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Introduction to *J.S.G. Boggs v. Eljay Bowron* et. al.

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INTRODUCTION TO *J.S.G. BOGGS v. ELJAY BOWRON*, et al.

Kent A. Yalowitz[*]

This brief was filed in June, 1995, in the United States Court of Appeals for the District of Columbia Circuit, on behalf of J.S.G. Boggs, the internationally acclaimed visual and performance artist whose principal metier involves the image of money, often life-size and in color. Boggs' work captures and represents ideas about beauty, value, trust and art in daily life. By conducting transactions with his work—say, a $100.00 "Boggs Bill" in exchange for $95.00 worth of merchandise and $5.00 in change—he has brought art out of the museum and into the street, confronting issues of trust, value, aesthetic beauty and questions about the usefulness and value of art—all in a dialogue *with* the viewer, rather than in a monologue directed *at* the viewer. In proposing a transaction, Boggs generally asks a series of questions designed to prompt the viewer into thinking about the meaning and uses of art and money in everyday life. His art allows him to ask the viewer, directly, what art should look like, what should be done with it and what it represents, in a kind of Socratic dialogue familiar to every law student. Indeed, Boggs has been called a Socratic artist, "endlessly confounding his everyday interlocutors with the precariousness of everything they took for granted about both money and art. (Why accept one kind of drawing and not the other? Why, exactly?)."[1] In part, Boggs' work is designed to elucidate the idea that the value of money—indeed, of all intangible forms of value—should be consciously accepted on the basis of our trust in each other and in our social and political institutions.

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[1] Lawrence Weschler, *Money Changes Everything*, THE NEW YORKER, Jan. 18, 1993, at 39.

Perhaps because of his high media visibility, perhaps because he does not pretend to curry favor with the government, Boggs has been the victim of harassment and censorship at the hands of the United States Secret Service, the law enforcement agency responsible for the enforcement of the anti-counterfeiting laws. The brief is in support of our appeal of the denial of injunctive relief that would prevent further harassment by the Secret Service and forbid prosecution of Boggs.

The case highlights procedural protections for the freedom of expression that extend beyond the classic "time, place or manner" analysis one ordinarily thinks of as the protection offered by the First Amendment.[2] Indeed, it is the procedural protections of the First Amendment that are the most compelling aspect of the case. In its treatment of Boggs, the Secret Service has insisted on freedom from judicial oversight, even though cases interpreting the First Amendment provide for a very explicit series of procedural protections for individuals engaged in expressive activity. Thus, law enforcement officers may not regulate expression through informal coercion and threats of enforcement; they may not regulate expression without supervision by an independent judicial officer; they may not seize expressive materials without a warrant; they may not make wholesale pretrial seizures of expressive materials; and they may not simply "confiscate" expressive materials with no post-seizure hearing. Yet that is what they have done to Boggs. They have silenced Boggs not with criminal prosecution, not with civil forfeiture, but through raw intimidation and unilateral seizure.

In addition, the First Amendment has long been understood to forbid the application of criminal sanction without some element of *scienter* on the part of the defendant. Strict liability punishment by the government has the collateral effect of inhibiting the freedom of expression. The rule has been applied to a wide array of government regulations of speech beyond the criminal law. Thus, under *New York Times v. Sullivan*,[3] the civil law of libel may not

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[2] Of course, those kinds of issues are also present in this case. We have presented evidence that the statute is not a reasonable restriction on speech and that it has been abused by the government as a content-based restriction on Boggs' speech.

[3] 376 U.S. 254, 279-80 (1964).

be applied to a defendant unless that defendant has "reckless disregard" for the truth. The same is true of the civil law of intentional infliction of emotional distress. In this case, however, the Secret Service has sought to impose a felony counterfeiting statute on a person with no *scienter*. In contrast, one will notice the brief reference to an informal survey we conducted of popular magazines. We found that dozens of images of money had been produced not in compliance with the law as interpreted by the Secret Service. Indeed, more than eighty-five million copies of these "violations" were published in one six-month period. This conflict is hardly justified by "settled expectations that the contents of magazines and film are generally [not] subject to stringent public regulation."[4]

The cases articulating these First Amendment principles have generally involved pornographers or others at the margins of mainstream society—precisely those who most need and can most benefit from simple, broadly understood and uniformly applied procedural protections. Large, sophisticated publishing houses surely benefit from the First Amendment's procedural protections, and as our society emerges into the twenty-first century, the freedoms afforded by the First Amendment to institutions will become ever more important. But the soap-box speaker needs First Amendment procedural protections as well—even more so, because the soap-box speaker cannot hire counsel to evaluate and enforce those rights.

The creation of express procedural protections for the exercise of particular rights has analogies in other areas of constitutional law, even beyond the rights of the criminally accused (which are principally procedural rather than substantive protections). For example, in the wake of *Planned Parenthood v. Casey*,[5] the battleground for protection of abortion rights will involve evaluation of procedural obstacles and protections for women. To take another example, minimum procedural rights would appear to be a natural element of the rights of the homeless under the Privileges

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[4] United States v. X-Citement Video, 115 S. Ct. 464, 468-69 (1994).

[5] 114 S. Ct. 909 (1994).

and Immunities Clause:[6] there too, individuals at society's margins have long been subject to *ex parte* harassment at the hands of police officers. And while the anti-loitering laws have long been held unconstitutionally vague as a matter of substance, the harassment continues. Specific procedural protections, rooted in particular guarantees of the Constitution, could provide powerful tools for the protection of these individuals with a more concrete grounding than the "liberty" interest protected by the Due Process Clause.[7]

In the end, of course, each case is decided on its own merits, and not on what it might lead to. Nonetheless, the *Boggs* case reminds us of the potential of the procedural protections of the First Amendment.

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[6] "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. CONST. amend. XIV, § 1.

[7] These freedoms also benefit from a *scienter* rule, as well—much in the same way that freedom of expression is protected by this bulwark—even though it is accepted that the Due Process Clause does not require a *scienter* element in every crime.

ORAL ARGUMENT TO BE CALENDARED FOR THE FIRST APPROPRIATE DATE AFTER COMPLETION OF BRIEFING

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-5100

J.S.G. BOGGS,

Appellant,

v.

ELJAY BOWRON, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLANT

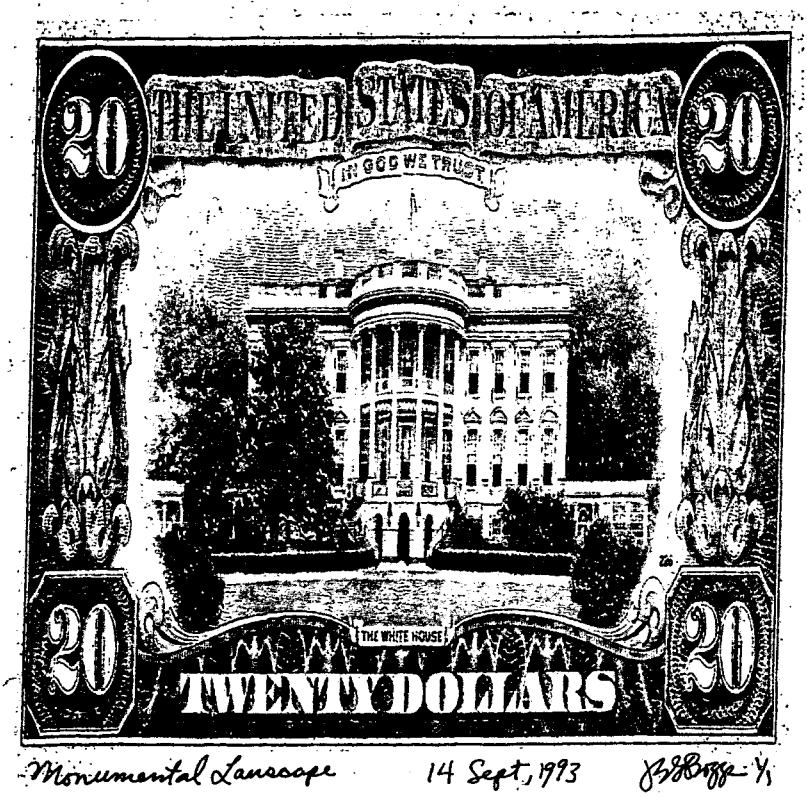
JURISDICTIONAL STATEMENT

In this First Amendment case, the District Court's jurisdiction rests on 28 U.S.C. § 1331. On December 9, 1993, the District Court granted Defendants' motion for summary judgment and denied Plaintiff's motion for a preliminary injunction. (App. 24.)

On December 14, 1993, Plaintiff served a motion for correction of error (App. 263-67) pursuant to Fed. R. Civ. P. 60(a), thereby tolling his time to appeal. Fed. R. App. P. 4(a). On March 28, 1995, the District Court granted that motion and directed the entry of final judgment as to the First Claim for Relief pursuant to Fed. R. Civ. P. 54(b). (App. 268-69.) Plaintiff filed a notice of appeal on April 11, 1995. This Court's jurisdiction rests on 28 U.S.C. §§ 1291 and 1292(a).

ISSUES PRESENTED

The District Court declined to issue an injunction protecting Plaintiff J.S.G. Boggs ("Boggs") from harassment by the Secret Service and held that even though Boggs has no intent to defraud anyone he may be prosecuted under clauses 5 and 6 of 18 U.S.C. § 474 (a counterfeiting felony) for having created this and other like pieces of art:



For that ruling to stand, this Court must answer each of the following questions in the affirmative:

1. May the Government regulate Boggs' speech by informal threats of prosecution and seizure *en masse* of his property without any forfeiture hearing?

2. Are the principles that *scienter* is a necessary element for conviction of any felony and that a statute must be interpreted to avoid serious First Amendment concerns inapplicable to 18 U.S.C. § 474?

3. Would prosecution of Boggs under section 474 be consistent with the First Amendment?

4. Would a jury drawing all reasonable inferences in favor of Boggs and conscientiously following instructions requiring proof of guilt beyond a reasonable doubt be justified in concluding that this piece and the other works of art in the record meet the traditional "similitude" test required for conviction in counterfeiting prosecutions?

CONSTITUTIONAL PROVISION AND STATUTES

1. The First Amendment provides in part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

2. 18 U.S.C. § 474(a) (Supp. V 1993) provides in part:

> **§ 474. Plates or stones for counterfeiting obligations or securities**
>
> (a) * * * *
>
> [5] 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

[6] 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 C felony.

3. 18 U.S.C. § 504 (Supp. V 1993) provides in part:

§ 504. Printing and filming of United States and foreign obligations and securities

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 provisions of this section shall be made in accordance with the following conditions—

(i) all illustrations shall be in black and white . . . ;

(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 . . .; 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.

* * * *

STATEMENT

The Nature Of The Case And The District Court's Disposition

The Complaint seeks (1) declaratory and injunctive relief forbidding the Government to harass Plaintiff J.S.G. Boggs or to prosecute him in violation of his First Amendment rights, and (2) the return of property seized by the Secret Service and damages for the destruction of property. (App. 10-20.) The District Court denied Boggs' motion for a preliminary injunction; granted Defendants' motion for summary judgment and dismissed the claim for declaratory and injunctive relief; certified the dismissal of that claim as final under Fed. R. Civ. P. 54(b); and held the claim for return of property and damages in abeyance pending resolution of this appeal. (App. 24, 268-69.)

Statement Of Facts

The Artist. J.S.G. Boggs is an internationally recognized artist. His work has been exhibited throughout America and Europe, and he has been the subject of articles in numerous publications, a documentary film called *Money Man* by Philip Haas, and stories

carried by every major television network. He received formal training in fine arts at Columbia University; served as a Fellow in Art and Ethics at Carnegie Mellon University; lectured at Brown University; and has published scholarly work. *See* Mem. Op. 2 & n.6 (App. 26), 842 F. Supp. at 544; Boggs Aff. ¶¶ 1-2; Mayer Decl. ¶ 4 (App. 110-11, 178); J.S.G. Boggs, *Who Owns This?*, 68 Chi.-Kent L. Rev. 889 (1993).

Boggs uses images of money in his work, which offers a rich commentary on social, political, and philosophical issues and is rooted in a strong historical tradition. Chambers Decl. ¶¶ 5-12; Mayer Decl. ¶¶ 5-6 (App. 171-76, 178-79). He began creating in this style inadvertently. In May 1984, while attending an art expo in Chicago, Boggs occupied himself in a diner by sketching the numeral one and developing it into a dollar bill; his waitress noticed it and asked to buy it from him. They negotiated a transaction in which she accepted the art as payment for his doughnut and coffee, which cost 90 cents. The waitress insisted on giving Boggs a dime in change, which he framed; the dime serves as a symbol of the transaction, which captured and represented ideas about beauty, value, trust, and art. Boggs Aff. ¶ 6 (App. 113); *see* Mem. Op. 3 n.9 (App. 27), 842 F. Supp. at 544.

This transaction and others like it have allowed Boggs to make his work accessible to ordinary people. In proposing a transaction, Boggs offers to exchange a work of art, often the same size as currency but generally one-sided, for goods or services. The proposal leads to a dialogue about the meaning and uses of art and money in everyday life. The viewer grapples with questions about what art should look like, what should be done with it, and what it represents. Sometimes the art is accepted in exchange for goods or services, sometimes not. Boggs Aff. ¶¶ 7-8; Mayer Decl. ¶¶ 6-7 (App. 113-14, 179-80).

Boggs' art is his medium and his message. Size and color profoundly affect that message: grossly oversized bills or comically small "mini-money" would communicate an entirely different set of ideas; they are not an alternative means to communicate the *same* ideas. Boggs Aff. ¶ 9; Chambers Decl. ¶ 12; Mayer Decl. ¶ 8 (App. 114-15, 175-76, 180). This is not to say that Boggs demands some sort of First Amendment right as an artist to create counterfeit money—quite the contrary. Boggs recognizes that there are

limits to what he can create without risking the possibility that someone might be deceived with his work; he does not and will not cross those limits. Verified Complaint ¶ 6; Boggs Aff. ¶ 3; Motions Hearing Tr. 59; Boggs Decl. ¶ 7; *see* Bittman Decl. ¶ 3 (App. 12, 111-12, 247, 258-60). As the art reproduced above at page 2 and in the record demonstrates, Boggs' work does not have the "look" and "feel" of money. It does not resemble money in its details. It is not calculated to deceive and defraud; it is calculated to illuminate.

Boggs does not defraud anyone. People who accept his work do so with full knowledge that it is not genuine currency—and not only because of Boggs' representations. Boggs' work has never been—and cannot be—"passed off" as genuine to a person of ordinary observation. Indeed, over the years, Boggs has created and bartered thousands of works of art around the world. There is no evidence in the record of a single person who has complained to any law-enforce-ment authority about being defrauded by Boggs or anyone else using his art. We repeatedly challenged the Defendants to produce such evidence in the District Court. They could not.

Censored By Federal Agents. Secret Service agents have repeatedly harassed Boggs because they do not like the subject matter of his work. While many publishers and advertisers large and small use images of money (see Addendum A at 1a-4a), the Secret Service has singled out Boggs, repeatedly censoring him, confiscating his art, and threatening to imprison him.

In September 1990, Secret Service agents in Florida censored a catalog entitled *smart money (HARD CURRENCY)*, which was to accompany an exhibition of Boggs' work. Boggs originally designed the catalog to present reproductions of his work in its actual dimensions and colors. Secret Service agents told the printer that he had already violated the counterfeiting laws by creating color separations for the catalog and that printing the catalog as designed would be a further crime. Naturally, the printer refused to print the catalog in the face of this advice. With the exhibition scheduled to begin in short order, Boggs was forced to redesign the content of the catalog to comport with the Secret Service's views of what did or did not violate 18 U.S.C. § 474 and its companion, 18 U.S.C. § 504. Verified Complaint ¶¶ 9-10; Boggs Decl. ¶ 2;

Bittman Decl. ¶¶ 5-7 (App. 13-14, 254-55, 260-61). The United States Attorney declined prosecution.

In March 1991, while Boggs was in Cheyenne, Wyoming for the opening in that city of the *smart money (HARD CURRENCY)* exhibition, Secret Service Agent Jerry Hanson, accompanied by the United States Attorney for the District of Wyoming, Richard Stacey, appeared at Boggs' hotel-room door and demanded that Boggs hand over his entire inventory of art. Boggs insisted that only a single example of each type of work be seized. After several hours of tense negotiation, during which it appeared to Boggs that he would face arrest and prosecution for the content of his art, the United States Attorney agreed to take only fifteen specimens and told Boggs that they would be sent to Washington, D.C., for a "determination" of whether the work was "contraband." Despite repeated demands, the Secret Service has refused to return the art or seek a hearing approving its seizure. Verified Complaint ¶¶ 11-12 (App. 14-15). Again, the United States Attorney declined prosecution.

Then, in December 1992, Secret Service agents in Pennsylvania seized more than 1300 items of personal property including dozens of drawings from his home and faculty office. They destroyed valuable pieces of art during their search. They "accidentally" broke Boggs' eyeglasses by picking them up, dropping them on the floor, and stepping on them. It was, for Boggs, a humiliating experience. Because of the Government agents' arrogance and brazenness, Boggs felt even more violated than he had when his home and studio had been burglarized by common thieves. Verified Complaint ¶ 13; Boggs Decl. ¶¶ 4-6 (App. 15, 256-57).

Since December 1992, Boggs' work has been severely hampered by the Secret Service's supposed "ongoing investigation." Secret Service agents have told Boggs that his work is "illegal" and have questioned people who have bought it. Boggs Aff. ¶¶ 15-16; Abraham Decl. ¶ 4 (App. 116-17, 187-88). As a result, many people who used to exchange Boggs' work for goods or services will no longer do so. Boggs Aff. ¶¶ 15-16 (App. 116-17). The specter of criminal liability caused the artists' cooperative where Boggs lived and worked to stop accepting his work in exchange for his use of the space. *Id.* And fear of the Secret Service has caused gallery owners who would like to show and sell Boggs' work to

refrain from doing so. Boggs Aff. ¶¶ 15-16; Berkovitz Decl. ¶¶ 2-3 (App. 116-17, 119-20).

Defendants have thus far refused to present any case against Boggs to a judge and jury, preferring instead to rely exclusively on extrajudicial threats and *ex parte* seizures. Although the United States Attorney for the Western District of Pennsylvania wrote to Boggs asserting that he had violated clauses 5 and 6 of 18 U.S.C. § 474 (S.J. Hearing Ex. 2 (App. 252-53)), he, too, has declined prosecution. And the United States Attorney in Washington, D.C. has advised us that the Defendants do not intend to file a forfeiture action, "but will merely keep" Boggs' art as "contraband."

The District Court Decision. Fearing imminent prosecution, unable to sell his work freely, and having exhausted all efforts to resolve the matter without the need for judicial intervention (Yalowitz Certif. ¶¶ 4-5 & Exs. A & B (App. 85-86, 89-100)), Boggs commenced this action on September 3, 1993, seeking a temporary restraining order and a preliminary injunction against the Director of the Secret Service, the Secretary of the Treasury, and the Attorney General.

On December 9, 1993, the District Court granted Defendants' motion for summary judgment, dismissed the First Claim (for declaratory and injunctive relief), and denied Boggs' motion for a preliminary injunction as "moot." The basis of this mootness ruling was merely that the claim had been dismissed on the merits—not that anything had rendered the case moot in the traditional Article III sense. Indeed, the District Court found that Boggs has a well-founded fear of prosecution and that he

> is being injured by the Secret Service in a number of ways other than threat of prosecution. Not only has the Secret Service seized his work, but also Mr. Boggs finds himself unable to sell his art. Fear of Secret Service seizure has also caused the artists' cooperative where Boggs lives to stop accepting his work. Boggs Aff. ¶ 15. Collectors and gallery owners who would like to show or buy Boggs' work are also fearful of Secret Service intervention. *See* Sam Berkovitz Aff.

Mem. Op. 13-14 (App. 37-38), 842 F. Supp. at 548. Inexplicably, however, the District Court failed to rule on Boggs' request for an

injunction forbidding the harassment causing these injuries, thereby denying it *sub silentio*.

In declining to enjoin prosecution, the District Court rejected the Government's contention that the Court was powerless to act, holding—on the strength of well-settled Supreme Court authority—that Boggs "'should not be required to await and undergo a criminal prosecution as the sole means of seeking relief'" to protect his First Amendment rights. Mem. Op. 10 (App. 34), 842 F. Supp. at 547 (quoting *Doe* v. *Bolton*, 410 U.S. 179, 188 (1973), and citing *Steffel* v. *Thompson*, 415 U.S. 452, 459 (1974)).

The District Court also found that "[n]o one seriously suggests that Mr. Boggs has any intent to defraud," so that "if intent to defraud is statutorily required, no jury could find that the statute applies to Boggs." Mem. Op. 35 (App. 59), 842 F. Supp. at 557. But the District Court held that "[i]f Congress intended an intent to defraud or an intent to pass as genuine standard it would have said so explicitly." Mem. Op. 39 (App. 63), 842 F. Supp. at 559 (internal quotations and emphasis omitted). In holding that section 474 is a strict-liability felony, the District Court did not point to any "affirmative instruction" by Congress to this effect, as is required by *Morissette* v. *United States*, 342 U.S. 246, 273 (1952), and did not acknowledge two important principles: that the First Amendment forbids strict-liability crimes infringing on speech; and that, where possible, statutes must be construed to avoid deciding constitutional questions. Instead, the District Court conducted a time-place-and-manner constitutional analysis of the size and color limitations set out in 18 U.S.C. § 504 and upheld their facial validity on the strength of a concurring opinion in *Regan* v. *Time, Inc.*, 468 U.S. 641, 704 (1984). Mem. Op. 31-33 (App. 55-57), 842 F. Supp. at 556.

Finally, the District Court found that "a jury would be justified, if not compelled, to find that [the works of art presented to the Court] were in the likeness and similitude of genuine United States currency." Mem. Op. 44 (App. 68), 842 F. Supp. at 561.

SUMMARY OF ARGUMENT

1. Whether or not we are correct that the counterfeiting statutes may not be applied to Boggs, the Secret Service may not proceed by fiat and intimidation. The First Amendment requires that it proceed in court. *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46 (1989); *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963). The Secret Service has seized Boggs' work *en masse* and eschewed judicial review of this prior restraint. It has also intimidated his customers, printers, and prospective art dealers. An injunction forbidding this behavior is warranted.

2. An injunction forbidding *prosecution* is warranted as well, for three reasons, any one of which is sufficient:

a. Boggs may not be prosecuted because he does not have an intent to defraud. Since the earliest days of our Nation's history, it has been a precept of the criminal law that the legislature intends to include the *scienter* element required at common law in all felonies, even where the words of the statute itself do not do so. *Morissette* v. *United States*, 342 U.S. 246 (1952). In counterfeiting and forgery statutes, this requires an intent to defraud. *E.g., United States* v. *Hester*, 598 F.2d 247 (D.C. Cir. 1979). The statute invoked by the Government in this case, 18 U.S.C. § 474, is no exception. Although the District Court acknowledged *Morissette* and found that Boggs possesses no intent to defraud, it concluded that Congress intended to exempt section 474 because Congress "knew how" to include a *scienter* element expressly and did not do so here. This "dog that did not bark in the night" analysis is contrary to well-settled Supreme Court authority. It is also contrary to the legislative history of this Civil War-era counterfeiting statute, which the District Court did not examine.

Although the District Court's failure to follow *Morissette* would alone be sufficient to require reversal, the District Court failed to grapple with—indeed failed even to acknowledge—the rule that, where possible, statutes must be construed to avoid questions as to their constitutionality. This rule, which applies with special force in the First Amendment context, also requires an interpretation of the statute to include a *scienter* element; without this narrowing interpretation, this Court will be faced with an unconstitutional statute.

b. Prosecution of Boggs under this statute would be unconstitutional (again for three independently sufficient reasons). *First*, without some *scienter* element, the statute would run afoul of the First Amendment's prohibition on strict-liability crimes that burden speech. *Smith* v. *California*, 361 U.S. 147 (1959). *Second*, the statutory scheme (which includes a safe-harbor exemption from liability for illustrations of currency meeting the size and color limitations of section 504) is not "narrowly tailored" to further a legitimate government interest. Ten years ago, a plurality of the Supreme Court held that sections 474 and 504 served to keep color separations of images of money out of the hands of would-be counterfeiters. Today, there is no longer a "real nexus" between this governmental interest and the restriction on speech; because of widely available computer technology, the size and color restrictions no longer serve the goal they were designed for. *Third*, the size and color limitations have been abused by the Secret Service as an unconstitutional, content-based restriction on Boggs' speech.

c. The works of art in the record do not meet the similitude test required for conviction of a counterfeiting felony. Mem. Op. 45 (App. 69), 842 F. Supp. at 561. This, too, stands as an independent ground for reversal: the evidence cannot be squared with the District Court's assertion (in granting the Government summary judgment) that a reasonable jury, conscientiously following instructions requiring proof beyond a reasonable doubt, would be "justified, if not compelled" to find that the works of art in the record are so similar to genuine currency that they are "*calculated* to deceive an honest, sensible and unsuspecting person of ordinary observation."

ARGUMENT

I. THE STANDARD OF REVIEW

On appeal from an order granting summary judgment, this Court examines the record *de novo*, drawing all reasonable inferences in favor of the appellant. *Sherwood* v. *Washington Post*, 871 F.2d 1144, 1145 (D.C. Cir. 1989) (*per curiam*). "Furthermore,

in cases which implicate first amendment issues, an appellate court has an obligation to make an independent examination of the whole record." *Liberty Lobby, Inc.* v. *Rees*, 852 F.2d 595, 598 (D.C. Cir. 1988) (quoting *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 284-86 (1964) (internal quotation marks omitted)), *cert. denied*, 489 U.S. 1010 (1989). Finally, the Court "must view the evidence presented through the prism of the substantive evidentiary burden." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986). The District Court's grant of summary judgment dismissing Boggs' claim for an injunction against criminal prosecution, therefore, cannot stand unless the evidence in the record, viewed in the light most favorable to Boggs, would support a finding of guilt beyond a reasonable doubt as to each of the essential elements of the crime. *Cf. Jackson* v. *Virginia*, 443 U.S. 307, 318-20 (1979) (articulating standard for post-conviction collateral attack).

II. HARASSMENT OF BOGGS SHOULD BE ENJOINED

Whether or not we are correct that the counterfeiting statutes may not be enforced against Boggs, the Secret Service may not install itself as a modern-day Star Chamber, acting as prosecutor, judge, jury, and sheriff to suppress expression. But that is what it has done. As the District Court found, Secret Service agents have injured Boggs by questioning his customers, intimidating his printers, and scaring off his art dealers. Mem. Op. 13-14 (App. 37-38), 842 F. Supp. at 548 (quoted *supra* p. 11); *see* Boggs Aff. ¶¶ 15-16; Berkovitz Decl. ¶ 3; Abraham Decl. ¶ 4; Bittman Decl. ¶¶ 5-7 (App. 116-17, 119-20, 187-88, 260-61). That kind of extrajudicial censorship violates the First Amendment. In *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963), the Supreme Court forbade the use of informal threats of legal sanction, saying:

> People do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around . . . .
>
> * * * *
>
> In thus obviating the need to employ criminal sanctions, the State has at the same time eliminated the safeguards of

> the criminal process. . . . It is a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law.

372 U.S. at 68-70; *accord PHE, Inc.* v. *Department of Justice*, 743 F. Supp. 15, 21-23 (D.D.C. 1990) (granting injunction on strength of *Bantam Books*); *Playboy Enterprises* v. *Meese*, 639 F. Supp. 581, 585 (D.D.C. 1986) (same); *U.T. Inc.* v. *Brown*, 457 F. Supp. 163, 168-69 (W.D.N.C. 1978) (ordinance void under *Bantam Books*). Inexplicably, the District Court never addressed the application of *Bantam Books* to this case even though it specifically requested briefing on the issue. (TRO Hearing Tr. 27-28, App. 147-48.)

In addition, Defendants seized Boggs' works *en masse* and have steadfastly resisted any hearing of any kind, insisting that they may "merely keep" the art he created. See *supra* p. 10. That, too, is forbidden by the First Amendment: "large-scale seizure of books or films constituting a 'prior restraint' must be preceded by an adversary hearing," and "even where a seizure . . . would merely preserve evidence for trial, . . . there must be an opportunity for a prompt postseizure judicial determination." *New York* v. *P.J. Video*, 475 U.S. 868, 873 (1986) (explaining *Heller* v. *New York*, 413 U.S. 483 (1973), *A Quantity of Books* v. *Kansas*, 378 U.S. 205 (1964), and *Marcus* v. *Search Warrants*, 367 U.S. 717 (1961)); *accord Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46, 63 (1989) ("[U]ntil there was a 'judicial determination of the obscenity issue in an adversary proceeding,' exhibition of a film could not be restrained by seizing all the available copies of it. The same is obviously true for books or any other expressive materials." (quoting *Heller*, 413 U.S. at 492-93 (1973))); *Vance* v. *Universal Amusement Co.*, 445 U.S. 308, 316-17 (1980); *Blount* v. *Rizzi*, 400 U.S. 410, 418 (1971). This line of cases stems from the Court's disapproval of "[t]he use by government of the power of search and seizure as an adjunct to a system for the suppression of objectionable publications." *Marcus*, 367 U.S. at 724; *accord Fort Wayne Books*, 489 U.S. at 63-64.

Our Constitution does not leave freedom of expression to the grace of government clerks and faceless bureaucrats; its Framers instead entrusted the fates of those the Government would silence to the common sense of juries tempered by the wisdom of judges.

Defendants' apparent unwillingness to abide by these rules speaks volumes.

Although the District Court quite clearly found that Boggs was suffering injury because of these wrongful acts (see *supra* p. 11), it did not issue an injunction against them and did not say why it was not doing so. This alone warrants reversal.

III. PROSECUTION OF BOGGS SHOULD BE ENJOINED

There are three independent reasons—each alone sufficient for reversal—why Boggs cannot be prosecuted under 18 U.S.C. § 474. First, Boggs does not have the intent to defraud that the statute must be read to require as an element of the crime. (Point III(A), below.) Second, prosecution of Boggs under this statute would violate the First Amendment. (Point III(B), below.) And third, the Government cannot satisfy the traditional similitude test required for conviction under the counterfeiting laws. (Point III(C), below.)

If the Court agrees with us on any one of these points, it should direct the prompt entry of an injunction forbidding prosecution of Boggs. Where, as here, First Amendment rights are jeopardized, declaratory and injunctive relief—including preliminary injunctive relief—are fully warranted.[1] Boggs' well-founded fear of prosecution is a sufficient basis for such a remedy: he need not show prosecutorial bad faith. *Ellis* v. *Dyson*, 421 U.S. 426, 432 (1975). The loss of First Amendment freedoms for any period of time constitutes the required irreparable injury. *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976).

In the District Court, Defendants contended that the separation-of-powers doctrine "compels judicial non-intervention." The argument that the federal courts lack authority to enjoin criminal prosecutions that threaten constitutional rights has been raised and

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[1] *See Wooley v. Maynard*, 430 U.S. 705, 712 (1977); *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 931 (1975); *Quaker Action Group* v. *Hickel*, 421 F.2d 1111, 1116 (D.C. Cir. 1969).

rejected time and time again.[2] It did not detain the District Court from passing on the merits and need not detain this Court either.

A. 18 U.S.C. § 474 Requires An Intent To Defraud For Conviction

The District Court's finding that "[n]o one seriously suggests that Mr. Boggs has any intent to defraud" (Mem. Op. 35 (App. 59), 842 F. Supp. at 557) is dispositive of whether Boggs can be prosecuted for a federal counterfeiting felony. The statute must be interpreted to include the *scienter* required at common law—here, an intent to defraud.

1. Scienter is the Rule, Not the Exception

As Chief Justice Burger explained for the Court in *United States* v. *United States Gypsum Co.*, "'[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.'" 438 U.S. 422, 436 (1978) (quoting *Dennis* v. *United States*, 341 U.S. 494, 500 (1951)). Justice Jackson's eloquent and enduring expression of this principle for the Court in *Morissette* v. *United States*, 342 U.S. 246 (1952), remains the touchstone for the rule requiring some "affirmative instruction from Congress to eliminate intent from any offense." 342 U.S. at 273. The *mens rea* requirement

> is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil

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[2] *E.g.*, *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992); *Virginia* v. *American Booksellers Ass'n*, 484 U.S. 383, 393 (1988); *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289, 298-99 (1979); *Wooley*, 430 U.S. at 709-12; *Doran*, 422 U.S. at 926-28; *Ellis*, 421 U.S. at 432; *Dombrowski* v. *Pfister*, 380 U.S. 479, 483-92 (1965); *Ex parte Young*, 209 U.S. 123, 163-66 (1908).

> The purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries. Such a manifest impairment of the immunities of the individual should not be extended to common-law crimes on judicial initiative.

Id. at 250, 263.

Again and again, this rule "has been 'followed in regard to statutory crimes even where the statutory definition did not in terms include it.'" *Staples* v. *United States*, 114 S. Ct. 1793, 1797 (1994) (quoting *United States* v. *Balint*, 258 U.S. 250, 251-52 (1922)).[3] Only this Term, the Supreme Court rejected "the most natural grammatical reading" of a federal statute in favor of the presumption that "some form of scienter is to be implied in a criminal statute even if not expressed." *United States* v. *X-Citement Video, Inc.*, 115 S. Ct. 464, 467-68 (1994) (Rehnquist, C.J.).

To be sure, a prosecutor's job would be easier without a *scienter* requirement. But in the ordinary criminal case, prosecutors have little trouble proving *scienter* because a jury may infer criminal intent from the facts and circumstances of the case. The *scienter* rule therefore offers only slight protection for the guilty, but important shelter for the rare individual pursued by an overly zealous or misguided prosecutor in a case where ordinary citizens might not expect to be subject to the moral condemnation of the community.[4] Some familiar cases have turned on this principle. *See, e.g.*, *United States* v. *D'Amato*, 39 F.3d 1249 (2d Cir. 1994);

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[3] *E.g.*, *Posters 'N' Things, Ltd.* v. *United States*, 114 S. Ct. 1747, 1752-54 (1994); *Braxton* v. *United States*, 500 U.S. 344, 351 n.* (1991); *Liparota* v. *United States*, 471 U.S. 419, 426 (1985); *United States Gypsum*, 438 U.S. at 437-38; *United States* v. *Harris*, 959 F.2d 246, 258, 261-62 (D.C. Cir.) (*per curiam*: Silberman and Ruth Bader Ginsburg, JJ., and Thomas, Circuit Justice, on the panel), *cert. denied*, 113 S. Ct. 362 (1992); *United States* v. *Burke*, 888 F.2d 862, 866-67 (D.C. Cir. 1989); *United States* v. *Nofziger*, 878 F.2d 442, 452-53 (D.C. Cir.), *cert. denied*, 493 U.S. 1003 (1989).

[4] *X-Citement*, 115 S. Ct. at 468; *Staples*, 114 S. Ct. at 1799-1802; *Liparota*, 471 U.S. at 426.

United States v. *Nofziger*, 878 F.2d 442 (D.C. Cir.), *cert. denied*, 493 U.S. 1003 (1989). Federal prosecutors—on whom the courts rely to exercise conscience and circumspection—have three times declined to prosecute Boggs. But the Secret Service appears determined to keep looking for one who will.

2. *Counterfeiting Statutes Require An Intent To Defraud*

In deciding the level of *scienter* required for each element of a crime, the Court must determine "what level of intent Congress intended the Government to prove, taking into account constitutional considerations, as well as the common-law background, if any, of the crime involved." *United States* v. *Freed*, 401 U.S. 601, 613-14 (1971) (Brennan, J., concurring) (citations omitted). The level of *scienter* required for conviction is generally the one imposed at common law for similar crimes because Congress is presumed to borrow the "cluster of ideas" that attached to such crimes at common law. *See Braxton* v. *United States*, 500 U.S. 344, 351 n.* (1991); *Morissette*, 342 U.S. at 263; *United States* v. *Carll*, 105 U.S. 611, 612-13 (1881); *Levine* v. *United States*, 261 F.2d 747, 750 (D.C. Cir. 1958).

The courts have therefore interpreted statutes aimed at counterfeiting, forgery, and fraud to carry an intent-to-defraud requirement where the statutes themselves contain an incomplete intent element or none at all. The most familiar example is 18 U.S.C. § 495, which prohibits false making, alteration, forgery, and counterfeiting "for the purpose of obtaining" money from the United States in certain cases. The cases hold that conviction under any clause requires a *fraudulent* state of mind, even though only two of the three clauses expressly require an intent to defraud.[5] In *United States* v. *Hester*, 598 F.2d 247 (D.C. Cir. 1979), this Court

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[5] *See, e.g.*, *United States* v. *Bates*, 468 F.2d 1252, 1255 (5th Cir. 1972); *United States* v. *Sonnenberg*, 158 F.2d 911, 915 (3d Cir. 1946); *Staton* v. *United States*, 88 F. 253, 255 (8th Cir. 1898); *see also United States* v. *Price*, 795 F.2d 61, 63 (10th Cir. 1986); *United States* v. *Massey*, 629 F.2d 1084, 1086 (5th Cir. Unit A 1980), *cert. denied*, 450 U.S. 969 (1981); *United States* v. *White*, 611 F.2d 531, 538 (5th Cir.), *cert. denied*, 446 U.S. 992 (1980); *United States* v. *Sullivan*, 406 F.2d 180, 186 (2d Cir. 1969).

invalidated the standard "red book" instruction that the Government need not prove an intent to defraud for conviction under section 495. Observing that some, but not all, of the statutory provisions "explicitly include 'intent to defraud' as an element," the Court held that "an individual cannot be convicted of forgery [under the statute] unless he has 'an intent to defraud.'" 598 F.2d at 248 & n.4.

The closest parallel to section 474 (18 U.S.C. § 481) has also been interpreted to require intent to defraud, even though it does not expressly include language to that effect.[6] Other statutes similarly interpreted to require an intent to defraud include 18 U.S.C. § 371 (conspiracy to defraud the United States)[7] and 18 U.S.C. § 505 (signatures of judicial officers).[8] At least one court of appeals has observed that section 474 itself carries a *scienter* element,[9] and in other cases under section 474, prosecutors have proceeded on the assumption that the defendant must be charged with the requisite intent.[10] Although other courts have stated (without considering *Morissette* and its progeny) that clause 6 of section 474 carries no intent requirement, the reported prosecutions all appear to have involved defendants who had the requisite intent to defraud.

By 1862, when Congress enacted the original version of section 474 (see *infra* pp. 30-31), the rules described above were well established: conviction of a felony required a criminal state of mind,[11] and conviction of statutory felonies required the state of

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[6] *Levinson* v. *United States*, 47 F.2d 470, 471 (6th Cir. 1931).

[7] *Hammerschmidt* v. *United States*, 265 U.S. 182, 187-88 (1924).

[8] *United States* v. *White*, 27 F. 200, 203 (E.D. Mo. 1886).

[9] *Michener* v. *United States*, 157 F.2d 616, 620 (8th Cir. 1946) ("Mere possession is not made a crime by this statute. That possession would be innocent were it not possessed with intent to use the plate in counterfeiting."), *rev'd on other grounds*, 331 U.S. 789 (1947) (*per curiam*).

[10] *Pawley* v. *United States*, 73 F.2d 907, 907 (9th Cir. 1934) (prosecution for violation of section 474's predecessor with intent to "use . . . in forging and counterfeiting"); *Litkofsky* v. *United States*, 9 F.2d 877, 878 (2d Cir. 1925) (same).

[11] *See* 1 Joel P. Bishop, *Commentaries on the Criminal Law* § 225, at 259 (Boston, Little, Brown & Co. 2d ed. 1858) (Addendum Tab 25); *id.* § 227, at 260 ("There is only one criterion by which the guilt of men is to be tested. It is

mind necessary for conviction at common law.[12] The federal statutes aimed at counterfeiting and forgery had already been interpreted to require a specific intent to defraud. *See United States* v. *Staats*, 49 U.S. (8 Howard) 41, 45 (1850) (noting that intent to defraud is a required element of forgery); *United States* v. *King*, 26 F. Cas. 787, 788 (D. Ohio 1851) (No. 15,535) (Addendum Tab 41); *United States* v. *Burns*, 24 F. Cas. 1313, 1315 (D. Ohio 1849) (No. 14,691) (Addendum Tab 40) ("It is of the essence of the crime imputed to the defendant, that he made, or assisted in making the spurious coin, with the fraudulent intent of passing it as genuine.").

The *King* case involved a magician who used spurious coins in his act. He was prosecuted for counterfeiting. In instructing the jury (which acquitted the defendant), the court had this to say:

> In this case it is insisted that if the defendant made the spurious coins, it was not for the purpose of fraudulent utterance, but to aid him in his performances as a professor of magic. If the jury shall come to the conclusion, from the evidence, that this was the defendant's purpose in making the coins, it is very clear, their verdict must be one of acquittal.

King, 26 F. Cas. at 788 (Addendum Tab 41).

The state cases appear to have been uniformly in accord with the federal cases.[13] And these holdings were, in turn, consonant

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whether the mind is criminal. . . . [T]he essence of an offence is the wrongful intent, without which it cannot exist.") (citing more than two dozen cases); *id.* § 228a, at 262.

[12] *Id.* §§ 80-81, at 117-18 (Addendum Tab 25). So-called regulatory crimes were embryonic in England during this period and had not yet taken root in the United States. *See generally Morissette*, 342 U.S. at 253-55 & n.12 (describing genesis of such crimes).

[13] *See Commonwealth* v. *Hinds*, 101 Mass. 209, 210 (Mass. 1869) (Addendum Tab 32) ("In order to maintain an indictment for forgery at common law, it must appear not only that there has been a false making of a written instrument, for the purpose of fraud or deceit, but also that the forged instrument is of such a description that it might defraud or deceive, if used with that intent."); *Wash* v. *Commonwealth*, 57 Va. (16 Gratt.) 530, 533, 540 (Va. 1861) (Addendum Tab 42); *Commonwealth* v. *Davis*, 77 Mass. (11 Gray) 4, 7-8 (Mass. 1858) (Addendum Tab 31); *Clarke* v. *State*, 8 Ohio St. 630, 634 (Ohio, Dec. Term 1858) (Addendum Tab 30); *Commonwealth* v. *Kent*, 47 Mass. (6 Met.) 221, 223 (Mass. 1843) (Addendum Tab 33) (prosecution under statute

with the learned treatises of the day.[14] Joel Bishop, one of the leading criminal-law commentators of the Nineteenth Century, explained that this principle applied to statutes with no express *mens rea* element: without a specific criminal intent, a person "commits no offence in law, though he does acts completely within all the words of a statute which prohibits the acts, being silent concerning the intent." 1 Bishop, *supra*, § 253, at 289-90 (Addendum Tab 25). For support, Bishop pointed to an English felony statute that forbade the duplicate use of any paper subject to a stamp tax, with "no mention whether the intent must be a fraudulent one or otherwise":

> Yet it was ruled by Abinger, C.B., that the offence is not committed unless the intent is fraudulent. The doctrine is, that the statute is to be so construed in connection with the common law, which requires an evil intent to accompany

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criminalizing possession of counterfeiting tools: "the gist of the offence is the criminal intent, and therefore the fact of the possession of such an instrument being proved, the intent was rightly left to the jury"); *Commonwealth* v. *Woodbury*, Thach. Crim. Cas. 47, 49-50 (Boston Mun. Ct. 1824) (Addendum Tab 35); *People* v. *Gardner*, 1 Wheel. Crim. Cas. 23, 25 (N.Y. City Ct. 1822) (Addendum Tab 36); *Commonwealth* v. *Ladd*, 15 Mass. 526, 527 (Mass. 1819) (Addendum Tab 34) ("The false making, with intent to defraud, is the gist of the offence" of forgery); *State* v. *Odel*, 4 S.C.L. (3 Brev.) *552, *553 (S.C. Const. Ct. 1816) (Addendum Tab 38) ("it is no offence to pass counterfeit money, knowing it to be so, unless it is with an intention to defraud"); *State* v. *Washington*, 1 S.C.L. (1 Bay) 120, 152 (S.C. Ct. Com. Pleas 1791) (Addendum Tab 39) ("The only point on which we agree with the prisoner's counsel, is, that to make forgery, felony under this act, it must be done with *intention to defraud.* It surely must. It is the essence of the crime.") (emphasis by the court); *id.* at 153 ("'The notion of forgery doth not seem so much to consist in the counterfeiting a man's hand, which may often be done innocently, but *in the endeavoring to give an appearance of truth to a mere deceit and falsity* . . . .'") (quoting 1 Hawk. P.C. c. 70 s. 2).

[14] *See* 2 Bishop, *supra*, § 491, at 345-46 (Addendum Tab 25) ("In forgery, as in all other offenses, the act, to be indictable, must proceed from some evil intention."); 5 Francis Wharton, *Treatise on the Criminal Law of the United States* 496 (Philadelphia, James Kay, Jun. & Brother 2d ed. 1852) (Addendum Tab 26) ("The intention to defraud is an essential to the completion of the offence . . . .").

> the evil act, as to add in favor of the defendant this provision.

Id.

3. Section 474 Is Subject To The Morissette *Presumption*

Instead of applying these rules to 18 U.S.C. § 474, the District Court said that "Congress intended some crimes [within section 474] to carry an intent to defraud requirement and others not, as evidenced by the differences in classification and punishment set out in the statute." Mem. Op. 41-42 (App. 65-66), 842 F. Supp. at 560. In fact, all six clauses of the statute provide for the same "class C" felony, and all therefore carry the same level of punishment, see *infra* p. 29 n.17. Building on that error, the District Court concluded that clause 6 is a strict-liability crime and that clause 5 requires only an "intent to use" for some pecuniary gain unrelated to criminal purposes. The District Court did not point to any "affirmative instruction from Congress" (*Morissette*, 342 U.S. at 273) supporting this interpretation. Instead, it relied exclusively on the absence of an express intent-to-defraud element and on three cases from other jurisdictions. Mem. Op. 38-42 (App. 62-66), 842 F. Supp. at 558-60.

Even taken on its own terms (and leaving aside the constitutional issues and the legislative history (see *infra* pp. 29-43)), the District Court's analysis does not withstand scrutiny for four reasons. *First*, the absence of an express intent element in clause 6 may not be used to demonstrate (as the District Court attempted) that no intent is required. The law is exactly the contrary. "Certainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement." *United States Gypsum*, 438 U.S. at 438; *accord Staples*, 114 S. Ct. at 1797-98; *Braxton*, 500 U.S. at 351 n.*; *Morissette*, 342 U.S. at 262-63; *Burke*, 888 F.2d at 866. The Supreme Court and this Court have also rejected the notion (embraced by the District Court) that the absence of an express *scienter* element in some but not all provisions of a statute implies an intent to omit a *scienter* requirement. *See, e.g.*, *X-Citement*, 115 S. Ct. at 468; *Hester*, 598 F.2d at 248-49; cases cited *supra* p. 22 n.5.

Second, none of the cases relied on by the District Court discusses or even cites *Morissette* or its progeny. Thus, they are not only irreconcilable with well-settled Supreme Court precedent, they are without precedential value on the question before this Court. As Justice Holmes said, "[l]aws frequently are enforced which the court recognizes as possibly or probably invalid if attacked by a different interest or in a different way." *Quong Wing* v. *Kirkendall*, 223 U.S. 59, 64 (1912).[15]

Third, the District Court's assertion that "intent to use" in clause 5 means intent to use for "substantial economic benefit" is erroneous. *See* Mem. Op. 39 (App. 63), 842 F. Supp. at 559. The District Court correctly recognized that "intent to use" standing alone is too broad to serve as the *mens rea* element. Images of currency may be "used" as kindling for fire; they may be mounted in frames and "used" in museums for the pleasure of the viewing public; they may be "used" as props in movies. None of those activities is a felony. As the District Court itself recognized, "intent to use" must mean something narrower under this statute—just as it does under 18 U.S.C. § 495. But the District Court's narrowing interpretation—intent to use for "substantial economic benefit"—breaks down even on cursory scrutiny. Consider application of the statute thus interpreted to a hypothetical newspaper publisher: if she prints a Boggs Bill in a story about this case, selling her newspapers for money, she has "used" an image of currency for pecuniary gain and can be imprisoned for 12 years; but if she anonymously lends a Boggs Bill to a local museum and attends an exhibit there, she has "used" it—but not for pecuniary gain—and would not be subject to criminal prosecution.

Once the court makes a narrowing interpretation of "intent to use," it should construe the phrase to mean what had been express in every earlier version of the statutory language: "intent to use . . . in forging or counterfeiting."[16] Well-settled canons of statutory

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[15] *Accord United States* v. *L.A. Tucker Truck Lines*, 344 U.S. 33, 38 (1952); *United States* v. *More*, 7 U.S. (3 Cranch) 159, 172 (1805) (Marshall, C.J.).

[16] Ch. 44, § 19, 14th Cong., 1st Sess., 3 Stat. 266, 275 (Apr. 10, 1816) (Addendum Tab 1); ch. 2, § 11, 25th Cong., 1st Sess., 5 Stat. 201, 203 (Oct. 12, 1837); ch. 5, § 10, 29th Cong., 2d Sess., 9 Stat. 118, 120 (Jan. 28, 1847); ch. 1, § 13, 35th Cong., 2d Sess., 11 Stat. 257, 259 (Dec. 23, 1857); ch. 1, § 13, 36th

construction require this interpretation: the statute's intent element must be construed in light of the common-law understanding (see *supra* pp. 21-25); the statute must be construed to avoid a constitutionally suspect interpretation (see *infra* pp. 33-34); and Congress must not be presumed to intend to change the meaning of a statute in a reenactment without clear evidence that it so intends (see *infra* pp. 32-33 n.30). For these reasons, this Court and others have consistently held a similar intent element in 18 U.S.C. § 495 to require not just *some* level of intent, but an intent to defraud. See *supra* p. 22 & n. 5. The District Court offered no reason why section 474 is any different.

Finally, the severe penalty is very strong evidence that Congress intended to incorporate the common-law *mens rea* element into the crime. *X-Citement*, 115 S. Ct. at 468; *Staples*, 114 S. Ct. at 1802. For the first 120 years of its existence, this statute carried a fifteen-year maximum term of imprisonment.[17] Today, the penalty is twelve years. That, too, strongly supports an interpretation of section 474 as requiring an intent to defraud. And the District Court ignored that, too.

4. The Legislative History Supports An Intent-To-Defraud Element In Section 474

The rule outlined above gives way (apart from constitutional prohibitions) if Congress "plainly and unmistakably"[18] intends a contrary result as evidenced by an "affirmative instruction." *Morissette*, 342 U.S. at 273. But neither the text of the statute nor its legislative history reveals an instruction to dispense with the common-law *scienter* requirement. The evidence points in the opposite direction: those involved in the drafting, passage, and administration of this legislation all expressed the view that it was

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Cong., 2d Sess., 12 Stat. 121, 123 (Dec. 17, 1860).

[17] *See* Ch. 33, § 7, 37th Cong., 2d Sess., 12 Stat. 345, 347-48 (Feb. 25, 1862) (Addendum Tab 3); 18 U.S.C. § 474 (1988). In October 1992, Congress changed the penalty by making the crime a "class C felony," which carries a term of imprisonment of up to twelve years (18 U.S.C. § 3581(b)(3) (1988)).

[18] *United States* v. *Bass*, 404 U.S. 336, 348 (1971) (quoting *United States* v. *Gradwell*, 243 U.S. 476, 485 (1917)).

directed against "counterfeiting." As we have shown (see *supra* pp. 23-25), to "counterfeit" was understood in legal usage to involve behavior undertaken wrongfully and with a view to defraud. Ordinary usage was in accord.[19] A radical departure from the common-law understanding of what was required for conviction did not seem to be on anyone's mind.

Section 474's oldest direct forebear was a provision in the controversial legal-tender legislation, which was enacted by the Thirty-Seventh Congress in 1862 to borrow funds needed to fight the Civil War.[20] As introduced, and as first reported by the Committee of Ways and Means, the bill had no penal provision at all.[21] Treasury Secretary (later Chief Justice) Salmon P. Chase

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[19] Noah Webster, *An American Dictionary of the English Language* 274 (Chauncey A. Goodrich ed.) (Springfield, George & Charles Merriam 1852) (Addendum Tab 27) (defining "*counterfeit*" as "[t]o forge; to copy or imitate, without authority or right, and with a view to deceive or defraud, by passing the copy or thing forged for that which is original or genuine; as, to *counterfeit* coin, banknotes, a seal, a bond, a deed, or other instrument in writing, the handwriting or signature of another, &c. To make a likeness or resemblance of any thing with a view to defraud"); Joseph E. Worcester, *A Dictionary of the English Language* 324 (Boston, Hickling, Swan & Brewer 1860) (Addendum Tab 28) (defining "*counterfeit*" as "[t]o copy with an intent to pass the copy for an original; to imitate wrongfully; to forge; to feign; as, 'To *counterfeit* a bank-note.'").

Indeed, to "counterfeit" has meant to "imitate (with intent to deceive)" and "[t]o make a fraudulent imitation of" since at least the Fourteenth Century and probably since the Norman invasion. *See* III *Oxford English Dictionary* 1027 (2d ed. 1989). Today, to counterfeit still means to copy or imitate "with a view to deceive or defraud," *Black's Law Dictionary* 349 (6th ed. 1990); *Webster's Third New International Dictionary* 519 (1986) ("copy with intent to deceive"); 1 Leonard B. Sand, *et al.*, *Modern Federal Jury Instructions: Criminal* Instruction 21-3 (1993) ("Counterfeiting in its broadest sense means the making of a copy without authority or right and with the purpose of deceiving or defrauding by passing the copy as original or genuine.").

[20] Ch. 33, § 7, 37th Cong., 2d Sess., 12 Stat. 345, 347-48 (Feb. 25, 1862) (Addendum Tab 3); *see* Elbridge G. Spaulding, *History of the Legal Tender Paper Money Issued During the Great Rebellion* 14-17 (Buffalo, Express Printing Co. 1869) (Addendum Tab 7) [hereinafter "Spaulding"]. Portions of the statutory language at issue here date to 1816. See *supra* p. 28 n.16; Addendum Tab 1.

[21] H.R. 182 (Dec. 30, 1861) (Addendum Tab 8); H.R. 187 (Jan. 7, 1862) (Addendum Tab 9); H.R. 240 (Jan. 22, 1862) (Addendum Tab 10); Spaulding, *supra*, at 14-17 (Addendum Tab 7).

reviewed the bill and suggested "that it would be necessary to have one or more penal sections to guard against counterfeiting."[22] He therefore submitted a provision "to punish counterfeiting and other fraudulent practices," adding that the "section in relation to counterfeiting explains itself."[23] This became section 6 of the act, which eventually became 18 U.S.C. §§ 471 and 472.

On February 3, 1862, Secretary Chase proposed to the Committee on Ways and Means that the bill include two penal sections relating to counterfeiting, instead of one. He did so, he wrote, "[t]hinking of the danger of counterfeits of the United States Notes and other securities."[24] This second penal section would become section 7 of the statute and, ultimately, 18 U.S.C. § 474. The sponsor of the legislation, Representative Elbridge G. Spaulding, agreed with Secretary Chase that *both* provisions (sections 6 and 7) would "guard against counterfeiting."[25]

A year after passage of the statute, the Thirty-Seventh Congress extended its provisions to cover additional federal obligations "in order to prevent and punish counterfeiting and fraudulent alterations of the bonds, notes, and fractional currency."[26] This statement—in the text of a statute enacted by the *same* Congress as the one that enacted the direct progenitor of modern section 474—may be the most authoritative statement of that Congress' intent: "to prevent and punish counterfeiting and fraud[]."

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[22] Spaulding, *supra*, at 26 (Addendum Tab 7).

[23] Letter from Salmon P. Chase, Secretary of the Treasury, to Thaddeus Stevens, Chairman, House Committee of Ways and Means (Jan. 29, 1862) (in the National Archives) (Addendum Tab 13).

[24] Letter from Salmon P. Chase, Secretary of the Treasury, to Thaddeus Stevens, Chairman, House Committee of Ways and Means (Feb. 3, 1862) (in the National Archives) (Addendum Tab 14).

[25] Spaulding, *supra*, at 98 (Addendum Tab 7). The Senate made minor verbal changes in the counterfeiting provisions, Cong. Globe 773 (Feb. 12, 1862) (Addendum Tab 12), which the House agreed to without recorded debate on the counterfeiting question. Cong. Globe 902 (Feb. 20, 1862) (Addendum Tab 12). A conference committee resolved discrepancies between the House and Senate versions, and President Lincoln signed the bill on February 25, 1862. *See* Cong. Globe 976 (Feb. 26, 1862), 994 (Feb. 27, 1862) (Addendum Tab 12).

[26] Ch. 73, § 8, 37th Cong., 3d Sess., 12 Stat. 709, 713 (March 3, 1863) (Addendum Tab 5).

The Thirty-Eighth Congress enacted a substantially identical provision.[27] This time, the House Ways and Means Committee reported the bill with the anti-counterfeiting provision already in place.[28] So far as we have found, this reenactment of the 1862 provision was not the subject of correspondence among the principal historical figures, any testimony before or report by any committee of Congress, any substantive amendment by the House or Senate, or any significant floor debate.[29] Thus, Congress must be presumed to have intended no substantive change.[30]

Finally, the recorded views of the agency charged with implementing the legislation in the era of its passage also indicate a concern only with "counterfeiting." In 1877, the Solicitor of the Treasury characterized the provision as one "which guards the issuing of counterfeits of paper money by punishing severely any person having in possession a plate engraved in counterfeit or

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[27] Ch. 172, § 11, 38th Cong., 1st Sess., 13 Stat. 218, 222 (June 30, 1864) (Addendum Tab 15).

[28] H.R. 540, § 11 (June 20, 1864) (Addendum Tab 17).

[29] See *Note on Sources* at the head of Appellant's Legislative History Addendum. The only allusion to the provision that we have found in the course of the debates came when the House adopted an amendment clarifying that the courts have discretion in the imposition of penalties upon conviction. Cong. Globe 3,209 (June 22, 1864) (Addendum Tab 18).

With minor changes in phraseology, this section was reenacted in 1874 as section 5430 of the Revised Statutes (Addendum Tab 20), and then recodified in 1909, as section 150 of the first revision of the Criminal Code. Ch. 321, § 150, 60th Cong., 2d Sess., 35 Stat. 1088, 1116 (Mar. 4, 1909) (Addendum Tab 23). According to the revising commission, section 150 did not involve any substantive change. S. Rep. No. 10, 60th Cong., 1st Sess., pt. 1, at 14, 19 (Jan. 7, 1908) (Addendum Tab 24). Section 150 was redesignated—again with only minor changes in phraseology—as section 474 of the criminal code in the 1946 recodification, ch. 645, 80th Cong., 2d Sess., 62 Stat. 683, 706 (June 25, 1948), where it remains today. 18 U.S.C. § 474 (Supp. V 1993).

[30] *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 318 (1985); *Muniz* v. *Hoffman*, 422 U.S. 454, 467-74 (1975); *Fourco Glass Co.* v. *Transmirra Products*, 353 U.S. 222, 227-28 (1957); *Anderson* v. *Pacific Coast S.S. Co.*, 225 U.S. 187, 199 (1912); *Logan* v. *United States*, 144 U.S. 263, 302 (1892); *United States* v. *LeBris*, 121 U.S. 278, 280 (1887); *United States* v. *Ryder*, 110 U.S. 729, 740 (1884); *McDonald* v. *Hovey*, 110 U.S. 619, 628-29 (1884); *Stewart* v. *Kahn*, 78 U.S. (11 Wall.) 493, 502 (1870).

similitude of any note issued by the United States."[31] A year later, the new Secretary of the Treasury, John Sherman (who had been the bill's principal supporter in the Senate), "fully concur[red] in the opinion of the Solicitor."[32]

5. The Doctrine Of Avoiding Constitutional Questions Requires The Inclusion Of The Common-Law Scienter Element

What we have said thus far provides a non-constitutional basis for reversal grounded in a rule that has been settled for generations. Another such rule must be applied as well: a statute must be construed, where fairly possible, so as to avoid substantial constitutional questions unless "such construction is plainly contrary to the intent of Congress."[33] The District Court did not even acknowledge this principle in its opinion. But it applies with particular force to statutes that raise First Amendment concerns. Especially in such cases, the courts go to great lengths to interpret statutes to avoid deciding questions as to their constitutionality. *See, e.g.*, *United States* v. *X-Citement Video, Inc.*, 115 S. Ct. 464, 467-68 (1994) (rejecting "most natural grammatical reading" of statute); *Frisby* v. *Schultz*, 487 U.S. 474, 483, 492 n.3 (1988) (adopting "rather strained" reading of statute); *Cantwell* v. *Connecticut*, 310

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[31] Letter from George F. Talbot, Solicitor of the Treasury, to Lot M. Morrill, Secretary of the Treasury (Jan. 15, 1877), *printed in* S. Ex. Doc. 19, 44th Cong., 2d Sess. (Jan. 17, 1877) (Addendum Tab 21); *accord* Letter from Lot Morrill, Secretary of the Treasury, to John Sherman, Chairman, Senate Committee on Finance (Jan. 15, 1877), *printed in* S. Ex. Doc. 19, 44th Cong., 2d Sess. (Addendum Tab 21).

[32] Letter from John Sherman, Secretary of the Treasury, to W.A. Wheeler, President *Pro Tem* of the Senate (Jan. 16, 1878), *printed in* S. Ex. Doc. No. 10, 45th Cong., 2d Sess. (Jan. 17, 1878) (Addendum Tab 22); *see generally* 1 John Sherman, *Recollections of Forty Years in the House, Senate and Cabinet* 268-83 (New York, The Werner Co. 1895) (Addendum Tab 6). For a discussion of Sherman's role in the passage of the act, see Frederick J. Blue, *Salmon P. Chase: A Life in Politics* 151-52 (1987).

[33] *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *see Public Citizen* v. *Department of Justice*, 491 U.S. 440, 465-66 (1989) (collecting cases).

U.S. 296, 311 (1940). This case follows *a fortiori* from those, because non-constitutional rules of statutory construction require an interpretation of the statute as containing a *scienter* element in any event. *See, e.g., X-Citement*, 115 S.Ct. at 467-68. We discuss below the three independent reasons why the statute is unconstitutional. But the Court need not reach those issues if it interprets that statute to include the *scienter* element required at common law.

B. Prosecution Of Boggs Would Be Unconstitutional

1. The First Amendment Forbids A Strict-Liability Felony Here

Strict-liability criminal statutes "cannot be applied in settings where they have the collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it." *Smith* v. *California*, 361 U.S. 147, 151 (1959). The Supreme Court recently reaffirmed this doctrine, holding that "'criminal responsibility may not be imposed without some element of scienter on the part of the defendant.'" *X-Citement*, 115 S. Ct. at 472 (quoting *New York* v. *Ferber*, 458 U.S. 747, 765 (1982), and citing *Smith*). *Smith* and *X-Citement* articulate the principle that the Government may not burden speech by punishing expression that is "honestly made." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 278-80 (1964) (relying on *Smith* to impose requirement of "actual malice" on libel plaintiffs); *Hustler Magazine* v. *Falwell*, 485 U.S. 46, 52 (1988) ("[A] rule that would impose strict liability on a publisher for [unprotected expression] would have an undoubted 'chilling' effect on speech.").

The safe harbor set forth in 18 U.S.C. § 504 has no bearing on this principle. As the Court explained in *X-Citement*, First Amendment constraints provide the public with "settled expectations that the contents of magazines and film are generally [not] subject to stringent [strict-liability] regulation." 115 S. Ct. at 468-69. Publishers—who assume that they have the full panoply of First Amendment protections—use the image of money with great frequency without satisfying the size and color limitations. The image of money is not limited to the nefarious world of the

counterfeiter. It is commonplace. The record contains examples contemporaneous with the filing of the Complaint. App. C to Pl.'s Mem. in Support of Mot. for TRO (Sept. 3, 1993) (App. 77-83). And in mainstream magazines published during a recent six-month period, we found dozens of images of money that did not satisfy the size and color provisions of section 504. *See* Addendum A at 1a-3a. Under the District Court's opinion, these publishers—and the millions of people who bought copies of the magazines in question (*id.* at 4a)—are all subject to criminal felony prosecution. But under *Smith* and its progeny, they have committed no crime.

This Supreme Court precedent is clear, unequivocal, and controlling. The District Court simply ignored it. That warrants reversal.

2. Section 504 Does Not Bear A "Real Nexus" To The Government's Goals

If this Court does not interpret section 474 as carrying the common-law *scienter* element, it must also confront the facial unconstitutionality of 18 U.S.C. § 504. The District Court held that section 504's safe-harbor exemption from criminal liability (for black-and-white illustrations that satisfy certain size limitations) saves section 474's seemingly limitless prohibition on speech from constitutional infirmity. Following a concurring opinion in *Regan* v. *Time, Inc.*, the District Court held that sections 474 and 504, when read "in tandem," are reasonable restrictions on speech. But even statutes furthering a *legitimate* government interest must be narrowly tailored to serve the interest.[34] As this Court explained in *Community for Creative Non-Violence* v. *Kerrigan*, 865 F.2d 382 (D.C. Cir. 1989):

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[34] *See, e.g., United States* v. *NTEU*, 115 S. Ct. 1003, 1014-18 (1995) (striking down statute chilling speech of federal employees because government failed to show nexus between statute and government interest to be served); *Simon & Schuster, Inc.* v. *New York State Crime Victims Bd.*, 502 U.S. 105, 122 n.** (1991) (striking down statute not narrowly tailored to promote admittedly "compelling" government interest); *Village of Schaumburg* v. *Citizens for a Better Env't*, 444 U.S. 620, 636 (1980) (striking down ordinance that only "peripherally" promoted admittedly "substantial" government interest).

> [T]he "narrowly tailored" portion of the time, place or manner test requires that there be a *real nexus* between the challenged regulation and the significant governmental interest sought to be served by the regulation. If the regulation does not meaningfully advance the interest, the regulation cannot withstand constitutional scrutiny if it restricts free expression in a public forum.

865 F.2d at 388 (emphasis by the Court). A regulation is not narrowly tailored where "a substantial portion of the burden on speech does not serve to advance [the Government's legitimate] goals." *Simon & Schuster*, 502 U.S. at 122 n.** (internal quotation omitted). Although a party challenging an act of Congress as unconstitutional ordinarily bears a heavy burden, the opposite is true in First Amendment cases, where the *Government* bears the burden of establishing the "real nexus."[35]

Defendants offered no evidence to meet that burden. That is fatal to their case. The statute cannot stand without evidence from the Government: "it is the government's case to prove and it has failed to do so." *United States* v. *Doe*, 968 F.2d 86, 91 (D.C. Cir. 1992). In recently striking down a federal statute, the Supreme Court repeated Justice Brandeis' famous prescription that even a "'reasonable' burden on expression requires a justification far stronger than mere speculation about serious harms. 'Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women.'" *NTEU*, 115 S. Ct. at 1017 (quoting *Whitney* v. *California*, 274 U.S. 357, 376 (1927) (concurring opinion)).

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[35] *Consolidated Edison* v. *Public Serv. Comm'n*, 447 U.S. 530, 540 (1980); *United States* v. *Doe*, 968 F.2d 86, 90 (D.C. Cir. 1992); *see First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 786 (1978); *Elrod* v. *Burns*, 427 U.S. 347, 362 (1976); *see also Sable Communications* v. *FCC*, 492 U.S. 115, 129 (1989) ("'Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake.'") (quoting *Landmark Communications* v. *Virginia*, 435 U.S. 829, 843 (1978)); *Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U.S. 767, 777 (1986) ("In the context of governmental restriction of speech, it has long been established that the government cannot limit speech protected by the First Amendment without bearing the burden of showing that its restriction is justified.").

a. The District Court Applied The Wrong Legal Standard

Apparently recognizing that the Government had not satisfied the "real nexus" standard, the District Court applied a different one. It held: "[a]fter reviewing the government's evidence as to a real nexus, this court agrees with Justice Stevens that . . . 'the color and size requirements are permissible methods of minimizing the risk of fraud as well as counterfeiting.'" Mem. Op. 32 (App. 56), 842 F. Supp. at 556 (quoting *Regan* v. *Time, Inc.*, 468 U.S. 641, 704 (1984)). *Regan*—a case in which Time, Inc. challenged the constitutionality of the size and color provisions of section 504—produced four opinions, none of which garnered a majority. Justice Stevens wrote only for himself, articulating a radical departure from traditional First Amendment doctrine by proposing a balancing test—never adopted by any court prior to this case, so far as we are aware—requiring a sliding-scale analysis to evaluate blanket restrictions on speech: "a statute which implicates a particularly strong governmental interest need not serve that interest to the same degree to withstand constitutional scrutiny as it would if the interest were weaker." 468 U.S. at 696. Thus, Justice Stevens appears to have concluded that the size and color restrictions are *not* narrowly tailored to serve a compelling governmental interest, but that—in his view—it should not matter. That view was shared by the District Judge,[36] but it is not the law.

b. The Size And Color Limitations Are Obsolete

Viewed under the proper legal standard, the statute cannot stand. The unrebutted evidence in the record demonstrates that the size and color limitations are no longer narrowly tailored to serve the goals of preventing counterfeiting and fraud. In 1984, the plurality in *Regan* deferred to the Government's assertion that negatives and four-color separations of images of currency were

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[36] Motions Hearing Tr. 36, 51-52 (App. 224, 239-40); Mem. Op. 32 (App. 56), 842 F. Supp. at 556.

(1) critical for the effective counterfeiter in the early 1980s, and (2) difficult to come by, so that allowing them to fall into the wrong hands could have had dangerous consequences. Therefore, four Justices opined that the size and color limitations were facially valid, on the theory that they served the goal of making it "harder for counterfeiters to gain access to negatives that could easily be altered and used for counterfeiting purposes." *Regan*, 468 U.S. at 657.

Today, alterations in size and color are no obstacle at all to the would-be counterfeiter: enlarging or reducing an image or changing its color takes only a few keystrokes. Michael Bittman, who has spent his entire adult life in the printing business, explained that widely available computer equipment

> is designed to allow the user to change the size and color of the images before outputting them to a printing device, so it would make no difference for a person up to no good whether he started with a genuine bill or a copy of one in black-and-white of a different size than genuine currency; either way, the technology that has now become widely available could be misused.

Bittman Decl. ¶ 8 (App. 262). This undisputed common-sense statement confirms what the Secret Service itself has told Congress:

> The development of new technology . . . has provided counterfeiters with new methods of duplicating currency and other securities. The introduction of multi-colored copiers, hi-tech computers, and laser scanners/printers (electro optical scanners) has made counterfeiting a crime of opportunity for those with access to such equipment.[37]

The Treasury Department has also conceded that the size and color limitations do not effectively serve the governmental interest at issue—preventing counterfeiting. The Director of the Bureau of Engraving and Printing, which designs and produces United States currency, has testified before Congress that the difficulty of

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[37] *U.S. Mint Authorization: Hearing Before the Subcomm. on Consumer Affairs & Coinage of the House Comm. on Banking*, 102d Cong., 1st Sess. 50 (Apr. 23, 1991) (hereinafter "*1991 Hearing*") (Testimony of William J. Ebert, Special Agent in Charge, Counterfeit Division, United States Secret Service).

reproducing "color [is] an ineffective deterrent against today's high quality color copiers and computer scanners,"[38] and that new, narrowly tailored anti-counterfeiting measures "best respond to the threat" of counterfeiting.[39] Surely these new measures are compelling evidence that the size and color restrictions are no longer an effective means for accomplishing the goal of preventing counterfeiting.

Congress has itself recognized that section 504 is no longer narrowly tailored to prevent counterfeiting and has therefore directed the Secretary of the Treasury to promulgate regulations that "permit color illustrations" and to "establish a system to ensure that the legitimate use of . . . electronic methods and retention of . . . reproductions [of currency] by businesses, hobbyists, press or others shall not be unduly restricted." Pub. L. 102-550, Title XV, § 1554, 106 Stat. 3672, 4071 (1992) (codified at 18 U.S.C. § 504(1)(D) & (2) (Supp. V 1993)). The regulations have not been promulgated.

The statute as interpreted below appears to cover a wide variety of speech that bears no risk of promoting counterfeiting or fraud. At least 85 million copies of popular magazines containing apparent "violations" were published in one recent six-month period. Addendum A at 1a-4a. The First Amendment requires a closer fit than this statute provides. *Simon & Schuster*, 502 U.S. at 122 n.**.

3. Sections 474 And 504 Are Unconstitutional As Applied To Boggs

The Government may not "suppress[] expression out of concern for its likely communicative impact," even if the statute is facially neutral. *United States* v. *Eichman*, 496 U.S. 310, 317 (1990) (flag burning). But that is what the Secret Service has done. The Secret

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[38] *Redesign of the Currency: Hearing Before the House Comm. on Banking*, 103d Cong., 2d Sess. 88 (July 13, 1994) (Prepared Statement of Peter H. Daly, Director, Bureau of Engraving and Printing).

[39] *1991 Hearing* at 47 (Prepared Statement of Peter H. Daly, Director, Bureau of Engraving and Printing); *see generally* Robert E. Schafrik & Sara E. Church, "Protecting the Greenback," *Scientific American*, July 1995 at 40-46 (describing project to redesign currency).

Service has applied the statutory scheme to Boggs because law-enforcement officers disapprove of the content of his work.

The Secret Service has seized Boggs' work *en masse*—with no pre- or post-deprivation adversary hearing of any kind—and has engaged in extrajudicial efforts at censorship. See *supra* pp. 8-10. Secret Service agents have also taken outrageous "enforcement" positions. One agent actually took the position that one of Boggs' black-on-canvas paintings that met the size restrictions was a "violation" because canvas is not "white" but "off-white." Boggs Aff. ¶ 14; Boggs Decl. ¶ 6 (App. 116, 257).

In an earlier case, Defendants articulated their policy position quite explicitly: sections 474 and 504 assist in "preserving the integrity" of some sort of governmental "property" interest in the "design and appearance" of currency. Brief for Appellants in *Regan* v. *Time, Inc.*, 468 U.S. 641 (1984) (No. 82-729) at 14. Another Treasury official recently condemned activities that would "defame the intrinsic value" of currency.[40] "After all," the Treasury official said, "this is the currency of the United States of America, and that stands for something." *Id.*

Viewed in light of these policy statements, Defendants' radical enforcement positions and insistence on freedom from judicial supervision raise an inference of content-based disapproval of Boggs' work—an inference to which Boggs is entitled on review of a grant of summary judgment against him. The District Court seems to have missed this point. It believed that it could only decide an overbreadth challenge and found the statute facially neutral. Mem. Op. 29 n.31 (App. 53), 842 F. Supp. at 555. But "a statute, even if not void on its face, may be challenged because [it is] invalid as applied." *Whitney* v. *California*, 274 U.S. 357, 378 (1927) (Brandeis, J., concurring).

This content-based restriction is particularly egregious as applied to Boggs, because he is hamstrung by section 504's size and color restrictions. Boggs Aff. ¶ 9; Chambers Decl. ¶ 12; Mayer Decl. ¶ 8 (App. 114-15, 175-76, 180). Regulation of the size and color of a work of art is regulation of its content. Imagine a

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[40] *See* Calvin Sims, "In Recycling of Greenbacks, New Meaning for Old Money," *New York Times*, May 22, 1994, at 1, 26.

government directive to Pablo Picasso to make *Guernica* smaller, to diminish its impact; or a directive to Jasper Johns not to use the image of the American Flag in its actual colors, to "preserve" the flag's "integrity." A blanket prohibition on a form of speech is unconstitutional in any event (*see, e.g., City of Ladue* v. *Gilleo*, 114 S. Ct. 2038, 2046 (1994) (collecting cases)), but appears particularly misplaced here. With advances in modern technology, only a fool would attempt to use Boggs' art as a template for counterfeiting; real currency would do the job far more effectively.

C. The Government Cannot Satisfy The Similitude Requirement

1. The Art In The Record Is Not "Calculated To Deceive"

The courts have long excluded from the reach of the counterfeiting laws those items that do not bear "such a likeness or a resemblance to a genuine obligation . . . as is calculated to deceive an honest, sensible and unsuspecting person of ordinary observation and care dealing with a person supposed to be honest and upright."[41] As one court observed after reviewing cases dating back more than a century, "[t]he similitude jury charge has received general acceptance in § 474 prosecutions." *United States* v. *Hall*, 801 F.2d 356, 358 (8th Cir. 1986).

On the Government's motion for summary judgment, the District Court was required to view all of the art in the record with every reasonable inference drawn in Boggs' favor, but it still found that a jury, conscientiously following instructions requiring proof beyond a reasonable doubt, would be "justified, if not compelled"

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[41] *United States* v. *Ross*, 844 F.2d 187, 190 (4th Cir. 1988) (internal quotations omitted); *see United States* v. *Cantwell*, 806 F.2d 1463, 1470 (10th Cir. 1986); *United States* v. *Hall*, 801 F.2d 356, 357-58 (8th Cir. 1986); *United States* v. *Johnson*, 434 F.2d 827, 829 (9th Cir. 1970); *United States* v. *Lustig*, 159 F.2d 798, 802 (3d Cir. 1947), *rev'd on other grounds*, 338 U.S. 74 (1949); *United States* v. *Williams*, 14 F. 550, 551 (E.D. Wis. 1882); 2 Edward J. Devitt, *et al.*, *Federal Jury Practice & Instructions* § 29.12 (4th ed. 1990); *cf. United States* v. *Gomes*, 969 F.2d 1290, 1293 (1st Cir. 1992).

in concluding that the art in the record is *so* similar to United States currency that it "is *calculated* to deceive an honest, sensible and unsuspecting person of ordinary observation and care dealing with a person supposed to be upright and honest." Mem. Op. 43 (App. 67), 842 F. Supp. at 561 (emphasis supplied).

We respectfully submit that this finding stands as a third, independent reason for reversal, because it cannot be squared with the evidence. Surely no reasonable juror could conclude beyond a reasonable doubt that the work of art reproduced at page 2 of this Brief is *calculated to deceive* anyone. At oral argument (or prior to it if the panel wishes) we shall have available for the panel's review the portfolio of works of art that we submitted to the District Court as Plaintiff's Summary Judgment Hearing Exhibit 1. As the Court will see, these works of art "have the general pattern of general currency" (Mem. Op. 44 (App. 68), 842 F. Supp. at 561), but they are not counterfeit. The counterfeiter's work is calculated to deceive; Boggs' work is calculated to illuminate. Accordingly, Boggs' work does not have the overall "look" and "feel" of genuine currency, even at first glance. On closer examination, the viewer discovers even more distinctions: Boggs' work bears his own signature and contain unique features distinguishing it from the genuine article. In sum, no reasonable juror could conclude beyond a reasonable doubt that these works are "calculated to deceive" (that is, designed for the *purpose* of deception).

2. Clause 6 Contains The Similitude Requirement

Although the District Court purported to evaluate the works of art in the record under the "similitude" test, it alternatively held that the Government did not have to meet this rigorous standard for a prosecution under clause 6 of section 474, because clause 6 in its current form uses only the word "likeness." Mem. Op. 44 (App. 68), 842 F. Supp. at 560-61. We submit that the similitude requirement applies with equal force in prosecutions under clause 6 for two separate reasons.

First, in both the 1862 and 1864 versions of the statute, clause 6 used the phrase "likeness or similitude."[42] During that period, as today, the two words were defined in terms of each other.[43] There is every reason, therefore, to believe that Congress intended the use of the word "or" in the phrase "likeness or similitude" to be understood in the sense of a synonymous expression.[44] *See Hawaiian Airlines, Inc.* v. *Norris*, 114 S. Ct. 2239, 2245 (1994). Not until the 1874 codification (Addendum Tab 20) did Congress omit the word "similitude" from the provision as a change in phraseology, presumably to eliminate this redundancy. Effecting a radical departure from the prior statute through so subtle a change would appear counter to, rather than consistent with, the goals of a general revision and comprehensive codification. For that reason, the presumption has been to the contrary for more than a century. See *supra* pp. 32-33 n.30.

Second, the similitude requirement has become an accepted landmark in counterfeiting prosecutions. See *supra* p. 43. To impose criminal liability under some lesser (but still unarticulated) standard, on the theory that one provision of a counterfeiting statute does not carry the requirement that all of the rest do, would hardly square with the accepted principle that a criminal statute constitutes a clear and fair warning that society—and Congress—has unequivocally imposed its moral condemnation on the behavior in question.

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[42] Ch. 33, § 7, 37th Cong., 2d Sess., 12 Stat. 345, 347 (Addendum Tab 3); ch. 172, § 11, 38th Cong., 1st Sess., 13 Stat. 218, 222 (Addendum Tab 15).

[43] Noah Webster, *An American Dictionary of the English Language* 666, 1032 (Chauncey A. Goodrich ed.) (Springfield, George & Charles Merriam 1852) (Addendum Tab 27); Joseph E. Worcester, *A Dictionary of the English Language* 840, 1341 (Boston, Hickling, Swan & Brewer 1860) (Addendum Tab 28). Roget classified both words in his entry on "Partial relation." Peter Mark Roget, *Thesaurus of English Words* 47 (Barnas Sears ed.) (Boston, Gould & Lincoln 1854) (Addendum Tab 29).

Today, the words "likeness" and "similitude" are still defined by reference to each other. *Webster's Third New International Dictionary* 1310, 2120-21 (1986); *Roget's International Thesaurus*, § 783.3 at 549 (5th ed. 1992).

[44] "*Or* is often used to express an alternative of terms, definitions, or explanations of the same thing in different words." Webster, *An American Dictionary* 775-76 (Addendum Tab 27).

See Crandon v. *United States*, 494 U.S. 152, 158 (1990); *United States* v. *Bass*, 404 U.S. 336, 347-48 (1971).

CONCLUSION

For the foregoing reasons, the summary judgment in favor of the Government should be reversed. The case should be remanded for: (1) entry of an injunction forbidding further harassment of Boggs or intimidation of his customers and dealers; (2) entry of an injunction forbidding prosecution of Boggs; and (3) further proceedings on Boggs' second claim for relief.

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