

No. 16-858

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IN THE  
**Supreme Court of the United States**

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HOME DESIGN SERVICES, INC.,  
*Petitioner,*

v.

TURNER HERITAGE HOMES, INC., ET AL,  
*Respondents.*

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**On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Eleventh Circuit**

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**MOTION FOR LEAVE TO FILE JOINT BRIEF  
*AMICI CURIAE* AND JOINT BRIEF OF  
*AMICI CURIAE* THE AMERICAN INSTITUTE  
OF BUILDING DESIGN, THE TEXAS  
INSTITUTE OF BUILDING DESIGN, DESIGN  
BASICS, LLC, FRANK BETZ ASSOCIATES,  
INC., AND ARTHUR RUTENBERG HOMES,  
INC., IN SUPPORT OF PETITIONER**

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DAVID E. BENNETT  
COATS AND BENNETT PLLC  
1400 Crescent Green Drive  
Suite 300  
Cary, NC 27518  
(919) 854-1844  
dbennett@coatsandbennett.com

*Attorney for Amicus Curiae,  
American Institute of  
Building Design*

WALLACE K. LIGHTSEY  
*Counsel of Record*  
WYCHE P.A.  
44 East Camperdown Way  
Greenville, SC 29601  
(864) 242-8200  
wlightsey@wyche.com

*Attorney for Amicus Curiae,  
Frank Betz Associates, Inc.*

[Additional Counsel Listed On Inside Cover]

FRANK R. JAKES  
JOHNSON POPE BOKOR  
RUPPEL & BURNS, LLP  
SunTrust Bank Building  
401 East Jackson Street,  
Suite 3100  
Tampa, FL 33602  
(813) 225-2500  
FrankJ@jpfirm.com  
*Attorney for Amicus Curiae,  
Arthur Rutenberg  
Homes, Inc.*

LOUIS K. BONHAM  
OSHA LIANG L.L.P.  
909 Fannin Street,  
Suite 3500  
Houston, Texas 77010  
(713) 228-8600  
bonham@oshaliang.com  
*Attorney for Amici Curiae,  
Texas Institute of  
Building Design and  
Design Basics, LLC*

February 2017

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INSTITUTE OF BUILDING DESIGN,  
THE TEXAS INSTITUTE OF BUILDING  
DESIGN, DESIGN BASICS, LLC,  
FRANK BETZ ASSOCIATES, INC., AND  
ARTHUR RUTENBERG HOMES, INC.,  
IN SUPPORT OF PETITIONER**

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To the Honorable the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 37.1 and 37.2 of the Rules of this Court, the American Institute of Building Design, the Texas Institute of Building Design, Design Basics, LLC, Frank Betz Associates, Inc., and Arthur Rutenberg Homes, Inc., hereby respectfully move this Court for leave to file the accompanying joint brief as *amici*

*curiae* in support of the position of the Petitioner in this case. The written consent of the counsel for the Petitioner has been filed with the Clerk of the Court. The consent of counsel for the Respondents was requested but refused.

In support of their motion, *amici* submit the following:

1. The American Institute of Building Design (“AIBD”) and the Texas Institute of Building Design (“TIBD”) are non-profit corporations founded as professional societies for the purpose of providing education resources for residential designers and developing design standards and codes of ethics for the building design profession. As a national and state trade organization for residential design professionals, respectively, the AIBD and TIBD have an interest in ensuring that architectural works are afforded the same protections under the copyright laws as other types of works. The economic interest and livelihood of their members are threatened by those who flagrantly copy and use home plans without compensation to the designer. Stopping home plan piracy is of paramount importance to the AIBD and the TIBD and their members.

The other *amici* are small businesses that, through the creativity and hard work of their respective employees, have achieved national recognition and received numerous industry awards for the originality and high quality of their architectural designs. Because of their success and the popularity of their designs, these companies have found themselves the frequent victims of copyright infringement. They have first-hand experience of the increasingly widespread occurrence, as well as the increasingly flagrant nature, of infringement,

and therefore, have a compelling interest in strong copyright protection for architectural works.

2. The importance to *amici* of this Court's review of the Court of Appeals' opinion in this case, and the decision of *Intervest Construction, Inc. v. Canterbury Estate Homes, Inc.*, 554 F.3d 914 (11th Cir. 2008) ("*Intervest*"), on which the Court of Appeals' opinion is based, stems from the devastating impact that *Intervest* has had on the enforcement of copyright protection for architectural works in the states constituting the Eleventh Circuit. In these states, as long as *Intervest* remains on the books, the creators of original architectural works are essentially powerless to stop the flagrant infringement of their designs by persons and companies who admit to copying but then claim immunity from liability under *Intervest* because they have made a few minor changes to the design. Every Circuit Court outside of the Eleventh Circuit that has addressed *Intervest* has rejected it or declined to follow it, with the result that courts are reaching diametrically opposing results on the same legal issue depending on the area of the country in which the court sits.

3. In contrast to the arguments put forth by Petitioner, *amici* seek in their brief to point out some of the broader policy interests that are threatened by the decision of the Eleventh Circuit in this case and the *Intervest* doctrine on which it is based. *Intervest* is fundamentally contrary to the legislative history of the Architectural Works Copyright Protection Act of 1990 ("AWCPA"), Title XVII, Pub. L. 101-650, 104 Stat. 5089 (1990), and undermines the treaty obligations of the United States under the Berne Convention and the broad policy interests of the United States that are promoted through strong copyright protection.

*Amici* propose to address such interests in their joint *amicus* brief. For this reason, *amici* respectfully submit that the attached brief may be helpful to the Court in its resolution of the petition for a writ of certiorari.

WHEREFORE, for the reasons stated, the American Institute of Building Design, the Texas Institute of Building Design, Design Basics, LLC, Frank Betz Associates, Inc., and Arthur Rutenberg Homes, Inc., hereby respectfully request that the Court grant them leave to file the accompanying joint brief as *amici curiae*.

Respectfully submitted,

DAVID E. BENNETT  
COATS AND BENNETT PLLC  
1400 Crescent Green Drive  
Suite 300  
Cary, NC 27518  
(919) 854-1844  
dbennett@coatsandbennett.com

*Attorney for Amicus Curiae,  
American Institute of  
Building Design*

FRANK R. JAKES  
JOHNSON POPE BOKOR  
RUPPEL & BURNS, LLP  
SunTrust Bank Building  
401 East Jackson Street,  
Suite 3100  
Tampa, FL 33602  
(813) 225-2500  
FrankJ@jpfirm.com

*Attorney for Amicus Curiae,  
Arthur Rutenberg  
Homes, Inc.*

WALLACE K. LIGHTSEY  
*Counsel of Record*  
WYCHE P.A.  
44 East Camperdown Way  
Greenville, SC 29601  
(864) 242-8200  
wlightsey@wyche.com

*Attorney for Amicus Curiae,  
Frank Betz Associates, Inc.*

LOUIS K. BONHAM  
OSHA LIANG L.L.P.  
909 Fannin Street,  
Suite 3500  
Houston, Texas 77010  
(713) 228-8600  
bonham@oshaliang.com

*Attorney for Amici Curiae,  
Texas Institute of  
Building Design and  
Design Basics, LLC*

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**JOINT BRIEF OF *AMICI CURIAE*  
THE AMERICAN INSTITUTE OF BUILDING  
DESIGN, THE TEXAS INSTITUTE OF  
BUILDING DESIGN, DESIGN BASICS, LLC,  
FRANK BETZ ASSOCIATES, INC., AND  
ARTHUR RUTENBERG HOMES, INC.,  
IN SUPPORT OF PETITION FOR  
WRIT OF CERTIORARI**

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The American Institute of Building Design, the Texas Institute of Building Design, Design Basics, LLC, Frank Betz Associates, Inc., and Arthur Rutenberg Homes, Inc., respectfully submit this joint brief of *amici curiae* in support of the petition for a writ of certiorari.<sup>1</sup>

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<sup>1</sup> Counsel of record for all parties received notice at least 10 days prior to the due date of the intention to file this brief.

**INTERESTS OF *AMICI CURIAE***

As detailed below, *amici curiae* are all involved with the development, creation, and marketing of “architectural works,” as that term is used in the Architectural Works Copyright Protection Act of 1990, Title XVII, Pub. L. 101-650, 104 Stat. 5089 (1990) (the “AWCPA”). They are all critically interested in the scope of copyright protection accorded to architectural works, and have been directly affected by the circuit split over the Eleventh Circuit’s widely-criticized decision in *Intervest Construction, Inc. v. Canterbury Estate Homes, Inc.*, 554 F.3d 914 (11th Cir. 2008) (“*Intervest*”), which is the basis of the Court of Appeals’ decision in the instant action.

*Amicus curiae* American Institute of Building Design (“AIBD”) is a non-profit corporation organized under the laws of the District of Columbia. The AIBD was formed in 1950 as a professional society for the purpose of providing residential designers with education resources, and developing nationwide design standards and codes of ethics for the building design profession. Today, the AIBD is a nationally recognized association with professional and associate members in 48 states, throughout Canada, and in Europe, Asia, Australia and the Bahamas. The AIBD oversees a certification program that is intended to ensure the competency of residential design professionals and increase public confidence in residential design professionals.

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Counsel for Petitioner consents to this filing, but counsel for Respondents is opposed. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

*Amicus curiae* Texas Institute of Building Design (“TIBD”) is a Texas non-profit corporation formed in the 1960’s. TIBD was formerly associated with AIBD, but since 2015 has been a separate organization that primarily serves building designers in Texas and the southwest. Like AIBD, TIBD is a professional society for residential designers. It provides its members educational and professional resources, including participation in the National Council of Building Design Certification program (overseen by the AIBD).

As national and regional trade organization for residential design professionals, AIBD and TIBD both have an interest in ensuring that architectural works are afforded the same protections under the copyright laws as other types of works. The economic interests and livelihoods of AIBD and TIBD members are threatened by those who flagrantly copy and use home plans without compensation to the designer. Stopping home plan piracy is of paramount importance to AIBD, TIBD, and their members.

*Amicus curiae* Design Basics, LLC (“Design Basics”) is a Nebraska corporation. It is a building design firm based in Omaha, Nebraska. Its business is the development, creation, and marketing of architectural works. For over twenty-five years, it has been one of the largest distributors of copyrighted single-family residential building plans in the country. However, the popularity and wide distribution of Design Basics’ plans has also led to the widespread piracy of its architectural works across the country.<sup>2</sup> Whether

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<sup>2</sup> See, e.g., the situation recounted by the court in *Design Basics v. ProBuild Company*, No. 10-cv-02274-REB-BNB, Docket 81, p.2.n.1 (D. Col. 2011), involving the widespread piracy of Design Basics’ works by a national chain of lumber yards. As noted in that decision, the defendant’s employees admitted to undercover

architectural works are afforded meaningful copyright protection is thus critically important to Design Basics' business and the livelihood of its employees.

*Amicus curiae* Frank Betz Associates, Inc. ("Betz") is a Georgia corporation based in Kennesaw, Georgia. Its business is creating and marketing original designs and blueprints for the construction of single-family residences. It is a small business that, through the creativity and hard work of its employees, has achieved national recognition and received numerous industry awards for the originality and high quality of its designs. Betz is currently one of the nation's leading designers of "stock" home plans (*i.e.*, plans created for mass marketing rather than being custom made for an individual buyer). Because of its success and the popularity of its designs, Betz has also found itself the frequent victim of copyright infringement. Betz has first-hand experience of the increasingly widespread occurrence, as well as the increasingly flagrant nature, of architectural works copyright infringement, and reluctantly has been forced to devote substantial resources to policing the market for unlawful copies of its designs and to pursuing claims against infringers. Betz, therefore, has a compelling interest in strong copyright protection for architectural works.

*Amicus curiae* Arthur Rutenberg Homes, Inc. ("ARH"):

is a franchisor of residential building companies throughout Florida[,] [Georgia, Indiana, North Carolina, Ohio, South Carolina and

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investigators that their copying of Design Basics' works "technically . . . is illegal" but that they "do it all the time."



Tennessee.<sup>3]</sup> Each year ARH invests significant sums to create and develop new architectural designs. ARH uses both its internal design department and independent architects. ARH's policy is to claim promptly and to enforce consistently (indeed, doggedly) copyrights for each protected architectural design.<sup>4</sup> ARH provides franchisees the right to use the name 'Arthur Rutenberg Homes'; a license to use and construct homes in accordance with ARH's copyrighted architectural designs; and business, financial, and warranty support.

*Arthur Rutenberg Homes, Inc. v. Maloney*, 891 F. Supp. 1560, 1562 (M.D. Fla. 1995). Given ARH's business model and the magnitude of its investment in the creation of new and innovative architectural designs, it is essential that ARH be able to protect its copyrights in these designs. If competitors are permitted *carte blanche* to reproduce ARH's architectural designs – as is the natural consequence of *Intervest* and its progeny – the efficacy of ARH's franchise system will be irreparably damaged.

*Amici curiae* seek to assist the Court by highlighting the impact of the Eleventh Circuit's *Intervest* precedent and the circuit split it presents that go beyond the parties in this case. *Intervest* has effectively eviscerated any meaningful protection of architectural

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<sup>3</sup> Since the *Maloney* decision in 1995, ARH has expanded its operations to these additional states.

<sup>4</sup> *E.g.*, *Arthur Rutenberg Homes, Inc. v. Drew Homes, Inc.*, 29 F.3d 1529 (11th Cir. 1994); *Arthur Rutenberg Homes, Inc. v. Berger*, 910 F. Supp. 603 (M.D. Fla. 1995); *Arthur Rutenberg Corp. v. Parrino*, 664 F. Supp. 479 (M.D. Fla. 1987); *Arthur Rutenberg Corp. v. Dawney*, 647 F. Supp. 1214 (M.D. Fla. 1986).

works copyrights in the states of Alabama, Georgia, and Florida because, under that decision, **all** architectural works copyrights are “thin” as a matter of law. As a result, under *Intervest* even willful infringers can (and do) escape liability by simply making nominal changes to an illegally made copy of an original architectural work.

There is a clear circuit split on whether *Intervest* is correct. Until that split is resolved, architectural works copyright owners such as *amici curiae* face the paradox of their rights being fully protected in most circuits, while architectural copyright infringers are effectively absolved from liability if they happen to be in the Eleventh Circuit. Particularly because *Intervest* is contrary to settled principles of copyright law, the legislative history of the AWCPA, and this nation’s international treaty obligations, and has been roundly criticized by courts and commentators, *amici curiae* all have a strong interest in the instant petition.

The Court of Appeals’ decision in the instant action relied squarely on *Intervest* and thus is an appropriate case for this Court to review and resolve the circuit split created by *Intervest*.

## INTRODUCTION AND SUMMARY

There is an unambiguous circuit split regarding the scope of copyright protection of architectural works. On one hand, the Eleventh Circuit’s novel *Intervest* doctrine – the basis for the decision in this case – holds that architectural works are afforded dramatically **less** copyright protection than other types of protected subject matter, based on extremely suspect reasoning that ignored clear and contrary legislative history. On the other hand, every other circuit that has considered the issue disagrees with this view. The Second Circuit

has explicitly held that *Intervest* is wrong, the Fourth and Fifth Circuits have declined to follow *Intervest*, and *Intervest* conflicts with earlier circuit cases on architectural works copyrights. Indeed, in the case at bar, at least one judge on the Eleventh Circuit has acknowledged that *Intervest* is at odds with not only other circuits but even the Eleventh Circuit's own jurisprudence, and called for that "wrong turn" to be corrected. *Home Design Services v. Turner Heritage Homes, Inc.*, 825 F.3d 1314, 1327 (11th Cir. 2016) (Rosenbaum, J., concurring). Because the Eleventh Circuit declined to do so through *en banc* review of the decision below, this Court's intervention is necessary to resolve this circuit split and restore a uniform interpretation of the AWCPA across the country.

Additionally, this case offers an opportunity for this Court to address what is probably the most glaring circuit split in copyright law: how courts decide whether works are "substantially similar." Over the years, the federal circuits have adopted a variety of differing interpretations of this element of a copyright infringement claim. As such interpretations have been refined over time, they have radically diverged from each other. By granting the instant petition and ruling on this issue, this Court can end years of uncertainty and inconsistent results, not only in architectural works copyright cases but in all copyright cases.

Finally, *Intervest* and the decision below present an important issue of international law: whether a court of appeals may simply ignore this nation's ratified treaty obligations in interpreting federal law. By stripping architectural works copyrights of any meaningful legal protection, *Intervest* violates this country's treaty obligations under the Berne Convention and

TRIPS. Because the Eleventh Circuit did not even consider those issues when deciding *Intervest*, and has refused to address them since, this Court's intervention is the only recourse available. The instant case presents a perfect opportunity for the Court to resolve these important issues of law.

## REASONS FOR GRANTING THE WRIT

### I. THERE IS A CLEAR CIRCUIT SPLIT ON *INTERVEST* THAT THIS COURT SHOULD ADDRESS.

The basis for the Eleventh Circuit's decision in this case is its continued reliance on *Intervest*. The basic logic of *Intervest* is as follows:

- Architectural works are composed of “individual standard features”;
- Under the AWCPA, “individual standard features” are not themselves protected by copyright;
- Therefore, architectural works are nothing but compilations of unprotected elements,
- Therefore, architectural works are comparable to compilation works;
- Therefore, because compilation works have only “thin” copyrights, ***all*** architectural works must also have “thin” copyrights ***as a matter of law***.

This conclusion – that as a matter of law, all architectural works copyrights are necessarily “thin,” and thus even modest differences preclude a finding of infringement – was unprecedented, and indeed *Intervest* cited no authority for its novel conclusion

that Congress somehow intended that architectural works be given *less* protection than other categories of protected works.

To the best of *amici's* research, since *Intervest* three circuits have declined to follow it.

In *Zalewski v. Cicero Builder Dev. Inc.*, 754 F.3d 95 (2d Cir. 2014), the Second Circuit explicitly refused to follow *Intervest*, holding that its reasoning of treating architectural works as compilations was fundamentally flawed. 754 F.3d at 1030-04 & n.16. Moreover, the Second Circuit found that *Intervest* contravened the express legislative history of the AWCPA. 754 F.3d at 104 n.17 (“When Congress added architectural works to the list of copyrightable subject matter, it made clear that it wanted architectural works analyzed no differently than other works . . . *Intervest* contravenes Congress’ intent by treating architectural works differently than other works and failing to determine what in architecture – beyond mere arrangement – is copyrightable”).<sup>5</sup>

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<sup>5</sup> The legislative history cited by the Second Circuit squarely contradicts *Intervest*:

As a result of the incorporation of the general standard of originality for architectural works, determinations of infringement of architectural works ***are to be made according to the same standard applicable to all other forms of protected subject matter***. The references in the definition of “architectural work” to “overall form,” and to the nonprotectibility of “individual standard features” ***are not intended to indicate that a higher standard of similarity is required to prove infringement of an architectural work, or that the scope of protection of architectural works is limited to verbatim or near-verbatim copying***.

H.R. Rep. No. 101-735, reprinted at 1990 U.S.C.C.A.N. 6935, 6952 (emphasis added).

The Fourth Circuit has similarly refused to follow *Intervest*. In *Charles W. Ross Builders v. Olsen Fine Home Building*, 496 Fed. Appx. 314 (4th Cir. 2012), the Fourth Circuit reversed a summary judgment that relied on *Intervest*. The Court ruled that because the district court failed to employ the Fourth Circuit’s established two-part “extrinsic / intrinsic” test of substantial similarity, the case had to be reversed for consideration under that test. *Id.* at 319. Further, the Fourth Circuit uses the “ordinary observer” test in determining the “intrinsic” part of the analysis – and that approach differs fundamentally from *Intervest*. See also *Bldg. Graphics, Inc. v. Lennar Corp.*, 708 F.3d 573, 580 n.3 (4th Cir. 2013) (declining to endorse another district court’s reliance on *Intervest*, holding that the standard two-part test for substantial similarity set forth in *Charles W. Ross Builders* and earlier cases governed architectural works cases in that Circuit).

The Fifth Circuit has also declined to follow *Intervest*. In *Hewlett Custom Home Design v. Frontier Custom Builders*, 588 Fed. Appx. 359 (5th Cir. 2014), the defendants sought to reverse a judgment based on a jury’s finding of architectural works copyright infringement, arguing that the Court should follow *Intervest* to do so. *Hewlett Custom Home Design v. Frontier Custom Builders*, No. 13-20464 (5th Cir.) (Appellants’ Brief at pp.28-30); see also *id.*, Appellee’s Brief at pp. 30-39 (arguing against following *Intervest*). The court affirmed, rejecting *sub silentio* defendants’ invitation to follow *Intervest*.

District courts across the country have similarly rejected *Intervest*, noting that not only did its logic misunderstand the nature of a “compilation,” it also

ignored the legislative history of the AWCPA. For example:

Defendants allege that Plaintiff's house plans are compilations, entitled to only "thin" copyright protection. This is not so, and Defendants are not entitled to summary judgment on this issue.

According to the Copyright Act, "A 'compilation' is a work formed by the collection and assembling of *preexisting* materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitute an original work of authorship." 17 U.S.C. § 101 (emphasis added). In this case, Plaintiff did not start with pre-formed bedrooms, kitchens, and hallways and then assembled them as one would a jigsaw puzzle. Plaintiff had to first create those elements, and then arrange them. This is not the type of preexisting material or data the Copyright Act describes as a compilation.

The Copyright Act maintains that architectural works, as a whole, are worthy of copyright protection. The legislative history shows that in extending this protection to architectural works, ***Congress did not intent*** [sic] ***to require a heightened level of similarity***. [citing and quoting AWCPA legislative history quoted *supra*]

*Design Basics LLC v. DeShano Companies*, 2012 U.S. Dist. LEXIS 135387, \*32-33 (E.D. Mi. 2012) (emphasis added). That court went on to decline to follow *Intervest*, noting that to grant architectural works only "thin" protection would limit infringement claims to

essentially only instances of verbatim copying – which, as detailed above, the legislative history of the AWCPA explicitly disclaimed any intent to do so. *Id.* at \*34.<sup>6</sup>

Nor are the Second, Fourth, and Fifth Circuits the only circuits that squarely conflict with *Intervest*. Other circuit cases predating *Intervest* are plainly inconsistent with its finding that architectural works copyrights are treated differently from other works or are necessarily “thin” as a matter of law.

In *Sturdza v. United Arab Emirates*, 281 F.3d 1287 (D.C. Cir. 2002), the Court reversed a summary judgment that held that no reasonable jury could find that protectable aspects of the works were substantially similar. In contrast to *Intervest*, the court found that while there were significant differences between the works, there was still a question of fact for the jury as to whether the overall look and feel of the two works was similar. *Id.* at 1299. Nor did that court treat architectural works as “compilations” or find that the existence of dissimilarities could preclude a finding of infringement.

Similarly, in *T-Peg, Inc. v. Vt. Timber Works, Inc.*, 459 F.3d 97 (1st Cir. 2006), the First Circuit reversed a summary judgment that no reasonable jury could find that the architectural works at issue were substantially similar. The court ruled that the “ordinary

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<sup>6</sup> Other district courts have similarly refused to follow *Intervest*. *E.g.*, *Frank Betz Associates v. J.O. Clark Construction*, No. 3:08-cv-159, op. at p.8 n.5 (M.D. Tenn. 2010) (declining to follow *Intervest*, finding that it was not supported by the AWCPA or any Sixth Circuit opinion, and describing it as “somewhat of an outlier even within the Eleventh Circuit”); *Plan Pros v. Zych*, 2009 U.S. Dist. LEXIS 124671, op. at \*13-14 n.5 (D. Neb. 2009) (declining to follow *Intervest*).



observer” test applied in that case, and that while “[d]ifferences between the works have some effect on the inquiry . . . the mere existence of differences is insufficient to end the matter in the defendant’s favor.” 459 F.3d at 112. The court did not treat architectural works as “compilations” or otherwise find that the copyright in architectural works was “thin,” nor did it treat architectural works differently from other categories of copyrightable works.

In *Rottlund Co. v. Pinnacle Corp.*, 452 F.3d 726 (8th Cir. 2006), the Eighth Circuit reversed a judgment for defendants and remanded for a new trial, ruling that its two-part “extrinsic / intrinsic” test for substantial similarity applicable in other copyright cases applied in an architectural works case. *Id.* at 731. Critical to court’s decision in that case was that the second prong of this test required application of the “ordinary observer” test. *Id.* Because that test focuses on similarities rather than differences, and does so from the perspective of the “ordinary observer,” it is antithetical to the *Intervest* approach.

The circuit split over *Intervest* has created a situation where the states of Alabama, Georgia, and Florida are effectively a “pirates’ bay” for architectural copyright infringement, where conduct that would result in civil (or even criminal<sup>7</sup>) liability in other circuits is not only tolerated but immunized. Indeed, the present case aptly illustrates this principle. Despite the jury’s finding that the plaintiff had a valid copyright and that the defendants did in fact copy protected aspects of the works, the defendants nevertheless escaped liability because of the rule of *Intervest*: that architectural works copyrights are “thin” as a matter of law,

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<sup>7</sup> See 17 U.S.C. § 506.

and therefore making even modest changes to such works immunized such conduct. *Cf. Sheldon v. Metro-Goldwyn pictures Corp.*, 81 F.2d 49, 56 (2d Cir. 1936) (L. Hand, C.J.) (“no plagiarist can excuse the wrong by showing how much of his work he did not pirate”). In contrast, the jury’s verdict would have resulted in defendants’ liability in other circuits. *See, e.g., Hewlett Custom Home Design, supra.* (affirming liability of builder and its principal for improperly creating derivatives of plaintiff’s architectural works). Such conflicting results sound a clarion call for this Court’s intervention to resolve the split.

## **II. THIS CASE PRESENTS AN OPPORTUNITY TO RESOLVE THE LONGSTANDING CIRCUIT SPLIT REGARDING HOW “SUBSTANTIAL SIMILARITY” IS DECIDED.**

Courts routinely hold that copyright infringement can be proved by circumstantial evidence because direct evidence of copying is often unavailable. *E.g., Lyons P’ship, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 801 (4th Cir. 2001). When there is no direct evidence of copying, the fact finder may infer copying if the defendant had access to the plaintiff’s work and the two works are “substantially similar.” *Id.* However, for years the circuits have been deeply divided on how to determine whether works are “substantially similar.”

For over a century, courts tested whether one work was copied from another under an “ordinary observer” test. This test was in use in the nineteenth century, *Daly v. Palmer*, 6 F. Cas. 1132, 1138 (C.C.S.D.N.Y. 1868) (No. 3552), after Congress substantially revised the Copyright Act in 1909, *Simonton v. Gordon*, 12

F.2d 116, 120 (F.D.N.Y. 1925), and was standardized in *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946).

As of the last comprehensive revision of the Copyright Act in 1976, there was no division between the circuits on the tests for substantial similarity. Courts generally applied some version of the *Arnstein v. Porter* test. But immediately after the passage of the Copyright Act of 1976, the circuits began to splinter on the test for substantial similarity.

In 1977, the Ninth Circuit decided that the *Arnstein v. Porter* test improperly allowed a finding of copying based on merely copying the work's idea. *Syd & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1165 (9th Cir. 1977). To solve this perceived problem, the Ninth Circuit adopted a new two part test, the extrinsic/intrinsic test. The Fourth and Eighth Circuits have adopted versions of this test. *Dawson v. Hinshaw Music, Inc.*, 905 F.2d 731, 732-33 (4th Cir.), *cert. denied*, 498 U.S. 981 (1990); *Moore v. Columbia Pictures Industries, Inc.*, 972 F.2d 939, 945 (8th Cir. 1992).

In 1991, the Second Circuit articulated a refinement of the *Arnstein v. Porter* test for works that include both protectable and unprotectable elements: the "more discerning observer" test. *Folio Impressions, Inc. v. Byer California*, 937 F.2d 759, 766 (2d Cir. 1991). The First, Third, Fifth, and Seventh Circuits have adopted versions of this test. *See, e.g., T-Peg*, 459 F.3d at 111 (1st Cir.); *Dam Things from Denmark v. Russ Berrie & Co.*, 290 F.3d 548, 562 (3d Cir. 2002); *Peel & Co. v. Rug Mkt.*, 238 F.3d 391, 395 (5th Cir. 2001); *Wildlife Express Corp. v. Carol Wright Sales, Inc.*, 18 F.3d 502, 507-09 (7th Cir. 1994).

In 1992, the Second Circuit articulated a new test, the “abstraction-filtration-comparison” for the similarity of computer programs. *Computer Associates Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693 (2d Cir. 1992). While many circuits use this test to compare computer programs, the Sixth, Tenth and District of Columbia Circuits have adopted versions of this test for all types of protected subject matter. *See, e.g., Kohus v. Mariol*, 328 F.3d 848, 855-56 (6th Cir. 2003); *Country Kids ‘N City Slicks, Inc. v. Sheen*, 77 F.3d 1280, 1285 (10th Cir. 1996); *Sturdza v. United Arab Emirates*, 281 F.3d 1287, 1295-97 (D.C. Cir. 2002).

The Eleventh Circuit uses a hodgepodge of tests. In some cases, it uses the “ordinary observer” test. *E.g., Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1266 (11th Cir. 2001); *Leigh v. Warner Bros., Inc.*, 212 F.3d 1210, 1214 (11th Cir. 2000). In others, it uses an extrinsic/intrinsic test. *E.g., Herzog v. Castle Rock Entertainment*, 193 F.3d 1241, 1248 (11th Cir. 1999). And, of course, in *Intervest*, it adopted the completely novel approach for architectural works – one that requires “supersubstantial similarity”<sup>8</sup> – that is being challenged in this case.

When it deals with copyright issues, the Federal Circuit applies the law of the regional circuit of the district court from which the appeal is taken. *E.g., Hutchins v. Zoll Med. Corp.*, 492 F.3d 1377, 1383 (Fed. Cir. 2007).

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<sup>8</sup> *See, e.g., Bldg. Graphics, Inc. v. Lennar Corp.*, 708 F.3d at 578 (describing the *Intervest* approach as requiring “supersubstantial similarity” and declining to follow it); *Design Basics LLC v. DeShano Companies*, 2012 U.S. Dist. LEXIS 135387, \*34 (E.D. Mi. 2012) (declining to follow *Intervest* because it requires “supersubstantial similarity,” which would improperly limit the scope of protection of architectural works to verbatim or near-verbatim copying).

To put it mildly, the current state of the law of “substantial similarity” in copyright cases is a mess. There are at least three radically different approaches being employed, with new and often wildly inconsistent permutations constantly emerging. This Court can and should resolve this confusion by granting the petition and addressing this issue.

### **III. *INTERVEST* IS INCONSISTENT WITH THIS NATION’S OBLIGATIONS UNDER INTERNATIONAL TREATIES.**

With the maturing of the “information age,” intellectual property has become a vital part of the United States economy. Moreover, because of the technological advantages that many American businesses possess over their competitors abroad, copyrighted works are now one of the most important components of the U.S. export economy. For these reasons, vigorous protection of copyrights at home and abroad is very much in the national interest.

It was precisely for this policy reason that the United States joined the Berne Convention<sup>9</sup> in 1988. While doing so extended the protection of United States copyrights abroad, that treaty also required this country to change its laws to comply with its provisions. One such requirement was Article 2(1) of the Berne Convention, which mandates copyright protection for works of architecture and works related

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<sup>9</sup> BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS (text available online at [http://www.wipo.int/treaties/en/text.jsp?file\\_id=283698#P85\\_10661](http://www.wipo.int/treaties/en/text.jsp?file_id=283698#P85_10661)).

to architectural designs.<sup>10</sup> To comply with this provision, Congress passed the AWCPA, which explicitly extended U.S. copyright protection to “architectural works.” See H.R. Rep. No. 101-735, at 4, 10; see also *Scholz Design, Inc. v. Sard Custom Homes, LLC*, 691 F.3d 182, 188 n.6 (2d. Cir. 2012).

Since enactment of the AWCPA, this country also became a signatory to the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”). TRIPS was negotiated as part of the Uruguay Round of multilateral trade negotiations that created the World Trade Organization (“WTO”), and obligates member nations to enact and maintain certain minimum protections of intellectual property as a condition of WTO membership. See generally *Golan v. Holder*, 132 S.Ct. 873, 879-81 (2012); WORLD TRADE ORGANIZATION, “Overview: the TRIPS Agreement” (WTO 2016).<sup>11</sup> Regarding copyrights, TRIPS requires member states to comply with Articles 1 through 21 of the Berne Convention. See TRIPS Art. 9.<sup>12</sup> Because Article 2(1) of the Berne Convention covers works of architecture and related works, TRIPS thus also obligates the United States to protect copyrights in architectural works.

By unilaterally deciding that architectural works are entitled to less protection than other categories of protected works, *Intervest* thus not only contravened the AWCPA, but also abrogated this nation’s international obligations under the Berne Convention and

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<sup>10</sup> [http://www.wipo.int/treaties/en/text.jsp?file\\_id=283698#P85\\_10661](http://www.wipo.int/treaties/en/text.jsp?file_id=283698#P85_10661)

<sup>11</sup> [https://www.wto.org/english/tratop\\_e/trips\\_e/intel2\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm)

<sup>12</sup> [https://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_04\\_e.htm#1](https://www.wto.org/english/docs_e/legal_e/27-trips_04_e.htm#1)

TRIPS. As with the contrary AWCPA legislative history, in its rush to declare that architectural works did not deserve the protections afforded other categories of protected works, *Intervest* made no effort to address or consider these important issues. When the Eleventh Circuit was subsequently advised of these treaty obligations, *see, e.g., Home Design Services Inc. v. Turner Heritage Homes Inc, et al.*, No. 15-11912 (11th Cir.) (proposed *amicus curiae* brief of Design Basics (July 15, 2016 docket entry)), it simply refused to address them.

This Court should not allow a Court of Appeals to blithely ignore not only an act of Congress, but also this country's international treaty obligations. The petition should be granted to remedy this situation.

### CONCLUSION

While *amici curiae* strongly believe that *Intervest* is wrong, there is no question that it presents a clear circuit split on an important issue of federal copyright law. This Court should grant the instant petition and decide the scope of protection accorded architectural works under the AWCPA, as well as the proper test of "substantial similarity" in copyright cases.

Respectfully submitted,

DAVID E. BENNETT  
COATS AND BENNETT PLLC  
1400 Crescent Green Drive  
Suite 300  
Cary, NC 27518  
(919) 854-1844  
dbennett@coatsandbennett.com

WALLACE K. LIGHTSEY  
*Counsel of Record*  
WYCHE P.A.  
44 East Camperdown Way  
Greenville, SC 29601  
(864) 242-8200  
wlightsey@wyche.com

*Attorney for Amicus Curiae,*  
*American Institute of*  
*Building Design*

*Attorney for Amicus Curiae,*  
*Frank Betz Associates, Inc.*

FRANK R. JAKES  
JOHNSON POPE BOKOR  
RUPPEL & BURNS, LLP  
SunTrust Bank Building  
401 East Jackson Street,  
Suite 3100  
Tampa, FL 33602  
(813) 225-2500  
FrankJ@jpfirm.com  
*Attorney for Amicus Curiae,  
Arthur Rutenberg  
Homes, Inc.*

LOUIS K. BONHAM  
OSHA LIANG L.L.P.  
909 Fannin Street,  
Suite 3500  
Houston, Texas 77010  
(713) 228-8600  
bonham@oshaliang.com  
*Attorney for Amici Curiae,  
Texas Institute of  
Building Design and  
Design Basics, LLC*

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