NO.

IN THE
Supreme Court of the United States

PUBLIC CITIZEN,
Petitioner,
v.

CLERK, U.S. DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Article I, section 7, clause 2 of the United States Constitution requires that, before a bill can become a law, it must first be passed in identical form by both Houses of Congress. With respect to the Deficit Reduction Act of 2005, ("DRA"), the House of Representatives never passed the version of the DRA that was enrolled and sent to the President for his signature. Therefore, the bicameralism requirement was not met. The question presented is:

> Whether this Court's decision in *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892), precludes the federal courts from considering a challenge to the validity of the DRA on the ground that it was enacted in violation of the bicameralism requirement.

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Some constitutional provisions are open to interpretation. One constitutional requirement that is not ambiguous, however, is the requirement that every bill pass both houses of Congress before it can be presented to the President and become law. The Deficit Reduction Act of 2005 ("DRA") was presented to the President in violation of that requirement: The Senate passed one version of a bill, the House another, and then the Senate's version was presented to the President, who signed it. Under the Constitution, that bill has not become a law.

Notwithstanding the straightforward constitutional requirement of bicameralism, the court below affirmed the dismissal of Public Citizen's claim that the DRA is invalid under the United States Constitution. The court held that *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892), established an "enrolled bill rule" that required dismissal of the constitutional challenge. According to the court, under that rule, the courts must conclusively presume that signed legislation was enacted in accordance with article I, section 7, clause 2, and may not consider any evidence to the contrary. Yet if that were so, then the bicameralism "requirement," although central to the legislative process established by the Constitution, would be merely advisory. Moreover, the court's broad reading of *Marshall Field* is divorced from the context and substance of the decision itself and from the authoritative limiting construction placed on it by this Court's more recent decision, *United States v. Munoz-Flores*, 495 U.S. 385 (1990).

OPINIONS BELOW

The decision of the United States Court of Appeals for the District of Columbia Circuit is reported at 486 F.3d 1342 (D.C. Cir. 2007), and is reproduced in the appendix at Pet. App. 1a. The district court's August 11, 2006, Memorandum Opinion granting Respondent's motion to dismiss is reported at 451 F. Supp. 2d 109 (D.D.C. 2006), and is reproduced in the appendix at Pet. App. 25a.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, section 7, clause 2 of the United States Constitution states:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States.

1 U.S.C. § 106 states, in relevant part:

> Every bill or joint resolution in each House of Congress shall, when such bill or resolution passes either House, be printed, and such printed copy shall be called the engrossed bill or resolution as the case may be. Said engrossed bill or resolution shall be signed by the Clerk of the House or the Secretary of the Senate, and shall be sent to the other House, and in that form shall be dealt with by that House and its officers, and, if passed, returned signed by said Clerk or Secretary. When such bill, or joint resolution shall have passed both Houses, it shall be printed and shall then be called the enrolled bill, or joint resolution, as the case may be, and shall be signed by the presiding officers of both Houses and sent to the President of the United States.

Excerpts of the Deficit Reduction Act of 2005, Pub. L. No. 109-171,120 Stat. 4 (2006), are included in the Appendix beginning on page 65a.

STATEMENT OF THE CASE

This case concerns a substantive discrepancy between House and Senate bills that arose during the process of preparing a bill for transmission from the Senate to the House and, later, to the President. Because an explanation of the factual background involves some terminology specific to the legislative process, Part A below provides a brief description of that process. Part B describes the facts underlying the lawsuit, and Part C provides a summary of the proceedings below.

A. The Legislative Process

Although the Constitution does not spell out procedures for complying with article I, section 7's bicameralism requirement, Congress has enacted a statute specifying such procedures, 1 U.S.C. § 106. First adopted in 1893, the year after *Marshall Field* was decided, section 106 provides that, after one chamber of Congress passes a bill, the bill is to be printed and signed by the Clerk of the House or the Secretary of the Senate (depending on which chamber passed the bill). The printed version of the bill passed by a single chamber is called the "engrossed bill." 1 U.S.C. § 106. The engrossed bill is sent to the other chamber and "in that form shall be dealt with by that House and its officers." *Id*. If the other chamber passes the engrossed bill without amendment, the Clerk or Secretary of that chamber signs the bill and returns it to the originating chamber. *Id*. The engrossed bill is then reprinted and, at that point, is called the "enrolled bill." *Id*. The presiding officers of the House and the Senate each sign the enrolled bill to attest that it passed each chamber. *Id*. The enrolled bill is then sent to the President. *Id*.

Pursuant to statute, an official copy of the precise text of each engrossed bill is printed by the Government Printing

Office ("GPO"). *See* 44 U.S.C. § 706 (enacted 1968). That official version is readily available from GPO:

> The information provided on [GPO's website, known as GPO Access] is the official, published version and the information retrieved from GPO Access can be used without restriction, unless specifically noted. This free service is funded by the Federal Depository Library Program and has grown out of Public Law 103-40, known as the Government Printing Office Electronic Information Enhancement Act of 1993.

GPO, *About GPO Access*, www.gpoaccess.gov/about/gpoaccess.html.

B. The Deficit Reduction Act Of 2005

In the fall of 2005, the House and Senate passed different versions of S. 1932, a budget bill referred to as the Deficit Reduction Act of 2005 or DRA. To reconcile the differences between the House and Senate bills, the legislation was sent to a House-Senate conference committee. The bill was modified in conference, and the final conference report was submitted to the House and Senate for their votes. *See* H.R. Conf. Rep. No. 109-362 (2005), *reprinted in* 151 Cong. Rec. H12641 *et seq*. (Dec. 18, 2005).

On December 19, 20, and 21, 2005, the Senate considered the conference report. Four points of order were raised against the report, and three were sustained on the ground that the provisions of the conference report that they challenged violated the rules of the congressional budget process. 151 Cong. Rec. S14203-04 (Dec. 21, 2005).[1] As a result, the conference report

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[1]A point of order is "[a] claim made by a Senator from the (continued...)

did not pass the Senate. *Id*. at S14205. Instead, on December 21, the Senate voted on an amended version of S. 1932 that omitted the items that gave rise to the points of order. *Id*. at S14337-86. The amended bill passed 51 to 50, with Vice President Cheney casting the tie-breaking vote. *Id*. at S14221; *see also id*. at H13178 (Dec. 22, 2005) (message from Senate clerk to House).

When engrossing the amended bill for transmittal to the House, a Senate clerk made a substantive change to section 5101(a)(1). In two places, the clerk altered the duration of Medicare payments for certain durable medical equipment, stated as 13 months in the version passed by the Senate, to 36 months. *Compare* 151 Cong. Rec. S14337, S14346 (Dec. 21, 2005) (version passed by Senate), *with* S. 1932, engrossed in Senate (Dec. 21, 2005) (D.C. Cir. JA 55-62).[2] The budget impact of the change is $2 billion over five years. Pet. App. 29a n.7.

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[1](...continued)
floor that a rule of the Senate is being violated. If the Chair sustains the point of order, the action in violation of the rule is not permitted." U.S. Senate, *Senate Glossary*, www.senate.gov/reference/glossary_term/point_of_order.htm. In this case, the points of order were based on the "Byrd rule," under which "any provisions in a final budget reconciliation bill that are extraneous to changing the budget can be stricken." 151 Cong. Rec. S14204.

[2]S. 1932 as engrossed in the Senate on December 21, 2005, is available in full from the Government Printing Office at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:s1932eas.txt.pdf. The discrepancy appears twice in section 5101(a)(1).

Errors in engrossed bills have occurred before. The proper procedure is for the chamber that made the error to send a message to the other chamber requesting return of the bill, so that the error can be corrected. *See* 109th House Rules and Manual, House Doc. No. 108-241, § 565 at 296-97 (2005) (listing examples), *available at* www.gpoaccess.gov/hrm/browse_109.html. That procedure was not followed here. Rather, on February 1, 2006, the House voted on the engrossed version of S. 1932, which contained the clerk's error and, therefore, was not identical to the version of the bill passed by the Senate. *See* S. 1932, engrossed in Senate (full citation *supra* note 2); 152 Cong. Rec. H69, H77 (Feb. 1, 2006). The House passed S. 1932, with the 36-month provision, by a vote of 216 to 214. 152 Cong. Rec. H68.[3]

Because the legislation originated in the Senate, the House returned the legislation to the Senate for enrollment and transmission to the President for his signature. *See* 152 Cong. Rec. S443 (Feb. 1, 2006) (message from House to Senate announcing that House agreed to Senate amendment to S. 1932). When enrolling the bill, a Senate clerk again changed the provision in section 5101(a)(1), from 36 months, as stated in the engrossed bill and passed by the House, back to 13 months, as earlier approved by the Senate. *See* S. 1932, enrolled in Senate, at § 5101 (App. 44-49).[4]

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[3]The Congressional Record provides authoritative evidence of the vote on and passage of bills. *See*, *e.g.*, *Smith v. City of Jackson*, 544 U.S. 228, 232 n.2 (2005); *McCreary Cty. of Ky. v. ACLU*, 545 U.S. 844, 889 (2005) (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting).

[4]A link to the enrolled bill is available online from the GPO

(continued...)

The enrolled bill was signed by the Speaker of the House and President pro tempore of the Senate on February 7, 2006, and transmitted to the President later that day. 152 Cong. Rec. S768 (Feb. 7, 2006). The House, however, had never passed that version of the bill; indeed, the House had never been sent that version for consideration.

On February 8, 2006, President Bush signed the enrolled bill. D.C. Cir. JA 113; *see* DRA, Pub. L. No. 109-171, 120 Stat. 4 (2006).

C. Proceedings Below

Since February 6, 2005, the fee for instituting a civil action in the United States district courts has been $250. 28 U.S.C. § 1914(a). Section 10001 of the DRA purports to increase the fee to $350, effective April 9, 2006. *See* DRA § 10001(a). This provision injures Public Citizen, which has paid a fee to file a civil case in the district court every year since at least 1976, *id*. at 38, and will continue to file cases in the district court. Complaint ¶ 5.

Public Citizen brought this action on March 21, 2006, alleging that the DRA is invalid because the means by which it was purportedly enacted violates the bicameralism requirement of the Constitution. The complaint requested declaratory relief and an order directing the district court clerk to accept $250 as the filing fee for civil cases, in accordance with 28 U.S.C. § 1914(a).

Public Citizen promptly moved for summary judgment, and the district court clerk, represented by the Department of

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[4](...continued)
at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid= f:s1932enr.txt.pdf.

Justice, opposed that motion and moved to dismiss the case. On August 11, 2006, the district court issued an order and opinion denying Public Citizen's motion for summary judgment and granting the clerk's motion to dismiss. The court found that, under *Marshall Field*, it could not look past the enrolled bill to determine whether the DRA had been enacted in accordance with the Constitution. Pet. App. 38a-39a.

The court of appeals affirmed. *Id*. at 3a. The court first addressed a standing argument made in the district court by amicus CTIA - The Wireless Association and then embraced by the clerk in the court of appeals.[5] The court held that "the *Marshall Field* rule is . . . a non-merits threshold ground for

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[5]The government argued that Public Citizen lacks standing because section 5101(a)—the provision as to which the House passed a version substantively different from that signed by the President—is severable from the rest of the DRA, and, therefore, Public Citizen has not been harmed by the fact that the House did not pass the version of the bill signed by the President. However, severability is a consideration only when a particular provision of an otherwise validly enacted law is unconstitutional because "[t]he unconstitutionality of *a part* of an act does not necessarily defeat or affect the validity of its remaining provisions." *Champlin Ref. Co. v. Corporation Comm'n of Okla.*, 286 U.S. 210, 234 (1932) (emphasis added); *see Regan v. Time, Inc*., 468 U.S. 641, 652 (1984) (discussing severability of an "unconstitutional provision" from "unobjectionable provisions"); *United States v. Jackson*, 390 U.S. 570, 585 (1968) (quoting *Champlin*). Thus, where part of a statute is unconstitutional, "the invalid *part* may be dropped if what is left is fully operative as law." *Champlin*, 286 U.S. at 234 (emphasis added). In this case, the constitutional problem is not that a specific provision of the DRA is unconstitutional. Rather, the *entire* DRA is not law because it was not enacted according to the requirements of the Constitution.

dismissal," *id*. at 12a, and thus could be considered prior to the standing question. It then turned to the "enrolled bill rule" and held that it was barred by *Marshall Field* from considering evidence that the House had not passed the version of the DRA signed by the President. *Id*. at 15a.

In addition to Public Citizen, several other plaintiffs filed cases challenging the validity of the DRA. Those cases were also dismissed on the theory that *Marshall Field* precludes judicial review of the evidence. *See OneSimpleLoan v. Secretary of Educ*., 2007 WL 2050852 (2d Cir. 2007); *Zeigler v. Gonzales*, 2007 WL 1875945 (S.D. Ala. 2007); *Conyers v. Bush*, 2006 WL 3834224 (E.D. Mich. 2006).

REASONS FOR GRANTING THE WRIT

There is no serious question that enactment of the DRA violated the bicameralism requirement of article I, section 7, clause 2 because the House did not approve the version of S. 1932 presented to and signed by the President. (And at this stage of the case, the facts pleaded in the complaint are taken as true. Pet. App. 4a-5a.) Rather, the question is whether, in the face of indisputable evidence proving a constitutional violation, the judiciary must turn a blind eye and permit enforcement of a bill that the Constitution does not recognize as law. The Court should grant the petition to address this important constitutional question.

I. The Decision Below Renders The Constitution's Bicameralism Requirement Unenforceable.

The United States Constitution provides: "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a law, be presented to the President of the United States . . . ." U.S. Const., art. I, § 7, cl. 2. Pursuant to this bicameralism requirement, a bill must be passed in

identical form by both chambers before it can become a law. *See Clinton v. City of New York*, 524 U.S. 417, 448 (1998) ("The Constitution explicitly requires that each of . . . three steps be taken before a bill may 'become a law'": a bill containing the "exact text" must be approved by one house; the other house must approve "precisely the same text," and "that text" must be signed by the President) (quoting art. I, § 7); *City of New York v. Clinton*, 985 F. Supp. 168, 178 (D.D.C.) ("At the heart of the notion of bicameralism is the requirement that any bill must be passed by both Houses of Congress in exactly the same form."), *aff'd*, 524 U.S. 417 (1998); Parliamentarian, U.S. House of Reps., *How Our Laws Are Made* XVII (June 30, 2003) (bill must be "agreed to in identical form by both bodies" before presentation to the President); *see also West Va. Univ. Hosps. v. Casey*, 499 U.S. 83, 98-99 (1991) (statutory purpose determined by "statutory text adopted by both Houses of Congress and submitted to the President"). If any provision of the text of a bill voted on in one house differs from the text voted on in the other or from the version signed by the President, the law has not been validly enacted. *Clinton*, 524 U.S. at 448.

The requirement that a bill pass both chambers of Congress before being presented to the President is not a mere formality but rather "serve[s] essential constitutional functions." *INS v. Chadha*, 462 U.S. 919, 951 (1983). "By providing that no law could take effect without the concurrence of the prescribed majority of the Members of both Houses, the Framers reemphasized their belief . . . that legislation should not be enacted unless it has been carefully and fully considered by the Nation's elected officials." *Chadha*, 462 U.S. at 948-49. Indeed, "[Alexander] Hamilton argued that a Congress comprised of a single House was antithetical to the very purposes of the Constitution," for to adopt a unicameral

legislature would be to confer on a single body "'all the most important prerogatives of sovereignty, and thus entail upon our posterity one of the most execrable forms of government that human infatuation ever contrived.'" *Id.* at 949 (quoting The Federalist No. 22, at 135 (H. Lodge ed. 1888)). Bicameralism is a central part of the system of checks and balances erected "to protect the people from the improvident exercise of power." *Id.* at 957.

In this case, although the version of the DRA that was presented to and signed by the President never passed the House of Representatives, the court refused to look beyond the enrolled bill to determine the validity of the enactment. The court of appeals' conclusive presumption that the enrolled bill, once signed, was constitutionally enacted renders the bicameralism requirement unenforceable. It transforms the requirement that both chambers of Congress agree on a piece of legislation into a requirement that the *presiding officers* of the chambers agree on the legislation, whether or not a majority of the members of their chambers would support their position if a vote were held. It raises "form over substance, fact over fiction, and amount[s] to government by clerical error." *Association of Tex. Prof. Educators v. Kirby*, 788 S.W.2d 827, 830 (Tex. 1990) (recognizing exception to state's enrolled bill rule).

Without this Court's intervention, article I, section 7, clause 2 will be rendered advisory. Congressional leaders will be free to ignore differences between House and Senate bills, whether those differences are purposeful or inadvertent, by enrolling the version they personally prefer. The Court should grant this petition to confirm that all enacted legislation must satisfy the Constitution's bicameralism requirement.

II. The Decision Below Is Not Required By *Marshall Field* And Is Inconsistent With This Court's Decision In *Munoz-Flores*.

The court below accepted the argument that—no matter the evidence showing that the House did not pass the bill presented to the President—courts are precluded from considering any evidence aside from the enrolled bill signed by the Speaker of the House and President pro tempore of the Senate. Pet. App. 15a. That conclusion was based entirely on *Marshall Field*. *Id*. However, *Marshall Field* does not bar courts from considering the evidence presented here, and this Court in *Munoz-Flores* rejected the mechanical reading of *Marshall Field* adopted by the court below.

A. *Marshall Field* Does Not Preclude Judicial Consideration Of Evidence Of Bicameralism Violations.

In *Marshall Field*, the plaintiffs alleged that the Tariff Act of October 1, 1890, was not enacted in accordance with the Constitution because, according to the legislative journals, the enrolled bill presented to the President omitted a section that was included in the bill passed by both Houses. The Court held that the journals could not be used to challenge the validity of a statute. However, in dicta going beyond what was necessary to decide the case, the Court stated that when an enrolled bill has been signed by the Speaker of the House and the President of the Senate attesting to its passage and then signed by the President, "its authentication as a bill that has passed congress should be deemed complete and unimpeachable." 143 U.S. at 673. To reconcile this dicta with the courts' "duty to review the constitutionality of congressional enactments," *Munoz-Flores*, 495 U.S. at 391, the statement must be considered in context as an explanation of why, as between an enrolled bill signed by the

Speaker of the House and the President of the Senate, on the one hand, and information gleaned from congressional journals, on the other, the Court in 1892 would credit the enrolled bill.

The argument of the *Marshall Field* plaintiffs turned on the significance of journals: "The clause of the constitution upon which the [plaintiffs] rest[ed] their contention that the act in question was never passed by congress is the one declaring that 'each house shall keep a journal of its proceedings, and from time to time publish the same, except such parts as may in their judgment require secrecy.'" *Marshall Field*, 143 U.S. at 670 (quoting art. I, § 5). The plaintiffs argued that "the object of [article I, section 5] was to make the journal the best, if not conclusive, evidence upon the issue as to whether a bill was, in fact, passed by two houses of congress." *Id*.; *see also id*. at 672 ("[T]he contention is that it cannot be regarded as a law of the United States if the journal of either house fails to show that it passed in the precise form in which it was signed by the presiding officers of the two houses, and signed by the president."). Journals were so central to the case that the United States attached to its brief an appendix containing a list of state authorities addressing the question whether legislative journals could be used to impeach an enrolled act. *Id*. at 661-66 (reproducing list).

The Court fully agreed that "a bill signed by the speaker of the house of representatives and by the president of the senate, presented to and approved by the president of the United States, . . . does not become a law of the United States if it ha[s] not in fact been passed by congress." *Id*. at 669. "In view of the express requirements of the constitution, the correctness of this general principle cannot be doubted." *Id*. Moreover, the Court expressly recognized that the Speaker of the House and the President of the Senate have no authority to attest by their signatures to any bill not passed by each house, and likewise

that the President has no authority to approve a bill not passed by Congress. *Id*.

Nonetheless, the Court rejected the plaintiffs' article I, section 5 argument, holding instead that the keeping of the journals, although required by the Constitution, is not a requirement tied to the valid passage of a bill. Moreover, the Court noted that the Constitution does not prescribe the content of the journals, but rather left those details to the discretion of Congress. *Id*. at 671. And to explain the "evils" that would result "from a rule making the validity of congressional enactments depend upon the manner in which the journals of the respective houses are kept by the subordinate officers charged with the duty of keeping them," *id*. at 673, the Court quoted extensively from cases decrying the "danger" of "intentional corruption" of the journals, the concern of putting every law "at the mercy of all persons having access to these journals," the "mischiefs absolutely intolerable" of allowing a law to be "impeached by the journals," and the likelihood of errors in journals "made amid the confusion of the dispatch of business." *Id*. at 674-77. For all of these reasons, the Court held that the journals could not be used to determine whether the enrolled bill signed by the President was the same bill passed by Congress.

After its extended discussion of the unreliability of journals, the Court concluded:

> We are of the opinion, for the reasons stated, that it is not competent for the appellants to show, from the journals of either house, from the reports of committees, or from other documents printed by authority of congress, that the enrolled bill, designated 'H. R. 9416,' as finally passed, contained a section that does not

> appear in the enrolled act in the custody of the state department.

Id. at 680. The court of appeals below read that sentence broadly to mean that courts could look at no evidence aside from the enrolled bill. Pet. App. 16a. However, the sentence need not be read so broadly; and, in the context of the opinion as a whole, it makes little sense to do so. Aside from one paragraph discussing the congressional leaders' signatures attesting to the passage of a bill and the respect due to Congress, 143 U.S. at 672, the "reasons stated" focus exclusively on journals and their shortcomings. Moreover, the Court's conclusion is specific to "the appellants" before it. In light of the lengthy discussion of journals that precedes the Court's conclusion, and given the Court's statement that the plaintiffs' contention that the Tariff Act of 1890 never passed Congress "rest[ed]" on the Journal Clause, a broad reading of the one sentence conclusion is unwarranted.[6]

In addition, in 1890, "[n]o provision of law exist[ed] for recording or filing in any office, as a public record, the bills introduced into Congress, the bills as they [were] reported from either House, or the bills as they [were] reported by committees. There [was] no appropriation for their publication by Congress,

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[6]To be sure, the *Marshall Field* plaintiffs presented exhibits in addition to the journals. However, the opinion makes clear that the plaintiffs' ability to prove their case turned on their argument about the significance of journal entries. The plaintiffs' claim was that a section that was included in the conference report passed by both Houses was omitted from the enrolled bill. The conference report was printed in the journals, which were offered as evidence of the report. *See*, *e.g.*, Reply Br. of Appellants in *Marshall Field*, No. 1052, at 50-51 (making this point and directing Court to an appendix to the government's brief that reproduced relevant journal entries).

and there [was] no way of proving their contents except by oral evidence." Br. for U.S. in *Marshall Field*, No. 1052, at 31 (filed Oct. 24, 1891). In 1893, however, the current procedure for engrossing and printing bills was adopted as a concurrent resolution; in 1947, it was enacted into law as 1 U.S.C. § 106. Section 106 requires that, after one house passes a bill, the bill must "be printed, and such printed copy shall be called the engrossed bill." The engrossed bill "shall be sent to the other House, and in that form shall be dealt with by that House and its officers." *See also* 44 U.S.C. § 706 (providing for GPO printing of each Senate and House bill).

Thus, whereas in 1890 engrossed bills had no official status, today they are defined and required by statute and constitute a formal, public part of the legislative process. The "nature of the evidence" in this case is, therefore, different from that in *Marshall Field*, and, accordingly, the outcome of *Marshall Field* should not dictate the outcome here.

B. *Munoz-Flores* Confirms That *Marshall Field* Does Not Preclude Challenges To Legislation Based On Violations Of The Constitution's Procedural Requirements.

Whereas *Marshall Field* is, first and foremost, a case about article I, section 5's journal requirement, this case does not concern journals at all. The only constitutional requirement on which Public Citizen "rest[s] [its] contention," *Marshall Field*, 143 U.S. at 670, is the bicameralism requirement of article I, section 7, clause 2.

This difference is critical. In *Munoz-Flores*, the Court rejected an argument, based on *Marshall Field*, that Congress's designation of a revenue bill as "H.J. Res." precluded judicial review of the issue whether the bill had in fact originated in the Senate. 495 U.S. at 391 n.4 (responding to concurrence at 408-

09). Although *Munoz-Flores* recognized that the "H.R." designation on an enrolled bill could be taken to mean that "Congress explicitly determined" that the bill had originated in the House, as is constitutionally required of revenue bills under article I, section 7, clause 1, the Court stated that "congressional consideration of constitutional questions does not foreclose subsequent judicial scrutiny of the law's constitutionality." 495 U.S. at 391.

The court below read *Marshall Field* to mean that courts must, without exception, assume that all bills signed by the presiding congressional officers and presented to the President satisfy article I, section 7, clause 2. *Munoz-Flores* belies that reading. It says that courts must assume the validity of bills authenticated in that manner only "[i]n the absence of any constitutional requirement binding Congress." *Id*. at 391 n.4. Here, a constitutional requirement binding Congress is directly before the Court—article I, section 7, clause 2.

Although *Munoz-Flores* uses the phrase a "requirement binding Congress" to distinguish cases in which courts must "accept as passed all bills authenticated in the manner provided by Congress" and cases in which "[*Marshall*] *Field* does not apply," this Court of course knew that the Journal Clause itself imposes a "requirement binding Congress"—it requires each house of Congress to maintain a journal. Therefore, the phrase a "requirement binding Congress" must refer to a requirement binding Congress with respect to the matter at issue—the valid enactment of a law. *See Board of Comm'rs v. W.N. Coler & Co.*, 180 U.S. 506, 524 (1901) (distinguishing *Marshall Field* from a case challenging a law's validity based on items required to be entered on journals but omitted); *Harwood v. Wentworth*, 162 U.S. 547, 562 (1896) (Arizona statute not impeachable by journals where Arizona law did not require journals to reflect necessary facts).

In *Munoz-Flores*, the constitutional provision at issue was the Origination Clause, article I, section 7, clause 1, which, unlike the Journal Clause, imposes a requirement with respect to the valid enactment of certain laws. In this regard, clause 1 and clause 2 are indistinguishable. Neither the government nor the courts below offered a reading of *Munoz-Flores* that sensibly would allow the courts to consider clause 1 challenges but not clause 2 challenges.[7]

The district court recognized that allowing claims based on article I, section 7, clause 1 violations to go forward, but not claims based on article I, section 7, clause 2 violations "is not entirely satisfying." Pet. App. 52a; *see also OneSimpleLoan*, 2007 WL at *9 n.7 ("[W]e do agree with plaintiffs that the Supreme Court has been less than clear in explaining why courts may probe congressional documents when adjudicating some types of constitutional claims but not others."). And the court of appeals said that the relevant passage of *Munoz-Flores* "def[ies] easy comprehension." Pet. App. at 21a. Nonetheless,

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[7]The court of appeals stated that this Court "recently reaffirmed *Marshall Field*" in *United States National Bank of Oregon v. Independent Insurance Agents of America, Inc*., 508 U.S. 439, 455 n.7 (1993). Pet App. 18a. *National Bank of Oregon* did nothing of the sort. The footnote cited by the court of appeals states that a law consists of an "enrolled bill" signed by the Speaker of the House and the President of the Senate, and then cites (as "see also") 1 U.S.C. § 106. It does not address the relationship between § 106 and a "enrolled bill rule." Indeed, the opinion does not discuss the "enrolled bill rule." It only states (accurately) that *Marshall Field* concerned the "'nature of the evidence' the Court [may] consider" to determine whether a bill has passed Congress, 508 U.S. at 455 n.7 (quoting *Marshall Field*) (brackets in original), and then explains that the case before it concerns not whether a bill passed Congress, but the meaning of the bill that was passed. *Id*.

the courts found that this outcome "is the only reading [of *Munoz-Flores*] that is consistent with *Marshall Field*." *Id*. at 52a. There is another reading, however, that shows the two cases to be consistent: If the holding in *Marshall Field* is read in context, with its sharp focus on legislative journals, and in light of the fact that no law at that time established a procedure for printing bills, *Munoz-Flores* does not reveal an "unsatisfying" distinction between claims based on clause 2 violations and claims based on clause 1 violations. To the contrary, under our reading, the distinction is between constitutional requirements that concern the valid enactment of law (*e.g.*, the origination requirement and, critically here, the bicameralism requirement) and constitutional requirements that do not (*e.g.*, the journal requirement). *See*, *e.g.*, *W.N. Coler*, 180 U.S. at 524.

In sum, in light of 1 U.S.C. § 106 and the nature of the evidence here, Petitioner's position honors both the Constitution's requirements and Congress's interests in avoiding mischief in the engrossing and enrolling process. The decision below honors neither.

III. If *Marshall Field* Establishes A Conclusive Presumption In Favor Of The Validity Of Enrolled Bills, It Should Be Overruled.

If the Court agrees with the holding below that *Marshall Field* dictates dismissal of this case, the Court should overrule *Marshall Field*. The concerns behind that decision, *see supra* p. 14, are of far less significance today, given the passage of § 106 and advances in technology over the past century. *See also OneSimpleLoan*, 2007 WL *1 ("[A]bsent Supreme Court direction, we may not reassess the need for an enrolled bill rule or create exceptions to that rule on the basis of technological or political developments since *Marshall Field* was decided.").

Moreover, today, "the tendency is in favor of [a] rule leaving only a prima facie presumption of validity which may be attacked by any authoritative source of information." 1 Singer, *Statutes and Statutory Construction* § 15.2, at 816-18 (6th ed. 2002) ("*Sutherland*"). As *Sutherland* notes, conclusive presumptions, such as that embodied in an enrolled bill rule, "are capable of producing results that do not accord with fact. . . . 'Courts applying such a rule are bound to hold statutes valid which they and everybody know were never legally enacted.'" *Id*. at 821-22 (quoting *Bull v. King*, 286 N.W. 311 (Minn. 1939)); *see OneSimpleLoan*, 2007 WL at *10 ("Whether the enrolled bill rule has come to serve as an incentive for politicians to avoid the rigors of constitutional law-making is a different question," the answer to which "might provide a policy argument against strict application of the enrolled bill rule.").

Thus, for example, Pennsylvania, which previously afforded enrolled bills a conclusive presumption of validity, no longer does so when the facts are undisputed and the issue is whether a mandatory constitutional provision has been violated. *See Consumer Party of Pa. v. Commonwealth of Pa.*, 507 A.2d 323, 334 (Pa. 1986). Likewise, Kentucky followed an enrolled bill rule beginning in 1896, *see Lefferty v. Huffman*, 35 S.W. 123, 126 (Ky. 1896), but more recently discarded it, adopting an approach under which the "prima facie presumption that an enrolled bill is valid" may be "overcome by clear, satisfactory and convincing evidence that constitutional requirements have not been met." *D&W Auto Supply v. Department of Revenue*, 602 S.W.2d 420, 425 (Ky. 1980); *see also Association of Tex. Prof. Educators*, 788 S.W.2d at 830 (relaxing rule to allow consideration of journals when presiding officers and attorney general stipulate that enrolled bill was not passed by legislature).

None of the factors that normally make adherence to precedent desirable are present here, and thus stare decisis should not prevent this Court from overruling *Marshall Field*. As both the district court and the court of appeals noted, the notion that *Marshall Field* establishes an absolute shield against bicameralism challenges is drawn into question by *Munoz-Flores*. Pet. App. 21a, 52a; *see Leegin Creative Leather Prods., Inc. v. PSKS, Inc*., 127 S. Ct. 2705, 2721 (2007) ("[W]e have overruled our precedents when subsequent cases have undermined their doctrinal underpinnings.") (citation omitted). An enrolled bill rule has neither become "embedded" in our "national culture," *Dickerson v. United States*, 530 U.S. 428, 443-44 (2000), nor often been followed by this Court. *See Bowles v. Russell*, 127 S. Ct. 2360, 2366 (2007) (overruling precedent that Court had not followed for 40 years). In addition, although "concerns about maintaining settled law are strong when the question is one of statutory interpretation," *Leegin*, 127 S. Ct. at 2720, *Marshall Field* does not implicate that concern. Moreover, 1 U.S.C. § 106 and 44 U.S.C. § 706 undermine a critical factual point underlying *Marshall Field*: that no law governs the process of engrossing or printing a bill. *See Randall v. Sorrell*, 126 S. Ct. 2479, 2489-90 (2006) (declining to overrule case where changed circumstances do not "undermine [its] critical factual assumptions").

Although reliance on a judicial opinion can in some cases be a significant reason to adhere to it, *see Leegin*, 127 S. Ct. at 2724, Congress cannot have relied on *Marshall Field* to enact the DRA without passage by the House because that opinion and subsequent cases, *see supra* pp. 9-10, confirm the substantive requirement that identical legislation must be passed by both houses of Congress before the legislation can be presented to the President. In any event, the violation appears to have been unintentional. And an intentional violation of the

bicameralism requirement, executed in reliance on the view that *Marshall Field* would protect the DRA from judicial scrutiny, would, like any intentional violation of the Constitution, lack good faith. It therefore would provide no basis for refusing to overrule *Marshall Field*.

Finally, notwithstanding the concern expressed in *Marshall Field* that allowing consideration of evidence aside from the enrolled bill would lead to "uncertainty" and "mischief," various states have for decades allowed consideration of evidence aside from the enrolled bill, with no indication of difficulty. *See*, *e.g.*, *State ex rel. Maloney v. McCartney*, 223 S.E.2d 607, 615 (W. Va. 1976) (presumption of validity accorded an enrolled bill may be "overcome by clear and convincing proof"), and *Charleston Nat'l Bank v. Fox*, 194 S.E. 4, 7 (W. Va. 1937) (citing *Osborn v. Staley*, 5 W. Va. 85 (1871)); *State ex rel. Sorlie v. Steen*, 212 N.W. 843, 845 (N.D. 1927) ("[T]he courts may go behind the enrolled bill and inquire into the legislative records to determine whether or not constitutional requirements have been observed.") (relying on *State v. Schultz*, 174 N.W. 81 (N.D. 1919)); *Ford v. Plum Bayou Rd. Improvement Dist*., 258 S.W. 613, 614 (Ark. 1924) (correctness of enrolled bill may be overcome by "clear and decisive" proof); *Ridgely v. Mayor & City Council of Balt*., 87 A. 909, 915 (Md. 1913) (presumption arising from proper authentication may be rebutted by clear and satisfactory evidence, "such as that furnished by the engrossed bills") (citing *Berry v. Drum Point R.R. Co.*, 41 Md. 463 (1875)). Any concern about disruption or mischief is contradicted by the small number of reported cases in these jurisdictions. The experience of these states thus undermines a key assumption underpinning the holding in *Marshall Field* and further illustrates that overruling the decision is now appropriate.

Accordingly, to the extent that the Court construes *Marshall Field* to establish a conclusive presumption in favor of the validity of enrolled bills, the Court should grant the petition and overrule *Marshall Field*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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