09-5172-cv(L)
10-992(CON)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

ACORN, ACORN INSTITUTE, INC., and MHANY MANAGEMENT, INC., f/k/a NEW YORK ACORN HOUSING COMPANY, INC.,

Plaintiffs-Appellees,

—against—

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

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF CONSTITUTIONAL LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae listed in the Appendix to this brief are professors of constitutional law who teach and write about the fundamental separation of powers issues raised in this appeal. In particular, although the federal Bill of Attainder Clause, U.S. CONST., art. I, § 9, cl. 3, is an infrequent subject of constitutional litigation, *amici* have come together to submit this brief to reinforce the structural importance of that provision, and to offer some modest observations concerning its application to this case.

SUMMARY OF ARGUMENT

The Constitution's prohibition on bills of attainder plays a vital structural role in our system of divided government by generally banning the legislative imposition of punishment. Indeed, the federal 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." *United States* v. *Brown*, 381 U.S. 437, 441 (1965).

1. Pursuant to Fed. R. App. P. 29(a), the parties have consented to the filing of this brief. In accordance with Local Rule 29.1, no counsel for a party to this appeal authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

Legislative imposition of punishment is troubling in at least three distinct respects: *First*, and most dramatically, the Founders feared "that the legislature, in seeking to pander to an inflamed popular constituency, will find it expedient openly to assume the mantle of judge or, worse still, lynch mob." *Nixon* v. *Adm'r of Gen. Servs.*, 433 U.S. 425, 480 (1977). *Second*, and related, such legislative inquisitions would be unbound by the myriad procedural and substantive protections attendant to criminal trials—including, as specified in Article III, Section 2 of the Constitution, the requirement of trial by jury. *Third*, the Constitution's ban on legislative punishment would not just serve as a check on the effects of popular passion or as a protection of judicial processes, but would also allow the distinct branches of government better to perform their constitutionally prescribed roles.

Because the Constitution's bar on bills of attainder is directed toward a more general evil (*i.e.*, legislative imposition of punishment), the Supreme Court has—correctly—embraced a functional, rather than formal, approach to whether individual legislative measures constitute impermissible punishment. The Court's repeated focus in these cases on function over form does more than merely explain why bills of attainder include bills of pain or penalties. It also explains why courts in conducting bill of attainder analysis are to look behind the literal terms of a statute in assessing the permissibility of the legislative regulation. In addition, both

the functional approach to bill of attainder analysis and the relationship between the Bill of Attainder Clauses and the separation of powers bolster *this* Court's conclusion that the Constitution bans bills of attainder whether directed at natural persons or corporate entities. *See Con. Edison Co. of N.Y.* v. *Pataki*, 292 F.3d 338, 346–47 (2d Cir. 2002).

More than just dicta, these statements are consistent with the Founders' understanding of the federal Bill of Attainder Clause as an integral part of the separation of powers, and, as such, a limitation on legislative power to operate not prospectively—the usual domain of legislation—but retrospectively, against specified parties, which is the usual domain of the judiciary. As long as corporate entities or other legislatively specified parties may be subjected to punishment for alleged past misdeeds by the legislature, powers are not properly separated and freedom is less secure.

The Supreme Court's bill of attainder jurisprudence also makes clear that the denial of eligibility for a particular governmental benefit *can* constitute punishment within the meaning of the Bill of Attainder Clause. "Punishment" in the context of bill of attainder analysis does not turn on whether there is a fine or specified term of imprisonment, but on the legislature's imposition of any kind of punishment on specified parties —the kind of governmental action that the Constitution reserves for the judiciary and judicial process. Indeed, the heart of the Bill of Attainder

Clause is a ban on legislative punishment based upon legislative singling out of parties, based on either their characteristics or conduct.

To that end, the Court's jurisprudence establishes one last point of significance here: Because bill of attainder analysis does not focus on whether it is *entitlements* that have been withdrawn, or on the differential treatment of those who are similarly situated, it does not comfortably find analogies in the analytical framework the Supreme Court has articulated for scrutinizing legislation under the Due Process and Equal Protection Clauses. The evil proscribed is simply the legislature's attempt to impose punishment on an identifiable party, which under the Constitution is instead the work of courts operating with due process.

As such, the appropriate scrutiny for laws that appear to impose "punishment" in violation of the Bill of Attainder Clause is *not* whether the government can proffer *any* legitimate, nonpunitive purpose for the law. Instead, the standard is more akin to the congruence and proportionality approach that the Supreme Court has identified in other contexts. In other words, in order to withstand scrutiny, legislation challenged as imposing punishment on identifiable individuals or groups must not only have a nonpunitive purpose, but that nonpunitive purpose must *itself* support and justify the singling out of the targeted individuals or groups.

ARGUMENT

I. THE BILL OF ATTAINDER CLAUSES PLAY A VITAL STRUCTURAL ROLE IN OUR CONSTITUTIONAL SYSTEM

The Constitution's twin Bill of Attainder Clauses[2] "have deep roots in rule-of-law ideology." AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 124 (2005). Referring to the federal Bill of Attainder Clause 45 years ago, Chief Justice Warren emphasized that it "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 441; *see also United States* v. *Lovett*, 328 U.S. 303, 318 (1946) ("When our Constitution and Bill of Rights were written, our ancestors had ample reason to know that legislative trials and punishments were too dangerous to liberty to exist in the nation of free men they envisioned. And so they proscribed bills of attainder.").

Legislative imposition of punishment is troubling in at least three distinct respects: *First*, and most dramatically, the Founders feared "that the legislature, in seeking to pander to an inflamed popular constituency, will find it expedient openly to assume the mantle of judge or, worse still, lynch mob." *Nixon*, 433 U.S.

2. The Constitution bans bills of attainder by both Congress, *see* U.S. CONST. art. I, § 9, cl. 3, and state legislatures, *see id.* § 10, cl. 1, one of the few limits in the Constitution as initially drafted that applied equally to the federal government and the states. And although only the federal provision is at issue in this case, it is clear that the two provisions should be read *in pari materia*.

at 480; *see also Brown*, 381 U.S. at 445 (noting that the bans on bills of attainder "reflected the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness, of, and levying appropriate punishment upon, specific persons"); *Lovett*, 328 U.S. at 317 ("Those who wrote our Constitution well knew the danger inherent in special legislative acts which take away the life, liberty, or property of particular named persons, because the legislature thinks them guilty of conduct which deserves punishment. They intended to safeguard the people of this country from punishment without trial by duly constituted courts.").

As James Madison explained in *Federalist* No. 44, "[We] have seen with regret and with indignation, that sudden changes, and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators; and snares to the more industrious and less informed part of the community." THE FEDERALIST No. 44, at 218 (Terrence Ball ed., 2003) (James Madison). Measures enacted under such circumstances would be "contrary to the first principles of the social compact, and to every principle of sound legislation." *Id.*; *see also Brown*, 381 U.S. at 444 (quoting Alexander Hamilton's statement that "if [the legislature] may banish at discretion all those whom particular circumstances render obnoxious, without hearing or trial, no man can be safe, nor know when he may be the innocent victim of a prevailing faction. The name of

liberty applied to such a government, would be a mockery of common sense."); Akhil Reed Amar, *Attainder and Amendment 2:* Romer*'s Rightness*, 95 MICH. L. REV. 203, 210 (1996) ("Without the nonattainder principle, the legislature could simply single out its enemies—or the politically unpopular—and condemn them for who they are, or for what they have done in the past and can no longer change.").

Second, and related, such legislative inquisitions would be unbound by the myriad procedural and substantive protections attendant to criminal trials—including, as specified in Article III, Section 2 of the Constitution, the requirement of trial by jury. Indeed, as Professor Tribe has noted, "trial by legislature . . . would be radically incompatible with the safeguards provided by trial before a neutral judge and an impartial jury according to ascertainable standards, promulgated in advance of the conduct said to violate them, and enacted and applied in accord with constitutionally required substantive and procedural standards." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-4, at 641 (2d ed. 1988); *see also id*. ("[W]ere such punishment by direct specification an available option, a host of other constitutional safeguards would be rendered nugatory as well.").

Third, the Constitution's ban on legislative punishment would not just serve as a check on the effects of popular passion or as a protection of judicial processes,

but would also allow the distinct branches of government better to perform their constitutionally prescribed roles. As John Hart Ely has put it, "separating policy making from application has the additional virtue of requiring relatively clear and candid articulation of the legislative purpose. By requiring the legislature to expose its purpose for observation, the political processes are given a fuller opportunity to react to it. And the judiciary is better able to judge the validity of the purpose and to assure that it violates no constitutional restrictions." Comment, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder* Clause, 72 YALE L.J. 330, 346–47 (1962) (footnote omitted).[3] Thus, Professor Ely concluded, the prohibitions on bills of attainder "should be viewed as a limitation on legislatures fully as broad, and as necessary to the effective separation of powers, as that which has been imposed upon courts by article III." *Id*. at 343.[4]

Although the Supreme Court has been asked to give meaningful substantive content to the Bill of Attainder Clauses only on a handful of occasions, it has repeatedly emphasized their significance, and not shown the least reluctance to

3. On Ely's authorship of this unsigned student note, see Alan M. Dershowitz, *Visibility, Accountability and Discourse as Essential to Democracy: The Underlying Theme of Alan Dershowitz's Writing and Teaching*, 71 ALB. L. REV. 731, 737 & n.14 (2008).

4. This Court has suggested that such separation-of-powers considerations are less relevant in the context of the *state* Bill of Attainder Clause, since "the federal Constitution does not impose any particular separation of powers requirement on state governments." *Con. Edison*, 292 F.3d at 346 n.4. Although *amici* take no position on whether such analysis is inconsistent with the state Bill of Attainder Clause itself, it bears emphasizing that, at least where the *federal* Bill of Attainder Clause is at stake, the separation-of-powers considerations are paramount.

enforce them as intended. As the Court explained in *Brown*, "the proper scope of the Bill of Attainder Clause, and its relevance to contemporary problems, must ultimately be sought by attempting to discern the reasons for its inclusion in the Constitution, and the evils it was designed to eliminate." 381 U.S. at 442.

II. THE STRUCTURAL ROLE AND UNDERLYING PURPOSE OF THE BILL OF ATTAINDER CLAUSES WARRANT A FUNCTIONAL, RATHER THAN FORMAL, APPROACH IN REVIEWING CHALLENGED LEGISLATION

Because the Constitution's bans on bills of attainder are directed toward a more general evil (*i.e.*, legislative imposition of punishment), the Supreme Court has—correctly—embraced a functional, rather than formal, approach to whether individual legislative measures constitute impermissible punishment. As Justice Field explained in *Cummings* v. *Missouri*,

> The Constitution deals with substance, not shadows. . . . It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding.

71 U.S. (4 Wall.) 277, 325 (1867); *see also Lovett*, 328 U.S. at 315 ("[L]egislative 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 are bills of attainder prohibited by the Constitution." (emphasis added)).

That the Supreme Court has championed function over form in the context of bills of attainder is also reflected in Chief Justice Marshall's dictum in *Fletcher* v. *Peck*, where he observed that "[a] bill of attainder may affect the life of an individual, or may confiscate his property, *or may do both*." 10 U.S. (6 Cranch) 87, 138 (1810) (emphasis added). Marshall's dictum, as the Court would later explain, compelled the conclusion that "what were known at common law as bills of pains and penalties are [also] outlawed by the Bill of Attainder Clause." *Brown*, 381 U.S. at 447; *see also Cummings*, 71 U.S. (4 Wall.) at 323 ("Within the meaning of the Constitution, bills of attainder include bills of pains and penalties.").[5] More generally, though, "[t]he Court's pronouncement [in *Fletcher*] . . . served notice that the Bill of Attainder Clause was not to be given a narrow historical reading (which would exclude bills of pains and penalties), but was instead to be read in light of the evil the Framers had sought to bar: legislative punishment, of any form or severity, of specifically designated persons or groups." *Brown*, 381 U.S. at 447.

To be clear, the Supreme Court's repeated focus in these cases on function over form does more than merely explain why bills of attainder include bills of pain or penalties. It also explains why courts in conducting bill of attainder analysis are to look behind the literal terms of a statute in assessing the permissibility of the legislative regulation. *See, e.g.*, *Nixon*, 433 U.S. at 475–76

5. At common law, bills of attainder imposed the death penalty, whereas bills of pains and penalties imposed less severe punishments. *See Con. Edison*, 292 F.3d at 346 n.3.

("The Court . . . often has looked beyond mere historical experience and has applied a functional test of the existence of punishment, analyzing whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes.").

In addition, both the functional approach to bill of attainder analysis and the relationship between the Bill of Attainder Clauses and the separation of powers bolster *this* Court's conclusion that the Constitution bans bills of attainder whether directed at natural persons or corporate entities. *See Con. Edison*, 292 F.3d at 346–47. Chief Justice Marshall suggested as much in his *Fletcher* dictum, noting that deprivations of *property* can implicate the Bill of Attainder Clause, *see* 10 U.S. (6 Cranch) at 138, and a unanimous Court in *South Carolina* v. *Katzenbach* asserted (albeit without analysis) that the Clause contemplates "protections for individual persons *and private groups*," 383 U.S. 301, 324 (1966) (emphasis added); *see also Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 239 n.9 (1995) (suggesting that bills of attainder may target a "single individual *or firm*" (emphasis added)).

More than just dicta, these statements are consistent with the Founders' understanding of the federal Bill of Attainder Clause as an integral part of the separation of powers, and, as such, a limitation on governmental power *regardless* of the particular nature of the targeted party. As long as corporate entities may be subjected to the criminal processes of both the state and federal governments, the

possibility that the legislatures might short-circuit those processes remains. *Cf. Katzenbach*, 383 U.S. at 324 (suggesting that the Bill of Attainder Clause applies to "those who are peculiarly vulnerable to non-judicial determinations of guilt").

III. THE DENIAL OF ELIGIBILITY FOR GOVERNMENT BENEFITS TO ENUMERATED PERSONS OR ENTITIES IMPLICATES THE BILL OF ATTAINDER CLAUSE

Although it should go without saying, the Supreme Court's bill of attainder jurisprudence also makes clear that the denial of eligibility for a particular governmental benefit *can* constitute punishment within the meaning of the Bill of Attainder Clause. Thus, the Court in *Lovett* held that it was a bill of attainder for Congress to bar the use of government funds to pay three specified government employees determined by the House to have engaged in "subversive activity," the practical effect of which was permanently to ban those three employees from government service. *See* 328 U.S. at 313–17.

Tellingly, *Lovett* pre-dated cases in which the Court suggested that individuals might have a constitutionally protected property interest in continuing public employment. *See, e.g.*, *Bd. of Regents of State Colls.* v. *Roth*, 408 U.S. 564, 578 (1972); *Perry* v. *Sindermann*, 408 U.S. 593, 602–03 (1972). The relevant consideration for the *Lovett* Court was not the legislative deprivation of a benefit (government employment) to which the plaintiffs had a right; rather, it was the fact that *Congress*, rather than the courts, had terminated the eligibility for that benefit

based not on the kinds of categorical judgments legislatures necessarily make, but on adverse legislative findings regarding specified persons. *See, e.g.*, *Lovett*, 328 U.S. at 316; *see also* TRIBE, *supra*, § 10-4, at 642–43. *See generally* John Hart Ely, United States v. Lovett*: Litigating the Separation of Powers*, 10 HARV. C.R.-C.L. L. REV. 1 (1975) (discussing the issues raised by—and the Court's analysis in—*Lovett*).

Lovett therefore stands for the proposition—reiterated in subsequent cases—that "punishment" in the context of bill of attainder analysis does not require any deprivation of *entitlements*, but simply the legislature's imposition of any kind of punishment (for past conduct or behavior) on specified persons, because the Constitution reserves punishment for the judiciary and judicial process. *See also* Comment, *supra*, at 360 ("[T]he fundamental reason that the right-privilege dichotomy must be rejected is that it does not accord with the rationale underlying the bill of attainder clause.").

IV. LEGISLATION CHALLENGED ON BILL OF ATTAINDER GROUNDS REQUIRES MORE THAN JUST A RATIONAL NONPUNITIVE PURPOSE

In addition, as the *Brown* Court would explain two decades after *Lovett*, "[t]he vice of attainder is that the legislature has decided for itself that certain persons possess certain characteristics and are therefore deserving of sanction, not that it has failed to sanction others similarly situated." 381 U.S. at 449 n.23. Put another way, the heart of the Bill of Attainder Clause is a ban on legislative

punishment based upon the *characteristics or conduc*t of specific individuals or groups, rather than their conduct. *See, e.g.*, Amar, *supra*, at 222 ("[G]overnment may pass laws classifying conduct . . . but may not create classes among citizens on the basis of who they are rather than what they do."); *see also id*. at 211 (noting that bills of attainder "wrongly designate[] criminals rather than crimes"); *cf. Romer* v. *Evans*, 517 U.S. 620, 634 (1996) (citing *Brown* for the proposition that a case upholding a law that deprived members of a group of their right to vote based upon their status—and not their conduct—would be a "most doubtful outcome").

To that end, the Court's jurisprudence establishes one last point of significance here: Because bill of attainder analysis does not focus on the deprivation of entitlements (*Lovett*) or on the differential treatment of those who are similarly situated (*Brown*), it does not comfortably find analogies in the analytical framework the Supreme Court has articulated for scrutinizing legislation under the Due Process and Equal Protection Clauses. The evil meant to be proscribed is simply the legislature's attempt to impose punishment on an identifiable party, which under the Constitution is instead the work of courts operating with due process.

At bottom, courts require the government to show "the need for a legitimate nonpunitive purpose and a rational connection between the burden imposed and [the] nonpunitive purposes of the legislation." *Foretich* v. *United States*, 351 F.3d

1198, 1221 (D.C. Cir. 2003). As this Court has explained, this standard is both different from and stricter than traditional "rational basis" review:

> Where a statute establishing a punishment declares and imposes that punishment on an identifiable party, . . . the Bill of Attainder Clauses undermine the usual solicitude we have for [the government's legitimate interest in punishing wrongdoing]. In such cases, we look beyond simply a rational relationship of the statute to a legitimate public purpose for "less burdensome alternatives by which [the] legislature . . . could have achieved its legitimate nonpunitive objectives."

Con. Edison, 292 F.3d at 350 (quoting *Nixon*, 433 U.S. at 482) (alteration and second omission in original); *see also Nixon*, 433 U.S. at 475–76 (noting that the inquiry focuses on "whether the law under challenge, *viewed in terms of the type and severity of burdens imposed*, reasonably can be said to further nonpunitive legislative purposes" (emphasis added)).

In short, then, the appropriate scrutiny for laws that appear to impose "punishment" in violation of the Bill of Attainder Clause is *not* whether the government can proffer *any* legitimate, nonpunitive purpose for the law. *See, e.g.*, TRIBE, *supra*, § 10-4, at 644 ("[T]he attainder ban cannot be rendered inapplicable simply because a law designating an identifiable class of individuals for punishment might be recharacterized as a prophylactic measure enacted to serve some legitimate public end."). Instead, the standard is more akin to the congruence and proportionality approach that the Supreme Court has identified in other contexts. *See, e.g.*, *City of Boerne* v. *Flores*, 521 U.S. 507, 530 (1997) ("[T]here

must be a congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented.").

In other words, in order to withstand scrutiny, legislation challenged as imposing punishment on identifiable individuals or groups must not only have a nonpunitive purpose, but that nonpunitive purpose must *itself* support the singling out of the targeted individuals or groups.[6] Otherwise, as Professor Tribe has explained,

> when a legislature's designation of a group cannot, for independent constitutional reasons, be defended by treating that designation as the equivalent of a list of undesirable *characteristics* but must be defended, if at all, by treating the designation as the equivalent of a list of *names*, the bill of attainder ban prevents the designation from being used as the basis of punishment.

6. This point is critical, and helps to explain why some legislative enactments that specify an individual or group for differential treatment are *not* bills of attainder. As the Supreme Court's decision in *Nixon* and the D.C. and Fifth Circuit's decisions in the *Bell* cases make clear, statutes may specifically target individuals or corporations when the legislature can justify such specificity by reference to unique conduct of the individual or corporation. *See, e.g.*, *Nixon*, 433 U.S. at 472 ("Congress' action to preserve only [Nixon]'s records is easily explained by the fact that at the time of the Act's passage, only his materials demanded immediate attention."); *BellSouth Corp.* v. *FCC*, 162 F.3d 678, 689–90 (D.C. Cir. 1998) (holding that "the differential treatment of the BOCs and non BOCs . . . is neither suggestive of punitive purpose nor particularly suspicious" "because, due to the unique infrastructure controlled by the BOCs, they could exercise monopoly power"); *SBC Commc'ns* v. *FCC*, 154 F.3d 226, 243 (5th Cir. 1998) (same).

TRIBE, *supra*, § 10-4, at 646. Congress is not without recourse in such cases,[7] but the Bill of Attainder Clause bars the legislature from directly imposing punishment.

Under this approach, as the D.C. Circuit has helpfully summarized, "where there exists a significant imbalance between the magnitude of the burden imposed and a purported nonpunitive purpose, the statute cannot reasonably be said to further nonpunitive purposes," *Foretich*, 351 F.3d at 1221, and is instead an unconstitutional bill of attainder.[8]

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7. Congress could have avoided the attainder problems presented in this case by, for example, generally blocking the use of federal funds to support groups that are certified by a predetermined executive branch official to be in violation of legislatively prescribed standards. *See, e.g.*, *Holy Land Found. for Relief & Dev.* v. *Ashcroft*, 333 F.3d 156, 159–60 (D.C. Cir. 2003) (summarizing the regulatory regime pursuant to which the Office of Foreign Asset Control is empowered to issue blocking orders with regard to "Specially Designated Global Terrorists"); *cf. World Fuel Corp.* v. *Geithner*, 568 F.3d 1345, 1346–47 & nn.1–2 (11th Cir. 2009) (summarizing OFAC's analogous authority to designate "Significant Foreign Narcotics Traffickers" under the Foreign Narcotics Kingpin Designation Act, 21 U.S.C. §§ 1901–08). *Amici*, of course, express no views on these regimes, other than to observe the extent to which they avoid the attainder issues raised here.

8. Indeed, *amici* wholeheartedly endorse the analytical framework enunciated by the D.C. Circuit in *Foretich*:

> First, to avoid designation as a bill of attainder, a statute that burdens a particular person or class of persons must serve purposes that are not only nonpunitive, but also rational and fair. In addition, as the historical cases foreshadowed, there must be a nexus between the legislative means and legitimate nonpunitive ends. Additionally, a court must weigh the purported nonpunitive purpose of a statute against the magnitude of the burden it inflicts. It is not the severity of a statutory burden in absolute terms that demonstrates punitiveness so much as the magnitude of the burden relative to the purported nonpunitive purposes of the statute. A grave imbalance or disproportion between the burden and the purported nonpunitive purpose suggests punitiveness, even where the statute bears some minimal relation to nonpunitive ends.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Dated: May 21, 2010
New York, New York

Respectfully submitted,

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351 F.3d at 1222 (citations omitted); *see also id.* ("[T]he selectivity or scope of a statute may indicate punitiveness where the differential treatment of the affected party or parties cannot be explained "without resort to inferences of punitive purpose.").

APPENDIX

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 4,495 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

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Dated: May 21, 2010

Respectfully submitted,

/s/ Charles S. Sims

Charles S. Sims, Esq.

CERTIFICATE OF SERVICE

09-5172-cv(L); 10-992 (CON) Acorn v. United States of America

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ANTI-VIRUS CERTIFICATION

Case Name: Acorn v. United States of America

Docket Number: 09-5172-cv(L); 10-992(CON)

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