No. 07-492

In the Supreme Court of the United States

ONESIMPLELOAN, ET AL., PETITIONERS

v.

MARGARET SPELLINGS, SECRETARY OF EDUCATION, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether, when an enrolled bill has been signed by the presiding officers of both Houses of Congress and by the President of the United States, its authentication as a bill that passed Congress is "complete and unimpeachable." *Marshall Field & Co.* v. *Clark*, 143 U.S. 649, 672 (1892).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 496 F.3d 197. The opinions of the district court (Pet. App. 27a-34a, 35a-57a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 19, 2007. The petition for a writ of certiorari was filed on October 10, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners allege that the Deficit Reduction Act of 2005 (the Act), Pub. L. No. 109-171, 120 Stat. 4, did not pass both Houses of Congress in identical form and that its enactment thus did not comport with the bicameral-

passage requirement of Article I, Section 7 of the Constitution. The district court dismissed the complaint and the court of appeals affirmed.

1. To become a law, a bill must be passed by both the House of Representatives and the Senate, and must be signed by the President. U.S. Const. Art. I, § 7, Cl. 2. Congress has specified procedures for the enactment of legislation. 1 U.S.C. 106. "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." *Ibid.* "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." *Ibid.* "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." *Ibid.*

2. Petitioners allege that the enactment of the Deficit Reduction Act in the fall of 2005 did not comport with the bicameral-passage requirement of Article I, Section 7 of the Constitution. Pet. App. 3a-4a. The Act has ten titles addressing a wide array of subjects. See 120 Stat. 4. It amended a variety of statutes, including the Federal Deposit Insurance Act, 12 U.S.C. 1811 *et seq.*, the Communications Act of 1934, 47 U.S.C. 151 *et seq.*, and the Social Security Act, 42 U.S.C. 301 *et seq.* See 120 Stat. 4. Among other things, it made extensive changes to the Medicaid and Medicare laws, provided relief for victims of Hurricane Katrina, and created a program

through which households may obtain coupons to defray the cost of digital-to-analog converter boxes for their televisions. Pet. App. 4a. Petitioners allege that they were injured by the Act's provisions affecting the marketing and financing of student loans. *Id.* at 2a-3a.

According to the facts alleged in the complaint—which have not been admitted—the House and Senate passed different versions of a budget bill referred to as S. 1932, 109th Cong., 1st Sess. (2005). Pet. App. 6a. The legislation was sent to a conference committee, which produced a conference report that failed to pass the Senate. *Ibid.* The Senate then passed an amended version of S. 1932. *Ibid.* In the process of engrossing the bill, a Senate clerk allegedly made an error affecting a provision that authorizes Medicare reimbursement for the rental of certain durable medical equipment, changing the number of months for which reimbursement was available from 13 to 36. *Id.* at 6a-7a. The House of Representatives then allegedly voted on the engrossed bill, including the erroneous duration figure, before returning the bill to the Senate for enrollment. *Id.* at 7a. The Senate clerk allegedly recognized the transcription error in the engrossed bill and included the 13-month figure in the enrolled bill. *Ibid.*[1]

There is no dispute that the "enrolled" version of the Act was signed by the Speaker of the House of Representatives and the President pro tempore of the Senate,

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[1] Petitioners incorrectly assert (*e.g.*, Pet. 17) that the allegations of the complaint are undisputed. The government has neither admitted nor denied the relevant allegations of the complaint. Instead, it objected to petitioners' statement of undisputed facts on the ground that the enrolled bill rule precludes any inquiry into the facts at issue here. Gov't C.A. Br. 4 n.* (citing R. Doc. 40, at 3-5).

transmitted to the President, and signed by the President. See Pet. App. 7a-8a, 16a.

3. The district court dismissed petitioners' complaint. Pet. App. 27a-34a, 35a-57a. It held that petitioners' challenge to the Act is foreclosed by the enrolled bill rule of *Marshall Field & Co.* v. *Clark*, 143 U.S. 649 (1892). Pet. App. 56a-57a. In the alternative, the court held that petitioners lack standing because their alleged injury might not be redressed by a favorable decision. *Id.* at 31a-34a, 55a-56a.

4. The court of appeals affirmed. Pet. App. 1a-26a. "Agreeing with the recent decision of the United States Court of Appeals for the District of Columbia in *Public Citizen v. United States District Court for the District of Columbia*, 486 F.3d 1342 (D.C. Cir. 2007)," the court "conclude[d] that the holding of *Marshall Field* is directly on point." *Id.* at 2a. The court explained that, under *Marshall Field*, "'it is not competent' for a plaintiff alleging that a statute is void because Congress did not pass the exact text appearing in an authenticated enrolled bill 'to show, from the journals of either house, from the reports of committees, or from other documents printed by authority of Congress,' that the bills actually passed by the two houses of Congress differed from the enrolled bill." *Id.* at 12a-13a (quoting *Marshall Field*, 143 U.S. at 680). Instead, the court determined, *Marshall Field* "set forth 'a clear rule' requiring the judicial branch to treat an enrolled bill signed by the presiding officers of the House and Senate as conclusive evidence of the text passed by both houses of Congress." *Id.* at 12a (quoting *Public Citizen* v. *United States District Court for the District of Columbia*, 486 F.3d 1342, 1350 (D.C. Cir. 2007), cert. denied, No. 07-141 (Dec. 10, 2007)).

The court of appeals also held that it could consider the enrolled bill rule without first addressing petitioners' standing, because the enrolled bill rule is a nonmerits threshold rule that is "designed not merely to defeat the asserted claims, but to preclude judicial inquiry." Pet. App. 14a (quoting *Tenet* v. *Doe*, 544 U.S. 1, 6 n.4 (2005)). Accordingly, the court of appeals did not review the district court's ruling on petitioners' standing. See *id.* at 14a-16a.

ARGUMENT

1. The court of appeals correctly held that petitioners' challenge to the Deficit Reduction Act is foreclosed by the enrolled bill rule of *Marshall Field & Co.* v. *Clark*, 143 U.S. 649 (1892). The other court of appeals, and all five district courts, that have addressed the issue with respect to the Act have unanimously reached the same conclusion. See *Public Citizen* v. *Clerk, United States District Court for the District of Columbia*, 451 F. Supp. 2d 109 (D.D.C. 2006), aff'd, 486 F.3d 1342 (D.C. Cir. 2007), cert. denied, No. 07-141 (Dec. 10, 2007); *Zeigler* v. *Gonzales*, No. 06-0080-CG-M, 2007 WL 1875945 (S.D. Ala. June 28, 2007); *Conyers* v. *Bush*, No. 06-11972, 2006 WL 3834224 (E.D. Mich. Nov. 6, 2006); *California Dep't of Soc. Servs.* v. *Leavitt*, 444 F. Supp. 2d 1088 (E.D. Cal. 2006); Pet. App. 35a-57a. Although petitioner urges this Court to overrule its century-old precedent, the vital public policy and separation of powers concerns that animated *Marshall Field* are as powerful today as when *Marshall Field* was decided.

This Court recently denied review of the same question in *Public Citizen*, No. 07-141 (Dec. 10, 2007). There is no reason for a different result in this case, especially considering that the decision below expressly tracks the

reasoning of the District of Columbia Circuit in *Public Citizen*. See, *e.g.*, Pet. App. 2a, 16a.

a. Petitioners do not dispute that the enrolled bill was signed by the presiding officers of the Senate and the House of Representatives before transmittal to the President. See Pet. App. 16a. Under *Marshall Field*, that resolves the inquiry: petitioners may not seek to prove, through extrinsic evidence, that the enrolled bill was not, in fact, identical to the bill passed by both chambers.

In *Marshall Field*, several importers challenged duties that had been assessed under the Act of Oct. 1, 1890, ch. 1244, 26 Stat. 567. The importers argued that the act omitted a provision that had been passed by Congress, and that it therefore was not a valid law. *Marshall Field*, 143 U.S. at 662-669.

This Court observed that "[t]here is no authority in the presiding officers of the House of Representatives and the Senate to attest by their signatures, nor in the President to approve * * * any bill not passed by Congress." *Marshall Field*, 143 U.S. at 669. The Court stressed, however, that the question before it was "the nature of the evidence upon which a court may act when the issue is made as to whether a bill, originating in the House of Representatives or the Senate, and asserted to have become a law, was or was not passed by Congress." *Id.* at 670. The Court held that principles of interbranch comity require the Judicial Branch to accept the signatures of the presiding officers of Congress and the President of the United States on the enrolled bill as "complete and unimpeachable" evidence that the bill passed Congress. *Id.* at 672.

The *Marshall Field* Court explained that "[t]he signing by the Speaker of the House of Representatives, and

by the President of the Senate, in open session, of an enrolled bill, is an official attestation by the two houses of such bill as one that has passed Congress." 143 U.S. at 672. Such a bill "carries on its face a solemn assurance by the legislative and executive departments of the government, charged, respectively, with the duty of enacting and executing the laws, that it was passed by Congress." *Ibid.* Accordingly, "[t]he respect due to coequal and independent departments requires the judicial department to act upon that assurance, and to accept, as having passed Congress, all bills authenticated in the manner stated." *Ibid.*

This Court emphasized "the consequences that must result if this court should feel obliged, in fidelity to the Constitution, to declare that an enrolled bill, on which depend public and private interests of vast magnitude, and which has been authenticated by the signatures of the presiding officers of the two houses of Congress, and by the approval of the President, and been deposited in the public archives, *as an act of Congress*, was not in fact passed by the House of Representatives and the Senate, and therefore did not become a law." *Marshall Field*, 143 U.S. at 670. "Better, far better, that a provision should occasionally find its way into the statute through mistake, or even fraud, than that every act * * * should at any and all times be liable to be put in issue and impeached by the journals, loose papers of the legislature and parole evidence. Such a state of uncertainty in the statute laws of the land would lead to mischiefs absolutely intolerable." *Id.* at 675 (quoting *Sherman* v. *Story*, 30 Cal. 253, 275 (1866)).

b. Like the *Public Citizen* petitioner, the petitioners here contend (Pet. 17) that *Marshall Field* restricts the use of only one form of evidence—the journals kept by

Congress pursuant to the Journals Clause—and allows the impeachment of an authenticated enrolled bill through other forms of extrinsic evidence, such as an engrossed bill. As the court of appeals explained, however, "*Marshall Field*'s plain language and justification cannot be read to create a rule of dismissal limited to the claims of plaintiffs who rely primarily upon journals to rebut an attested enrolled bill." Pet. App. 16a (quoting *Public Citizen*, 486 F.3d at 1351). The *Marshall Field* Court held broadly that the signatures of the presiding officers of Congress and the President on an enrolled bill are "complete and unimpeachable" evidence that the bill passed Congress. 143 U.S. at 672. And in *Marshall Field* itself, the plaintiffs relied not only on congressional journals, but also on "reports of committees of each house, reports of committees of conference, and other papers printed by authority of Congress." *Id.* at 669.

Indeed, it would make "little sense" to exclude "the legislative journals that the Constitution requires, but leav[e] the door open to the use of documents of some lesser stature under the law—that would elevate other evidence over evidence that the Constitution requires Congress to maintain." *Public Citizen*, 451 F. Supp. 2d at 119. Moreover, as the court of appeals explained, neither the *Marshall Field* Court's "concern for stability nor its attentiveness to the constitutional doctrine of separation of powers 'applies solely to impeachment by journals.'" Pet. App. 17a (quoting *Public Citizen,* 486 F.3d at 1351). "Permitting litigants to impeach the text of an enrolled bill by * * * congressional documents" other than journals "would likewise create 'uncertainty in the statute laws'" and "require courts to conduct inquiries that impinge upon the 'respect due to coequal and independent departments.'" *Ibid.* (quoting *Mar-*

shall Field, 143 U.S. at 672, 675, and *Sherman* v. *Story*, 30 Cal. 253, 275 (1866)).

c. As in *Public Citizen*, petitioners essentially argue (Pet. 10-17) that a footnote in *United States* v. *Munoz-Flores*, 495 U.S. 385 (1990), cabined *Marshall Field* to such an extent that *Marshall Field* no longer applies to bicameralism challenges (such as the bicameralism challenge in *Marshall Field* itself). That is incorrect.

Munoz-Flores did not involve the question whether a bill had passed both Houses of Congress. Rather, the question was whether a provision that unquestionably had passed Congress was a bill for raising revenue. *Munoz-Flores*, 495 U.S. at 387-388. If so, the Constitution required that the provision originate in the House of Representatives. U.S. Const. Art. I, § 7, Cl. 1. The Court found "consideration of [the] origination question 'unnecessary'" because it determined that the challenged bill "was not one for raising revenue." *Munoz-Flores,* 495 U.S. at 401 (quoting *Twin City Bank* v. *Nebeker*, 167 U.S. 196, 203 (1897)).

In a footnote, the Court also rejected the contention that the Origination Clause question was non-justiciable under *Marshall Field*. *Munoz-Flores*, 495 U.S. at 391 n.4. In doing so, the Court stated that *Marshall Field* is inapplicable "[w]here * * * a constitutional provision *is* implicated." *Id*. at 391-392 n.4. While the precise meaning of that sentence is unclear, the court of appeals correctly explained that the footnote is clear on one point: "the Court did not intend to change the fundamental parameters of the enrolled bill rule established in *Marshall Field*—namely, that courts must 'accept, as having passed Congress, all bills authenticated' by the signatures of the presiding officers of the House and Senate." Pet. App. 22a (quoting *Marshall Field*, 143

U.S. at 672). Rather, the footnote in *Munoz-Flores* correctly explained that *Marshall Field* "concerned 'the nature of the evidence' the Court would consider in determining whether a bill had actually passed Congress," and 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." 495 U.S. at 391-392 n.4 (quoting *Marshall Field*, 143 U.S. at 670, 672). Thus, "[w]hatever plausible alternative interpretations may be supported by the language of the 'oblique footnote,' [petitioners'] reading is not one of them." Pet. App. 22a (quoting *Public Citizen*, 486 F.3d at 1354-1355).

Three years after *Munoz-Flores*, this Court confirmed that the *Marshall Field* doctrine concerns "'the nature of the evidence' the Court [may] consider in determining whether a bill had actually passed Congress," and that, under *Marshall Field*, "a law consists of the 'enrolled bill,' signed in open session by the Speaker of the House of Representatives and the President of the Senate." *United States Nat'l Bank* v. *Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 n.7 (1993) (quoting *Munoz-Flores*, 495 U.S. at 391 n.4, and *Marshall Field*, 143 U.S. at 672). That is fatal to petitioners' contention that *Marshall Field* no longer stands for that proposition.[2]

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[2] Petitioners' reliance (Pet. 19-20) on *United States* v. *Ballin*, 144 U.S. 1 (1892), is misplaced. *Ballin* did not involve a bicameralism challenge. Instead, the *Ballin* Court *rejected* the contention that a bill had not been lawfully enacted because the House of Representatives had allegedly lacked a quorum to vote on the bill. The Court "assum[ed], without deciding," that it could consult the House journal, and it found the journal's recording of votes conclusive, and not subject to challenge, on the question whether a quorum had been present. *Id.* at 4. Nothing

d. As in *Public Citizen*, petitioners (Pet. 27-30) eventually get to the heart of the matter by arguing that *Marshall Field* should be overruled, suggesting that the concerns that underlie the enrolled bill rule have lost force over time. Circumstances have not, however, changed meaningfully.

i. Now as when *Marshall Field* was decided, clerical errors may occur, but the task of comparing and reconciling the bills passed by each House must be done by Congress itself in the process of enrolling a bill, before presenting it to the President. Once that process is complete, the public is entitled to rely on the attestations of the presiding officers of Congress and the President as unimpeachable assurance that the measure was duly enacted.

Although petitioners' argument (Pet. 28) rests on the "change in information technology since the 19th Century," their complaint is premised on the notion that "even engrossed bills printed today are subject to error or mishandling." Pet. App. 23a-24a. "Indeed, such advances may provide new ways to alter a bill's text during the legislative process." *Id.* at 24a. As the House Parliamentarian has explained, the engrossing process can be a "detailed and complicated process," requiring the synthesis of a large number of amendments. Charles W. Johnson, U.S. House of Representatives, *How Our Laws Are Made*, H.R. Doc. No. 93, 108th Cong., 1st Sess. 37 (2003).

Petitioners' own arguments underscore the continuing need for the enrolled bill rule. While petitioners (Pet. 5 n.5) are somewhat vague in this Court concerning

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in *Ballin*'s assumption that the Court could consider journals to refute a different type of challenge casts doubt on *Marshall Field*, which was decided on the same day as *Ballin*.

the portions of the *Congressional Record* on which they rely, the *Congressional Record* indicates only that the House voted on H.R. Res. 653, 109th Cong., 2d Sess. (2006). The *Congressional Record* does not specify that H.R. Res. 653 is the engrossed bill containing a clerical error that petitioners presume it to be. Gov't C.A. Br. 34-35. While the House should have voted on the engrossed bill, see 1 U.S.C. 106, the whole point of petitioners' case is that Congress allegedly failed to follow required procedures.

As in *Public Citizen*, therefore, petitioners are essentially asking this Court to "replac[e] the 'enrolled bill rule' as a practical matter with an 'engrossed bill rule.'" 451 F. Supp. 2d at 128. An enrolled bill, however, has weightier indicia of accuracy than an engrossed bill, because it is signed by the presiding officer of each House of Congress, as opposed to a clerk. See 1 U.S.C. 106. In any event, there is little sense in overruling a century-old precedent in order to replace the enrolled bill rule with an engrossed bill rule.

The reliance interests on this bill alone—not to mention the thousands of bills enacted since this Court decided *Marshall Field* 115 years ago—are enormous. The Act has ten titles addressing a wide array of subjects. See 120 Stat. 4. Among other things, it made extensive changes to the Medicaid and Medicare laws, provided relief for victims of Hurricane Katrina, and created a program through which households may obtain coupons to defray the cost of digital-to-analog converter boxes for their televisions. Pet. App. 5a. "One need only look to the breadth of the [Act] to understand the 'vast magnitude' of 'public and private interests' which depend upon the certainty of statutes." *Public Citizen*,

486 F.3d at 1355 (quoting *Marshall Field*, 143 U.S. at 670).

ii. The "separation-of-powers concerns at the forefront of *Marshall Field*" are likewise "undiminished by the passage of time." Pet. App. 25a. "[T]oday, no less than in 1892, the spectacle of courts directing legislative authentication procedures and otherwise meddling in the inner workings of Congress 'disregards that coequal position . . . of the three [branches] of government.'" *Public Citizen*, 486 F.3d at 1355 (quoting *Marshall Field*, 143 U.S. at 676).

As the court of appeals observed, petitioners' allegation that the presiding officers of Congress conspired to violate the Constitution (Pet. 5-6, 28) only underscores the separation-of-powers concerns inherent in their position. Pet. App. 25a. Petitioners would have the Judiciary "conduct threshold inquiries into how likely it was for a particular set of legislative and executive actors to conspire in alleged constitutional violations." *Ibid.* Nor does petitioners' conspiracy theory distinguish *Marshall Field*. The *Marshall Field* Court itself warned that "[j]udicial action based upon . . . a suggestion [of deliberate conspiracy] is forbidden by the respect due to a co-ordinate branch of the government." *Ibid.* (brackets in original; quoting *Marshall Field*, 143 U.S. at 673).

e. Finally, while the overruling of *Marshall Field* would be extremely unsettling, it is not clear how often this issue arises. With *Marshall Field* in place, the issue appears to have recurred only rarely, which provides another reason for not overruling such a well-settled precedent. If *Marshall Field* were overruled, however, litigants would have a strong incentive to scour the *Congressional Record* for evidence of previously unnoticed clerical errors. If few such errors were found, that

would underscore the absence of a compelling reason to grant review in order to consider overruling *Marshall Field*. If numerous such errors were found, that would underscore the enormous reliance interests that the *Marshall Field* rule protects. Either way, *Marshall Field* should not be overruled.

2. Petitioners also contend (Pet. 31-35) that this Court should review the district court's standing rulings. The court of appeals did not reach the standing question. Instead, that court concluded, correctly, that it could reach the enrolled bill rule question before turning to standing because the enrolled bill rule is a non-merits threshold rule designed to preclude judicial inquiry. Pet. App. 14a-16a; see *Sinochem Int'l Co.* v. *Malaysia Int'l Shipping Corp.*, 127 S. Ct. 1184, 1191-1194 (2007); *Public Citizen*, 486 F.3d at 1349. Thus, there is no reason for this Court to reach that question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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