No. 98-1785

In the Supreme Court of the United States

J.S.G. BOGGS, PETITIONER

v.

LAWRENCE H. SUMMERS, SECRETARY OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Secret Service agents may seize bills that are in the likeness and similitude of federal currency, without first providing an adversarial hearing before an independent judicial officer.

2. Whether the court of appeals correctly declined to order the record on appeal supplemented, so that it could itself view and determine if the bills at issue were in the likeness of federal currency, when petitioner failed to ask the court to supplement the record until after oral argument, and failed to raise the substantive issue in his brief on appeal.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 161 F.3d 37. The opinion of the district court (Pet. App. 16a-35a) is reported at 987 F. Supp. 1.

JURISDICTION

The judgment of the court of appeals was entered on November 6, 1998. A petition for rehearing was denied on February 3, 1999 (Pet. App. 36a). The petition for a writ of certiorari was filed on May 3, 1999. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Constitution gives Congress the power to "coin Money [and] regulate the Value thereof," Art. I,

§ 8, Cl. 5, and to "provide for the Punishment of counterfeiting the Securities and current Coin of the United States," Art. I, § 8, Cl. 6. Pursuant to that authority, Congress has prohibited the possession or production of a likeness of an obligation or security of the United States. See 18 U.S.C. 474(a) (paras. 5-6) (1994 & Supp. III 1997).[1] Congress also has provided, in 18 U.S.C. 504 (1994 & Supp. III 1997), exceptions to that prohibition. Section 504(1) permits the possession or production of illustrations of United States obligations and securities if the illustration is in black and white and less than

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[1] Paragraphs 5 and 6 of 18 U.S.C. 474(a) (1994 & Supp. III 1997) provide:

> Whoever has in his possession or custody, except under authority from the Secretary of the Treasury or other proper officer, any obligation or other security made or executed, in whole or in part, after the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same; or
>
> Whoever prints, photographs, or in any other manner makes or executes any engraving, photograph, print, or impression in the likeness of any such obligation or other security, or any part thereof, or sells any such engraving, photograph, print, or impression, except to the United States, or brings into the United States, any such engraving, photograph, print, or impression, except by direction of some proper officer of the United States—
>
> Is guilty of a class B felony.

Although the relevant events of this case took place between 1991 and 1993, the substance of 18 U.S.C. 474 has not changed since then. In October 1992, however, Congress renumbered Section 474 as 474(a) and added Section 474(b). See Pub. L. No. 102-550, Tit. XV, § 1552, 106 Stat. 4070. And, in September 1996, Congress changed a violation of Section 474(a) from a class C felony to a class B felony. See Pub. L. No. 104-208, Tit. VI, § 648(a), 110 Stat. 3009-367.

75% or more than 150% the size of the original, and if the negatives and plates used in making the illustrations are destroyed after their final use.[2] This Court

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[2] 18 U.S.C. 504 (1994 & Supp. III 1997) provides in pertinent part:

> Notwithstanding any other provision of this chapter, the following are permitted:
>
> (1) The printing, publishing, or importation, or the making or importation of the necessary plates for such printing or publishing, of illustrations of—
>
> (A) postage stamps of the United States,
>
> (B) revenue stamps of the United States,
>
> (C) any other obligation or other security of the United States, and
>
> (D) postage stamps, revenue stamps, notes, bonds, and any other obligation or other security of any foreign government, bank, or corporation.
>
> Illustrations permitted by the foregoing provision of this section shall be made in accordance with the following conditions—
>
> (i) all illustrations shall be in black and white, except that illustrations of postage stamps * * * may be in color;
>
> (ii) all illustrations * * * shall be of a size less than three-fourths or more than one and one-half, in linear dimension, of each part of any matter so illustrated which is covered by subparagraph (A), (B), (C), or (D) of this paragraph, except that black and white illustrations of postage and revenue stamps * * * may be in the exact linear dimension in which the stamps were issued; and
>
> (iii) the negatives and plates used in making the illustrations shall be destroyed after their final use in accordance with this section.
>
> The Secretary of the Treasury shall prescribe regulations to permit color illustrations of such currency of the United States as the Secretary determines may be appropriate for such purposes.

has held that the prohibition and the exceptions, read in tandem, do not violate the First Amendment. *Regan* v. *Time, Inc.*, 468 U.S. 641 (1984).

2. Petitioner is an artist and an academic who reproduces, in color, the currency of the United States. Petitioner admits that those reproductions, which are the same size as United States currency, can be confused with actual currency. See C.A. App. 16 (Compl. para. 6) ("Boggs draws pictures of money. They are actual-sized, *trompe l'oeil* pieces.").[3] Petitioner then uses his reproductions, referred to as "Boggs Bills," as a medium of barter. Pet. App. 17a; C.A. App. 16 (Compl. para. 6). Petitioner purchases services or goods with the notes in order to elicit "a dialogue" about "the meaning and uses of art and money." C.A. App. 111 (Boggs Aff. paras. 7-8). This case arises out of two incidents involving petitioner, the Secret Service, and petitioner's use of the so-called Boggs Bills.

The Wyoming Incident. In March 1991, the Secret Service learned from the Cheyenne, Wyoming Police Department that petitioner had attempted to obtain merchandise from a local K-Mart using one of his Boggs Bills. See C.A. App. 124-125 (Hansen Decl. para. 3). Apparently, petitioner had indicated to a sales clerk at the K-Mart that he wanted to obtain the face value of a $100 Boggs Bill in goods and receive any change in actual currency. *Ibid.*

After inspecting samples of the Boggs Bills and determining that they appeared to be the size, color and

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[3] The phrase *trompe l'oeil* means deception or trick of the eye, and refers to a style of painting that creates a strong illusion of reality, often such that the viewer, on first sight, is in doubt as to whether the thing depicted is real or a representation. See 18 *Oxford English Dictionary* 578 (2d ed. 1989).

similitude of United States currency, a Secret Service agent met with Boggs at his Cheyenne hotel. Pet. App. 17a, 19a-22a; C.A. App. 125 (Hansen Decl. para. 6). After being advised that his Bills appeared to be in violation of federal counterfeiting laws, and after what petitioner characterized as "several hours of tense negotiation," Pet. App. 21a, petitioner agreed to provide 15 samples of his reproductions (the Cheyenne Boggs Bills) to the Secret Service agent. See *id.* at 21a-23a.

The Pittsburgh Incident. In November 1992, the Secret Service learned that the petitioner had printed an additional $1 million in Boggs Bills and that he planned to spend those bills in the Pittsburgh area over the course of two years. Pet. App. 17a-18a; C.A. App. 190 (Abraham Aff. para. 17(a)). Based upon this information, the Secret Service obtained, from a magistrate judge in the United States District Court for the Western District of Pennsylvania, a warrant to search Boggs' person, studio and residence. Pet. App. 17a-18a; C.A. App. 217-224 (Warrant of Dec. 1, 1992). When the Secret Service executed that warrant, it seized a number of reproductions (the Pittsburgh Boggs Bills). Pet. App. 18a.

3. Petitioner brought this suit for declaratory and injunctive relief. He sought a declaration that the anti-counterfeiting statutes (18 U.S.C. 474, 504 (1994 & Supp. III 1997)) either did not apply to him, because he allegedly had no intent to defraud, or were unconstitutional. He sought an injunction that would, among other things, (1) prohibit the government from prosecuting him under the counterfeiting laws or otherwise interfering with his work or possessions, and (2) require the government to return all property that has been seized. He additionally sought an award of compensa-

tory damages for interference with, and injury to, his property. Pet. App. 18a; C.A. App. 14-27 (Compl.).

The district court held that the statutes at issue were constitutional on their face and as applied and did not require proof of intent to defraud. *Boggs* v. *Bowron*, 842 F. Supp. 542, 544, 562 (D.D.C. 1993). Analyzing Sections 474 and 504 in tandem, see *Regan* v. *Time, Inc.*, 468 U.S. at 647-648, the district court found the size and color restrictions of Section 504 to be reasonable time, place and manner limitations. *Ibid.*

In an unpublished judgment order, the court of appeals affirmed. See *Boggs* v. *Bowron*, No. 95-5100, 1995 WL 623690 (D.C. Cir. Oct. 12, 1995) (67 F.3d 972 (Table)). Petitioner filed a petition for a writ of certiorari, which this Court denied. 517 U.S. 1134 (1996).

4. Petitioner then moved in the district court for summary judgment on the question of whether he was entitled to the return of his property. See Pet. App. 16a ("This matter comes before the court on cross-motions for summary judgment on [petitioner's] claims for the return of his seized property."). He argued that the procedures employed by the Secret Service to obtain the Cheyenne and Pittsburgh Boggs Bills violated the First Amendment because he was not given a hearing before the seizure. And although petitioner's complaint had not raised a Fourth Amendment claim, petitioner also argued that the Secret Service's actions in obtaining the Cheyenne Bills had constituted a warrantless seizure in violation of the Fourth Amendment. He asserted that the remedy for those alleged violations is return of the bills. *Id.* at 18a-19a.

The district court rejected petitioner's claims. It first found that, on the undisputed facts of record, no seizure occurred in the Wyoming incident, since the entry into

petitioner's hotel room was consensual, as was the turning over of the Boggs Bills. Pet. App. 19a-23a. And it held that, because the officers who seized the Boggs Bills in Pittsburgh did so pursuant to a valid warrant, no Fourth Amendment violation arose out of that incident either. *Id.* at 23a-30a.

In particular, the court rejected petitioner's argument that the First Amendment required the government to provide him with a hearing before the Pittsburgh warrant was issued. Pet. App. 23a-30a. While the court recognized that, under the law of the case, the Boggs Bills were to be regarded as presumptively expressive materials, *id.* at 23a n.2, it rejected petitioner's argument that a hearing was required under cases such as *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46, 63 (1989). The court determined that those cases, which hold that special procedures are required before materials may be seized under an obscenity statute, do not apply to the seizure of counterfeit money. Pet. App. 26a. Because a warrant was obtained for the Pittsburgh seizure of Boggs Bills, and because the court held that the warrant affidavit was supported by probable cause, the court concluded that the Pittsburgh seizure did not violate petitioner's First Amendment rights. *Id.* at 28a.

The district court also held that, even if the Boggs Bills had been illegally seized, they would not be subject to return because they constituted contraband per se. Pet. App. 33a-35a. In its earlier decision, the court had examined the 15 samples relinquished in Wyoming and had found that they were similar, in size, color, and likeness, to genuine currency. It had therefore concluded that a jury would be justified "if not compelled" to find that the items were in the likeness and similitude of United States currency. *Id.* at 33a. On the

basis of that earlier determination, the court concluded that the Wyoming Boggs Bills were contraband per se. *Ibid.*

The Pittsburgh Boggs Bills had not been before the district court earlier, and petitioner had declined to make them available. Accordingly, the government submitted them to the court for its inspection. Although petitioner requested a hearing in open court to determine if the Boggs Bills were counterfeit per se, the district court denied the motion and conducted an *in camera* inspection of the Pittsburgh Boggs Bills. Pet. App. 34a-35a. Based on that inspection, the court concluded that "all of the items that the Secret Service contends are contraband are, to this court's satisfaction, reproductions of genuine currency of the United States or reproductions of genuine foreign currency. Each are in the likeness and similitude of genuine currency and therefore in violation of 18 U.S.C. §§ 472 or 481." Pet. App. 35a.[4]

5. The court of appeals affirmed. Pet. App. 1a-15a. First, the court rejected petitioner's argument that the Secret Service should have afforded petitioner an adversarial hearing, before an independent judicial officer, prior to seizing the "Boggs Bills." "Bogg's artwork is designed to look like money," the court explained, and was therefore subject to seizure as a violation of the counterfeiting statutes. *Id.* at 7a. The court of appeals also distinguished the pornography

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[4] While the court concluded that all the Boggs Bills that the Secret Service claimed to be contraband were in fact contraband per se, and therefore subject to forfeiture, it found that the Secret Service had correctly declined to forfeit many of the Boggs Bills because they were not contraband and therefore were not forfeited. Indeed, of 81 reproductions in one group, only three were found to be contraband. See Pet. App. 35a.

cases on which petitioner relied, pointing out that the counterfeiting statute leaves officers in the field substantially less discretion, and has a significantly lower potential impact on protected expression, than the pornography statutes at issue in those cases. "While some judgment is needed on the part of the officers charged with enforcing the counterfeiting statutes, the inquiry is not inherently content-based and thus poses little risk of acting as a prior restraint on expressive materials," the court of appeals explained. *Ibid.*

The court of appeals also held that the district court acted properly when it inspected the Boggs Bills *in camera*. Petitioner, the court of appeals concluded, had no right, on summary judgment, to have the bills examined in open court. And while petitioner asserted that he could not tell from the record what items were submitted to the court for inspection, the court of appeals observed that "he received notice from the government listing the items submitted." Pet. App. 8a.

Finally, the court of appeals upheld the statutory standard for counterfeit currency used by the district court and embodied in 18 U.S.C. 474, but declined to examine the Boggs Bills to determine whether the lower court had correctly applied that standard. Petitioner, the court of appeals pointed out, had failed to raise that issue—*i.e.*, whether or not his Bills were in fact contraband per se—until after oral argument. Citing Federal Rule of Appellate Procedure 28(a)(4), the court held that it was "too late in the appellate process" to ask for such review. Pet. App. 10a.

Judge Rogers concurred in part and dissented in part. While she acknowledged that petitioner's appeal "focused on his First Amendment procedural claim without explicitly contending that his art does not meet the statutory definition of counterfeit currency," Pet.

App. 11a, she nonetheless concluded that the court of appeals should overlook any waiver, *id.* at 12a, and review the Bills. In her view, the preferable course would have been to supplement the record with the Boggs Bills so as to permit the court to determine whether or not the lower court had properly evaluated them. *Id.* at 11a-12a.

ARGUMENT

The decisions of the courts below are correct and do not conflict with the decisions of this Court or any other court of appeals. Accordingly, further review is not warranted.

1. Petitioner first argues that the government's seizure of his "Boggs Bills" constituted an unlawful prior restraint. According to petitioner, he should have been afforded a hearing before his *trompe l'oeil* currency was seized. He seeks return of the seized reproductions of currency as a remedy for that alleged violation. See Pet. 13-20.

a. As an initial matter, it is far from clear that petitioner's prior restraint claim—*i.e.*, his challenge to the government's failure to afford him an adversary hearing before seizing his Boggs Bills—is properly before the Court in this case.[5] Petitioner's motion in

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[5] Moreover, there is some question concerning the district court's authority to order the return of the property. Although the district court purported to "operate under its equitable power in determining whether the property should be returned," Pet. App. 30a-31a n.3, in our view such a power, if it exists at all, cannot be used to compel officers of the United States to turn over property held by the United States absent a waiver of sovereign immunity. Petitioner nowhere identifies the waiver of immunity that would permit a suit to compel the return of property here. But see *Polanco* v. *DEA*, 158 F.3d 647, 652 (2d Cir. 1998) (concluding that

district court sought one form of relief alone: return of the seized bills. Pet. App. 16a ("This matter comes before the court on cross-motions for summary judgment on [petitioner's] claims for the return of his seized property."); *id.* at 30a (petitioner's "rationale for challenging the above seizures is that he seeks return of the items"); *id.* at 4a-5a ("Boggs argued that * * * the appropriate remedy [for the allegedly unlawful seizures] was return of the seized goods."); see also *id.* at 2a ("Boggs argues that these errors require us to order the government to return his artwork.").[6] It is now clear, however, that the bills cannot be returned *even if* their initial seizure was improper because they are contraband per se, and thus illegal to possess. See *id.* at 32a-33a. In particular, the district court expressly concluded that "a jury would be compelled to find that the fifteen Cheyenne Boggs Bills" seized in Wyoming "violate 18 U.S.C. § 474, para. 5," because they are in the "general pattern of general currency" and "in the likeness and similitude of genuine United States currency." Pet. App. 33a (citation omitted). Likewise, it expressly concluded that "[e]ach reproduction" seized in Pennsylvania "has the general design and appearance of genuine * * * currency." *Id.* at 35a.

The conclusion that the Bills are contraband per se—and thus illegal to possess—precludes petitioner

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waiver of immunity in Administrative Procedure Act, 5 U.S.C. 702, extends to suits for the return of property).

[6] Nor can petitioner persuasively argue that this issue is "live" because, if he prevailed, he might be entitled to the monetary relief requested in his complaint. Petitioner abandoned that claim in this action—choosing instead to raise it through a separate action, No. 95-1051 (D.D.C)—and in any event sought no relief other than return of his Bills either in his motion for summary judgment in district court or on appeal in the D.C. Circuit.

from recovering the Bills even if one were to assume that the initial seizure of those Bills constituted an unlawful prior restraint. As this Court has explained, where the subject "property [i]s contraband," the individuals from whom it was seized "have no right to have it returned to them." *Trupiano* v. *United States*, 334 U.S. 699, 710 (1948); *United States* v. *Jeffers*, 342 U.S. 48, 53 (1951) (same). For example, where the police discover heroin during an unlawful search, the victim of that search may be able to seek suppression of the heroin in the subsequent criminal trial; the victim may even be able to seek an award of damages. But he cannot seek the return of contraband narcotics he cannot lawfully possess. The same reasoning applies to the contraband counterfeit Boggs Bills that petitioner seeks to have returned here. As the district court explained, "[i]f mere possession of an item is a crime, the government's return of that item would make the recipient a criminal, and a court cannot enter an order that would lead to such a result." Pet. App. 33a.

That conclusion flows not only from the contraband nature of the Boggs Bills and this Court's decisions in *Trupiano* and *Jeffers*, but also from this Court's reasoning in *Carey* v. *Piphus*, 435 U.S. 247 (1978). There, the plaintiffs claimed to have been suspended in violation of procedural due process. Agreeing with the analysis of the court of appeals below, this Court held that the plaintiffs were not entitled to recover compensation for injuries caused by the suspensions *if* they "would have been suspended even if a proper hearing had been held." *Id.* at 260. If the suspensions would have occurred in any event, the Court explained, the lack of a prior hearing "could not properly be viewed as the cause of the suspensions." *Ibid.*

That same reasoning precludes petitioner from recovering the Bills as a remedy for their having been seized without prior process in this case. In the years following the seizures at issue here, this case has been thoroughly litigated in district court, and twice appealed in the court of appeals; that process has shown that the Bills are contraband per se. Consequently, it is clear that, even if petitioner had been granted a prior, adversary hearing before the Bills were seized, that hearing would not have prevented the seizure from taking place. To the contrary, just as the later hearing found the Bills to be contraband per se and subject to seizure and forfeiture, so too would have a hearing before seizure. Because the Bills would have been seized "even if a proper [pre-seizure] hearing had been held," the allegedly unlawful failure to hold such a hearing cannot "properly be viewed as the cause" of the seizures and cannot entitle petitioner to return of the Bills. *Carey*, 435 U.S. at 260.[7]

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[7] To the extent petitioner seeks to challenge the conclusion that the Bills are contraband per se, petitioner waived that fact-bound claim by failing to raise it in a timely fashion below. See pp. 19-20, *supra*; see also Pet. App. 10a. In any event, the record establishes that the works in dispute are contraband per se. The Secret Service submitted affidavits of counterfeiting experts attesting to the fact that Boggs Bills meet the definition of counterfeit currency—and hence constitute contraband per se. The district court, which reviewed the Bills, reached the same conclusion. And petitioner's own complaint appears to concede the point, referring to the Boggs Bills as "actual-sized, *trompe l'oeil* pieces," C.A. App. 16 (Compl. para. 6), *i.e.*, as actual-sized reproductions of currency drawn in a style that is sufficiently life-like to "fool the eye." See note 3, *supra*. See also C.A. App. 111 (Boggs Aff. para. 9) ("My work simply would not carry the same meaning in black and white or in grotesquely enlarged or comically shrunken size.").

Consequently, petitioner's prior restraint claim is largely irrelevant to the propriety of the district court's decision denying petitioner's motion for return of the Bills. Because petitioner's Boggs Bills are contraband, petitioner is not entitled to their return, the only relief petitioner sought in the motion before the district court, even if a prior restraint had been unlawfully imposed. Conversely, if the courts' conclusion regarding the contraband status of the Boggs Bills were incorrect, the illegality of the initial seizure would neither enhance nor lessen the force of petitioner's claim for their return. If the Bills were not subject to forfeiture as contraband, petitioner's right to their return would not be defeated by a finding that the initial seizure was lawful and based on probable cause to believe the Bills were subject to forfeiture.

The prior restraint issue thus has no bearing on the correctness of the district court's and court of appeals' decisions not to order the return of petitioner's property, and is not properly before the Court. And that remains true even though the lower court decisions purported to address that issue. This Court "reviews judgments, not statements in opinions," *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956), and does not "decide questions that cannot affect the rights of litigants in the case before them." *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990) (internal quotations omitted).

b. In any event, the district court and court of appeals both properly rejected petitioner's prior restraint argument. According to petitioner, the Secret Service was required to conduct an adversarial proceeding to determine the propriety of seizing the Cheyenne and Pittsburgh Boggs Bills before the seizure occurred. In obscenity cases involving books,

films, and videotapes, petitioner points out, the strong First Amendment-based policy against prior restraints on free speech requires such a "prompt judicial determination [of the obscenity issue] in an adversary hearing" before all available copies of a book or movie may be seized. *Heller* v. *New York*, 413 U.S. 483, 492 (1973); *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46, 63 (1989).

As for the Wyoming Bills, the argument fails because the district court found that they were not seized but instead were voluntarily surrendered, Pet. App. 19a-23a, and petitioner never disputes that finding. More fundamentally, petitioner's attempt to extend the prior restraint doctrine to the counterfeiting context is erroneous. In the context of obscenity seizures, a pre-seizure hearing is required in part because a "dim and uncertain line" separates obscenity from protected expression. *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 66 (1963); see *A Quantity of Books* v. *Kansas*, 378 U.S. 205, 210 (1964) (plurality opinion). As the district court below pointed out (Pet. App. 25a-26a), reasonable minds can and often do differ over what is, and what is not, obscene. Indeed, this Court's formula for separating obscenity from protected expression—"whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest"—is quite subjective and requires a great degree of judgment in its application. See *Roth* v. *United States*, 354 U.S. 476, 489, 491 (1957). Consequently, "[f]or a magistrate or other judicial officer to make a probable cause determination based merely on the bald affidavit of a police officer presents too much of a possibility that the subjective impression of that police officer will act as a prior restraint on protected speech." Pet. App. 25a.

In contrast, the standards to be applied in the counterfeiting context—whether or not the materials are in the likeness of United States currency, and whether or not they are within the permissible size and color specifications set forth in 18 U.S.C. 504—are relatively clear and easy to apply. Pet. App. 26a. No "subjective" determinations are required; the only question is whether the material to be seized looks like money. *Ibid.* Moreover, unlike the seizure of allegedly obscene materials, the seizure of alleged counterfeit money does not by its very nature raise a grave risk that protected materials will be seized. As a result, the sound constitutional reasons for requiring a prior hearing before permitting the seizure of materials alleged to be obscene simply do not apply to the seizure of materials alleged to be counterfeit.

Petitioner is mistaken to claim that the decisions of the district court and the court of appeals afford sexually explicit materials greater protection than other forms of expression, Pet. 18, or that they limit the prior restraint doctrine to cases that "involve sex," Pet. 19. Neither court below held that the prior restraint doctrine applies only to allegedly obscene (or sexually explicit) materials. Instead, they merely declined to extend that doctrine to a context—the enforcement of the Nation's counterfeit laws—in which the applicable standards are neither inherently subjective nor content-based, and where there is no grave risk that seizures without prior adversary hearings will suppress protected expressive materials.

2. Petitioner also argues that the district court erred in viewing the Pittsburgh Boggs Bills *in camera* and failing to grant him an in-person hearing at which he could present evidence and argument. See Pet. 20-24.

Those case-specific claims do not warrant this Court's review.

a. Although due process generally requires notice and an opportunity to be heard, see Pet. 21, it does not always require an in-person hearing at which witnesses and evidence may be presented. To the contrary, motions to dismiss under Federal Rule of Civil Procedure 10(b) and motions for summary judgment under Federal Rule of Civil Procedure 56 are regularly granted on the basis of paper submissions alone, as they were here. Moreover, petitioner had, during the years of litigation created by this case, ample opportunity to show that the Pittsburgh Boggs Bills do not fall within the prohibition of the counterfeit laws. And he specifically attempted to do so through the affidavits he submitted in support of his motion for summary judgment. See C.A. App. 107 (Boggs Aff.); C.A. App. 155 (Bittman Decl.). The affidavits and arguments he submitted, however, simply did not reveal a need for the district court to hear further oral argument or take additional testimony from witnesses. Under those circumstances, it was not an abuse of discretion for the district court to rely on the evidence submitted and resolve the summary judgment motions without a further hearing. Pet. App. 7a; see also *id.* at 15a n.7 (Rogers, J., concurring in part and dissenting in part) ("I * * * concur in the court's holding that *in camera* review was * * * appropriate.").[8]

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[8] Petitioner's suggestion that he was entitled to a jury trial before civil forfeiture could be ordered, Pet. 23, is also incorrect. Since no reasonable juror could have concluded that petitioner's documents were *not* contraband, see p. 11, *supra*, the district court properly granted the government's motion for summary judgment.

Nor is petitioner correct to suggest (Pet. 21) that the decision is inconsistent with *Robinson* v. *Hanrahan*, 409 U.S. 38, 39-40 (1972) (per curiam), and *United States* v. *James Daniel Good Real Property*, 510 U.S. 43 (1993). Although petitioner characterizes *Robinson* as having reversed a forfeiture order "on the ground that the owner did not receive actual notice of the forfeiture hearing," Pet. 21, in fact the constitutional defect in that case was the State's failure to make sufficient efforts to advise the owner that *forfeiture proceedings* had been *instituted* against his property—a defect that deprived him of any opportunity (on paper or in person) to contest the forfeiture action. See 409 U.S. at 39-40 (holding that the *in rem* forfeiture violated due process because the notice provided by the State was not "'reasonably' calculated to apprise [the owner] of the pendency of the forfeiture proceedings"). Petitioner's reliance (Pet. 21-22) on this Court's decision in *James Daniel Good Real Property*, *supra*, is misplaced for similar reasons. That case merely held that, absent exigent circumstances, *real property*—a home—cannot be seized by the government without affording the owner notice and an opportunity to be heard. See 510 U.S. at 46, 52-54. This case did not concern real property and petitioner, in any event, was clearly given the opportunity to address—in his moving papers and in response to the government's moving papers—whether or not his Bills were contraband per se and thus subject to forfeiture. See Gov't Mem. of Points and Authorities 5-7 (Jan. 30, 1997) (arguing that the Bills are contraband per se and thus not subject to return).

b. Petitioner, in any event, forfeited his claim that the district court should not have reviewed the Bills *in camera* because he failed to object to that procedure in

the district court. Pet. App. 8a. Although petitioner attempts to blame others for that omission, see Pet. 23, his argument is unpersuasive and unrelated to any generalized issue of national importance. Petitioner never objected to the district court's review of the bills *in camera* in district court, either before the district court reviewed the bills and entered judgment, or, through a motion for reconsideration, after the district court did so. Cf. *Insurance Servs.* v. *Aetna Cas. & Sur. Co.*, 966 F.2d 847, 852 (4th Cir. 1992) (where party "had no opportunity to object" until after the district court issued its order, an objection in a "motion for reconsideration" is considered "timely made"). Nor did petitioner seek access to the bills during the district court proceedings. Under those circumstances, the court of appeals did not err in concluding that petitioner's claim of error was forfeited. See Pet. App. 8a ("If there was error, * * * [petitioner] could have avoided any ill effect by proper motion below."); *id.* at 15a n.7 (Rogers, J., concurring in part and dissenting in part) ("With respect to [petitioner's] claim that the district court erred by viewing the bills *ex parte*, I concur in the opinion of the court * * * to the extent that it relies on [petitioner's] failure to seek access to the bills during the district court proceedings. * * * [T]he district court's procedure [did] not result in reversible error.").

3. Finally, petitioner complains that the court of appeals failed to rule on whether the Boggs Bills in fact violate 18 U.S.C. 474(a) (paras. 5-6), and affirmed the district court's judgment without having actually seen the Boggs Bills. Pet. 24-25. That claim is both fact-bound and without merit.

As the court of appeals made clear, it had good reason for declining to review the district court's application of 18 U.S.C. 474 and 504 to the Boggs Bills

by reviewing the Bills—petitioner did not timely ask it to do so. Although Rule 28(a) of the Federal Rules of Appellate procedure requires the argument section of an appellant's brief to contain "the contentions of the appellant with respect to the issues presented," petitioner failed to ask the court of appeals "to make a full reexamination of the merits of the grant of summary judgment" by reviewing the Bills and applying the appropriate standard to them. Pet. App. 10a; see also *id.* at 11a (Rogers, J., concurring in part and dissenting in part) (Petitioner "should not be too surprised by this result, as his appeal" did not "explicitly contend[] that his art does not meet the statutory definition of counterfeit currency.").

Indeed, petitioner actually sought to deprive the court of appeals of access to the Boggs Bills so as to prevent it from conducting that review. Although petitioner now complains that the record did not include the actual Boggs Bills at issue, Pet. 24, petitioner not only failed to file a timely motion to supplement the record to include those Bills, Pet. App. 10a, but actually opposed, in his court of appeals brief, the government's offer to present the Boggs Bills to the court for inspection, *ibid.* Only during oral argument did petitioner change his mind about the government's offer, and only afterward did he move to supplement the record. *Ibid.* As the court of appeals explained, that is "simply too late in the appellate process" to ask the court of appeals to address an additional issue and to ask it to supplement the record so as to be able to do so. *Ibid.* At the least, that ruling did not constitute an abuse of the court of appeals' discretion. Petitioner's fact-bound challenge to it does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1999