No. 25-449

IN THE
Supreme Court of the United States

STEPHEN THALER,

Petitioner,

v.

SHIRA PERLMUTTER, REGISTER OF COPYRIGHTS AND DIRECTOR OF THE UNITED STATES COPYRIGHT OFFICE, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

BRIEF OF *AMICI CURIAE* PHYLLIS SCHLAFLY EAGLES AND EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*[1]

Amicus Curiae Phyllis Schlafly Eagles was founded in 2016 as an association to carry on the work of its namesake in advocacy and educational work, including defense of a strongly textualist interpretation of the Patent and Copyright Clause, also known as the Intellectual Property Clause, embodied in U.S. CONST., Art. I, Sec. 8, cl, 8.

Amicus Eagle Forum Education & Legal Defense Fund ("Eagle Forum ELDF") was founded in 1981 by Phyllis Schlafly, and has consistently advocated in court and elsewhere for the rights of individual inventors under the Patent and Copyright Clause. Eagle Forum ELDF was the lead entity on an *amicus* brief in this Court in support of a textualist interpretation of this Clause in the copyright case of *Eldred v. Ashcroft*, 537 U.S. 186 (2003). *See* Brief of Amicus Curiae Eagle Forum Education & Legal Defense Fund in Support of Petitioners, 2002 U.S. S. Ct. Briefs LEXIS 265, No. 01-618.

Amici thereby have strong interests in this Petition for a Writ of Certiorari to advocate in defense of the traditional purpose and beneficial incentives in the

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[1] *Amici* file this brief after providing the requisite ten days' advance written notice to counsel for all the parties. Pursuant to Rule 37.6, counsel for *amici curiae* authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity – other than *amici*, their members, and their counsel – contributed monetarily to the preparation or submission of this brief.

U.S. Constitution for the human authorship of original, creative works.

SUMMARY OF ARGUMENT

This Court should address here the constitutional authorship requirement in the context of Artificial Intelligence (AI), before it is too late. There have not yet been any substantive decisions emanating from this Court concerning AI, and its rulings have apparently never even mentioned AI except once in a citation. Meanwhile, AI has become a dominant force in the financial markets, political discourse, and legal research, and there are thousands of references to it in lower courts. Continued silence by this Court on this issue is no longer helpful.

Similar to the successful ruling by this Court in *Feist*, which boldly held that originality is a constitutional and not merely a statutory requirement for copyright protection, this Court should decide here whether the Constitution permits an AI program to be a copyright author. Clarification as to this fundamental property right is essential to facilitating rapid development in this field, on which future prosperity in many other fields of endeavor also depends.

The D.C. Circuit punted on this fundamental constitutional question, and instead found merely that the Copyright Act requires human authorship as a matter of statutory interpretation. But the federal statute is silent as to its definition of an author, and it is implausible that the drafters of the Copyright Act intended that its scope for an "author" be any different from its meaning in the Patent and Copyright Clause. The D.C. Circuit strongly implied that Congress could

extend copyright protection to non-human generated works. *Thaler v. Perlmutter*, 130 F.4th 1039, 1050 (D.C. Cir. 2025) ("[I]f the human authorship requirement were at some point to stymy the creation of original work, that would be a policy argument for Congress to address."). This Court should address the validity of that dicta below, in light of the uncertainty it creates.

Other circuits are likely to confront the constitutional issue head-on, and legal havoc about who owns or may freely reuse AI-generated works is devastating to the development of this new technology. There are interests of human authors at stake as well as looming competition from China's development of AI. It is unhelpful and unwarranted for this Court to kick this can further down the road.

This case is the ideal vehicle for addressing the constitutional issue because Petitioner has teed up the Question Presented with remarkable clarity, without any ambiguity as to whether the work includes a "direct, traditional authorial contribution by a natural person." The Petition should be granted to clarify whether human authorship is a constitutional requirement for copyright protection.

ARGUMENT

I. As This Court Successfully Held in *Feist*, This Court Should Resolve Whether the Constitution Allows Copyright for a Certain Category of Works.

AI technology is moving too quickly for this Court to wait for the customarily years-long process of unresolved constitutional questions percolating up through the lower courts. Public officials, investors in

AI, authors, and many others need to know whether Congress has the authority under the Patent and Copyright Clause to protect entirely AI-generated works. There are strong arguments on both sides that warrant full consideration now by this Court, and the Petition should be granted to join the issue and squarely resolve it. If a remand to address this constitutional issue in the first instance is desired, then that too would be appropriate and a step forward.

The D.C. Circuit decision below declined to address the constitutional issue, and missing from its opinion is any mention of "public domain" or the "First Amendment." Instead, the decision relies entirely on a dubious interpretation of the undefined term "author" in the Copyright Act, untethered to consideration of what is meant by the same term in the Patent and Copyright Clause. The analysis below fails to provide certainty to anyone on either side of this issue. A decision that reaches a correct outcome but based on flawed reasoning should be reconsidered on appeal and affirmed on different grounds.

As Justice Scalia pointed out:

> Legal opinions are important, after all, for the reasons they give, not the results they announce; results can be announced in judgment orders without opinion. ***An opinion that gets the reasons wrong gets everything wrong which is the function of an opinion to produce***.

Antonin Scalia, *The Dissenting Opinion*, 1994 J. Sup. Ct. Hist. 33 (1994) (emphasis added).

It is this Court which boldly decided, without dissent, that "[t]he *sine qua non* of copyright is originality." *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*,

499 U.S. 340, 345 (1991) (O'Connor, J., writing for this Court, without dissent). Justice O'Connor did not flinch in that landmark decision from making it clear from where that requirement derives: "Originality is a constitutional requirement." *Id.* at 346.

That bright-line ruling by this Court brought order and finality to a nagging question about the copyrightability of data. Thousands of subsequent decisions have relied on *Feist*, many to properly deny similar copyright infringement claims. *See, e.g.*, *Utopia Provider Sys. v. Pro-Med Clinical Sys., L.L.C.*, 596 F.3d 1313, 1323 (11th Cir. 2010) ("the headings and subcategories on the ED Maximus forms are what one would expect to find on such a medical template," and thus "are better analogized to the non-copyrightable baseball scorecard or travel diary").

Authorship, too, is an express constitutional requirement for copyright. The text of the Patent and Copyright Clause in the Constitution seems clear enough in granting Congress the power:

> "To promote the Progress of Science and useful Arts, by securing for limited Times to ***Authors and Inventors*** the exclusive Right to their respective Writings and Discoveries."

U.S. CONST. Art. I, Sec. 8, cl, 8 (emphasis added). But nearly 250 years later, technological advancements raise the issue of what "authors" really means. Only this Court can definitively answer this question, and it should do so in this case.

The reasoning invoked below by the D.C. Circuit is detrimental to all sides of this issue. Investors and developers of AI are left without incentives to improve their programs for generating expressive works

ordinarily protected by copyright. Human authors, on the other hand, are left by the decision below without any assurances that their current incentives will still be intact next year or five years from now. The D.C. Circuit has implicitly invited the well-heeled lobbyists of D.C. to persuade Congress to redefine "author" in the Copyright Act, without any regard for the Constitution. The Copyright Office under new leadership is left without any guidance as to constitutional limits on who an "author" may be for copyright purposes.

II. The Chilling Effect on First Amendment Rights, Due to Draconian Penalties under the Copyright Act, Merit Review of Copyrightability of AI-Generated Material.

The penalties under the Copyright Act, as amended, are draconian and a substantial deterrent to First Amendment-protected speech. Fines of $150,000 per work are imposed for willful infringement, for example, plus attorney-fee shifting that can easily run into millions of dollars. 17 U.S.C. §§ 504(c)(2), 505. The ruling below by the D.C. Circuit is enforceable in the District of Columbia, but the 50 states remain under a cloud of unease about this.

Lavishly funded AI companies, including Google and Microsoft, can bear the risks of copyright infringement penalties as a cost of doing business, but individual authors cannot. Publishers will predictably decline manuscripts if there is any doubt as to potential copyright infringement. Fair use, the doctrine which protects First Amendment rights, is based on implied consent by an author to reuse of his material. But that reasoning runs into difficulties when the author is not a human, but an AI program.

This Court has explained that:

> The First Amendment and Copyright Clause appear, at first glance, to be in tension. The First Amendment guarantees freedom of speech, *see* U.S. Const. amend. I, but the Copyright Clause, by "securing for limited Times to Authors ... the exclusive right to their respective writings ...," *id.* art. I, § 8, cl. 8, has the "inherent and intended effect" of restricting some expression by others, *Golan v. Holder*, 565 U.S. 302, 327-28, 132 S. Ct. 873, 181 L. Ed. 2d 835 (2012).

Green v. United States DOJ, 111 F.4th 81, 87 (2024). This Court then elaborated on how fair use doctrine helps protect First Amendment rights, by inferring consent by the author:

> courts have long recognized a common-law doctrine of 'fair use' that implies an 'author's consent to a reasonable use of his copyrighted works' by other speakers.

Id. (quoting *Harper & Row, Publrs. v. Nation Enters.*, 471 U.S. 539, 549 (1985), quoting Horace G. Ball, *Law of Copyright and Literary Property* 260 (1944)).

AI, as run on a machine, does not "consent" to anything as a human would. Instead, a private-equity AI project could flood federal dockets with automatically generated complaints to seek draconian copyright infringement damages from even the slightest offender. Already there is a problem of "copyright trolls" filing these lawsuits, but with AI-generated works receiving copyright protection this problem would magnify a hundred-fold. *Malibu Media, LLC v. Doe*, 2015 U.S. Dist. LEXIS 87751, at *4-5

(S.D.N.Y. July 6, 2015) ("Recent empirical studies show that the field of copyright litigation is increasingly being overtaken by 'copyright trolls,' roughly defined as plaintiffs who are 'more focused on the business of litigation than on selling a product or service or licensing their [copyrights] to third parties to sell a product or service.'") (quoting Matthew Sag, *Copyright Trolling, An Empirical Study*, 100 Iowa L. Rev. 1105, 1108 (2015)).

This Court stands as the last line of defense of First Amendment rights. It also has a supervisory role over all federal courts, and should be proactive in averting a flood of copyright infringement actions as AI-generated works proliferate.

III. Expressive Works Are the Wellspring of Human Progress, and This Court Should Grant *Cert* to Protect Them.

Expressive works are the wellspring of human progress, and American prosperity. The harmful uncertainty about AI-related ownership will only worsen if the Court denies the Petition, to the detriment of what is needed to protect our future.

No further development of any record would be helpful to resolving the constitutional issue presented here. Instead, delay would have the effect of worsening disorder and leaving lower courts in the dark about what the Constitution requires. *Cf. Am. Legion v. Am. Humanist Ass'n*, 588 U.S. 29, 48-49 (2019) (decrying the failure of the *Lemon* test to establish a "framework bring order and predictability to Establishment Clause decisionmaking") (collecting examples).

The success of the Copyright Act and its predecessor in England cannot be overstated. Multiple

expressions of immense ongoing value were created by English authors during the period in which copyright laws were developed to establish incentives for such originality. "To err is human; to forgive, divine,"[2] is an example of a phrase that human creativity published the year after the enactment in England of the Statute of Anne of 1710, which was an early version of the Copyright Act today. The so-called "father of American copyright," Noah Webster, was incentivized by it to create the first influential American dictionaries and grammatical texts.

AI arrives as a bull in this delicate China shop, capable of destroying much that is good which has taken centuries to encourage. Yet if properly harnessed, AI itself may tremendously enhance human creativity, just as Technicolor did to movies in 1939 to propel *Gone With The Wind* to become by far the highest grossing movie of all-time in inflation-adjusted dollars.[3]

This Court should not expect further litigation on the scope of copyrightable authorship to be beneficial, as other circuits will inevitably issue rulings having reasoning at odds with the decision below. A up-front, bright-line clarification of property rights by this

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[2] Alexander Pope, *An Essay on Criticism* (1711).

[3] Setting a record expected never to be broken, the movie *Gone With The Wind* has garnered an inflation-adjusted domestic revenue of $1.850 billion as of 2022. Second place *Star Wars* (1977) is more than $200 million behind. *See* David Caballero, "10 Highest-Grossing Movies Adjusted for Inflation" (Nov 17, 2023), https://tinyurl.com/2p8ykbs6 (viewed Nov. 10, 2025).

Court, based on the Constitution, is already overdue as AI sweeps the economy.

The tendency to avoid reaching constitutional issues is often laudable, but misplaced here. *See, e.g.*, *Billard v. Charlotte Catholic High Sch.*, 101 F.4th 316, 334 (4th Cir. 2024) (observing that "the Supreme Court and our Circuit have consistently applied the constitutional avoidance doctrine") (collecting cases). A corollary principle, or at least one similar to it, is that "it is a proper exercise of judicial restraint for courts … to avoid reaching unnecessary constitutional issues." *Commodity Trend Serv. v. Commodity Futures Trading Commission*, 149 F.3d 679, 688 n.5 (7th Cir. 1998) (citing *Board of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 484-86 (1989)). Because Congress can tinker with and improve upon its statutes, in contrast with the Constitution, there is often merit in grounding decisions in statutes rather than in the generally immutable Constitution.

But human authors need the incentive of an open playing field to invest the substantial time and effort into their work, without incursion by AI-owned copyrights in the future. Our economy and people making career decisions are better off with clarity as to whether the Constitution allows copyrighting entirely AI-generated works to displace human opportunities. *Certiorari* should be granted before more AI-related havoc becomes more difficult to tidy up later. Even if the outcome below is correct that all works developed entirely by AI are immediately in the public domain as not qualifying for copyright protection, review of this fundamental issue of national importance is warranted by this Court.

CONCLUSION

For the foregoing reasons, the Court should grant the requested Writ of Certiorari.

Respectfully submitted,

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