

# 09-5172-cv; 10-992-cv

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW;  
ACORN INSTITUTE; NEW YORK ACORN HOUSING COMPANY, INC.,

Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA; SHAUN DONOVAN, Secretary of Housing  
and Urban Development; PETER ORSZAG, Director of the Office of Management  
and Budget; TIMOTHY R. GEITHNER, Secretary of the Treasury; LISA P.  
JACKSON, Administrator of the Environmental Protection Agency; GARY  
LOCKE, Secretary of Commerce; ROBERT GATES, Secretary of Defense,

Defendants-Appellants.

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On Appeal From The United States District Court  
For the Eastern District of New York

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**BRIEF FOR THE APPELLEES**

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## **STATEMENT OF THE CASE**

Plaintiff ACORN and two separately incorporated 501(c)(3) organizations, ACORN Institute (AI) and MHANY Management, Inc. (MHANY), formerly known as New York ACORN Housing Inc., challenge the constitutionality of unprecedented Congressional statutes barring the distribution of federal funds to ACORN, its “affiliates, subsidiaries or allied organizations.” The complaint alleges that these statutes violated plaintiffs’ due process rights under the Fifth Amendment, their First Amendment rights to freedom of speech and association, and constituted unconstitutional bills of attainder. In December 2009, the District Court held that the first of these statutes, the Continuing Appropriations Resolution which went into effect on October 1, 2010, was likely an unconstitutional Bill of Attainder and preliminarily enjoined its enforcement, and did not reach plaintiffs’ First Amendment and Due Process claims. SA 26-27. Congress thereafter enacted five similar provisions in the Fiscal Year 2010 Appropriation Acts. On March 10, 2010, the District Court held that these statutes and the Continuing Resolution all constitute unconstitutional bills of attainder and issued a declaratory judgment and permanent injunction precluding enforcement of the fiscal year 2010 provisions. All parties agreed in the District Court that all these statutes are intertwined, and should be analyzed as one statute. SA-37.

## STATEMENT OF FACTS

### **I. Statutory Framework**

The statutes at issue here are unprecedented in American history. It is undisputed that Congress has never before singled out a particular corporation or organization for a broad statutory ban on federal funding or contracts. SA-41. Nor has any State *legislature* enacted *legislation* suspending or barring ACORN from state contracting or funding.<sup>1</sup> Indeed, plaintiffs' counsel found only one instance in which a state *legislature* denied a specific corporation the opportunity to apply for state contracts, and a Federal District Court enjoined that law as an unconstitutional Bill of Attainder. SA-41 (citing *Fla. Youth Conservation Corps, Inc. v. Stutler*, No. 06-275, 2006 WL 1835967 at \*2 (N.D. Fla. June 30, 2006)).

The statutes at issue here sweep broadly, denying federal grants, contracts or funds from current or prior appropriations without any hearing, to not only ACORN, but also any *undefined* subsidiaries, affiliated and *allied* organizations. Section 163 of the Continuing Resolution -- which went into effect on October 1, 2009,<sup>2</sup> was extended by Congress on October 31, 2009<sup>3</sup> and expired on

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<sup>1</sup> All of the State suspensions cited by defendants involved short-term suspensions implemented by executive officials, not legislative enactment. *See* A688, 693, 705, 707; Appellants' Br. at 7.

<sup>2</sup> Continuing Appropriations Resolution, 2010, H.R. 2918, 111th Cong. § 163 (2009) (enacted), Division B of Pub. L. No. 111-68 (CR) Section 163.

December 18, 2009 -- provided that:

*[n]one* of the funds made available by this joint resolution or *any prior Act* may be provided to the Association of Community Organization for Reform Now (ACORN) or any of its affiliates, subsidiaries, or *allied* organizations.

SA-2 (emphasis added).

The 2010 Consolidated Appropriations Act, signed into law by President Obama on December 16, 2009, similarly barred funding to ACORN and certain affiliates for all of the many agencies covered by the Act. Consolidated Appropriations Act, Pub. L. No. 111-117, 123 Stat. 3034 (2009). The Consolidated Act consists of six subdivisions, three of which contain Defund ACORN language. Section 511 of Division E of the Act states “that none of the funds made available in this division or *any other division* in this Act may be distributed to the Association of Community Organizations for Reform Now (ACORN) or its subsidiaries,” and thus covers the entire Consolidated Appropriations Act. SA-6 (emphasis added).

Section 418 of Division A of the Act, which provides appropriations for the Transportation and Housing and Urban Development (HUD) agencies, the largest source of federal funding for plaintiffs, contains identical language to the Continuing Resolution. SA-2, 5. Division B of the Consolidated Act and two other

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<sup>3</sup> Further Continuing Appropriations Resolution, 2010, H.R. 2996, 111th Cong. § 101 (2009) (enacted), Division B of Pub. L. No. 111-88.

separate appropriation statutes covering the Department of Defense and Departments of the Interior, Environment and Related Agencies also bar federal funding to ACORN and its undefined subsidiaries. SA-3, 4, 5.

In sum, Congress has barred all, or almost all, federal agencies from awarding ACORN and any number of *undefined* related organizations, federal funding, contracts, or grants. As the District Court found, this has resulted in: a) the suspension and *de facto* termination of existing contracts and grant agreements; SA-24, SA-59–60; b) rescission of grants previously awarded where a signed contract had not been entered into, SA-24–25; c) the denial to plaintiffs of the opportunity to apply for and receive new grants and contracts, SA-24–25, 55, 59, 60; and d) “affected ACORN’s ability to obtain funding from non-governmental entities fearful of being tainted—because of the legislation—as an affiliate of ACORN,” SA-57.

The breadth of the statute’s effects on plaintiffs is as follows:

**A. Existing Contracts Suspended or Terminated**

Plaintiffs ACORN Institute (AI) and MHANY both had existing contracts suspended and effectively terminated due to the challenged statutes, and ACORN had subcontracting agreements suspended and/or terminated.

HUD suspended six contracts with AI to perform services for residents of public housing, and continues to suspend/effectively terminate those contracts to

date. SA-11, A44–45, A809, A829. These three year contracts, commencing either in 2006, 2007, or 2008, each provided that HUD could only terminate or suspend the contracts *for cause*. A135, 162. The Office of Management and Budget Circular 110A, ¶¶ 60, 61, which governs such agreements also so provides. *See* A-95. Over \$500,000 dollars has not been disbursed on these contracts, despite the undisputed fact that AI was performing the contracts satisfactorily. A44–A-45, 223.

HUD initially also denied AI payment for work it had performed on these contracts, but based on advice HUD solicited from the Justice Department’s Office of Legal Counsel (OLC paid AI for that work. A-44–A45, A-45, A233–34; SA-11-12. However, HUD has continued to suspend these contracts, thus effectively terminating contracts that expired in 2009 or 2010. HUD claimed that contractual language stating that the contracts are governed by HUD Appropriation Acts, “as they may from time to time be amended,” permitted such suspension without cause if Congress so directs in a subsequent appropriation act. A-222.

So too, HUD suspended similar contracts with the ACORN Tenants Union (ATU) that ran from 2008 to 2011, thereby precluding ACORN, which was an ATU subcontractor, from completing its work. A-414, 422–35. Plaintiff MHANY had a grant agreement with a New York state agency funded by HUD appropriations, which was also suspended and now terminated. SA-24, A-217.

**B. Loss of Federal Grants Previously Awarded but Not Yet Finalized**

AI was formally awarded a \$997,000 grant renewal with FEMA and grant renewals with several nongovernmental contractors involving federal funds that were simply awaiting AI's signature, when pursuant to the Continuing Resolutions, these agencies and contractors informed AI that the contracts could not be signed. A44, SA-24–25. In each case, AI had performed satisfactorily, and the agency wanted to renew the contract but was precluded from doing so because of the legislative ban. *Id.*; A-200.

**C. Loss of Right to Be Considered for Contracts and Awards**

Plaintiffs were “recipients on significant federal grants”, but are now barred from consideration for grants based on FY 2010 appropriations, including multiyear grants funded from FY 2010 appropriations. SA-24. When the Continuing Resolution went into effect, plaintiffs had significant grant applications that became ineligible. *Id.* A-42. ACORN is precluded from receiving a broad swath of federal awards from virtually all federal agencies.<sup>4</sup>

The congressional ban also applies to any federal funds provided to state or private entities that subcontract to ACORN or its affiliates. A-39, A-202–03, A-238.

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<sup>4</sup> AI is also effectively precluded, either because it will be deemed a subsidiary, ally or affiliate of ACORN, or because as a practical matter it subcontracts most of its awards to ACORN. A-330-31.

**D. MHANY Deprived of Section 8 Subsidies Necessary to Operate Its Buildings and Federal Loans Needed to Rehabilitate and Develop Properties**

MHANY is a 501(c)(3) non-profit corporation with a management and Board of Directors independent of ACORN.<sup>5</sup> MHANY's primary mission is to develop, manage and own affordable housing for low-income people in New York. A217, A783. It owns and/or manages over 140 buildings with over 1,200 apartments in New York City. ACORN has no role in the management or ownership of any building, nor does it receive income from any of those buildings. A783. MHANY relies heavily on Federal Section 8 housing subsidies from HUD appropriations to provide affordable housing to poor people. A783–87. It is undisputed that MHANY has never been accused of any fraud, misconduct or mismanagement with respect to any of the buildings it owns or manages. A789–90.

HUD cannot renew what are known as project-based Section 8 contracts in buildings owned by MHANY because it considers MHANY an affiliate or ally of ACORN.<sup>6</sup> MHANY cannot operate these buildings without Section 8 subsidies for

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<sup>5</sup> MHANY changed its name from New York Acorn Housing Inc. to avoid any confusion between it and ACORN or ACORN Housing, Inc., a separate national organization headquartered in Chicago. A-414, 782-83.

<sup>6</sup> HUD refused to renew a project-based contract for 57 units in buildings known as Mott Haven -- for almost 4 months, until 4 days before the government's motion for a stay was argued before a panel of this Court, when HUD suddenly determined that the entity that owned the buildings—an entity wholly owned and controlled by MHANY with identical management—

very long because low-income tenants pay only a small fraction of the market rent and the Section 8 subsidies make up the difference. A-786, A-840–41.

MHANY also cannot rent any vacant apartments which have been designated for Section 8 tenants in any of the buildings it owns and manages. That is because neither HUD nor the NYC agencies which provide the federal subsidies to Section 8 tenants can approve new Section 8 tenant-based vouchers for eligible poor people who want to move into these vacant apartments due to the Defund ACORN legislation. Therefore, poor and homeless people have been left waiting for vacant apartments solely because of the challenged legislation. A-786–87, A-817.

MHANY has often utilized HUD’s Home Investment property program funds at very low rates to develop and rehabilitate properties. Those federal funds are now no longer available. A-833.

**E. Defunding of Undefined “Subsidiaries,” “Affiliates” and “Allies” of ACORN and the Resulting Harm to ACORN**

The challenged statutes bar undefined subsidiaries, affiliates and allies of ACORN from federal funding and contracts, leaving it to the absolute, standardless, discretion of Executive agencies to determine which organizations fall within the statutory bar, without any requirement that the organization be

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was not a subsidiary, affiliate or ally of ACORN, and therefore the contract could be signed, although MHANY is still deemed to be an ACORN ally or affiliate. *See* the April 16 and 19, 2010 Letters submitted by the parties to this Court in connection with the government’s motion for a stay, 10-992-cv, Dkt ## 63, 65.

accorded any process. Because of this broad language, numerous organizations and funders, including unions, non-profit organizations, banks, and radio stations, have cut their ties to ACORN and the plaintiffs out of fear of being considered an “affiliated organization.” A239–40 (large, diversified social services non-profit would not enter into any relationship with an ACORN entity for fear of being considered an allied organization); A-219, A241–48 (banks cut ties to NY ACORN Housing after passage of Continuing Resolution out of fear of being tainted); A-773 (independent radio station cut ties to ACORN). See generally A 412

As the District Court found, “the record establishes” that the “challenged legislation has not only barred ACORN from federal funding but has also affected ACORN’s ability to obtain funding from non-governmental entities fearful of being tainted—because of the legislation -- as an affiliate of ACORN.” SA-57.

For example, KNON, an independent Dallas radio station with no apparent “subsidiary” relationship to ACORN, no history of fraud or *any* misconduct, and no connection to any purported or alleged misconduct by ACORN, has had funding delayed and likely now denied because of the broad language in Section 511 of the bill prohibiting funding to ACORN and “subsidiaries.” A-772–81. KNON was included on a list of the organizations that Congressman Issa’s staff compiled as “affiliated” with ACORN, and distributed by executive agencies shortly after the Continuing Resolution was enacted. A-775, A-201, A-206–13.

This experience has led KNON's general manager to terminate the station's entire working relationship with plaintiffs in order to avoid jeopardizing the station's future federal funding. A773,775.

ACORN is now teetering on the edge of bankruptcy, because of ---- as predicted by a report submitted by the government in the District Court,—the legislation's "ripple effect in influencing states and charities to also cut off funds." A-837-38; *ACORN v. United States*, 09-CV-4888 (E.D.N.Y.), Dkt # 38-26.

## **II. Legislative Background to the Challenged Provisions**

ACORN was, before the enactment of the challenged statutes, the nation's largest community organization of low and moderate income families. However, ACORN's voter registration activities became very controversial during the 2008 presidential campaign, and the Republican National Committee repeatedly criticized ACORN as "a quasi-criminal organization," and sought to tie then presidential candidate Barack Obama to the group.<sup>7</sup> Over the ensuing months, various Republican members of Congress opposed funding ACORN stating that "ACORN's fraudulent voter registration activities on behalf of Democratic candidates are well known", that proposed funding would represent "a giveaway that would force taxpayers to bankroll a slush fund to a discredited ally of the

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<sup>7</sup> Brian C. Mooney, *Republicans Try to Tie Obama to Vote Fraud Cases*, BOSTON GLOBE, Oct. 10, 2008, available at [http://www.boston.com/news/nation/articles/2008/10/10/republicans\\_try\\_to\\_tie\\_obama\\_to\\_vote\\_fraud\\_cases/](http://www.boston.com/news/nation/articles/2008/10/10/republicans_try_to_tie_obama_to_vote_fraud_cases/)

Democratic Party,”<sup>8</sup> and that “ACORN has been guilty of massive voter registration fraud and politicization of their activities.”<sup>9</sup>

In July, 2009, the Congressional effort to defund ACORN escalated when Representative Darrell Issa of California, the ranking Republican member of the House Committee on Oversight and Governmental Reform, published an 88-page staff report entitled *Is ACORN Intentionally Structured as a Criminal Enterprise* (hereinafter the “Issa Report”).<sup>10</sup> The Issa Report concluded that ACORN and numerous organizations associated or allied with it constituted “a criminal enterprise” that had “repeatedly and deliberately engaged in systemic fraud,” is “a shell game,” and had “committed a conspiracy to defraud the United States by using taxpayer funds for partisan political activities.” *Id.* at 3-4. The Report purports to have reviewed documents that “demonstrate the degree to which ACORN and ACORN affiliates organized to elect President Barack Obama in 2008,” and accused it of improperly aiding democratic candidates. *Id.* at 5, 7. The Report called for “piercing the corporate veil” to “remove the distinction between

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<sup>8</sup> 154 Cong.Rec. H10281 (daily ed. Sep. 27, 2008).(statement of Representative Foxx) (Pursuant to F.R.A.P. 28(f), copies of this and all other portions of the Congressional Record cited in Appellees’ Brief are included in the Addendum attached hereto).

<sup>9</sup> 155 Cong.Rec. S1841, 1854 (daily ed. Feb. 6, 2009)(statement of Senator Vitter)

<sup>10</sup> See Staff of House Comm. on Oversight and Government Reform, 111th Cong., IS ACORN INTENTIONALLY STRUCTURED AS A CRIMINAL ENTERPRISE? (July 23, 2009), attached hereto in the Addendum and available at [http://republicans.oversight.house.gov/images/stories/Reports/20091118\\_ACORNREPORT.pdf](http://republicans.oversight.house.gov/images/stories/Reports/20091118_ACORNREPORT.pdf)

ACORN and its affiliates.” *Id.* at 13. It also appended a list of 361 organizations including trade unions, radio stations, political parties and community groups – alleged to compose the ACORN “council.” *Id.* at 74-81. That list was initially distributed by federal agencies after the Continuing Resolution was enacted. A-206-213.

The Executive Summary of the “Issa Report” was in turn read into the Congressional Record by Senator Mike Johanns (R-NE) when he introduced the amendment that eventually became Section 418 of Division A of the Consolidated Appropriations Act of 2010 on September 14, 2009.<sup>11</sup> Senator Johanns, who also introduced the amendments that became the other four FY 2010 appropriations statutes challenged here,<sup>12</sup> described ACORN as “an organization that is besieged by corruption, by fraud, and by illegal activities, -all committed on the taxpayers' dime,” and declared that “somebody has to go after ACORN” and “that ‘somebody’ is each and every member of the Senate.”<sup>13</sup>

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<sup>11</sup> 155 Cong.Rec. S9308, 9309-10 (daily ed. Sep. 14, 2009)

<sup>12</sup> *See* 155 Cong.Rec. S9499, 9517-9518 (daily ed. Sep. 17, 2009) (amendment to the Interior, Environment, and Related Agencies Appropriations Act); 155 Cong.Rec. S9683, 9685 (daily ed. Sep. 22, 2009) (amendment to Department of Defense Appropriations Act); 155 Cong.Rec. S 10181, 10207 (daily ed. Oct. 7, 2009) (amendment to Commerce, Justice, Science and Related Agencies Appropriations Act); 155 Cong.Rec. S11313 (daily ed. Nov. 10, 2009) (amendment to Military Construction, Veterans Affairs and Related Agencies Appropriations Act)

<sup>13</sup> 155 Cong.Rec. S9308, 9310, 9317

On September 17, 2009, Congressman Issa introduced the Defund Acorn Act to permanently bar ACORN and any ACORN affiliates from receiving any federal funds, stating that the purpose of the bill was “to put an immediate stop to federal funding to this crooked bunch,” and to “enact a comprehensive ban of federal funding for this corrupt and criminal organization.”<sup>14</sup> The House voted on that legislation the same day with no debate and passed it by a vote of 345-75.<sup>15</sup> That same day, Senator Johanns and other Republican Senators introduced Senate Bill 1687, the Protect Taxpayers from ACORN Act, to permanently prohibit ACORN and its affiliates from obtaining federal funds in any form, and prohibit any federal employee or contractor from promoting the organization.<sup>16</sup>

These Congressional actions introducing both permanent funding bans and FY2010 appropriation bars in September 2009 were spurred by the release of videotapes purporting to show ACORN employees engaged in misconduct, videos that have now been shown to have been heavily edited for partisan purposes.<sup>17</sup> During the debate on the Continuing Resolution and the challenged FY 2010 Appropriations Acts, every member of Congress who spoke in favor of these

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<sup>14</sup> 155 Cong.Rec. H9675, 9700 (daily ed. Sep. 17, 2009)

<sup>15</sup> *Id.* at 9700-9701.

<sup>16</sup> 155 Cong.Rec. S 9554, 9555 (daily ed. Sep. 17, 2009)

<sup>17</sup> *See* p. 19 *infra*; A-268-69

provisions accused the organization of serious criminal conduct or attacked it for its partisan political activities in support of Democrats. ACORN was excoriated for: “their repeated assistance for housing, tax and mortgage fraud;”<sup>18</sup> helping “facilitate child prostitution,” maintaining “a culture of . . . child prostitution,” “involvement” in “corrupting our election process,” and “a practice of shaking down lenders” equivalent to the “Mafia”;<sup>19</sup> engaging in “racketeering enterprises” and “committing investment fraud”;<sup>20</sup> “furthering the trafficking of illegal aliens, minor girls into childhood prostitution and child abuse”;<sup>21</sup> being in the “criminal hall of fame”;<sup>22</sup> being associated with “voter fraud”;<sup>23</sup> being “a parasitic organization,”<sup>24</sup> and being “a reprehensible enterprise” engaged in “outrageous and illegal activity.”<sup>25</sup> ACORN was also attacked as “a get-out the vote organization

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<sup>18</sup> 155 Cong. Rec. S9308, 9314 (daily ed. Sept. 14, 2009)(statement of Senator Bond)

<sup>19</sup> 155 Cong.Rec. H9946, 9948-9950(daily ed. Sep. 24, 2009)(statement of Representative King).

<sup>20</sup> 155 Cong.Rec. H 784, 9785-88 (daily ed. Sep. 22, 2009) (statement of Representative Carter)

<sup>21</sup> 155 Cong.Rec. H9946, 9952 (daily ed. Sep. 24, 2009)(statement of Representative Bachman)

<sup>22</sup> 155 Cong.Rec. H10129 (daily ed. Sep. 30, 2009) (statement of Representative Franks)

<sup>23</sup> 155 Cong.Rec. H11080 (daily ed. Oct. 7, 2009) statement of Representative Inglis)

<sup>24</sup> 155 Cong.Rec. H9784, 9785, 9787 (daily ed. Sep. 22, 2009) (Statement of Representative Gohmert)

<sup>25</sup> 155 Cong.Rec. H9555 (daily ed. Sep. 16, 2009) (statement of Representative Bilirakis)

for Democrats,”<sup>26</sup> and a “partisan political organization.”<sup>27</sup> Senator Grassley released to the press in late September a report from his staff on the Senate Committee on Finance accusing “the ACORN family of organizations of being a big shell game” which impermissibly misuses donations. A-672. In November, in response to the Justice Department’s OLC memo advising HUD to pay ACORN and its affiliates for work already performed pursuant to federal contracts, Issa accused OLC of “old fashioned cronyism,” and stated that “[t]axpayers should not have to continue subsidizing a criminal enterprise that helped Barack Obama get elected president” A-236, SA-53. Congress has never afforded ACORN or other plaintiffs the opportunity to respond to any of these charges.

The FY 2010 Consolidated Appropriations Act also contains a provision requiring the GAO to investigate ACORN’s activities and submit a report within 180 days. SA-5. The legislative debarment of plaintiffs, however, is not tied to the results of the investigation and continues for the entire year irrespective of the conclusions reached by the GAO. *Id.*\_

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<sup>26</sup> 155 Cong. Rec. H9946, at 9949 (statement of Representative King)

<sup>27</sup> 155 Cong.Rec. S9308, 9314 (daily ed. Sep. 14, 2009) (statement of Senator Hatch).

Indeed, the provision was introduced by Senator Durbin (D-IL), who voted against the Defund ACORN amendments to the FY 2010 appropriations acts,<sup>28</sup> and proposed the investigation as an *alternative* to defunding<sup>29</sup>. As the District Court noted, Senator Durbin stated in proposing the investigation provision:

[W]e are seeing in Congress an effort to punish ACORN that goes beyond any experience I can recall in the time I have been on Capitol Hill. We have put ourselves—with some of the pending amendments—in the position of prosecutor, judge and jury.

Mr. President, I went to one of these old-fashioned law schools. We believed that first you have the trial, then you have the hanging. But, unfortunately, when it comes to this organization, there has been a summary execution order issued before the trial. I think that is wrong. In America, you have a trial before a hanging, no matter how guilty the party may appear.

(SA-49, n.14).<sup>30</sup>

Since the passage of the GAO investigation provision in December 2009, Congressman Issa and his supporters in Congress have continued their efforts to extend the federal funding ban. Congressman Issa issued two additional staff

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<sup>28</sup> See 155 Cong.Rec. S9308, 9317-18 (vote on amendment to Transportation, Housing and Urban Development, and Related Agencies Appropriations Act); 155 Cong.Rec. S 9541, at 9542 (vote on amendment to Interior, Environment and Related Agencies Appropriations Act)

<sup>29</sup> Supporters of defunding such as Congressman Issa and Johanns wrote the GAO requesting an investigation after they had already voted to or introduced legislation to permanently ban ACORN from government funding and contracts, thus not choosing to await the results of the investigation before reaching their own conclusions as to ACORN's misconduct. See A-620,622 (letters written on September 23, 2009, six days after the permanent defund legislation had been introduced in Senate and House and passed in House) and SA 48-49

<sup>30</sup> See 155 Cong. Rec. S10181, 10211 (daily ed. Oct. 7, 2009).

reports from the House Committee on Oversight and Government Reform in February and April 2010 claiming that the national trade union SEIU is “substantially intertwined” with ACORN and conspired with it “to engage in fraudulent activities” and that despite ACORN’s reorganization, ACORN and its affiliates still exist under new names and present the same dangers.<sup>31</sup> Other members of Congress have continued to attack ACORN as “nothing more than a criminal enterprise”, “a “band of thieves,”<sup>32</sup> that must be “pulled out by the roots”<sup>33</sup>. The White House’s proposed budget for Fiscal Year 2011 contains the same Defund ACORN provisions as the FY 2010 Appropriations Acts. *See* Office of Management and Budget, *Appendix: Budget of the U.S. Government, Fiscal Year 2011*, at 240 (Commerce), 335 (Defense), 735 (Interior), 1003 (Transportation), and 1100 (Veterans Affairs), available at <http://www.whitehouse.gov/omb/budget/fy2011/assets/appendix.pdf>

### **III. Regulatory Scheme**

The Code of Federal Regulations contains extensive regulations providing

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<sup>31</sup> *See* Staff of House Comm. on Oversight and Government Reform, 111th Cong., FOLLOW THE MONEY—ACORN, SEIU AND THEIR POLITICAL ALLIES (Feb. 18, 2010), available at <http://republicans.oversight.house.gov/images/stories/Reports/20100218followthemoneyacornseiandtheirpoliticalallies.pdf>; and ACORN POLITICAL MACHINE TRIES TO REINVENT ITSELF (April 1, 2010), available at <http://republicans.oversight.house.gov/images/stories/Reports/20100401ACORNreport.pdf>

<sup>32</sup> *See* 156 Cong.Rec. H 2177 (daily ed. Mar. 22, 2010) (statement of Representative Poe)

<sup>33</sup> *See* 156 Cong.Rec. H 183, 187 (daily ed. Jan. 19, 2010) (statement of Representative King)

for government-wide debarment and immediate suspension of eligibility of federal grantees or contractors in certain circumstances. 2 C.F.R. Ch. 1, Part 180; *see also* Federal Acquisition Regulations, 48 C.F.R. Ch.1, Part 9. While agencies have significant discretion in making this decision, they are required to consider a variety of particularized criteria. 2 C.F.R. § 180.705, 180.700, 180.800.

In suspending or debarring organizations, the Federal Regulations require that due process be afforded, including written notice of the reasons for the agency action and a reasonable opportunity to contest the action. 2 C.F.R. §§ 180.610, .715, .720, .805, .825; Executive Order 12549, 51 F.R. 6370, Feb. 18, 1986. Had any federal agency debarred or suspended plaintiffs from eligibility to receive federal contracts, it would have been required to follow those procedures.

#### **IV. Investigations of ACORN**

ACORN has been the subject of many recent investigations concerning alleged misconduct. Nonetheless, it is undisputed that neither ACORN, nor any of the plaintiffs, has been found guilty of any crime. Indeed no federal prosecutor has brought any charges against ACORN, and “several U.S. attorneys found no legal basis upon which to investigate ACORN’s voter registration efforts,” A259 n1. Both the Brooklyn District Attorney and California Attorney General recently concluded that neither ACORN nor its employees violated any criminal laws.

A864-868. The only criminal prosecution currently pending is in Nevada.

Appellants' Br. at 6.

As the District Court noted, ACORN has acknowledged that it has made mistakes, but it has also undergone significant reforms, terminated any staff member found to have engaged in misconduct and reorganized its board of directors. An independent report, commissioned by ACORN, conducted by former Massachusetts' Attorney General Scott Harshbarger and relied upon heavily by the Government, see Appellants' Br. at 3–4, 13, 25–26, supports ACORN's claims. The Harshbarger Report found that while ACORN faced "serious management challenges," it also found: **a)** no "...pattern of intentional, illegal conduct by ACORN staff"; **b)** that "ACORN has been *aggressively* implementing the changes recommended"; **c)** that ACORN and some interrelated entities "while united broadly in purpose, are separate entities with separate management," and have been "inaccurately blended into one."; and **d)** that with respect to the videos, which served as a focal point for the legislative action here, "the released videos were edited or manipulated by the videographers and/or individual[s] acting on their behalf." A-260, 263, 270, 295. That latter conclusion has now been affirmed by Brooklyn law enforcement officials and California's Attorney General, who recently stated that "the evidence illustrates that things are not always as partisan

zealots portray them through highly selective editing of reality. Sometimes a fuller truth is found on the cutting room floor.” A-864, 866.<sup>34</sup>

The District Court believed it unnecessary to resolve the contrasting views of members of Congress who attacked ACORN and those of ACORN’s leadership and the Harshbarger Report. The District Court held that:

...this case does not involve resolution of these contrasting views. It concerns only the means Congress may use to effect its goals. Nor does this case depend upon whether Congress has the right to protect the public treasury from fraud, waste, and abuse; it unquestionably does. The question here is only whether Congress has effectuated its goals by legislatively determining ACORN’s guilt and imposing punishment on ACORN in violation of the Constitution’s Bill of Attainder.

SA-31\_.

### **SUMMARY OF ARGUMENT**

These unprecedented statutes single out a single, named organization and its undefined “subsidiaries, affiliates or allies” for a sweeping ban on federal contracts and funding. The statutes are so broad as to potentially disqualify any group that works with or funds ACORN.

The government has never proffered any non-punitive reason that Congress singled out only ACORN from amongst the many government contractors that have been alleged or adjudicated to have committed serious misconduct. The government also offers no non-punitive reason for Congress to bypass the

extensive federal regulatory mechanism designed to address the very concerns that defendants assert motivated these statutes, and debar ACORN without the due process required were an agency to impose suspension or debarment.

These statutes present the exceedingly rare instance where Congress inflicts a very serious deprivation upon a specifically named individual or group based on charges of misconduct, without affording the group the protections of either a judicial trial or administrative proceeding. They constitute a Bill of Attainder as defined by the Court in *United States v. Lovett*, 328 U.S. 303 (1946), and *United States v. Brown*, 381 U.S. 437 (1965). Moreover, the breadth and extent of the deprivation is clearly overbroad to meet any purported non-punitive governmental interest. *Consol. Edison Co. of N.Y, Inc. v. Pataki* 292 F.3d 338 (2d Cir. 2002),

The government claims that the statutory ban constitutes merely “a temporary measure pending the findings of ongoing investigations.” Appellants’ Br. 20, 31. The government is simply incorrect. The absolute one year statutory ban is not tied to the GAO investigation, and will continue for a minimum of one year irrespective of the conclusions reached by the Comptroller General or any other investigation. Moreover, punishment need not be permanent, as this Court’s *Con Edison* decision confirms, and the economic and reputational consequences of even temporary debarments of government contractors are often severe. *See pp. 32-33, infra*. Nor is it clear that this one year debarment will not be continued.

Second, the government claims that the Bill of Attainder Clause only prohibits statutes targeting a group based on “impermissible criteria” such as political “beliefs or affiliations.” Appellants’ Br. at 14–15. This is clear error, for *Con Edison* and *Foretich v. Morgan*, 351 F. 3d 1198 (D.C. Cir 2003), demonstrate that an individual or group need not be targeted based on their political viewpoint for a statute to constitute a Bill of Attainder, and no Supreme Court opinion so requires. Moreover, the legislative record here discloses that ACORN was targeted for its political activities supporting democrats, and the statutory text bars plaintiffs because of their “affiliations” with ACORN, and not any misconduct they have allegedly committed.

Finally, the government argues that evidence of ACORN’s “mismanagement and lax oversight” supports a “legitimate government interest” justifying these statutes. Appellants’ Br. at 13, 15, 23–26, 31–32. However, where Congress targets a single individual or organization for a serious deprivation as opposed to regulating a either narrow or general class based on its characteristics, the government must explain why this group or individual was singled out from among many others. That the legislature has the legitimate power to bar a) subversive individuals from government positions during war time, b) individuals who are likely to instigate political strikes from trade unions’ positions, c) child abusers from having custody of their children or d) public utilities from recovering

costs incurred through their own negligence did not save statutes specifically targeting named individuals or groups for such deprivations from being declared Bills of Attainder. Whether Congress had evidence of misconduct, or relied on investigations, made no difference in those cases.

The District Court did not—as the government claims—hold that the Bill of Attainder Clause precludes Congress from “singling out any organization.” Appellants’ Br. at 26. Rather the Court held that the government had not proffered any non-punitive reason to treat ACORN uniquely as a “legitimate class of one,” *Nixon v. Admin. of Gen. Serv.*, 433 U.S. 425, 475 (1977), and that the “type and severity of the burdens imposed” belied the conclusion that Congress had not determined ACORN’s guilt and imposed a punitive sanction. That conclusion is correct.

## **ARGUMENT**

### **I. The Congressional Statutes Defunding ACORN and Related Organizations Constitute an Unconstitutional Bill of Attainder**

#### **A. The Bill of Attainder Clause Prohibits Trial and Punishment by the Legislature**

The Constitution, Art. I, § 9, cl. 3 expressly prohibits Congress from enacting a Bill of Attainder. This prohibition extends not only to criminal punishments, but to all “legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a

way as to inflict punishment on them without a judicial trial.” *Lovett*, 328 U.S. at 315. Corporations, as well as individuals, may not be singled out for punishment under the Bill of Attainder Clause. *Con. Ed.*, 292 F.3d at 349. The Clause bars a legislative determination of guilt and the infliction of punishment “of any form or severity.” *Brown*, 381 U.S. at 447. Its central function is to ensure the procedural protections of the judicial process for the attribution of guilt and imposition of punishment. *Con. Ed.*, 292 F.3d at 347.

The Clause is thus deeply rooted in separation of powers and the framers’ well-founded distrust of legislative trials. As the Supreme Court noted, “the Bill of Attainder Clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature.” *Brown*, 381 U.S. at 442. The framers understood that when the “legislature assumes judicial magistracy, pronouncing upon the guilt of the party without any of the common forms and guards of trial,” it exercises “what may properly be deemed an irresponsible despotic discretion, being governed solely by what it deems political necessity or expediency . . .” 2 Joseph Story, *Commentaries on the Constitution of the United States* 270 (4th ed. 1833).

A major concern that underlay the Bill of Attainder prohibition was “the fear that the legislature, in seeking to pander to an inflamed popular constituency, will find it expedient to openly assume the mantle of judge—or, worse still, lynch mob.” *Nixon*, 433 U.S. at 480; see also *Brown*, 381 U.S. at 445 (legislature is “peculiarly susceptible to popular clamor” (quoting 1 Cooley, *Constitutional Limitations* 536–37 (8th ed. 1927))). The Clause is thus integrally related to the guarantee of due process. *Con. Ed.*, 292 F.3d at 347; *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 468–69 (7th Cir. 1988).

A statute constitutes a Bill of Attainder if: (1) specific individuals or readily ascertainable members of a group or corporate entity are singled out in the statute; and (2) the legislature determines guilt and inflicts punishment on those individuals or entities; (3) without the due process protections of a judicial trial. *Nixon*, 433 U.S. at 485. These criteria are clearly met here.

**B. The Continuing Resolution Indisputably Meets the Specificity Requirement of a Bill of Attainder**

The Government does not dispute that the challenged statutes unquestionably single out ACORN and every single organization considered to be one of ACORN’s “affiliates, subsidiaries, or allied organizations.” . Therefore these statutes fit the historic practice of a Bill of Attainder which specifically named designated persons or groups. *Selective Serv. Sys. v. Minnesota Public Interest Research Group*, 468 U.S. 841, 847 (1984).

**C. These Statutes Unquestionably Reflect a Punitive Determination That ACORN Was Guilty of Past Misconduct**

The government claims that a one year, absolute debarment from government contracting and funding for ACORN and related organizations, “is not tantamount to a congressional finding of ‘guilt’”. Appellants’ Br. at 31. The government’s claim is belied by the circumstances surrounding these statutes’ enactment, the severity of the burdens they impose, and the legislative record on which the government itself relies.

While these statutes do not explicitly state plaintiffs’ guilt, the statutory text cannot be viewed in isolation of “the circumstances of its passage.” *Lovett*, 328 U.S. at 313; *see also Selective Serv. Sys.*, 468 U.S. at 852 (“each case has turned on its own highly particularized context”); *Foretich*, 351 F.3d at 1215 (“It makes little sense to view the Act in isolation, divorced from the legislative process that produced it.”) *Con. Ed.*, 292 F.3d at 349 (“Although on its face Chapter 190 does not speak in terms of guilt or innocence, we have no doubt that the legislature considered Cons Ed guilty of wrongdoing”). As in *Lovett*, *Con Ed* or *Foretich*, the circumstances of passage, beginning with the Issa Report, continuing with the Congressional reaction to the purportedly incriminating videotapes, and culminating with the excoriation of ACORN in the debates surrounding the

statutes' enactment, make clear that Congress enacted these statutes because it believed that ACORN was guilty of misconduct.

Moreover, the severity of the burden and its unprecedented nature can only be explained by a Congressional determination that ACORN had committed some serious misconduct. The District Court correctly held that, "as in *Con Ed*, the nature of the bar and the context within which occurred make it unmistakable that Congress determined ACORN's guilt before defunding it." SA-45. "[W]holly apart from the vociferous comments by various members of Congress as to ACORN's criminality and fraud, as described below, no reasonable observer could support that such severe action [the cutoff of funding] would have been taken in the absence of a conclusion that misconduct had occurred." *Id.* (citing *Con Ed*, 292 F.3d at 349).

The government -- perhaps recognizing that a determination to defund ACORN because Congress believed it guilty of fraud or other criminal conduct would clearly be punitive -- repeatedly characterizes the congressional defunding as a reaction to ACORN's "mismanagement" problems and lack of oversight. However, even this characterization reflects a determination of guilt, just as the New York legislature's determination that Con Edison was negligent reflected a judgment that it was guilty of wrongdoing. *Con. Ed.*, 292 F.3d at 349. But the government's characterization of what motivated Congress is implausible. The

overwhelming thrust of the Defund ACORN commentary in Congress was an attack on ACORN's purportedly criminal behavior and not lack of oversight or mismanagement, and the severity of a one-year debarment supports the District Court's conclusion that Congress must have concluded that misconduct occurred. The failure to tie the statutory debarment to the GAO investigation supports that conclusion.

Finally, the legislative record relied upon by the Government in its brief also demonstrates the Congressional judgment that ACORN was guilty of misconduct. The government quotes Senator Bond who "described the legislation as necessary because of ACORN's 'endemic systemwide culture of fraud and abuse'", and Senator Johanns who said it was "necessary to 'defend taxpayers against waste, fraud and abuse'". Appellants' Br at 34. Clearer statements of a legislative finding of guilt are hard to imagine.

#### **D. The Challenged Statutes Impose Punishment**

The Defund ACORN statutes also clearly impose punishment. The Supreme Court has set forth three factors to be considered in determining whether a statute directed at a specified individual or group is punitive:

(1) whether the challenged statute falls within the meaning of historical punishment; (2) whether the statute, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further non-punitive legislative purposes; and (3) whether the legislative record evinces a congressional intent to punish.

*Selective Serv. Sys.*, 468 U.S. at 892 (quoting *Nixon*, 433 U.S. at 473, 475–76, 478). A statute need not fit all three factors to be considered a Bill of Attainder. SA-40; *Con. Ed.*, 292 F.3d at 338, 350; *Foretich*, 351 F.3d at 1218.

### (1) Historical Punishment

These appropriation statutes fit comfortably within traditional notions of a Bill of Attainder. The Supreme Court has cautioned that the clause is not to “be given a narrow historical reading” but rather must “be read in light of the evil the framers had sought to bar: Legislative punishment of any form or severity, of specially designated persons or groups.” *Brown*, 381 U.S. at 447. *See also Foretich*, 351 F.3d at 1220 (“while not squarely within the historical meaning of legislative punishment, [the harm] is not dissimilar to the types of burdens traditionally recognized as punitive”). The Court has historically applied the Bill of Attainder Clause to legislative enactments barring designated individuals or groups from participation in specified employments or vocations. *United States v. Lovett*, 328 U.S. 303 (1946).

The ban on federal funds to ACORN is analogous to the cutoff of pay to specified government employees held to constitute punishment for purposes of the Bill of Attainder Clause. *Lovett*, 328 U.S. at 317–18. Both the *Lovett* statute and those at issue here are appropriation statutes which bar the affected group or individuals from employment or contracting with government entities without

according them due process. While this case involves independent government contractors and not government employees, the Supreme Court has repeatedly held that there is no “difference of constitutional magnitude between the threat of job loss to an employee of the state, and a threat of loss of contracts to a contractor.” *Lefkowitz v. Turley*, 414 U.S. 70, 83 (1973) (finding plaintiff’s disqualification for contractors was a “penalty” in Fifth Amendment context); *Bd. of County Comm’rs v. Umbehr*, 518 U.S. 668, 679 (1996) (listing cases). As the Court noted in holding that there was no constitutional difference between independent contractors and employees in the First Amendment context, “[i]ndependent government contractors are similar in most relevant respects to government employees.” *Bd. of County Comm’rs*, 518 U.S. at 684.

In *Lovett* and here, Congress succumbed to the temptation to “pander to an inflamed popular constituency,” to punish politically unpopular individuals or, in this case, groups. *Seariver Mar. Fin. Holdings, Inc. v. Mineta*, 309 F.3d 662, 676 (9th Cir. 2002) (quoting *Nixon*, 433 U.S. at 480). Just as in *Lovett*, where Congressman Dies listed individuals tied to “subversive activities,” here Representative Issa’s report concluded that ACORN constitutes a “criminal enterprise,” and appended a list of organizations allegedly tied to that “criminal enterprise.” Issa Report at 3, 74-81. While *Lovett* was accorded a secret, star chamber congressional hearing at which government investigators presented their

findings, here no hearing *whatsoever* was afforded ACORN to dispute or defend against these charges.

In both cases Congress prohibited funding through appropriation bills that on their face did not assign blame to those affected. Like the pay freeze in *Lovett*, the statutes here present no “mere question” “of appropriations,” but rather were introduced “because the legislature thinks [that ACORN and its affiliates are] guilty of conduct which deserves punishment.” *Lovett*, 328 U.S. at 314, 317. The *Lovett* Court’s admonition is applicable here: “The fact that the punishment is inflicted through the instrumentality of an Act specifically cutting off the pay of certain named individuals found guilty of disloyalty, makes it no less galling or effective than if it had been done by an Act which designated the conduct as criminal.” *Id.* at 316. Here, as in *Lovett*, “the congressional action . . . stigmatized [the plaintiffs’] reputation and seriously impaired their chance to earn a living.” 328 U.S. at 314.

The Government asserts three reasons why this case is distinguished from *Lovett* and the other employment bar cases. None of these asserted distinctions are of consequence.

*First*, the government claims that this case, unlike *Lovett*, does not involve a permanent deprivation but “only” a “temporary,” one-year bar. Appellants’ Br. at 19–20. But there is no requirement that a Bill of Attainder need impose *permanent*

punishment. Rather the clause bars legislative punishment “of any form or severity.” *Brown*, 381 U.S. at 447. A one year prison sentence would clearly qualify as punishment. The statute declared unconstitutional in the *Con Ed* case was not a permanent deprivation, but rather a deprivation of one-time rate increase which did not preclude Con Ed from recovering costs of future outages from ratepayers. SA-47.

Moreover, the consequences of even a temporary ban on government funding for government contractors can be “potentially harsh,” as “disqualification from government contracting is a very serious matter” for entities that do a significant amount of government work. *Sloan v. Dep’t of Housing and Urban Dev.*, 231 F.3d 10, 17 (D.C. Cir. 2000). As this Circuit has recognized: “Where a federal agency takes action to debar a private firm from further business relations with that agency, the effect is far different from that of simply denying an application for a contract... “Disqualification from bidding or contracting . . . directs the power and prestige of government at a particular person and . . . may have a serious economic impact on that person. .” *Myers & Myers v. United States Postal Serv.*, 527 F.2d 1252, 1258-59 (2d Cir. 1975) (quoting *Gonzalez v. Freeman*, 334 F.2d 570 (D.C. Cir. 1964)). Because of these serious economic consequences and the stigma to an organization’s reputation, it is well established that plaintiffs have a liberty interest in avoiding even a short term debarment or

suspension and must be afforded due process protections when a government agency takes such action. *Reeve Aleutian Airways, Inc. v. United States*, 982 F.2d 594, 598 (D.C. Cir. 1993)(four month suspension of airline by DOD that was then lifted “imposed a sure stigma [on airline]; branding the airline unsafe creates a lasting blemish on a company’s reputation”); *Myers & Myers, supra.*; *Transco SEC v. Freeman*, 639 F. 2d 318,321 (6<sup>th</sup> Cir 1981)(“One who has been dealing with the government on an ongoing basis may not be blacklisted, whether by suspension or debarment, without being afforded procedural safeguards”); *Trifax Corp. v. District of Columbia*, 314 F.3d 641, 643 (D.C. Cir. 2003)(corporation has a liberty interest in right to pursue a chosen profession which is implicated where “the government ‘has seriously affected, if not destroyed, [their] ability to obtain employment [or contracts] in [their] field’ ” ).

Moreover, these statutes are in one manner far broader and more severe than the *Lovett* statute, for they bar not only ACORN from funding, but also undefined subsidiaries, affiliates or allies and therefore could be applied to any company that works with ACORN. The statutes thereby not only “attaint” ACORN with a “note of infamy,” but also encourage others to shun ACORN. 4 William Blackstone, *Commentaries* 380, quoted in *SBC Communications, Inc. v. FCC*, 154 F.3d 226, 235 (5th Cir. 1998). It is as if the *Lovett* statute had prohibited any federal funds from being used to pay Lovett or any firm that employed him, effectively denying

him both public and most private employment. The effect here has been to drive ACORN close to bankruptcy—the equivalent of a corporate death sentence.

Finally, these statutory bars may not be “temporary”. While these statutes do expire after one year, the ban has already been extended by Congress twice, Congressman Issa and his supporters are determined to extend it further and make it permanent, and the bar is included in next year’s proposed budget. *See* OMB, *Budget of the U.S. Government, Fiscal Year 2011, supra*. As the District Court correctly noted, holding that only a permanent ban on funding constitutes a Bill of Attainder would allow Congress to continually renew a legislative bar for each succeeding year’s appropriation, thereby precluding review of a *de facto* permanent ban. SA-46–47 n.12.

*Second*, the government purports to distinguish *Lovett* because “this legislation affects corporations rather than individuals.” Appellants’ Br. at 20. However, the Bill of Attainder Clause protects both individuals and corporations, and this Court’s analysis in *Con Edison* did not vary because a corporation, not a natural person, was the subject of legislative punishment. 292 F.3d at 348–49, 354. The Supreme Court, in *O’Hare Truck Service Inc. v. City of Northlake*, 518 U.S. 719, 722–23 (1996), held that a corporation was entitled to the same First Amendment protections with respect to deprivation of government contracts as an individual employee would have with respect to a job. The Court has also

“rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not ‘natural persons.’” *Citizens United v. FEC*, \_\_\_ U.S. \_\_\_, 130 S. Ct. 876, 900 (2010). “A corporation may contract and may engage in the common occupations of life, and should be afforded no lesser protection under the Constitution than an individual to engage in such pursuits.” *Old Dominion Dairy v. Secretary of Defense*, 631 F. 2d 953, 962(D.C. Cir 1980) (rejecting government argument that corporation has no liberty interest in preventing a government debarment).

*Third*, the government argues that *Lovett* and *Brown* are distinguishable because the present case is about alleged “mismanagement” or other alleged ACORN misconduct, and not about “subversive beliefs” or associations. Appellants’ Br. at 22-23. However, legislative punishment imposed on specific individuals need *not* be based on “political beliefs or affiliations” or some other “impermissible criteria” to constitute a Bill of Attainder. Appellants Br., at 14,15. This Court in *Con Edison*, and the D.C. Circuit in *Foretich*, declared statutes to be unconstitutional Bills of Attainder although neither Consolidated Edison nor Dr. Foretich were singled out because of their political beliefs or associations. The Supreme Court has never stated that a deprivation must be based on impermissible political criteria to constitute a Bill of Attainder, but rather has repeatedly

characterized the evil the Bill of Attainder clauses address as legislative punishment of “specifically designated persons or groups” or “named individuals.” *Brown*, 381 U.S. at 447–49. While legislative enactments of Bills of Attainder are exceedingly rare in American history and often involve Congress’ targeting an individual or group for political reasons, plaintiffs need not prove that this legislation was motivated by impermissible political criteria for it to constitute a Bill of Attainder.

Nonetheless, in this case, the legislative history and text of these statutes demonstrate that plaintiffs *were* singled out for their political viewpoint and affiliations. The legislative record amply demonstrates that Congress targeted ACORN because of its actions supporting Democratic politicians such as Barack Obama. *See* pp. 11-12, 14-15, *supra*. As Senator Patrick Leahy aptly noted:

Everyone—except perhaps many of the casual observers who are the target audience of the orchestrated anti-ACORN frenzy—knows that the score-at-any-price partisanship is being mixed in an unseemly way with public policy. For more than a year—since long before these videotapes were made—it has been well known that a partisan project has been launched to demonize ACORN.<sup>35</sup>

More fundamentally, irrespective of the legislators’ motivations, the statutory text targets organizations based on their undefined associations or alliances with ACORN, raising similar concerns to the statutes declared unconstitutional in *Lovett* and *Brown*. The *Brown* Court recognized that while

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<sup>35</sup> 155 Cong. Rec. S9541, 9542 (daily ed. Sept. 17, 2009) (statement of Senator Leahy).

Congress had a legitimate purpose in barring from leadership positions in trade unions individuals who would instigate political strikes, it could not specify the individuals or groups who it thought fit that description, nor could it simply designate “Communists as those persons likely to cause political strikes”, even if such designation rested “upon an empirical investigation by Congress of the acts, characteristics and propensities of Communist Party members”. 381 U.S. at 455. So too, while Congress has a legitimate interest in barring organizations a who commit fraud or other misconduct from receiving government contracts, it can neither specify the groups or individuals it believes meet that description, nor cannot it “automatically be inferred” that anyone associated or allied with ACORN will be guilty of misconduct or serious mismanagement. *Id.* at 456. *Brown* decried just this kind of guilt by association: Congress designating *every* program run by ACORN and *all* of its undefined subsidiaries, affiliates and allies, as “those [organizations] likely to [misuse federal funds]”, based upon the “empirical investigation” conducted by Congressman Issa and his staff, or even some objective and non-partisan report. Just as the employment bar in *Brown* “was based on the constitutionally repugnant premise that political affiliation could predict an individual’s propensity to engage in future misconduct” Appellants’ Br. at 27, so too the contracting bar here is premised on the impermissible assumption

that any organization allied or affiliated with ACORN can be predicted to be fraudulent or mismanaged.<sup>36</sup>

## (2) Functional Test

This Court’s functional test for determining whether a statutory burden constitutes punishment looks at “whether the law under challenge viewed *in terms of the type and severity of the burden* imposed, reasonably can be said to further non-punitive legislative purposes.” *Con Ed*, 292 F.3d at 351 (quoting *Nixon*, 433 U.S. at 475). Moreover, where, as here, a statute imposes a punishment on “an identifiable party . . .,” the Bill of Attainder Clauses undermine the *usual solicitude* we have for such purposes. In such cases, we look *beyond simply a rational relationship* of the statute to a legitimate public purpose for less burdensome

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<sup>36</sup> The government has abandoned its argument rejected by the District Court that *Lovett* is distinguishable because Lovett was deprived of a vested property interest and plaintiffs here are not. For as the District Court recognized, the *Lovett* Court did not base its decision on a property right analysis. SA-42. Nor does one have any property right to a position in a trade union, to a profession as an attorney, nor to be a priest. The Supreme Court in *Cummings v. Missouri* clearly held that a property right need be taken for a deprivation to constitute traditional punishment;

We do not agree with the counsel of Missouri that “to punish one is to deprive him of life, liberty, or property and that to take from him anything less than these is no punishment at all . . . .” Disqualification from the pursuits of a lawful avocation . . . may also, and often has been, imposed as punishment.”

71 U.S. (4 Wall.) 277, 320 (1866).

In any event, the statutory bar here has resulted in the deprivation of plaintiffs’ liberty interest in contracting with the government, and the suspension and termination of plaintiffs’ existing contracts.

alternatives by which [the] legislature . . . could have achieved its legitimate non-punitive objectives.” *Con. Ed.*, 292 F.3d at 350 (emphasis added)

The government posits that Congress’ unquestioned right to protect the public treasury against “ACORN’s uncontroverted management problems” served as Congress’ legitimate non-punitive purpose here. Appellants’ Br. at 23–24; *see also id.* at 25–26 (citing Harshbarger Report). However, the government’s argument fails for several reasons. First, the fact that challenged legislation targets specific organizations rather than a category of activity renders the statutes’ purported non-punitive purpose suspect. Second, the government fails to even articulate any legitimate non-punitive reason for singling out only ACORN and related organizations for a one-year debarment. Finally, the statutes are clearly overbroad, and there were obvious “less burdensome alternatives” for Congress to achieve the legitimate non-punitive purpose the government claims Congress had.

**(a) The Singling Out of ACORN and Its Affiliates Renders the Purported Non-Punitive Purpose of the Challenged Statutes Suspect**

The government claims erroneously that a statute’s singling out of one organization and its affiliates is of no consequence because a “statute’s specificity does not render it suspect . . .” Appellants’ Br. at 28. However, as stated above, p. 38 *supra*, this Court’s decision in *Con Edison* is directly to the contrary. 292 F.3d at 350.

So too, the D.C. Circuit has held that while “underinclusiveness or specificity alone, do not render a statute an unconstitutional bill of attainder” . . . “narrow application of a statute to a specific person or class of persons *raises suspicion*, because the Bill of Attainder Clause is principally concerned with “the *singling out* of an individual for legislatively prescribed punishment.” *Foretich v. Morgan*, 351 F.3d. at 1224 (emphasis added).<sup>37</sup> A court therefore must take “account of the scope or selectivity of a statute in assessing the plausibility of alleged non-punitive purposes.” *Id.* In *Foretich*, “it was the Act’s specificity that renders the asserted non-punitive purposes *suspect*.” *Id.* (emphasis added).

The Supreme Court has often recognized the “crucial constitutional significance” between restricting *a group or individual “by name”* and “a statutory program regulating not enumerated organizations but *designated activities*.” *Brown v. United States*, 381 U.S., *supra*, at 451 (emphasis added), quoting *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1, 84–85 (1961). Similarly, the Court in *Flemming v. Nestor* distinguished between statutes

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<sup>37</sup> Many of the Bill of Attainder cases cited by the government do not involve statutes which single out an individual or group. For example, *Navegar v. USA*, 192 F. 3d 1050 (D.C. Cir. 1999) involved a statute which did not specify any person or corporation for specific harm, but rather barred various categories of weapons. *Id.* at 1067 (statute “regulate(s) an entire class of weapons”) So too, *DeVeau v. Braisted*, 363 U.S. 144 (1960) prohibited convicted felons as a class from serving as officers of a waterfront union, and did not target specific individuals. Similarly, the restriction challenged in *SeaRiver Mar. Fin. v. Mineta*, 309 F. 3d 662, 666 (9<sup>th</sup> Cir 2002) did not apply to only one specific, named corporation, but rather defined a narrow class of tanker vessels to be restricted by the conduct they had engaged in. While the plaintiffs objected in *Sea River* that the class was too narrowly defined and should have included other vessels, the statute there included all vessels that had spilled over a million gallons of oil into a marine environment after a certain date, unlike those here which include only ACORN.

which regulated a category of activities or a status, from those “where the statute in question is evidently aimed at the person or class of persons disqualified.” 363 U.S. 603, 614 (1960). The *Flemming* Court concluded that because the disqualification of social security benefits there was based on the “fact of deportation” it was “a far cry from situations . . . where legislation was on its face aimed at particular individuals.” *Id.* at 619. The Court has repeatedly noted that a statute is suspect as a Bill of Attainder when it is intended “to reach the person not the calling.” *Cummings v. Missouri*, 71 U.S. at 320; *Selective Service Sys.*, 468 U.S. at 842; *see also Nixon*, 433 U.S. at 485-86 (Stevens J. concur) (“It has been held permissible for Congress to deprive Communist deportees, as a group, of their social security benefits, *Flemming v. Nestor*, 363 U.S. 603, but it would surely be a bill of attainder for Congress to deprive a single, named individual. The very specificity of the statute would mark it as punishment, for there is rarely any valid reason for such narrow legislation . . .”). In the words of Chief Justice Warren, it is the “command—of the Bill of Attainder Clause—that a legislature can provide that persons possessing certain characteristics must abstain from certain activities, but must leave to other tribunals the task of deciding who possesses those characteristics . . .” *Brown*, 381 U.S. at 455 n.29.

The cases that the Government cite, such as *Sabri v. United States*, 541 U.S. 600, 608 (2004) Appellants Br. at 24, for the proposition that Congress has the

legitimate power to enact measures designed to ensure the proper use of government funds are irrelevant here, because the plaintiffs do not question Congress' right to prohibit bribery of public officials or fraud in the expenditure of federal funds by means of a "generally applicable rule", as did the statute at issue in *Sabri*. Rather, plaintiffs challenge Congress' designation of the specific individual or group to whom the sanction applies. As the Court explained in

*Brown*:

We do not hold today that Congress cannot weed dangerous persons out of the labor movement, any more than the Court held in *Lovett* that subversives must be permitted to hold sensitive government positions. Rather, we make again the point made in *Lovett*: that Congress must accomplish such results by rules of general applicability. It cannot specify the people upon whom the sanction it prescribes is to be levied.

381 U.S. at 461

Moreover, that Congress has never enacted a funding bar against any of the many corporations accused or convicted of misconduct, mismanagement or fraud, suggests that these statutes are suspect, and at minimum the government must explain why ACORN was treated so uniquely. What Justice Scalia noted in *Plaut v. Spendthrift Farm* 514 U.S. 211,230 (1995) applies in this context: "Apart from the statute we review today, we know of no instance where Congress [has taken this kind of action]. That prolonged reticence would be amazing if such interference were not understood to be constitutionally proscribed."

**b) The government asserts no non-punitive reason for treating ACORN uniquely**

Even if Congress was in fact acting merely because of concerns about ACORN’s “mismanagement”—an implausible conclusion based on the legislative history and the burdens imposed here—the government nonetheless totally fails to articulate any reason why Congress singled out only ACORN for this severe sanction. Unlike the statutes at issue in the *Nixon* or *BOCS* cases, there is simply no non-punitive reason that justifies ACORN’s unique treatment here. SA-51.

The government claims that, “in the District Court’s view, the bill of attainder clause precludes Congress from singling out any organization when Congress imposes appropriation restrictions.” Appellants’ Br at 26. The District Court held no such view. Rather, the Court recognized that in *Nixon* and the *Bell Operating* cases, the Supreme Court and appellate courts upheld statutes singling out a “single individual or entity” where the government proffered a legitimate non-punitive reason to treat the affected entity uniquely.<sup>38</sup> SA-50–51. The District

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<sup>38</sup> Neither *Nixon* nor any other case cited by the government has held a statute which specifically singled out a named individual or group for a serious deprivation to be constitutional. In *Nixon*, the Court emphasized that the statute safeguarded “appellants right to copy, and use the materials”, provided “for the payment of just compensation” if any rights were deemed violated, and “preserves for appellant all of the protections that inhere in a judicial proceedings”, holding that all these protections “belie any punitive interpretation”. 433 U.S. at 481-482. The contrast here is stark.

So too, in the *Bell Operating Companies* cases, appellate courts found that the challenged legislation was not an attack on those companies, but rather a “compromise” which actually

Court simply held that here the “government has offered no similarly unique reason to treat ACORN differently from other contractors accused of serious misconduct and to bar ACORN from federal funding without either a judicial trial or the administrative process applicable to all other government contractors.” SA-51. The government continues to offer none in this appeal.

Hundreds if not thousands of government contractors not only have “management” problems but have received contract awards despite having engaged in serious proven misconduct. Kate M. Manuel, *CRS Report for Congress: Debarment and Suspension of Government Contractors: An Overview of the Law Including Recently Enacted and Proposed Amendments* (Nov. 19, 2008), at 12-13.<sup>39</sup> In 2002, the General Accounting Office found that numerous

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“benefits the BOCS”, which they were “pleased” with and supported during Congress’ consideration of the legislation. *Bellsouth Corp. v. FCC*, 162 F. 3d 678 at 690-91 (D.C. Cir. 1998) (emphasis in original), *SBC Communications v. FCC*, 154 F. 3d 226, 244 (5<sup>th</sup> Cir. 1998). Nobody could argue that was the case here.

*Atonio v. Wards Cove Packing Co.*, 10 F. 3d 1485, 1496(9<sup>th</sup> Cir 1993) involved a statute which denied the retroactive application of a Title VII rule change to a class of workers in their lengthy litigation that had already been decided by the Supreme Court. As the Court recognized might occur, the Supreme Court later held that the rule change was not retroactive, so the exemption for the workers turned out to be meaningless. *Id.* at 1492; *see also Landgraf v. USI Filon Products*, 511 U.S. 244 (1994). In any event, it was obvious there, unlike here, that Congress did not deny the workers any benefit because it believed them guilty of some misconduct and sought to punish them, but simply wanted to put an end to lengthy and costly litigation. *Id.* at 1496 That Congress can favor one company over another, or deny a benefit to one group of workers that it provides others is quite different from punishing a group of workers or a company because of perceived misconduct or mismanagement.

<sup>39</sup> For example an independent oversight organization reported in 2002 that: [S]ince 1990, 43 of the government’s top contractors paid approximately \$3.4 billion in fines/penalties, restitution, and settlements, and that four of the top 10 government contractors have at *least two* criminal convictions. Project on Government Oversight, *Federal Contractor Misconduct:*

federal contractors were awarded substantial contracts despite convictions or judgments that they had violated federal laws. United States General Accounting Office, *Report to Congressional Requesters, Government Contracting Adjudicated Violations of Certain Laws by Federal Contractors* (Nov. 2002), at 5. Perhaps most dramatically, Congress, in response to the 2004 WorldCom scandal involving proven billions of dollars of fraud by a major government contractor, expressed concerns about the efficacy of agency actions and required a GAO investigation, but did not bar WorldCom from government contracting. *See GSA Actions Leading to Proposed WorldCom Debarment*, GAO-04-741R (May 26, 2004, available at <http://www.gao.gov/new.items/d04741r.pdf>); House Report 108-243, accompanying the Transportation, Treasury, and Independent Agencies Appropriations Act of 2004, H.R. Rep. 108-243 (2003).

Congress has not singled out any of these contractors for debarment or suspension. Yet it chose to debar only ACORN and its so-called “affiliated or allied organizations,” despite the lack of any adjudicated criminal convictions or administrative findings against ACORN.

Nor does Congress’ alleged purpose of preventing *future* misconduct render the statute regulatory rather than punitive,” because as the District Court observed,

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*Failure of the Suspension and Debarment System* (2002), available at [<http://www.pogo.org/pogo-files/reports/contract-oversight/federal-contractor-misconduct/co-fcm-20020510.html>].

preventing and deterring misconduct is a traditional justification of punishment. SA-46 (citing *Con Ed*, 292 F.3d at 353); *Brown*, 381 U.S. at 456-60 (rejecting the Solicitor General’s argument that the statute’s preventive, not retributive purpose made it non-punitive, pointing out that the statute in *Lovett* was also justified for preventive purposes); and *Selective Service Sys.*, 468 U.S. at 851–52 (“Punishment is not limited solely to retribution for past events, but may involve deprivations inflicted to deter future misconduct.”).

The government is also incorrect in asserting that Congress can rely on newspaper accounts, investigations, the Issa Report, or the investigation by the GAO to sustain the legitimacy of its judgment debarring ACORN. For the evil the Bill of Attainder clauses address is trial and punishment by legislature, not Congressional irrationality or lack of a factual basis to support Congress’ conclusions. While Congress can rely on investigations to support the rationality of legislative regulations of narrow or broad classes based on their characteristics, it cannot single out an individual for punishment, even where it has investigative facts supporting its findings. The District Court correctly rejected the government’s argument that Congress could rely on the GAO report when its investigation is complete to again bar ACORN for federal funding next year or even permanently, for if Congress did so it would be acting as the prosecutor, judge and jury – even if not investigator – to declare guilt and impose punishment.

In *Lovett*, *Brown*, *Con Ed* or *Foretich* it was irrelevant to the Court whether the legislature had a factual basis for its legislative judgment. It would have been equally illegitimate for Congress to have singled out a particular individual in *Brown* to investigate, try and bar from union leadership for instigating political strikes, rather than simply barring Communist party members generally. But the government's argument would allow Congress to do just that.

**(c) Less Burdensome Alternatives clearly existed**

These statutes are also clearly overbroad, and Congress had less burdensome alternatives to accomplish its purportedly non-punitive purposes.

**(i) Section 535 Investigation and the absolute one-year bar**

The government claims that all these statutes do is “provide a temporary response to incontrovertible evidence of mismanagement pending the findings of ongoing investigations, including the investigation by the Comptroller General.” Appellants’ Br. at 31. The government is simply wrong in this assertion.

These statutes debar ACORN and its related associated organizations for a year until October 1, 2010, irrespective of the results of the Comptroller General’s investigation. None of the statutory bars here are tied in any way to the GAO investigation. Consequently, therefore, *even* if the Comptroller General concludes within the 180 days allotted for the investigation that ACORN has not committed

any misuse of federal funds, the five challenged provisions nonetheless continue to prevent plaintiffs' access to federal funds and federal contracts for at least a year.

In contrast, any regulatory investigation in connection with a suspension of a federal contractor or grantee would reinstate the suspended contractor if the investigation concluded that no misconduct occurred. 2 C.F.R. § 180.605 (a suspension is a temporary status of ineligibility for procurement and non-procurement transactions, pending *completion* of an investigation or legal proceeding). Similarly, various federal statutes suspend companies or persons from contracting with the government for violations of those statutes in order to ensure that the violations are corrected, and therefore the suspension is lifted “[w]henever the Administrator determines that the condition which gave rise to such a conviction has been corrected.” Clean Air Act, 42 U.S.C. § 7606; Clean Water Act, 33 U.S.C. § 1368.

A percentage of the funding bar—that occurring after the GAO reports—is therefore unrelated to the purported government purpose of providing a “temporary response pending the outcome of an investigation” in an analogous manner to the overbroad rate increase denial at issue in *Con Edison*. 292 F. 3d at 354. As the District Court noted, “the unavailability of any means for ACORN to overcome the funding ban if the investigative report is favorable underscores the lack of a

connection between the burdens of the statute and Congress’ purpose in enacting it”. SA-49.

Moreover, Congress had an easily available less burdensome and often used appropriation technique of barring the use of certain funds unless the Executive certifies that certain conditions have been met, a technique it actually used in other sections of the challenged statutes unrelated to ACORN.<sup>40</sup> That Congress did not use a readily available less burdensome alternative further demonstrates that these provisions constitute punishment. *Con. Ed.*, 292 F.3d at 350, 354.

Nor do these statutes contain any provision for ACORN to overcome the debarment by demonstrating that it has undertaken significant reform efforts, as the Harshbarger report asserts it had. A-295. The Supreme Court has often noted that one indicia of a punitive and not merely regulatory statute is whether the statute contains a provision affording the affected party the opportunity to lift the disqualification. *Selective Serv. Sys.*, 468 U.S. at 853 (students “carry the keys of their prison in their own pockets”); *Brown*, 371 U.S. at 457–58 (that members of

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<sup>40</sup> *See, e.g.*, Supplemental Appropriations Act, 409, Pub. L. No. 111-32, § 1102 (2009) (authorizing certain funds for Afghanistan only if the Secretary of State reports that certain organization is cooperating with USAID in investigating past use of funds); Department of Defense Appropriations Act, 2010 Pub. L. No. 111-118, § 9011 (none of the funds made available in this or any other act may be used to transfer Guantanamo detainees to the United States until 45 days after the President submits a plan with certain requirements including a certification by the Attorney General that the individual poses little or no security risk); § 9003 (500 million dollars in funds shall not be available until 5 days after the Secretary of Defense has completed a thorough review of the Commander’s Emergency Response Program and provided a report on his findings to the congressional defense committees). *See also id.* §§ 8046, 8048, 8050, 8060 (similar provisions).

class can extricate themselves is probative of whether statute is punitive); *Selective Serv. Sys.*, 468 U.S. at 851 (“‘Far from attaching . . . to past and ineradicable actions,’ ineligibility of Title VI benefits ‘is made to turn upon continuingly contemporaneous fact,’ which a student who wants public assistance can correct.” *Id.* at 851 (quoting *Communist Party of United States v. Subversive Activities Control Bd.*, 367 U.S. 1, 87 (1961))).

Similarly, the administrative regulations are designed to be non-punitive and therefore accord agencies ample discretion to consider any changed circumstances suggesting that a contractor is unlikely to repeat past misconduct, such as changes in personnel or procedures. *See* CRS Debarment and Suspension Report, *supra*, at CRS–8. Congress could easily have conditioned the debarment on a showing by ACORN or affiliated groups to the relevant agency that they had taken appropriate actions to prevent future misconduct.

**(ii) The Overbroad Debarment of Any ACORN program and all ACORN subsidiaries, affiliates or allies**

Second, the sweeping prohibition on any federal funding for any ACORN affiliated or allied organization, whether or not it is independently organized, structured or incorporated, and whether or not the organization has itself committed any fraud or misconduct clearly is punitive and serves no legitimate regulatory purpose. This case is analogous to *Con Ed* where the New York statute

denying Con Ed a cost-pass-through was overbroad because the statute denied not only costs that could be attributed to the company's own negligence that ratepayers should not have to bear, but also costs that had no connection to lax monopolistic conduct that utility regulation would ordinarily seek to deter. 292 F.3d at 352–54.

The Court held that:

If the entirety of the cost-pass-through prohibition served the economic-regulatory function described above, *we might be willing* to conclude that Chapter 190's deterrent function was non-punitive. Our view of the "type and severity of burdens imposed" by Chapter 190, however leads us to a different conclusion.

*Id.* at 352 (emphasis added).<sup>41</sup>

Here too, Congress not only barred funding to those organizations or ACORN programs that it alleges actually committed fraud, but has also denied funds to any ACORN program or affiliated or allied organization, whether or not such program or organization had an exemplary record of serving the public, or whether or not there were any allegations of fraud or corruption against that organization. As in *Con Ed.*, the legislature made no effort to tailor the prohibition to the alleged misconduct. Rather, "by lumping all" of ACORN's

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<sup>41</sup> Because the Con Edison Court decided that the statute at issue there was overbroad, it did not decide whether a statute that only prohibited those costs directly attributable to Con Edison's negligence would have constituted punishment. The Court's discussion relied on by the government, Appellants' Br at 30, is dicta, and in any event did not definitively conclude that a narrow pass along would have been justified by the government's proffered regulatory reason, but generally used conditional terms like "arguably non punitive", "not necessarily" punitive or "might be willing". *Id.* at 352-3 Moreover, the burden here is far more draconian than the one time rate increase denial in *Con Ed.*

programs and so-called “affiliated and allied” corporations together, the legislature acted in an unconstitutionally punitive, not regulatory manner. *See Con. Ed.*, 292 F.3d at 354.

In *Con Ed.*, the denial of funds to the corporation was overbroad in covering costs not associated with the corporation’s alleged culpability; here the denial of funds is likewise overbroad in covering organizations and programs not even alleged to have committed fraud or misconduct. See A-41, 789-90 (no grant administered by AI nor building managed by MHANY ever involved in misconduct). In both cases, the overbroad prohibition cannot be tied to a legitimate regulatory goal and thus must be viewed as punishment for purposes of the attainder clause.

Indeed, the only possible rationale for excluding any ACORN related, affiliated or allied organization from funding would be that Congress chose to treat any ACORN related organization as, in the words of the Issa Report and congressional statements, “a criminal enterprise.” But that rationale is of course punitive, not merely regulatory.

The American Bar Association’s Sections of Public Contract Law and Administrative Law and Regulatory Practice concluded that the “automatic coverage of entities beyond fraudulent actors is inappropriate” in the related Defund ACORN Act passed by the House. That Act, which unlike the legislation

at issue here, at least defined the “ACORN-related affiliates” whose funding would be denied, was criticized by the ABA sections for its “overly broad sweep,” “which would extend the denial of funding to persons and entities with no demonstrated relationship to fraud,” and was inconsistent with the current administrative scheme. A446–47. The ABA sections recommended an alternative which is clearly less burdensome: defunding only those entities shown to be “directly involved in fraudulent activity” or have control “specifically over demonstrated fraudulent activity.” A447.

### **(iii) Bypassing the Regulatory Process**

Finally, the District Court found that Congress bypassed and circumvented the existing regulatory process established pursuant to law for determining whether and under what circumstances the federal government bars corporations from government funds and grants. That regulatory process, as the ABA sections on Public Contract Law and Administrative Law and Regulatory Practice has pointed out, was created specifically in response to congressional concerns of the type that the government asserts motivated Congress here, and requires that the affected corporation be accorded due process protection. A-443 (“the summary termination of funding without any hearing or other procedural protection... would violate basic due process protections as elaborated by the Supreme Court over the last

forty years..” and is inconsistent with rules “created specifically in response to congressional concerns” )

That there is already in place a constitutionally acceptable administrative procedure to vindicate the interest in protecting government funds from fraudulent or corrupt contractors is strong evidence that Congress’ interest in enacting the Continuing Resolution is not merely regulatory, and is clearly a less burdensome alternative Congress could have relied on. The government has never even offered an explanation as to why that process was inadequate. The District Court did not conclude that Congress could never bypass an existing regulatory mechanism. It only reiterated what this Court said in *Con Edison*:

Although an established procedure existed for determining whether Cons Ed has been “imprudent” in increasing the costs associated with the outage, the legislature bypassed it and, in a single stroke, found guilt on the facts of Cons Ed’s case. The legislature retains the power to reclaim authority over rate setting from the PSC. However, the decision to bypass the PSC *reinforces* our conclusion that the legislature’s decision was to find guilt and order punishment directly.

292 F.3d at 349(emphasis added); *see also* SA-21 (finding that “the existence of these regulations militates against the need for draconian, emergency action by Congress”).

### **(3) The Legislative History Demonstrates Punitive Intent**

Contrary to the Government’s assertion, *see* Appellant Br. at 34-35, the legislative record surrounding the challenged Defund ACORN statutes reflects “a

clear legislative intent to punish” ACORN and its subsidiaries, affiliates, and allies. *Con. Ed.*, 292 F.3d at 354. As set forth on pp. 11-17 *supra*, far from “a smattering of legislators,” *Con. Ed.*, *supra*, at 354, virtually every member of Congress who has spoken in support of defunding ACORN over the past year-and-a-half, including and especially the chief sponsor of the five FY 2010 appropriations statutes challenged here, Senator Johanns, has expressed a desire to punish and “get” ACORN for its perceived political affiliations and/or congressionally-determined misconduct.<sup>42</sup> *See id.* at 355 (looking to the statements of “one of the floor managers of the legislation” to reinforce conclusion that legislation was punitive)(emphasis added).

This legislative history in fact closely resembles that of the statute at issue *Lovett*. In *Lovett* Congress passed the challenged federal employment bar in response to a special House Appropriations subcommittee report submitted together with the challenged bill which found that the three Plaintiffs targeted by the bar were engaged in subversive activity against the United States government. 328 U.S. at 311-12. Similarly, the Congressional supporters of the challenged Defund ACORN statutes such as Senator Johanns clearly relied on the Issa

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<sup>42</sup> Plaintiffs and the District Court have addressed the legislative history of all the Congressional Defund ACORN legislation together rather than treating the legislative record for each bill separately because all of these provisions can only be understood as part of a general plan to defund ACORN, and therefore the legislative history that is most appropriate is that setting forth and establishing the context and “circumstances of . . . passage” of all these provisions, taken as a whole. *Lovett*, 328 U.S. at 313; *Foretich*, 351 F.3d at 1215.

Report's findings of supposed illegal activity and misconduct on the part of ACORN. *See* Issa Report, at 3-4, 5, 7; 155 Cong.Rec. S9308, 9314; 155 Cong.Rec. H9555; 155 Cong.Rec. H9784, 9785-88; 155 Cong.Rec. H 9946, 9949; 155 Cong.Rec. H11080.

Moreover, in automatically barring any undefined subsidiary, affiliate or ally of ACORN, the statute's text undeniably reflects the conclusion of the Issa report that hundreds of ACORN associated organizations represent a "criminal enterprise" or "shell game" whose corporate form must be pierced and disregarded. Meanwhile, as discussed at p. 28 *supra*, the portions of the legislative record cited by Appellants to the effect that the legislation is necessary to "defend taxpayers against waste, fraud and abuse" and ACORN's "endemic culture of fraud and abuse," *see* Appellants' Br. at 34, only further demonstrate the punitive intent behind the challenged statutes.

Finally, nothing in the legislative history suggests, as the government claims, that Congress merely intended to temporarily suspend federal funding to ACORN pending the conclusion of investigations of the organization. Appellant Br. at 35. To the contrary, as set forth on pp. 16-17 *supra*: (a) § 535's six-month GAO investigation provision was introduced by a Senator who had voted against the challenged Defund Acorn statutes as an alternative to be undertaken before any defunding ACORN legislation is considered; (b) the Defund ACORN supporters in

Congress originally passed bills to permanently defund ACORN *before* requesting the GAO to investigate; and (c) many of these same legislators have since § 535's passage continued to label ACORN a criminal organization and to extend and broaden the funding ban despite the pending investigation.

## **II. Plaintiffs Have Standing To Sue All the Named Defendants in This Case**

Lastly, the government's arguments as to why plaintiffs lack standing to bring claims against the Secretary of Defense and Director of OMB, *see* Appellants' Br. at 35-37, are without merit. As the District Court correctly held, the injuries to plaintiffs' reputations which the challenged statutes have caused "can be an injury-in-fact for standing purposes." SA-55; *see also Gully v. Nat'l Credit Union Administration Bd.*, 341 F.3d 155, 162 (2d Cir. 2003) (holding that plaintiff had standing to challenge a ruling of misconduct which did not include a suspension because plaintiff's "reputation will be blackened by the Board's finding of misconduct and unfitness."). Moreover, the injuries to plaintiffs' reputations have also had a significant economic impact because the federal funding bar has hindered ACORN's ability to do work with or obtain funding from non-governmental entities afraid of being tainted as "allies" or "affiliates" of ACORN. SA-57; A-775.

Meanwhile, OMB's failure to rescind the instructions they provided to thousands of state agencies and non-governmental grantees and contractors

concerning the Continuing Resolution's prohibition on subcontracting with ACORN ensured that the injuries to plaintiffs' reputations and their resulting economic impact would continue long after the expiration of the CR. *See* A-360-410. Moreover, as the District Court correctly noted, OMB does indeed play an important role in the enforcement of appropriations statutes by providing guidance to the agencies responsible for enforcing them. SA-57.

### **CONCLUSION**

For the foregoing reasons, the judgments of the District Court should be affirmed.

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Respectfully submitted,

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