Nos. 06-2770-CV, 06-2994-CV, and 06-3770-CV

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

OneSimpleLoan, *et al.*,

Plaintiffs-Appellants,

v.

U.S. Secretary of Education, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF *AMICI CURIAE* ON BEHALF OF REPRESENTATIVES HENRY A. WAXMAN, NANCY PELOSI, JOHN D. DINGELL, CHARLES B. RANGEL, PETE STARK, GEORGE MILLER, JAMES L. OBERSTAR, LOUISE MCINTOSH SLAUGHTER, SHERROD BROWN, BENNIE G. THOMPSON IN SUPPORT OF ONESIMPLELOAN AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the undersigned counsel for Amici Curiae states that there is no parent corporation, or publicly held company that owns 10% or more of the stock, of any of the Amici herein.

NATIONAL HEALTH LAW PROGRAM

By: _____
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TABLE OF AUTHORITIES

The parties have consented to the filing of this brief.

The *Amici Curiae* are elected members of the United States House of Representatives. Each has taken an oath to "preserve, protect, and defend the Constitution of the United States," as have all other members of Congress and the President.

One of the most important responsibilities of the *amici* is to represent the will of the people by voting on legislation that is brought before them. *Amici* and the other members of the House of Representatives voted on a version of the Deficit Reduction Act of 2005, S. 1932, on February 1, 2006. S. 1932 is comprehensive legislation, affecting a number of government programs, from housing and education to Medicare and Medicaid, and including significant appropriations. The version of S. 1932 that was passed by the Senate and signed by the President on February 8, 2006 is different from the version that passed the House.

Representative Henry A. Waxman (CA) is the Ranking Minority Member of the House Committee on Government Reform. Representative Nancy Pelosi (CA) is the Minority Leader of the House of Representatives. Representative John D. Dingell (MI) is the Ranking Minority Member of the House Committee on Energy and Commerce. Representative Charles B. Rangel (NY) is the Ranking Minority Member of the House Committee on Ways and Means.

Representative Pete Stark (CA) is the Ranking Minority Member of the House Ways and Means Health Subcommittee. Representative George Miller (NY) is the Ranking Minority Member of the House Committee on Education and the Workforce. Representative James L. Oberstar (MN) is the Ranking Minority Member of the House Committee on Transportation and Infrastructure. Representative Louise McIntosh Slaughter (NY) is the Ranking Minority Member of the House Committee on Rules. Representative Sherrod Brown (OH) is the Ranking Minority Member of the House Energy and Commerce Health Subcommittee. Representative Bennie G. Thompson (MS) is the Ranking Minority Member of the House Committee on Homeland Security.

SUMMARY OF ARGUMENT

The House and Senate passed different versions of S. 1932. The version of the bill signed by the President differed from the version passed by the House. The Republican leadership of the House and Senate knew, before the President signed the enrolled bill, that the enrolled version did not reflect what the House had passed. The President was aware that the legislation presented to him had not been passed by the House; yet, he signed it as the Deficit Reduction Act of 2005. The process nullified the votes of the *amici*, as they were never presented with an opportunity to vote one way or the other on the version of the bill that is now purportedly the law of the land.

There are recognized methods of resolving differences when the House and Senate pass different versions of a bill. These accepted protocols were not used when the House and Senate passed different versions of S. 1932 and the President signed a version that was not passed by the House.

"A bill cannot become a law of the land until it has been approved in identical form by both Houses of Congress." Charles W. Johnson, *How Our Laws Are Made*, H.R. Doc. No. 108-93, at 50 (2003). The Deficit Reduction Act of 2005 violates Article I, § 7 of the United States Constitution, which requires both houses of Congress to pass the same legislation before it can be signed into law by the President. The Deficit Reduction Act of 2005 also violates Article I, § 9 of the United States Constitution, which provides that money may be drawn from the Treasury only in consequence of appropriations made by the laws of Congress.

STATEMENT OF THE FACTS

The "facts are already well known." U.S. House of Representatives Committee on Government Reform, Adverse Report together with Additional Views to accompany H. Res. 752 at 2 (May 4, 2006) (Exhibit A, hereto). We will summarize them here.

The House of Representatives and the Senate considered the Deficit Reduction Act of 2005, S. 1932, during the fall of 2005. The two chambers

passed different versions of the legislation, so a House and Senate conference committee was formed to reconcile the differences.

The conference committee made a number of changes to the legislation. Among other things, the committee addressed Medicare payments for durable medical equipment (DME) and oxygen equipment. Existing law allowed payment for an unlimited period of time. To reduce Medicare spending, the conferees tentatively agreed to reduce the duration of Medicare payments to 13 months, after which the responsibility for payment would pass to the Medicare beneficiary. Senator George Voinovich and Representative David Hobson objected to the inclusion of oxygen equipment in the payment limitation. *See* Jeffrey Young & Patrick O'Connor, *Small Typo, Big Headache,* The Hill, Feb. 9, 2006. The conferees agreed to reduce the duration of Medicare payments for DME to 13 months and provided that Medicare would pay for oxygen equipment for 36 months.

On December 19, 2005, the conference report was submitted to the House and Senate for a vote. *See* H.R. Conf. Rep. 109-362 (2005), *reprinted in* 151 Cong. Rec. H12641 *et seq.* (Dec. 19, 2005). The House passed the conference report by a vote of 212 to 206 (Roll Call No. 670); 151 Cong. Rec. H12276-77 (Dec. 19, 2005). All of the *amici* participated in the consideration of the conference report and voted.

The Senate considered the conference report on December 19, 20, and 21. A point of order was raised against some sections of the report on the ground that they violated section 313(b)(1)(A) of the Congressional Budget Act of 1974, 2 U.S.C. § 644 (2000). *See* 151 Cong. Rec. S14204-05 (Dec. 21, 2005). Commonly called the "Byrd Rule," this provision prohibits the Senate from considering extraneous matter as part of a reconciliation bill, resolution, or conference report. A motion was made to waive these points of order, but it failed (Record Vote No. 362). *Id.* at S14205. Thereafter, the Presiding Officer of the Senate sustained the Byrd Rule point of order, striking three provisions from the conference report. *Id.* Thus, the Senate rejected the conference report.

Immediately thereafter, as required by the Byrd Rule, the Senate considered and voted on S. 1932, as amended without the three stricken provisions. *See* 151 Cong. Rec. S14211 (Dec. 21, 2005). The measure passed by a 51-50 vote, with the Vice President casting the tie-breaking vote (Record Vote No 363). *See* 151 Cong. Rec. D1331 (Dec. 21, 2005); *see* 151 Cong. Rec. S14337, S14344, S14360 (Dec. 22, 2005) (Congressional Record print).

The House and Senate had passed different versions of S. 1932. As a result, the Senate was required to engross, or transcribe, the text of the bill. The engrossed version is the official copy of the bill as passed by the Senate, which must be sent to and acted on by the House. *See* 7 Lewis Deschler, *Deschler's*

Precedents of the United States House of Representatives, ch. 24, § 12, H. Doc. No. 94-661, at 4889 (2d Sess. 1976).

As widely reported, the Senate clerk made an error in transcribing the bill that resulted in a significant, substantive change to the legislation. The change amended section 5101(a)(1) of the Deficit Reduction Act to extend the duration of Medicare payments for *all* DME to 36 months. According to the Congressional Budget Office, this change increased the estimated budgetary outlay by about $2 billion over five years. *See* Letter from Donald B. Marron, Acting Director, Congressional Budget Office, to Honorable John M. Spratt, Jr., Ranking Member, Committee on the Budget, U.S. House of Representatives (Feb. 13, 2006) (Exhibit B, hereto). The Senate clerk realized the error and informed the House leadership before the final House action was scheduled to occur.

Rather than address the difference, the House leadership knowingly sent S. 1932, with the error, to the floor for a vote. On February 1, 2006, the House agreed to the bill it had received from the Senate clerk by a vote of 216-214 (Roll Call No. 4). *See* 152 Cong. Rec. H68 (Feb. 1, 2006) (regarding H. Res. 653). As passed by the House of Representatives, the engrossed version of S. 1932 extended the duration of Medicare payments for all DME to 36 months. *See* 152 Cong. Rec. H69, H 77 (Feb. 1, 2006). All of the *amici* participated in consideration of the bill and voted.

Because the legislation had originated in the Senate, it had to return to the Senate to be transmitted to the President for signing. The Senate clerk then made a second, substantive change in the legislation, revising the House-passed text to reflect the language passed in the Senate, thereby restoring the 13-month period for coverage of DME other than oxygen equipment. *See* Congressional Q. Daily, Feb. 10, 2006, at 5.

The Speaker of the House and the President *pro tempore* of the Senate signed an attestation that the legislation had been passed in identical form by both the House and the Senate. On February, 8, 2006, the President signed the version of S. 1932 that had passed the Senate (authorizing Medicare payment of oxygen equipment for 36 months and all other DME for 13 months).

Later that evening, the Senate passed a resolution, S. Con. Res. 80, 109th Cong. (2nd Sess. 2006), which "deemed" the version of the bill signed by the President to reflect the intent of the Congress. *See* 152 Cong. Rec. S869-70 (Feb. 8, 2006). The House received the message from the Senate stating that the Senate had agreed to S. Con. Res. 80 and asking the House to agree to it as well. *Id.* at H202-05. However, the House did not take up the measure.

The Republican leadership knew that their respective chambers had not passed identical versions of the Deficit Reduction Act before the President signed it. According to reports published after the fact, Speaker Dennis Hastert asked

the President to delay signing the bill to allow the House and Senate time to take further action. When the Speaker and Senate Majority Leader went to the White House on February 8th, they expected only a "mock ceremony," not a real signing. David Rogers, *Politics & Economics: Watchdogs' Suit Could Threaten Budget Cutbacks*, Wall St. J., Mar. 22, 2006, at A-6. However, knowing of the discrepancy, the President signed S. 1932 into law without allowing time for any action by the House and Senate to address the discrepancy. U.S. House of Representatives Committee on Government Reform, Adverse Report together with Additional Views to accompany H. Res. 752 at 2 (Exhibit A, hereto).

ARGUMENT

I. The manner of signing the Deficit Reduction Act of 2005 violated the House Rules and the Constitution itself.

Discrepancies in the legislation passed by the houses of Congress are not unprecedented. They are recorded as having occurred as early as March 13, 1800 and as recently as July 12, 2005. Yet, when such differences occur, they are handled by sending the legislation back to the appropriate chamber for the mistake to be corrected.

The House Rules provide explicit directions and numerous examples of the required approach:

> If messengers commit an error in delivering their message, they may be admitted or called in to correct their message. 4 Grey, 41. This is the long-standing rule, as exemplified by the Rules Manual itself. For

example, on March 13, 1800, the Senate, having made two amendments to a bill from the House, their Secretary, by mistake, delivered only one, which being inadmissible by itself, that House disagreed, and notified the Senate of their disagreement. This produced a discovery of the mistake. The Secretary was sent to the other House to correct this mistake, the correction was received, and the two amendments acted on de novo.

A request of one House for the return of a bill messaged to the other, or the request of one House to correct an error in its message to the other, may qualify as privileged in the House or may be disposed of by unanimous consent (III, 2613; V, 6605; Deschler, ch. 3, Sec. 2; Oct. 1, 1982, p. 27172; May 20, 1996, p. 11809). For example: (1) the House by unanimous consent agreed to a request from the Senate for the return of a Senate bill, to the end that the Senate effect a specified (substantive) change in its text (May 7, 1998, p. 8386) or to the end that the bill be recommitted to committee (July 15, 2004, p. ---); (2) the House by unanimous consent directed its Clerk to correct an error in a message to the Senate (V, 6607); (3) the House, upon receipt of a request by the Senate to return a bill during consideration of the conference report accompanying that bill, laid the conference report aside and agreed to the Senate request (V, 6609); (4) the House requested the return of a message indicating passage of a Senate joint resolution after learning that both Houses had previously passed an identical House Joint Resolution, so that it could indefinitely postpone action thereon (Nov. 16, 1989, p. 295870; (5) the Speaker laid before the House as privileged a message from the Senate requesting the return of a message where it had erroneously appointed conferees to a bill after the papers had been messaged to the House, so that the message could be changed to reflect the appointment of Senate conferees (May 20, 1996, p. 118090); (6) the Speaker laid before the House as privileged a message from the Senate requesting the return of a Senate bill that included provisions intruding on the constitutional prerogative of the House to originate revenue measures (Oct, 19, 1999, p. 25901; Sept. 28, 2004, p. ---; Sept. 30, 2004, p. ---); (7) where the engrossment failed to depict certain action of the House, the House considered and agreed to a privileged resolution requesting the Senate to return the engrossment of a House bill (July 15, 2004, p. ---) and a House-passed Senate bill (Oct. 8, 2004, p. ---); (8) the Speaker laid before the House as privileged a message from the Senate requesting the return of Senate amendments to a House bill where the engrossment failed to properly depict the action of the Senate (July 12, 2005, p. ---).

See 109th Congress House Rules Manual § 565, H.R. Doc. No. 108-241, at 296-97; *see also Deschler*, supra page 6, at 17-31.

Prior to sending it to the floor for a vote, the Republican leadership of the House knew that the engrossed bill received from the Senate, S. 1932, contained a provision regarding Medicare payment for DME that had not been passed by the Senate. Rather than following the House Rules, the leadership brought the bill to the floor of the House, which passed it by a 216-214 vote margin.

The process leading up to and including the signing of S. 1932 by the President was unprecedented. It is a basic constitutional principle that a bill is not a law unless the same version is passed by both the House and the Senate and signed by the President. *See City of New York v. Clinton*, 985 F. Supp. 168, 178 (D.D.C.), *aff'd*, 524 U.S. 417 (1998) ("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.") The Constitution gives no authority to any one individual—whether the Speaker of the House, the President *pro tempore* of the Senate, or a Clerk—to change unilaterally the text of legislation passed by either body. Nonetheless, on February 8, 2006, this fundamental tenet of our democratic system of government was ignored with the full knowledge of high-ranking congressional and White House officials.

In sending a different bill to the President from the bill passed by the House of Representatives, the Speaker of the House became a House unto himself. In signing a bill that he knew the House of Representatives had not passed, the President placed himself above the Constitution. In the process, the votes of the *amici* and all other members of the House of Representatives, except that of the Speaker, were nullified.

The House had passed its version of S. 1932 by a razor-thin 216-214 margin, so it was surely more efficient for a few selected representatives and the President to decide the law and sign it; however, the desire for efficiency cannot trump the Constitutional requirement that legislation pass both houses of Congress in identical form before it is signed by the President. *See* U.S. Const., art. I, § 7. As the Supreme Court has stated, this requirement is

> intended to erect enduring checks on each Branch and to protect the people from the improvident exercise of power by mandating certain prescribed steps. To preserve those checks, and maintain the separation of powers, the carefully defined limits on the Power of each Branch must not be eroded…. In purely practical terms, it is obviously easier for action to be taken by one House without submission to the President; but it is crystal clear from records of the Convention, contemporaneous writings and debates, that the Framers ranked other values higher than efficiency.

INS v. Chadha, 462 U.S. 919, 957, 959 (1983).

More than 100 years ago, the Supreme Court addressed whether a bill could become law if the version signed by the President differed from the version passed by the House and Senate. In *Marshall Field & Co. v. Clark,* 143 U.S. 649

(1892), the Court held that the President could rely on the attestation of the Speaker of the House and the President of the Senate that the legislation before the President was the same as the legislation that passed the Congress. But the Court also recognized that the outcome would be different if there were a "deliberate conspiracy" to ignore the Presentment Clause of the Constitution:

> It is said that … it becomes possible for the Speaker of the House of Representatives and the President of the Senate to impose upon the people as a law a bill that was never passed by Congress. But this possibility is too remote to be seriously considered in the present inquiry. It suggests a deliberate conspiracy to which the presiding officers, the committees on enrolled bills, and the clerks of the two houses must necessarily be parties, all acting with a common purpose to defeat an expression of the popular will in the mode prescribed by the Constitution.

Id. at 672-73.

Prior to February 8, the possibility of any President knowingly signing legislation that did not pass Congress was "too remote to be seriously considered" by most Americans. However, that possibility has now admittedly become reality. *See* U.S. House of Representatives Committee on Government Reform, Adverse Report together with Additional Views to accompany H. Res. 752 at 2 (Exhibit A, hereto).

II. The court should declare the Deficit Reduction Act of 2005 unconstitutional.

"It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). In

this case, Article I, § 7 of the Constitution is clear: For a bill to become a law, it must be passed in identical form by both Houses of Congress before it is signed by the President. The congressional leadership and President must follow this "single, finely wrought and exhaustively considered, procedure." *Chadha*, 462 U.S. at 951. The Constitution contains no authority for the congressional leadership or the President to develop their own methods for making law, as was the case with the process leading up to the President's signing of the Senate version of S. 1932. The *amici* adopt the legal arguments on this point made by the Plaintiffs-Appellants. In addition, they make the following additional points:

The Deficit Reduction Act also violates the Appropriations Clause of the Constitution which provides, "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law…." U.S. Const., art. I, § 9. The purpose of the Clause is to "place authority to dispose of public funds firmly in the hands of Congress rather than the Executive." *Am. Fed'n Gov't Employees, AFL-CIO Local 1674 v. Fed. Labor Relations Auth.*, 388 F.3d 405, 408-09 (3d Cir. 2004). "It is to assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good, and not according to the individual favor of Government agents…." *Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 428 (1990). Here, Congress never reached agreement in the Deficit Reduction Act as to how public funds will be spent. The

version of the bill passed by the House differed from the version passed by the Senate and signed by the President. With his signature, the President authorized the Treasury to implement unicameral legislation.

In addition, if ignored, the process leading up to the President's signing of the Senate version of S. 1932 will have seriously eroded the separation of powers envisioned by the Constitution and founding fathers. To safeguard liberty, the Constitution creates three separate, distinct branches of government—the Congress, the President and the federal judiciary. Each branch is assigned differing roles in the exercise of the government's powers, and there are both substantive and procedural limitations on each branch. The founding fathers of this country "viewed the principle of separation of powers as a vital check against tyranny." *Buckley v. Valeo*, 424 U.S. 1, 121 (1976) (per curiam). Thus, where "[e]xplicit and unambiguous provisions of the Constitution prescribe and define … just how powers are to be exercised," the procedures are to be followed with precision. *Chadha*, 462 U.S at 945.

The procedures used to sign the legislation at issue here ignored these founding principles. The House of Representatives never voted on the version of S. 1932 that was purportedly signed into law by the President. The President signed a version of the bill to which only the Senate had consented and thereby knowingly disregarded the legislative process set forth in the Constitution.

Although the House leadership is now saying that the "courts are perfectly capable of addressing" the constitutional infirmities, s*ee* Adverse Report together with Additional Views to accompany H. Res. 752 at 2 (Exhibit A, hereto), the Administration is seeking to avoid judicial review altogether. Resting upon dicta in *Field*, 143 U.S. at 649, the Administration has argued that the judicial branch cannot say what the law is because the leadership of Congress certified that the President was being presented with a version of S. 1932 that had passed both chambers. However, this 100-year-old, discredited dicta is not applicable here, because the "well known" facts establish that both the congressional leadership and the President knowingly and deliberately ignored the requirements of the Constitution. As the *Field* Court stated: "There is no authority in the presiding officers of the House of Representatives and the Senate to attest by their signatures, not in the president to approve, not in the secretary of State to receive and cause to be published, as a legislative act, any bill not passed by Congress." *Field,* 143 U.S. at 669.

CONCLUSION

The procedures used to enact S. 1932 violated fundamental Constitutional requirements that cannot be ignored by any branch of the government. The Court should declare the law invalid in its entirety.

Respectfully submitted,

Representatives Henry A. Waxman, Nancy Pelosi,
John D. Dingell, Charles, B. Rangel, Pete Stark,
George Miller, James L. Oberstar, Louise McIntosh Slaughter,
Sherrod Brown, Bennie G. Thompson

Dated: September 8, 2006

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Fed. R. App. P. Rule 29(d) and Rule 32(a)(7), that the foregoing brief is proportionately spaced, has a typeface of 14 points, and contains 3,893 words.

Dated: September 8, 2006

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Steven A. Hitov

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing brief has been forwarded by first class postal service and electronic service to the following counsel this 8th day of September 2006:

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