de facto industry standards."[6] And even when mortgage lenders are not required to obtain an appraisal by law, they will insist on one roughly 85% of the time before providing a home loan.[7] Lenders are also likely to demand proof of homeowner's insurance, which often necessitates an appraisal as well.[8] With so many steps potentially triggering the need for a floorplan, the average homebuyer will likely have to create at least one.

2. Floorplans also frequently prove necessary to the use and enjoyment of the home. Many homeowners rely on them to accomplish a wide range of tasks, from determining whether a desired piece of furniture will

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[5] *See* Fannie Mae, *About Desktop Appraisals* (Mar. 2022), https://bit.ly/3KRvmDE; Fannie Mae, *Selling Guide* § B4-1.2-01 (Feb. 2, 2022), https://bit.ly/3LK6gI9; Scott Reuter, *Desktop Appraisal Assignments – A Practical Guide for Appraisers*, Freddie Mac (Mar. 16, 2022), https://bit.ly/3tTNnM4.

[6] Vikas Bajaj, *Home Appraisal Standards Stiffened*, N.Y. TIMES (Mar. 3, 2008), https://nyti.ms/3IgwX4t; *see* Andrew Ackerman, *Fannie Mae, Freddie Mac To Back Home Loans of Nearly $1 Million as Prices Soar*, WALL ST. J. (Nov. 16, 2021), https://on.wsj.com/3LM7Klq.

[7] *See* Gov't Accountability Office, *Real Estate Appraisals: Most Residential Mortgages Received Appraisals, but Waiver Procedures Need To Be Better Defined* 10 (Nov. 2021), https://bit.ly/3NjwQsI.

[8] *See* CFPB, *What Is Homeowner's Insurance? Why Is Homeowner's Insurance Required?* (Sept. 9, 2020), https://bit.ly/3NmiG9W; Duncan Jenkins, *Should I Get an Appraisal for Home Insurance?*, SFGate, https://bit.ly/3wHM9oS (last visited Apr. 5, 2022).

fit in a room to figuring out what materials need to be purchased for a home-improvement project. Given this need, companies large and small have gotten into the game. Beyond the floorplan creation services offered by national corporations such as Crate & Barrel, the Home Depot, IKEA, and Wayfair, there is no shortage of software that allows homeowners to craft their own floorplans.[9] As Fannie Mae has recently observed, along with "[s]oftware that creates computer-generated floor plans and sketches for appraisal reports"—which "is readily available and already in widespread use"—"new technologies, such as phone apps" that "can measure houses" and "generate floor plans," have recently emerged.[10] For example, *amicus* CubiCasa's technology, which is used by over 10,000 companies and has produced over 1 million floorplans to date, allows homeowners and their agents to use a smartphone to scan and produce a floorplan in five minutes.[11]

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[9] *See, e.g.*, J. D. Biersdorfer, *How To Make a 3-D Model of Your Home Renovation Vision*, N.Y. TIMES (Feb. 13, 2019), https://nyti.ms/3rX0hYR; Crate & Barrel, *The Design Desk at Crate*, https://bit.ly/3LGns1c (last visited Apr. 5, 2022); Floor Plan Creator Home Page, https://bit.ly/3BtVT6I (last visited Apr. 5, 2022); The Home Depot, *DesignConnect*, https://thd.co/3GYNOrC (last visited Apr. 5, 2022); IKEA, *Planning Tools*, https://bit.ly/3sN6lCu (last visited Apr. 5, 2022); SketchUp Home Page, https://bit.ly/3piCMYD (last visited Apr. 5, 2022); Wayfair, *Create a Room & Make it Yours*, https://bit.ly/3JbAfHr (last visited Apr. 5, 2022)

[10] Fannie Mae, *Standardized Property Measuring Guidelines* 1-2 (Mar. 2022), https://bit.ly/3KWpPMc.

[11] CubiCasa Home Page, https://bit.ly/3iFDRFR (last visited Apr. 6, 2022).

In fact, many localities, whether in the Corn Belt or the Beltway, demand that homeowners file a floorplan before they can renovate their homes.[12] And even in jurisdictions that do not, homeowners are unlikely to find a professional willing to risk malpractice liability by assisting them without a floorplan in hand. As one court put it, "[n]o professional architect or builder would commence a substantial renovation project without drawings or plans reflecting the existing structure," as doing so would be "a recipe for professional malpractice and structural failure." *Javelin Invs., LLC v. McGinni*s, No. 05-cv-3379, 2007 WL 781190, at *7 (S.D. Tex. Jan. 23, 2007), *report and recommendation adopted*, 2007 WL 9753202 (S.D. Tex. Feb. 8, 2007). In still other jurisdictions, a floorplan may be required as part of an appraisal for the assessment of property taxes.[13] Floorplans have therefore become a practical necessity for many Americans who wish to maintain or alter their homes.

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[12] *See, e.g.*, City of Lincoln, Nebraska, *Building & Safety: Frequently Asked Questions*, https://bit.ly/3rVx8Nr (last visited Apr. 5, 2022); D.C. Dep't of Consumer & Regul. Affs., *Overview of Permitting Process*, https://bit.ly/34PpMSX (last visited Apr. 4, 2022).

[13] *See, e.g.*, Me. Revenue Servs., *Introduction to Property Tax Assessments* 60-61 (June 2020) (noting that "Records in the Assessor's Office" include "an interior floor plan" for each building), https://bit.ly/3KQUsmn; *Hill v. Twp. of Moorestown*, No. 9783-2008, 2020 WL 116112, at *7 (N.J. Tax Ct. Jan. 6, 2020) (observing that "floor plans with interior walls and features depicted … are typical" documents "submitted to this court with appraisal reports").

B. The Decision Below Threatens To Severely Limit Property Rights.

The Eighth Circuit's ruling puts all of this at risk. Stripped of a statutory defense allowing the creation, distribution, and display of floorplans without fear of copyright infringement, homebuyers, homeowners, and the many real estate professionals they rely on face an unenviable choice. They must either "cease all" creation, distribution, and display of floorplans—and thereby potentially lose the ability to buy, sell, or renovate a home—or else "risk severe and potentially criminal penalties." *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1513 (2020).

This is no fanciful concern. Even setting aside litigious home designers, the decision below opens up a new hunting ground for enterprising copyright trolls. Well before the Eighth Circuit scuttled the statutory defense here, copyright trolls were using floorplans to turn a profit by targeting home builders with *in terrorem* demands. Take the case of Design Basics, LLC, a Texas-based "copyright troll" that "holds registered copyrights in thousands of floor plans for suburban, single-family tract homes" and that has filed "more than 100 [infringement] suits in the last decade or so." *Design Basics, LLC v. Signature Constr., Inc.*, 994 F.3d 879, 882 (7th Cir. 2021). The firm's business model consists of having its "employees trawl the Internet in search of targets for strategic infringement suits of questionable merit," with "[t]he goal" of securing "'prompt settlements with defendants who would prefer to pay modest or nuisance settlements rather than be tied up in expensive litigation.'" *Id.*

With the Eighth Circuit's ruling in hand, it is hard to see what would stop such trolls from turning their fire on homeowners, appraisers, insurers, assessors, contractors, real estate agents, and more. Confronted with the charge of contributory infringement after merely asking a professional to create a floorplan, most homeowners would be unlikely to gamble on high-stakes litigation. *See Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005) ("One infringes contributorily by intentionally inducing or encouraging direct infringement."). When the financial penalty for a loss in court can reach up to $150,000 for each act of infringement, few Americans are likely to bet the house in response, especially when they have just been sued for making a sketch of it. *See* 17 U.S.C. § 504(c)(2).

And it is not as if homeowners (or the many professionals who assist them) can realistically take steps to protect themselves beforehand. "Unlike other forms of intellectual property, copyright protection is both instant and automatic," vesting "as soon as a work is captured in a tangible form," and "triggering a panoply of exclusive rights that can last over a century." *Public.Resource.Org*, 140 S. Ct. at 1513. The median period of homeownership, by contrast, is a mere 13 years, with less than nine percent of homeowners having dwelt in their abode for 40 years or more.[14] It is thus safe to say that most Americans remain unaware of their home's original designer or

[14] Nadia Evangelou, *How Long Do Homeowners Stay in Their Homes*, NAR (Jan. 8, 2020), https://bit.ly/3rWLYDA; iPropertyManagement, *Average Length of Homeownership* (last updated Nov. 12, 2021), https://bit.ly/3gRUhKD.

past renovators—much less the copyright's current holder, whether heir or troll.

Nor is consulting the Copyright Office apt to make much of a difference. Because registration is no prerequisite to copyright protection, an aspiring litigant can wait until a hapless homeowner has publicly displayed the floorplans, register the relevant work with the Copyright Office, and then file a lawsuit seeking recovery for conduct from both before and after the registration. *See Fourth Est. Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 891 (2019). Indeed, that is what happened here. *See* Pet. App. 43a-44a. And even if a designer has registered the copyright, that registration will likely provide little, if any, guidance as to which aspects of the home may be covered. *See Design Basics, LLC v. Lexington Homes, Inc.*, 858 F.3d 1093, 1102 (7th Cir. 2017) (explaining that homes "share many design elements and characteristics to which no individual designer can lay claim"). Given all this, "[t]he less bold among us would have to think twice before" engaging in an activity that has become a frequent part of home ownership. *Public.Resource.Org*, 140 S. Ct. at 1513.

While the Eighth Circuit suggested the "fair-use defense" might offer some protection, Pet. App. 12a, that tool will probably provide little comfort to the average homeowner, real estate broker, appraiser, insurer, assessor, or contractor. Such individuals are likely to be the least "willing to roll the dice with a potential fair use defense," which is "notoriously fact sensitive and often cannot be resolved without a trial." *Public.Resource.Org*, 140 S. Ct. at 1513.

And even when the facts are undisputed, "the 'fair use' doctrine" is a "flexible" concept that "requires judicial balancing" of a non-exhaustive "list of factors," including whether the "'use is of a commercial nature.'" *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1196-97 (2021) (quoting 17 U.S.C. § 107). Thus, as respondents' counsel recently told this Court, "the vagueness and unpredictability of fair use" often exerts a profound "chilling effect." Digit. Just. Found. Br. at 37, *Google,* 141 S. Ct. 1183 (No. 18-956), 2020 WL 1131474. There is no reason to expect a different dynamic here.

C. This Court's Review Is Warranted.

Given all this, the Eighth Circuit's decision will at best result in a significant wealth transfer from homeowners, their agents, and others connected to the real estate industry to architects, intellectual property lawyers, and copyright trolls. At worst, it will cause many Americans to forgo the use of floorplans altogether, to the detriment of their ability to buy, sell, and enjoy their homes. Unless mortgage lenders and their regulators change their tune, those who wish to purchase a home may no longer be able to obtain the financing necessary to do so. Those who want to renovate their homes may find it hard to locate a contractor willing to proceed without a floorplan. And those who want to maximize the value of the sale of their greatest asset will be prevented from providing buyers with critical information.

These consequences alone make this case worthy of this Court's attention. After all, acquiring, enjoying, and selling a home is at least as important as "using official legal works that illuminate the law," such as

an annotated state code. *Public.Resource.Org*, 140 S. Ct. at 1513. Confirming the point, nearly 90% of homeowners in a recent survey "strongly agree[d]" that Americans should be able to make floorplans of their homes without having to get permission from the holder of an architectural copyright.[15]

And while no other court, appellate or otherwise, has held that homeowners and their agents may be on the hook for creating floorplans, that does not counsel in favor of waiting for other circuits to say their piece. Given the vagaries of copyright litigation, few homeowners are likely to fight the threat of an infringement suit all the way to this Court's doorstep, especially when the only federal appellate decision out there is against them. *See supra* at 10-13.

Indeed, this Court has granted review in important copyright cases even in the absence of any apparent circuit split. *See, e.g.*, *Am. Broad. Cos. v. Aereo, Inc.*, 573 U.S. 431, 438 (2014); *N.Y. Times Co. v. Tasini*, 533 U.S. 483, 493 (2001); *see also Grokster*, 545 U.S. at 923 (noting that "the probable scope of copyright infringement" at issue was "staggering"); Stephen M. Shapiro et al., *Supreme Court Practice* § 4.13 (11th ed. 2019) (discussing *Grokster*). It should do so again here. Regardless of the presence of a conflict among the circuits, this Court regularly reviews interpretations of federal statutes that threaten "enormous potential liability," *Fid. Fed. Bank & Tr. v. Kehoe*, 547 U.S. 1051 (2006) (Scalia, J., concurring); call into question "important and increasingly popular" business

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[15] American Property Owners Alliance, *American Property Owners Alliance Supports Appeal of Ruling on Homeowners' Use of Floorplans* (Apr. 5, 2022), https://bit.ly/3NJ3tQJ.

arrangements, *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006); or affect "many individuals," *Supreme Court Practice* § 4.13. The decision below does all three. There are over 1.5 million real estate agents in the United States, with over 75,000 in the Eighth Circuit alone.[16] The court of appeals' ruling threatens those individuals—and the roughly 81 million U.S. homeowners they may represent[17]—with "severe and potentially criminal penalties" for engaging in an activity that until now, was widely regarded as part and parcel of homeownership. *Public.Resource.Org*, 140 S. Ct. at 1513. The Eighth Circuit has also empowered copyright trolls to go after a host of other industries connected to real estate, from appraisals to home improvement to furniture. Given that the real estate industry alone accounts for more than $3.8 trillion (or roughly 18.3%) of the country's GDP—over $192 billion of which comes from the Eighth Circuit—the question here easily qualifies as one of national significance.[18]

And unlike some other copyright disputes, this case concerns a class of property that traditionally has been the domain of States and localities—the home. *See infra* at 19-20. The Eighth Circuit's interference with state and local regulation of real property—tax assessments and renovation permits included—is yet

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[16] *See* NAR, *Monthly Membership Rept.* (Mar. 31, 2022), https://bit.ly/3K8iAkw.

[17] *See* Key Realty, *Is Real Estate America's Rock During Coronavirus?* (Sept. 1, 2020), https://bit.ly/37hOqg8.

[18] *See* NAR, *State-By-State Economic Impact of Real Estate Activity: Economic Impact of a Home Sal*e (2020), https://bit.ly/33HuSAd (last visited Apr. 4, 2022).

another consideration calling out for this Court's review. *See supra* at 9; *see also Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901 (2019) (plurality opinion) (observing that this Court "granted review" in light of "the significance of the question presented"—namely, whether "Congress sought to strip States of their traditional power to regulate mining on private lands within their borders"); *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 596 (1999) (noting that the Court "granted certiorari in view of the importance of the question presented to the States and affected individuals").

II. THE DECISION BELOW IS BADLY MISTAKEN.

The consequences of the Eighth Circuit's decision highlight not only why it merits this Court's review, but also why it is deeply flawed. Before upending the real estate industry by subjecting homeowners and their agents to the threat of severe liability for engaging in a common and often necessary practice, the court of appeals should have checked twice to make sure the Copyright Act actually decreed such a result. And it turns out that here, Congress and common sense line up. Text, context, and interpretive tools all confirm that homeowners can make floorplans of their dwellings without fear of liability for copyright infringement. The Eighth Circuit concluded otherwise solely through a series of contextual inferences that wilt under scrutiny.

A. Congress Protected Homeowners from Copyright Liability Based on Floorplans.

In 17 U.S.C. § 120(a), Congress confirmed that while a "copyright in an architectural work that has been constructed" may come with many benefits, they

do "not include the right to prevent the making, distributing, or public display of pictures, paintings, photographs, or other pictorial representations of the work"—provided that "the building in which the work is embodied is located in or ordinarily visible from a public place." There is no dispute that the buildings at issue here, like most homes, qualify as visible to the public. *See* 19-3608 Resp. C.A. Br. 23; 20-1099 Resp. C.A. Br. 21. Rather, the only question is whether the floorplans of these homes qualify as "pictures" or "pictorial representations." They do.

1. The Eighth Circuit did not deny that "floorplans fit within the literal definitions of 'pictures' and 'other pictorial representations.'" Pet. App. 11a; *see id.* at 6a-7a. Wisely so. Dictionary definitions from around when Congress enacted § 120(a) in 1990 say as much. *See, e.g.*, Oxford English Dictionary (2d ed. 1989) (defining "picture" as "[a]n individual painting, drawing, or other representation on a surface, of an object or objects," and "pictorial" "representation" as "[a]n image, likeness, or reproduction in some manner of a thing" "[c]onsisting of, expressed in, or of the nature of, a picture or pictures"). And while Congress did not specifically define "picture" or "pictorial representation" for purposes of the Copyright Act, its definition of "[p]ictorial, graphic, and sculptural works" provides further confirmation that it meant to capture floorplans in § 120(a). 17 U.S.C. § 101. Specifically, Congress made clear that these works "include … architectural plans." *Id.* It would be quite odd, to say the least, for the same floorplan to qualify as a "pictorial … work" but not as a "pictorial representation" under the Copyright Act.

All of this is presumably why the leading treatise on copyright law takes it as a given that § 120(a)'s "exemption applies to floorplans no less than photographs." 1 *Nimmer on Copyright* § 2A.09[A][4][c] n.286.11 (2021). Indeed, every court to consider the issue before the decision below apparently thought it so straightforward that it merited little analysis. *See* Pet. App. 27a-29a; *Sorenson v. Wolfson*, 96 F. Supp. 3d 347, 366 (S.D.N.Y. 2015); *Morgan v. Hawthorne Homes, Inc.*, No. 04-cv-1809, 2009 WL 1010476, at *12 (W.D. Pa. Apr. 14, 2009).

2. Context backs up this commonsense reading. In the neighboring § 120(b), Congress gave homeowners and their agents additional protection against copyright-infringement suits by allowing "the owners of a building embodying an architectural work" to "make or authorize the making of alterations to such building" "without the consent of the author or copyright owner of the architectural work." Before a homeowner can begin to alter a structure, however, he or his agent will often have to create a floorplan first. *See supra* at 9. Thus, the upshot of Eighth Circuit's reading is that in § 120, Congress preserved the right of Americans to renovate their homes while subjecting them to infringement suits for creating the floorplans necessary to do so. That cannot be right.

The Eighth Circuit brushed off this problem on the premise that while "major projects" may require floorplans, "small alterations" likely would not. Pet. App. 13a. Even if that were true, it would make no difference: § 120(b) undeniably protects the many "major" alterations that *do* require floorplans, and the decision below effectively eliminates that safeguard. In fact, an earlier version of § 120(b) would have

confined the scope of the defense to "minor" or "necessary" alterations, H.R. 3990, 101st Cong., 2d Sess. § 4(a) (1990), but that limitation never made it into law. *See Chickasaw Nation v. United States*, 534 U.S. 84, 93 (2001) ("We ordinarily will not assume that Congress intended to enact statutory language that it has earlier discarded in favor of other language.") (cleaned up).

3. Even if this were a close question, basic principles of interpretation would break the tie in favor of homeowners. To start, not even the Eighth Circuit defended its interpretation of § 120(a) as the most natural one, whether as a matter of text or of policy. Rather, the court below admitted that at "first" glance, one would think "floorplans could be classified as 'pictures,'" and it acknowledged "the concern" over the consequences of its ruling. Pet. App. 5a, 14a. It nevertheless embraced an esoteric reading of § 120(a) following a convoluted analysis of statutory context, *id.* at 6a-11a, even though "'the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover,'" *Lynch v. Alworth-Stephens Co.*, 267 U.S. 364, 370 (1925).

The decision below "also has striking implications for federalism and private property rights." *U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1849 (2020). The Eighth Circuit's ruling threatens severe liability under a federal statute for an activity closely associated with buying, enjoying, and selling a home. *See supra* at 5-11. That is an area squarely within the regulatory wheelhouse of States

and localities—as evidenced by their various laws on the subject. *See supra* at 9; *see also BFP v. Resol. Tr. Corp.*, 511 U.S. 531, 544 (1994) (addressing the federalism implications of an interpretation that imposed "a federally created cloud" on the "title of every piece of realty purchased at foreclosure").

Even though Congress must "'enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property,'" *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021), the Eighth Circuit thought context clues to be sufficient here. But the only "exceedingly clear" language Congress provided here was that "[n]othing in" the Copyright Act "annuls or limits any rights or remedies under the common law or statutes of any State with respect to … State and local landmarks, historic preservation, zoning, or building codes, relating to architectural works," 17 U.S.C. § 301(b)(4). Nothing in that qualification suggests that Congress wanted homeowners and their agents to face substantial liability for merely making a floorplan in connection with the sale or use of real property.

B. The Eighth Circuit's Contrary Analysis Is Deeply Flawed.

The Eighth Circuit offered four justifications for its peculiar reading. None holds up.

1. The court of appeals' lead argument was one of negative implication: Because Congress employed terms such as "architectural plans" or "technical drawings" in the Copyright Act's definitional provisions, 17 U.S.C. § 101, its use of "pictures" and "pictorial representations" in § 120(a) is telling. *See*

Pet. App. 6a-7a. But "[t]he *expressio unius* canon applies only when circumstances support a sensible inference that the term left out must have been meant to be excluded," *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 940 (2017) (cleaned up), and it readily yields when it threatens "'to supplant local authority,'" *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 434 (2002). And here, § 120(a)'s omission of "architectural plans" is no more instructive than its lack of other terms included in the Copyright Act's definitional provisions, such as "drawing" or "poster." 17 U.S.C. § 101. No one could reasonably conclude that a child's drawing of his home or a poster of the Supreme Court Building would fall outside § 120(a)'s protection, even though those items would equally be covered by the Eighth Circuit's *expressio unius* theory.

2. The court of appeals also drew on the *noscitur a sociis* and *ejusdem generis* canons, concluding that floorplans should be excluded because § 120(a)'s terms—"'pictures, paintings, [and] photographs'"—"all connote artistic expression." Pet. App. 8a; *see id.* at 8a-10a. But pictures and photographs often serve a "practical" or "functional purpose" rather than an "artistic" one, *id.* at 8a; the phrase "pictures, paintings, and photographs" covers everything from mugshots to Monets. Indeed, the photographs that appear in virtually every real estate listing are also "generated for the practical purpose of informing potential buyers of home layouts and interiors, and, more broadly, to help sell homes," *id.* at 8a-9a, yet no one thinks they should be excluded from § 120(a)'s safe harbor. And as for the Eighth Circuit's suggestion that reading "'other pictorial representations'" to cover floorplans would make "the specific enumerations" in § 120(a)

"superfluous," *id.* at 10a, this Court has repeatedly rejected the "argument that *ejusdem generis* must apply when a broad interpretation of the clause could render the specific enumerations unnecessary," *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 227 (2008) (citing *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 589 n.6 (1980)).

3. Moving on from interpretive canons, the Eighth Circuit noted that § 120(a) is triggered when "'the building in which the work is embodied is located in or ordinarily visible from a public place'" and that "it would be quite difficult to create a floorplan of a building simply by viewing it from a public place." Pet. App. 10a. But there is no dispute that the homes at issue here were visible to the public, *supra* at 17, making this observation beside the point. And again, the court of appeals' theory proves too much. It likewise "would be quite difficult" to produce pictures, paintings, or photographs of a home's interior from the sidewalk, but no one thinks that means Americans are defying the Copyright Act every time they send a Christmas card with a family picture taken from inside their home. And if the Eighth Circuit meant to suggest that *any* depiction of a home's interior—a category including nearly every real estate listing—is now a target for copyright trolls, that only makes the need for this Court's review even more imperative.

4. That leaves the Eighth Circuit's use of legislative history. *See* Pet. App. 10a-11a. Evidently Congress considered, but did not adopt, a version of § 120(a) that would have forbidden "pictorial representations made in order to further the unauthorized design and construction of a substantially similar architectural work." H.R. Rep. No. 101-735, at 22 n.50 (1990). And

according to a House report, that was because the relevant "Subcommittee believed such an amendment was unnecessary" on the ground that "[i]f an unauthorized substantially similar architectural work is constructed, it is irrelevant how the design of the infringing building is achieved." *Id.*

So what? Nothing about that report suggests that the "drafters of § 120(a) evidently did not believe it covered floorplans." Pet. App. 11a. Photographs of a home—like floorplans—can be made either "to further the unauthorized design and construction of a substantially similar work" or for other purposes, such selling real estate. That does not mean they are categorically excluded from § 120(a). The point of the House report was merely that the threat of liability for the unauthorized *construction* of a building—whether with the aid of a floorplan, photograph, or mole from a rival architectural firm—already afforded sufficient protection. There was no need to *also* sanction the *sketching* of a structure for that purpose or any other one. And in all events, the decision to subject millions of homeowners and their agents to the threat of industry-shaking liability should surely rest on a sturdier foundation than inferences from a footnote in a House report.

CONCLUSION

The Court should grant certiorari and reverse the decision below.

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Respectfully submitted,

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