ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5232

PUBLIC CITIZEN,

Appellant,

v.

CLERK, UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA,

Appellee.

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

REPLY BRIEF FOR APPELLANT

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CONSTITUTIONAL AND STATUTORY PROVISIONS

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*Authorities on which we chiefly rely are marked with asterisks.

GLOSSARY

DRA	Deficit Reduction Act of 2005

SUMMARY OF ARGUMENT

The government does not dispute that the text of S. 1932 as engrossed in the Senate and transmitted to the House for consideration differed substantively from the version of S. 1932 transmitted to the President for his signature. The government seeks to divert the Court's attention from this dispositive fact in three ways.

First, relying on *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892), the government argues that this Court cannot look at the indisputable evidence at all. To make this argument, the government gives short shrift to the Supreme Court's much more recent description of *Marshall Field*. In its 1990 decision in *United States v. Munoz-Flores*, 495 U.S. 385 (1990), the Court explained that, under *Marshall Field*, courts cannot rely on the content of legislative journals to determine whether a law was constitutionally enacted because the duty to keep a journal does not bind Congress with respect to the enactment of laws. However, where a case concerns a constitutional requirement binding Congress with respect to the enactment of laws, "[*Marshall*] *Field* does not apply." *Id*. at 391 n.4.

Second, the government argues that the House may not have voted on the engrossed bill but perhaps voted on a version of the bill never engrossed and never sent to the House. This argument asks the Court to indulge in a fantasy. Under procedures established by statute and House rules and practice, the House could only have voted on the engrossed bill.

Third, the government argues that an "enrolled bill rule," which employs an irrebuttable presumption that bills sent by Congress to the President were passed in accordance with constitutional requirements, is a good idea as a matter of policy. Policy arguments, however, cannot override the bicameralism requirement of article I, section 7, clause 2. In any event, the certainty and stability that the government seeks are best achieved through rigorous enforcement of the Constitution's requirements for enacting legislation, not by overlooking those requirements when the Executive or Legislative Branch finds it convenient to do so.

The government also argues that, if enactment of the Deficit Reduction Act ("DRA") violates article I, section 7, the cure is to sever section 5101(a) and declare the remainder of the statute constitutional. Severing a provision, however, is appropriately considered only when a plaintiff successfully challenges specific provisions of a constitutionally enacted statute. This case does not involve an unconstitutional provision. The issue here is whether the DRA as a whole was enacted in accordance with constitutional requirements. If it was not, then none of the DRA has the force of law.

ARGUMENT

I. Enactment Of The DRA Violated The Bicameralism Requirement Of The United States Constitution.

A. *Marshall Field* Turned On Interpretation Of The Journal Clause.

1. The government (at 13) argues that, if "the very journals that the Constitution requires to be kept" cannot be used to impeach an enrolled bill, then nothing can. That argument shows a lack of understanding about the journal requirement. As the Supreme Court explained in *Marshall Field*, the Constitution's requirement for the keeping of journals is unrelated to its requirements for passing legislation. 143 U.S. at 671. The Constitution does not even require that journals include the text of bills. *Id*. For this reason, journals are not appropriate evidence to prove that text.

In *Marshall Field*, the plaintiffs had argued that journals offered the "best, if not conclusive, evidence" of the content of bills, *id*. at 672, and that the "clause of the constitution upon which the [plaintiffs] rest[ed] their contention that the act in question was never passed by congress" was the Journal Clause. *Id*. at 670. Under those circumstances, the fact that the Constitution's journal requirement is not tied to the requirements for the passage of legislation was fatal to the plaintiffs' claim. *See Munoz-Flores*, 495 U.S. at 391 n.4 (explaining that *Marshall Field* rejected the

argument that "whether a bill had passed must be determined by an examination of the journals"). By contrast, the evidence at issue here, the engrossed and enrolled bills, was created and printed pursuant to a statute establishing procedures for enacting legislation—precisely the connection between evidence and the legislative process that was absent in *Marshall Field*.

Arguing for a broad reading of *Marshall Field*, the government (at 14) points out that the *Marshall Field* plaintiffs presented exhibits in addition to the journals.[1] However, the opinion in *Marshall Field* 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, which reproduced relevant journals entries). As the Supreme Court explained, the plaintiffs "assumed in

[1]The *Marshall Field* Transcript of Record explains that, of five Congressional Record exhibits, two were used to show the undisputed passage of the Tariff Act of 1890 and one was used to show the later passage of a tobacco rebate bill. App. 93-97. The Transcript of Record does not describe the other two Congressional Record exhibits. (The government (at 14) states that there were six Congressional Record exhibits, but in fact there were five.)

argument that the object of [the Journal] clause was to make the journal the best, if not conclusive, evidence upon the issue as to whether a bill was, in fact, passed by the two houses of congress." 143 U.S. at 670; *see id*. ("The clause of the constitution upon which [plaintiffs] rest 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. . . .'"). For this reason, it is not surprising that the journals are the only evidence discussed in the Court's opinion.

Citing page 50 of Marshall Field's reply brief, the government more specifically argues (at 14 & n.1) that the *Marshall Field* plaintiffs pointed to an engrossed bill as evidence of their claim that the Tariff Act of 1890 had not passed both houses in the form in which it was sent to the President. The plaintiffs, however, did not claim that the engrossed bill contained the text of the bill that eventually passed both houses. The case turned on the conference report (set forth in the journals), and the engrossed bill was used to elucidate the meaning of certain amendments discussed in the conference report. As explained on pages 50 and 51 of Marshall Field's reply, the conference report (not the engrossed bill) was what passed both houses, and "[t]his conference report is shown by the journal of the house and the journal of the senate."

Moreover, as explained in our opening brief (at 31), 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, 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). Three years later, in 1893, the procedure of engrossing bills was adopted as a concurrent resolution; and, in 1947, it was enacted into law. *See* 1 U.S.C. § 106. 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 government (at 10) states that the "critical question" before the Court in *Marshall Field* was "the nature of the evidence upon which a court may act when the issue is made as to whether a bill" was passed by Congress. Yet the government attributes no significance to the fact that the "nature of the evidence" is different in this case than it was in *Marshall Field*. In fact, the evidence in this case—a bill engrossed in accordance with statute—did not exist in 1892. Accordingly, *Marshall Field* does not dictate the outcome here.

2. The government (at 15) states that the Supreme Court suggested in *United States National Bank of Oregon v. Independent Insurance Agents of America*, 508 U.S. 439 (1993), that 1 U.S.C. § 106 reflects "the same principle announced in *Marshall Field.*" If by "principle" the government is referring to an "enrolled bill

rule," *National Bank of Oregon* says nothing of the sort. In the portion of the opinion quoted by the government, the Court says 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. *National Bank of Or.*, 508 U.S. at 455 n.7. The Court does not address the relationship between § 106 and the principle that the government is advocating here—the so-called "enrolled bill rule." Indeed, the Court does not discuss the "enrolled bill rule." It states that *Marshall Field* concerned the "'nature of the evidence' the Court [may] consider" to determine whether a bill has passed Congress, *id*. (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*.

3. In *United States v. Munoz-Flores*, the Supreme Court described *Marshall Field* as follows:

> Appellants [in *Marshall Field*] had argued that the constitutional Clause providing that "[e]ach House shall keep a Journal of its proceedings" implied that whether a bill had passed must be determined by an examination of the journals. The Court rejected that interpretation of the Journal Clause, holding that the Constitution left it to Congress to determine how a bill is to be authenticated as having passed. In the absence of any constitutional requirement binding Congress, we stated that "[t]he respect due to coequal and independent departments" demands that the courts accept as passed all bills authenticated in the manner provided by Congress. Where, as here, a constitutional provision *is* implicated, *Field* does not apply.

495 U.S. at 391 n.4 (citations omitted; quoting *Marshall Field*, 143 U.S. at 670 (quoting U.S. Const. art. I, § 5) & 672). As discussed in our opening brief (at 27-29), this description of *Marshall Field* and the Supreme Court's rejection of the argument that *Marshall Field* precludes consideration of an article I, section 7, clause 1 challenge confirms that *Marshall Field*'s holding was tied to the plaintiffs' Journal Clause argument.

The government (at 19) quotes this passage from *Munoz-Flores* but spends little time considering what it means. Instead, the government focuses on the final clause of the penultimate sentence to suggest that the passage means that the courts must, without exception, assume that all bills signed and sent to the President satisfy all constitutional requirements. *Munoz-Flores* does not say that, however. It says that courts must make that assumption only "[i]n the absence of any constitutional requirement binding Congress." 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," the Supreme 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, when the Court referred to a "requirement binding Congress," it must have been referring to a requirement binding Congress with respect to the matter at issue—the valid enactment of a law. 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. The government offers no reading of *Munoz-Flores* that would allow the courts to consider clause 1 challenges but not clause 2 challenges.

Misconstruing Public Citizen's argument, the government states both that we "insist" that *Marshall Field* "applies only in situations in which a violation of article I, section 7 is *not* alleged" and that we concede that such a violation was alleged in *Marshall Field* itself. Gov't Br. 20 (emphasis in original) (characterizing Opening Br. 29). According to the government, our argument thus reads *Marshall Field* "out of existence." *Id*. The government is incorrect. Again, our point is that, according to the Supreme Court's own discussion in *Munoz-Flores*, *Marshall Field* was addressing a situation in which the plaintiffs' argument turned on a constitutional clause (the Journal Clause) that did not impose a "requirement binding Congress" with respect to the matter at issue—the valid enactment of laws. *Cf. Board of Comm'rs v. W.N. Coler & Co.*, 180 U.S. 506, 524 (1901) (distinguishing issue

presented from *Marshall Field*, which did not decide "effect upon legislation of the failure to enter upon the journals that which is expressly required by the state Constitution to be entered on them before an act can become a law"). Although the underlying claim in *Marshall Field* was that there was an article I, section 7, clause 2 violation, that point is not even mentioned in *Munoz-Flores*. Rather, *Munoz-Flores*, like *Marshall Field*, *see* Opening Br. 25 (quoting *Marshall Field*), describes the *Marshall Field* plaintiffs' argument in terms of article I, section 5—the Journal Clause. Thus, *Munoz-Flores* reflects that the Journal Clause issue was a predicate constitutional issue in *Marshall Field* and that, by deciding it against the plaintiffs, the Court never had to grapple with the alleged article I, section 7, clause 2 violation.[2]

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[2]The government (at 21 n.3) states that Public Citizen argued below that *Marshall Field* involved a Presentment Clause violation, not a bicameralism violation, and that we have now abandoned that argument. More accurately, below, the government generally equated bicameralism with article I, section 7, clause 2 and, in so doing, confused bicameralism with presentment. For example, the government stated that the "Bicameralism clause requires that 'before [a bill] becomes a law' it must be 'presented to the President.' The alleged conference committee bill that Marshall Field contended had passed both houses was not so presented." Def. Mem. 4 n.3. Public Citizen did argue below that, whereas this case involves a bicameralism issue, *Marshall Field* did not because, there, the parties agreed that both chambers had passed the same bill. *See* 143 U.S. at 669; *see also INS v. Chadha*, 462 U.S. 919, 949-51 (1983) (describing presentment and bicameralism). That point remains true and is another point distinguishing this case from *Marshall Field*. Moreover, that point is not a "waivable" argument but simply a fact supporting the argument, made at length in the opening brief, that *Marshall Field* does not dictate the outcome of this case. *See Nelson v. Adams*, 529 U.S. 460, 469 (2000).

The district court read *Munoz-Flores* to say that "*Marshall Field* does not apply when the Constitution itself sets with particularity a procedure to be followed in preparing a bill for passage—*but* carving out the ultimate act of bicameral passage from the universe of procedural irregularities beyond the reach of *Marshall Field*." App. 26. That "carve out," which the court conceded "is not entirely satisfying," *id*., simply cannot be found in *Munoz-Flores*.

4. According to the government (at 16), *Marshall Field* established an "enrolled bill rule" that the Court again applied in *Harwood v. Wentworth*, 162 U.S. 547 (1896), a challenge to a territorial statute. There, in an opinion by Justice Harlan, who also wrote *Marshall Field*, the Court posed the question in terms of the evidence before it: "Is it competent to show, by evidence derived from journals . . . , from the endorsement or minutes made by those clerks on the original bill . . . and from the recollection of the officers of each body" that provisions passed by both houses were omitted from a statute as enacted? *Id*. at 557-58. It then turned to *Marshall Field*, using lengthy quotations that both begin and end by addressing journals and that mention no other evidence. *Id*. at 558-60. The Court concluded that there was "no reason to modify the principles announced in [Marshall] Field" and therefore held that the statute, having been attested to by the presiding officers of the legislature and signed by the governor, was "unimpeachable by the recitals, or omissions of recitals,

in the journals of legislative proceedings, *which are not required by the fundamental law of the territory to be so kept as to show everything done* in both branches of the legislature while engaged in a consideration of bills presented for their action." *Id*. at 562 (emphasis added). This holding—that journals cannot be used to impeach legislation based on facts that journals are not required to record—is fully consistent with our reading of *Marshall Field* and with the Supreme Court's own interpretation of that precedent in *Munoz-Flores*.

The government also cites *Leser v. Garnett*, 258 U.S. 130 (1922). That case challenged the Nineteenth Amendment on the ground, among others, that two states allegedly violated their particular legislative procedures when they ratified the amendment. *Id*. at 137. After observing that the matter "may have been rendered immaterial" because two other states had since ratified the amendment, the Supreme Court cited *Marshall Field* and stated that the states' official notice to the U.S. Secretary of State that they had ratified the amendment "was conclusive upon him" on the question whether they had done so and thus conclusive upon the courts. *Id*. This application of *Marshall Field* is also consistent with our reading of that case and *Munoz-Flores*. Under those cases, courts will not look beyond Congress's authentication that legislation was validly enacted in circumstances where a "constitutional requirement binding Congress" with respect to the enactment of a law

is not implicated. *Munoz-Flores*, 495 U.S. at 391 n.4 (discussing *Marshall Field*). *Leser* involved analogous circumstances: The Constitution sets forth the two means by which the states may approve amendments—convention or legislative ratification—and allows Congress to propose which method the states will use. *See* U.S. Const., art. V. The Constitution does not, however, set forth procedures for the states' legislative ratification of proposed amendments. Thus, the challenge based on two states' compliance with their own legislative procedures for ratification did not implicate a requirement binding Congress or the Secretary of State with respect to the matter at issue (states' ratification); and the Court, therefore, accepted the certification that the amendment had been ratified. Furthermore, it is one thing to hold, under principles of federalism, that federal courts should not look behind the official notice from a State that it had complied with those procedures. It is quite another for a federal court to refuse to consider indisputable evidence that a constitutional requirement for enacting federal legislation has not been met.

The government also relies on three appellate court decisions from 1986 and 1988 addressing challenges to the Sixteenth Amendment. In those cases, individuals contended that the Sixteenth Amendment was not properly ratified in 1913 because non-substantive differences in capitalization and spelling existed in the versions included by some states in the instruments of ratification transmitted from the states

to the U.S. Secretary of State more than 70 years earlier. *United States v. Thomas*, 788 F.2d 1250, 1253 (7th Cir. 1986) (describing differences). Those challenges, based on "trivial inconsistencies," *United States v. Sitka*, 845 F.3d 43, 46 (2d Cir. 1988), are inapposite here. To begin with, under Article V, amendments must originate with Congress, not with the states. The appellate court decisions, which overlook the text of documents created to memorialize the states' ratification in favor of the only text forwarded to the states for a vote (Congress's proposed amendment), parallel our argument here, where we urge the Court to look to the only text forwarded to the House for a vote (the engrossed bill). Moreover, although the Sixteenth Amendment cases cite *Marshall Field*, they involve neither substantive differences nor an enrolled bill. Here, the variation is not an uppercase letter that no one contends affects the meaning of the legislation. It is a substantive difference valued by the Congressional Budget Office at $2 billion. *See* Opening Br. 6 n.3.[3]

[3]Because this case does not present the question whether a non-substantive variation between a bill passed by one house and the enrolled bill sent to the President constitutes an article I, section 7, clause 2 violation for which a judicial remedy is available, the Court need not address that question. However, substantial authorities suggest that the Constitution can tolerate variations that do not affect meaning, such as the "inconsequential" variations, *Thomas*, 788 F.2d at 1253, at issue in the Sixteenth Amendment cases. *See* 1 Singer, *Statutes and Statutory Construction* § 15.17, at 847 (6th ed. 2002) ("*Sutherland Statutory Construction*").

B. Indisputable Evidence Proves The Bicameralism Violation Here.

In 1947, Congress enacted 1 U.S.C. § 106, which 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." As explained in more detail in our Opening Brief (at 18), the only Senate bill on which members of the House may vote is an engrossed bill. Thus, when the House voted on February 1, 2006, to concur in the Senate Amendment to the House Amendment to S. 1932, it was voting on the engrossed (*i.e.*, printed) version, which states in bold letters on its first page "SENATE AMENDMENT TO HOUSE AMENDMENT," App. 55, and which had been sent from the Senate to be "dealt with by [the] House," as required by statute.

1. Although the bicameralism violation here is proved by a document printed pursuant to a statutory requirement, and although House procedures make plain that the only version of S. 1932 before the House that day was that engrossed bill, the government argues (at 26-27) that perhaps the House was not voting on the bill before it. Perhaps, the government suggests, the House voted on the text of the bill that the President actually signed—text that was never engrossed, never sent to the

House, and not before the House according to statute and the House "common law."[4] This argument has no basis in reality and should be rejected for the reasons discussed in the Opening Brief at 17-19.

In a related argument, the government contends (at 28-29) that reliance on the engrossed bill would create an "engrossed bill rule" that is no more principled than an "enrolled bill rule." That argument is refuted in the Opening Brief at 32-33. Here, we reiterate that an engrossed bill is reliable evidence of what passed the House because the bill was created *before* the chamber voted (*see* 1 U.S.C. § 106 ("printed copy shall be called the engrossed bill")), was not susceptible to alteration by the House, and was the only version of S. 1932 before the House that day. In contrast, the enrolled bill was created *after* the vote. The government argues that the engrossed bill should not be accorded a "conclusive presumption," but it offers nothing to refute that the engrossed bill is the bill that actually passed the House.

2. The government (at 25-27) goes to some length to argue that the Congressional Record is not sound evidence with which to prove a bicameralism violation. That argument is a red herring. The Congressional Record is used here to

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[4] *See* 7 *Deschler's Precedents of the U.S. House of Reps.* (House Doc. No. 94-661), ch. 24, § 12 at 4889, *available at* http://origin.www.gpoaccess.gov/precedents/deschler/browse.html. *Deschler's Precedents* "may be viewed as the 'common law,' so to speak, of the House, with much the same force and binding effect." *Deschler's Precedents*, Preface at vii.

establish the history of S. 1932—which chamber passed S. 1932 and when, and the content of S. 1932 as passed by the Senate on December 21, 2005, before it was engrossed and sent to the House. *See*, *e.g.*, Opening Br. 5, 6, 7, 9. These facts are offered as background and are not necessary to prove that the House did not pass the version of the bill signed by the President.

In addition, after citing the engrossed bill itself, our Opening Brief (at 7 & 16) cites the Congressional Record as further evidence of the content of S. 1932 passed by the House on February 1. However, no fair reading of our brief would suggest that we rely on the Congressional Record, as opposed to the engrossed bill printed by the Government Printing Office in accordance with 1 U.S.C. § 106 and 44 U.S.C. § 706. The text of the February 1 Congressional Record version of S. 1932 is discussed only in response to the government's speculation (offered with no explanation of how it could have happened) that the House may have passed text never put before it, rather than the text engrossed in the Senate. *See* Opening Br. 17-19.

In sum, the government does not dispute that the Congressional Record is proper authority to show the factual background leading up to the enrollment of S. 1932. And its discussion does not address, much less dispute, that the engrossed bill prepared in accordance with 1 U.S.C. § 106 and sent to the House for a vote was substantively different from the enrolled bill sent to and signed by the President.

Accordingly, the government's discussion about the Congressional Record is simply a distraction.

C. The Policy Justifications Offered By The Government Do Not Justify Acquiescence In A Bicameralism Violation.

1. The government suggests (at 22-23) that consideration of undisputed evidence of documents printed pursuant to statutory directive will create uncertainty and that the public should not be expected to compare documents to know whether a bill has become law. The government's concern is unwarranted for several reasons.

To begin with, no one is suggesting that the public is expected routinely to compare documents. Indeed, here, the discrepancy was not discovered through a random search by members of the public but was identified by the clerk who created it on the day that she did so and was acknowledged by the House Speaker's office before the President signed the enrolled bill. *See* App. 79, 80; *Watchdog's Suit Could Threaten Budget Cutbacks*, Wall St. J., Mar. 22, 2006, at A6 ("Scott Palmer, Mr. Hastert's chief of staff, said he had called a high-ranking White House official on behalf of Mr. Hastert" to ask for a delay in the signing ceremony "until the problem could be addressed by the House and Senate"). And if the Court agrees that the bicameralism violation cannot be tolerated, Congress and the President can be expected to correct such errors in the future, before purporting to enact the bill into

law. Procedures for making such corrections already exist. *See* 109th House Rules and Manual, House Doc. No. 108-241, § 565 at 296-97 (2005), *available at* www.gpoaccess.gov/hrm/browse_109.html. They were simply not used here.

In any event, any comparison would be limited to two or three documents: the final bills passed by each chamber and the enrolled bill signed by the President. Variations in prior versions of bills would not indicate an article I, section 7, clause 2 violation, but would be fodder, if anything, only for dispute about the meaning of the statute—a situation common to many cases presenting issues about congressional intent.

In addition, the specter of chaos is illusory because, in nearly all instances, the final version passed by the House and Senate will be the same. One chamber can vote on a bill passed by the other only after that bill has been engrossed. *See* Opening Br. 4, 18. Absent intentional wrongdoing or, as here, a clerk's error, the engrossed bill will be identical to the bill passed by the initiating chamber. Moreover, when legislation is passed through adoption of a conference report, it is hard to see how there could be a discrepancy between a House bill and a Senate bill because both chambers vote on the same document. *See* 109th House Rules and Manual § 559 at 290 (House Doc. No. 108-241). For this reason, the government's concern that bicameralism violations will lead to frequent litigation is unjustified.

The government and amicus CTIA also contend that the interests of those who benefit from various provisions of the DRA should factor into the constitutional analysis. There are, of course, many people pleased with the content of the DRA and many people displeased. And Congress is free to enact—in accordance with the requirements of article I, section 7—any provision contained in either the engrossed or enrolled version of the DRA. However, the outcome of this constitutional challenge cannot be determined by the preferences of people who would benefit from one provision or another.

Moreover, the Constitution makes no exception to the bicameralism requirement for omnibus legislation. Thus, to the extent that the government is suggesting that to invalidate the DRA would be a headache at this point in time, that suggestion is also irrelevant. A constitutionally invalid "statute" cannot be upheld simply because it has become inconvenient for the government to undo work that it has done in the interim. And the government's complaint is particularly inappropriate here, where the government was aware of the constitutional flaw before the bill was even signed into "law." *See Watchdog's Suit*, *supra* p. 13, at A6.

Finally, the government (at 22) says that it does not mean "to suggest that Congress may enact into law a bill that does not pass both houses." But in effect, the government is suggesting just that. In its view, once a bill has been enrolled and

signed by leaders of the House and Senate, the Constitution must yield to a need for certainty, even if the bill "[did] not pass both Houses." In essence, the government argues that a public interest in being able to rely on an attestation, even an attestation widely recognized as wrong, outweighs the interest in ensuring compliance with a mandatory constitutional requirement. In the circumstances of this case, that argument makes a mockery of the principle of bicameralism. Although Public Citizen agrees that both the public and the government need certainty with respect to the status of the DRA, that interest is best served by a speedy resolution of the constitutional question, not by side-stepping the question altogether.

2. To support its argument that an "enrolled bill rule" is a good idea, the Constitution notwithstanding, the government (at 25 n.5) cites a few state courts that follow such a rule. However, 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." *Sutherland Statutory Construction* § 15.2, at 816-18. In fact, 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)).

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 the enrolled bill doctrine 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 v. Kirby*, 788 S.W.2d 827, 830 (Tex. 1990) (relaxing rule to allow consideration of journals when presiding officers and attorney general stipulate that enrolled bill was not passed by legislature).

Furthermore, notwithstanding the government's repeated concern about "disruption" threatened by enforcing the bicameralism requirement, other states have for decades allowed consideration of evidence aside from the enrolled bill, with no indication of difficulty. For instance, West Virginia has since 1871 allowed the presumption of validity accorded an enrolled bill to be "overcome by clear and convincing proof." *State ex rel. Maloney v. McCartney*, 223 S.E.2d 607, 615 (W. Va.

1976); *Charleston Nat'l Bank v. Fox*, 194 S.E. 4, 7 (W. Va. 1937) (citing *Osborn v. Staley*, 5 W. Va. 85 (1871)). Yet there is no sign that the state has experienced any "uncertainty and instability," to use the government's words. Gov't Br. 22. Other states have long followed similar rules. *See*, *e.g.*, *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 and 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)). The government's picture of chaos is contradicted by the small number of reported cases in these jurisdictions.

Thus, to the extent that it is relevant, state court practice largely undermines the government's policy arguments.

II. The Constitutional Defect Cannot Be Cured By Severing Section 5101(a).

The government argues that, even if the DRA was not enacted in a constitutional manner, the constitutional defect can be cured by severing section 5101(a).[5] That argument misses the point of this case. *See* App. 12 n.9. Severability becomes a consideration only when a particular provision of an otherwise validly enacted law is unconstitutional. As the Supreme Court has stated in setting forth the standard for evaluating severability: "The 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). The government does not disagree. *See* Gov't Br. 32 ("the courts routinely sever the unconstitutional section from a statute").

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[5]Both the government (at 30 n.7) and amicus CTIA suggest (at 23-27) that if section 5101(a) is severable, Public Citizen lacks standing because it has not been harmed by section 5101(a). This suggestion merely restates the severability argument in different terms.

For example, in *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678 (1987), cited by the government (at 31), the Supreme Court considered whether a "constitutionally flawed provision" of the Airline Deregulation Act of 1978—a provision that provided for a one-house legislative veto of certain regulations promulgated to enforce the act—could be severed from the remainder of the statute. *Alaska Airlines*, 480 U.S. at 684. Looking to the statute's language, structure, and legislative history, the Court concluded that the unconstitutional provision could be severed and the remaining provisions left in effect. *Id*. at 697. Although, as the government points out, the legislative veto provision violated the bicameralism requirement, it was the exercise of authority under that single provision—not the circumstances of the statute's enactment—that gave rise to the violation in *Alaska Airlines*. *See also Chadha*, 462 U.S. at 959 (severing a one-house veto provision from a law enacted in accordance with the Constitution).

In contrast, the constitutional problem at issue here is not that a specific provision in the DRA is unconstitutional. Rather, the *entire* DRA is not law because the DRA was not enacted according to the requirements of the Constitution. No part can remain in effect because no part ever validly became law. *See also State ex rel. Grendell v. Davidson*, 716 N.E.2d 704, 709 (Ohio 1999) (holding that, in light of bicameralism requirement of state constitution, "[r]elators' contention that when the

House and Senate pass different versions of a bill, the nondiffering provisions contained in the differing versions become law, is consequently meritless.").[6]

Clinton v. City of New York, 524 U.S. 417 (1998), a case ignored by the government, makes clear that either all of a bill is signed into law by the President or none of it is. In *Clinton*, the Court considered a law that allowed the President, when he signed a bill, to excise any provision authorizing discretionary budget authority, direct spending, or limited tax benefits, leaving the rest of the statute "to have the same force and effect as [it] had when signed into law." *Id*. at 438. Noting that "the power to enact statutes may only 'be exercised in accord with a single, finely wrought and exhaustively considered, procedure,'" *id*. at 439-40 (*quoting Chadha*, 462 U.S. at 951), the Court held that the line-item veto procedure was unconstitutional. Although the provisions of the statutes that remained after the President exercised his line-item veto had been included in the bills that passed the House and Senate and were signed by the President, the Court found that those provisions—"truncated versions of two bills that passed both Houses of Congress"—were not "the product

[6]Amicus CTIA errs in stating that "Public Citizen has alleged that subsection 5101(a) of the DRA, which relates to certain Medicare payments—not the section of the DRA that raises court filing fees from $250 to $350— is unconstitutional." CTIA Br. 23. We do not allege that subsection 5101(a) is unconstitutional, but rather that the DRA as a whole is void because it was not enacted in accordance with the Constitution.

of the 'finely wrought' procedures that the Framers designed." *Id*. at 440. Pointing out that the line-item veto procedures authorized the President to create a law that had not passed Congress, the Court commented that "[s]omething that might be known as 'Public Law [] as modified by the President' . . . is surely not a document that may 'become a law' pursuant to the procedures designed by the Framers of Article I, § 7, of the Constitution." *Id*. at 448-49.

Similarly, here, a document consisting of the provisions of the DRA that the government thinks should be considered law, which might be known as "Public Law 109-171 as modified by a Senate clerk," is not a document that has become law pursuant to the procedures designed by the Framers of article I, section 7. Because no provision of the DRA was constitutionally enacted into law, there are no valid provisions of the act and thus none to be severed.

CONCLUSION

For the foregoing reasons, the decision of the district court should be reversed. The Court should hold that the DRA is invalid because it was not enacted in conformity with article I, section 7, clause 2 of the United States Constitution.

Respectfully submitted,

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RULE 32(a)(7)(C) CERTIFICATION

Using the word count provided on our word processing system, I hereby certify that the above brief was produced in WordPerfect using 14-point Times New Roman typeface and contains 6,619 words.

Allison M. Zieve

December 11, 2006

CERTIFICATE OF SERVICE

I, Allison M. Zieve, certify that on this 11th day of December, 2006, I served the foregoing Reply Brief for Appellant on all parties required to be served by causing two true and correct copies thereof to be sent to counsel at each of the following addresses:

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