09-5172-cv;
10-992-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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.

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

BRIEF FOR THE APPELLANTS

[Counsel listed on following page]

COUNSEL FOR DEFENDANTS-APPELLANTS

TONY WEST
Assistant Attorney General

BENTON J. CAMPBELL
United States Attorney

MARK B. STERN
(202) 514-5089
MICHAEL S. RAAB
(202) 514-4053
BENJAMIN S. KINGSLEY
(202) 353-8253
HELEN L. GILBERT
(202) 514-4826
Attorneys, Appellate Staff
Civil Division, Room 7261
Department of Justice
950 Pennsylvania Ave., NW
Washington, D.C. 20530

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page**

Constitution:

Statutes:

Legislative Materials:

Other Authorities:

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 09-5172, 10-992

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.

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

BRIEF FOR THE APPELLANTS

STATEMENT OF JURISDICTION

Plaintiff invoked the jurisdiction of the district court pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 2201. A-454.[1] The district court entered a preliminary

[1] "A-__" denotes a citation to the joint appendix.

injunction on December 11, 2009. SA-28–29.[2] Defendants filed a notice of appeal of this interlocutory order on December 16, 2009, within the time provided by Fed. R. App. P. 4(a)(1)(B). A-848. The district court entered final judgment on March 10, 2010. SA-63. Defendant filed a second notice of appeal on March 17, 2010, also within the time provided by Fed. R. App. P. 4(a)(1)(B). A-851. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether provisions in fiscal year 2010 appropriations acts, which bar distribution of federal funds to ACORN, its affiliates, subsidiaries, and allied organizations, are unconstitutional bills of attainder.

STATEMENT OF THE CASE

The decisions below were issued by Judge Nina Gershon. The opinions of the district court were reported at ACORN v. United States, 662 F. Supp. 2d 285 (E.D.N.Y. 2009), and Association for Community Reform Now v. United States, __ F. Supp. 2d __, No. 09-cv-4888, 2010 WL 809960 (E.D.N.Y. Mar. 10, 2010).

Congress barred the distribution of funds to ACORN and its affiliates, subsidiaries, and allied organizations in a provision of the Continuing Appropriations Resolution, 2010, Division B, § 163, Pub. L. No. 111-68, 123 Stat. 2023, 2053 (2009)

[2] "SA-__" denotes a citation to the special appendix.

("Continuing Resolution"). Plaintiffs, ACORN, ACORN Institute, and New York ACORN Housing Company, Inc., filed suit, challenging the constitutionality of this provision. The district court held that the provision is likely an unconstitutional bill of attainder and entered a preliminary injunction prohibiting its enforcement. The Continuing Resolution then expired, and the government moved to vacate the preliminary injunction as moot. The district court denied the motion.

Plaintiffs amended their complaint to challenge five similar provisions in three final fiscal year 2010 appropriations acts that also bar the distribution of funds to ACORN and its affiliates, subsidiaries, and allied organizations. The district court held that these five provisions and the provision in the Continuing Resolution are all unconstitutional bills of attainder and issued a declaratory judgment and permanent injunction precluding enforcement of the fiscal year 2010 provisions.

This is an appeal from both the preliminary injunction and the permanent injunction and declaratory judgment.

STATEMENT OF FACTS

I. Factual Background

A. Founded in 1970, ACORN has "evolved from a grassroots, community-based organization with a mission of advocacy for the poor and homeless into, in recent years, a major national entity both in scope and ambition." A-262. An independent report commissioned by ACORN in 2009 ("Harshbarger Report") noted

that ACORN's "legal and governance structure . . . is incredibly complex, with a number of separate but interrelated components that . . . now consists of 29 entities." A-263. At the time the initial complaint in this action was filed in 2009, these entities included plaintiffs ACORN Institute, Inc. and New York ACORN Housing Company, Inc. ("NYAHC"). Plaintiff NYAHC has since changed its name to MHANY Management, Inc. A-782.

Components of ACORN have received contracts and grants from several federal agencies, from state and municipal governments, and from private entities. See A-264.[3]

It is not controverted that ACORN has been plagued by serious mismanagement, including embezzlement at its highest levels. Indeed, the systemic problems that have contributed to the significant misuse of funds are set out in two independent reports commissioned by ACORN in 2008 and in 2009 following public revelations of misconduct.

In 1999 and 2000, Dale Rathke, the brother of ACORN's founder Wade

[3] The 2009 Harshbarger Report states that ACORN's fundraising "is achieved both locally and nationally. Historically, the national organization has received grants from major foundations like the Ford Foundation, Open Society Institute and Sandler Foundation, while local funding has been provided largely by local organizations (with the exception of The Needmor Fund, which funds local affiliates through ACORN Institute) and members. Until this fall, 10 percent of ACORN's funding derived from federal government grants." A-264.

Rathke, embezzled nearly $1 million from the organization. See A-699–700. For several years, ACORN's officers failed to notify law enforcement officials or even ACORN's board of directors. As a result, Dale and Wade Rathke both remained on ACORN's payroll until June 2008, when a whistleblower forced ACORN to disclose the embezzlement and to discharge both brothers. Ibid.[4]

A 2008 report commissioned by ACORN in the wake of the embezzlement scandal ("Kingsley Report") detailed potentially improper use of charitable dollars for political purposes, money transfers among ACORN affiliates, potential conflicts created by employees working for multiple affiliates, and general governance problems. See A-702–05.

In 2009, a new scandal arose when hidden cameras recorded ACORN employees and volunteers providing advice and counseling in support of proposed prostitution. See A-259; 155 Cong. Rec. H9970, 9972 (daily ed. Sep. 25, 2009) (statement of Rep. Lewis) (noting "recently disclosed efforts, caught on videotape, proposing the use of taxpayer dollars to support prostitution"). ACORN responded by commissioning another independent report. See A-259. The 2009 Harshbarger Report cited continuing problems of mismanagement of the type previously noted in the 2008 Kingsley report. Ibid.

---

[4] Wade Rathke served as ACORN's chief organizer. A-699. Dale Rathke was an employee.

B. Since 2004, 29 workers in nine ACORN local offices have been convicted of voter registration fraud. See A-652–53, 664, 667, 674–75, 678, 683, 690–92, 713, 734–36, 737, 739–40, 742–43, 745–46, 748–52, 766–67. Criminal proceedings are pending in Nevada, where the state has charged ACORN and two of its employees with alleged participation in an illegal voter registration scheme. See A-690–92. A 2010 investigation by the California Attorney General uncovered "'likely violations' of state law, including dumping 500 pages of confidential records into a dumpster, failure to file a 2007 tax return, and four instances of possible voter registration fraud by ACORN in San Diego in connection with the 2008 election, as well as other irregularities in the group's California operations." A-864–65. The California Attorney General has referred the likely violations to the appropriate authorities. Ibid. The Indiana Secretary of State also stated that there his office uncovered "strong evidence" that "ACORN violated multiple state and federal election laws." A-591–97.

In addition to Nevada, California, and Indiana, eight other states—Louisiana, Maryland, Minnesota, Mississippi, New York, Rhode Island, Texas, and Wisconsin—have announced investigations of ACORN. See A-657, 676, 688–89, 693, 696, 710. When Congress enacted the 2010 appropriations legislation challenged in this suit, it directed the Comptroller General to complete an investigation of ACORN and its affiliates and report to Congress within 180 days of the effective date

of the legislation. See Consolidated Appropriations Act of 2010, Pub. L. No. 111-117, Division B, § 535, 123 Stat. 3034, 3157-58 (2009).[5]

C. In light of the existing evidence of mismanagement and misconduct, the states of Georgia, Louisiana, Minnesota, and New York each ordered the suspension of all state contracts with ACORN, pending investigations. See A-688, 693, 705, 707. New York City likewise suspended its grants to ACORN pending the conclusion of an investigation undertaken by New York State. See A-694.

Responding to evidence of ACORN's conduct, two federal agencies—the Internal Revenue Service and the Census Bureau—terminated their relationships with ACORN in September 2009 prior to enactment of the congressional restrictions at issue in this case. On September 11, 2009, the Census Bureau concluded that ACORN could no longer effectively manage its partnership with the Bureau through ACORN's local offices. See A-598–99. The agency concluded that, "[o]ver the last few months, through ongoing communication with our regional offices, it is clear that ACORN's affiliation with the 2010 census promotion has caused sufficient concern in the general public, has indeed become a distraction from our mission, and may even

[5] Members of Congress also asked several federal agencies to undertake agency-specific investigations of ACORN, including the Department of Housing and Urban Development; the Department of the Treasury; the Department of Health and Human Services; the Department of Education; the Department of Labor; the Department of Homeland Security; the Internal Revenue Service; the Federal Election Commission; and the Small Business Administration. A-600–19; 624–49.

become a discouragement to cooperation, negatively impacting 2010 Census efforts." Ibid. Shortly thereafter, the IRS ended ACORN's participation in its volunteer tax assistance program. See A-654–55. The IRS noted that "[i]t is absolutely critical that taxpayers have trust in our Volunteer Income Tax Assistance program partners," and that "[i]n light of recent events IRS has decided to terminate its relationship with ACORN." Ibid.

II. Statutory Background

A. In September 2009, in response to evidence of mismanagement and fraud at ACORN entities, members of Congress asked the Government Accountability Office ("GAO") to initiate an investigation. See A-620–23. The following month, Congress enacted restrictions on ACORN's eligibility for federal funds as part of the 2010 Continuing Appropriations Resolution ("Continuing Resolution"), the stop-gap measure that funded federal agencies prior to enactment of the FY 2010 appropriations bills. Continuing Appropriations Resolution, 2010, Division B, § 163, Pub. L. No. 111-68, 123 Stat. 2023, 2053 (2009). Section 163 of the Continuing Resolution 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 Organizations for Reform Now (ACORN), or any of its affiliates, subsidiaries, or allied organizations."

In response to a request for guidance from the Department of Housing and

Urban Development ("HUD"), the Office of Legal Counsel of the Department of Justice ("OLC") issued a memorandum, explaining that the Continuing Resolution did not preclude agencies from making payments in satisfaction of pre-existing contractual obligations ("OLC Memorandum"). A-229. The OLC Memorandum, which is binding on all federal agencies, concluded that the Continuing Resolution "does not direct or authorize HUD to refuse payment on binding contractual obligations that predate the Continuing Appropriations Resolution . . . where doing so would give rise to contractual liability." A-229, 232.

The Continuing Resolution, along with its restrictions on ACORN funding, expired on December 18, 2010. Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010, Division B–Further Continuing Appropriations, 2010, § 101, Pub. L. No. 111-88, 123 Stat. 2904, 2972 (2009).

B. The restrictions that are presently in effect are five provisions in FY 2010 appropriations acts that bar distribution of funds to ACORN and its subsidiaries, or to ACORN, its affiliates, subsidiaries, and allied organizations. Three of the FY 2010 appropriations acts, those for the Department of the Interior, Environment, and Related Agencies; the Department of Defense; and the Consolidated Appropriations Act[6] each include a provision stating: "None of the funds made available under this

[6] The Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, 123 Stat. 3034 (2009), consists of six distinct appropriations acts, each of which constitutes a

Act may be distributed to the Association of Community Organizations for Reform Now (ACORN) or its subsidiaries."[7] See Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010, Division A, § 427, Pub. L. No. 111-88, 123 Stat. 2904, 2962 (2009); Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, Division A, § 8123, 123 Stat. 3409, 3458 (2009); Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, Division B, § 534, 123 Stat. 3034, 3157 (2009); Id. at Division E, § 511, 123 Stat. at 3311.

In addition, the relevant appropriations provision for the Department of Transportation, HUD, and Related Agencies states: "None of the funds made

---

division within the Consolidated Act, and includes three relevant provisions. These six divisions are: Division A: Department of Transportation, HUD, and Related Agencies Appropriations Act, 2010; Division B: Commerce, Justice, Science, and Related Agencies Appropriations Act, 2010; Division C: Financial Services and General Government Appropriations Act, 2010; Division D: Department of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2010; Division E: Military Construction and Veterans Affairs and Related Agencies Appropriations Act, 2010; Division F: Department of State, Foreign Operations, and Related Programs Appropriations Act, 2010. Three of these divisions include provisions barring funding to ACORN and its subsidiaries, or to ACORN and its affiliates, subsidiaries, and allied organizations. See Division A, § 418, 123 Stat. at 3112; Division B, § 534, 123 Stat. at 3157; Division E, § 511, 123 Stat. at 3311.

[7] The language in the Consolidated Appropriations Act, 2010 states: "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." Consolidated Appropriations Act, 2010, Division E, § 511, 123 Stat. at 3311.

available under this Act or any prior Act may be provided to the Association of Community Organizations for Reform Now (ACORN), or any of its affiliates, subsidiaries, or allied organizations." Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, Division A, § 418, 123 Stat. at 3112.

In enacting the 2010 appropriations measures, Congress formally directed the Comptroller General (the head of the GAO) to "conduct a review and audit of Federal funds received by [ACORN] or any subsidiary or affiliate of ACORN" to determine whether any federal funds were misused, steps that can be taken to recover misused funds and prevent the misuse of funds, and whether all necessary steps were taken to prevent the misuse of funds. Congress required that the Comptroller General complete the investigation and report to Congress within 180 days. See Consolidated Appropriations Act of 2010, Pub. L. No. 111-117, Division B, § 535, 123 Stat. at 3157–58.

III. Prior Proceedings

Plaintiffs filed suit on November 11, 2009, to enjoin the ACORN-related provision of the Continuing Resolution. A-1. They named as defendants the United States, the Secretary of the Treasury, the Secretary of HUD, and the Director of the Office of Management and Budget ("OMB"). A-1, 11. On December 11, 2009, the district court entered a preliminary injunction prohibiting enforcement of the restriction against providing federal funds to ACORN. SA-28–29. The government

filed a notice of appeal from the preliminary injunction on December 16, 2009. A-848.

After the preliminary injunction issued, plaintiffs amended their complaint to include the five ACORN-related provisions in the final FY 2010 appropriations bills. A-459–63. Plaintiffs also added three new defendants: the Administrator of the Environmental Protection Agency ("EPA"), the Secretary of Commerce, and the Secretary of Defense. A-459, 471–72. The district court combined plaintiffs' request for a preliminary injunction of these new provisions with plaintiffs' request for a permanent injunction and declaratory judgment of all the legislative provisions named in their amended complaint. A-457–58.

On March 10, 2010, the court issued a declaratory judgment, SA-63–64, holding that the provisions in the Continuing Resolution and the final FY 2010 appropriations acts that prohibit the distribution of federal funds to ACORN are unconstitutional bills of attainder, SA-30–62, and issued a permanent injunction precluding enforcement of the FY 2010 appropriations act provisions. SA-64. The court denied the government's motion to vacate as moot the order preliminarily enjoining the Continuing Resolution. SA-63. The court concluded that the controversy with respect to the Continuing Resolution, which expired on December 18, 2009, was not moot because, in its view, the Continuing Resolution continues to injure plaintiffs' reputations. SA-59 n.18.

The government filed a notice of appeal on March 17, 2010. A-851. This Court consolidated that appeal with the government's appeal from the preliminary injunction order. A-863.

The district court denied the government's motion for a stay pending appeal on March 31, 2010. A-846–47. After hearing argument on April 20, 2010, this Court granted the government's request for a stay pending appeal on April 21, 2010. A-872. Plaintiffs then sought relief from the stay from the Supreme Court, which was denied by Justice Ginsburg on April 23, 2010. A-873.

SUMMARY OF ARGUMENT

ACORN's history of mismanagement and systemic failures in employee oversight is not seriously controverted. The 2009 Harshbarger Report concluded that the failure "to commit the organization to the basic, appropriate standards of governance and accountability" has left ACORN "vulnerable to public embarrassment." A-259. Despite some efforts at reform, these deep-rooted, long-standing problems continue to haunt the organization.

Congress responded to the evidence of mismanagement and lax oversight by precluding the use of FY 2010 funds for grants to, or contracts with, ACORN pending an investigation and report by the Comptroller General due within 180 days. Congress's action parallels steps taken by several states and municipalities to ensure the effective use of public funds pending investigations.

The district court's invalidation of these congressional enactments to protect the federal fisc from potential misuse seriously misapprehends the scope of the constitutional prohibition on bills of attainder. The Supreme Court has found legislation to constitute such impermissible legislative punishment in only five cases. In each instance, the Court invalidated an attempt to punish individuals for political beliefs and affiliations, and the Court did so only upon unmistakable evidence of punitive intent by the legislature and an absence of any legitimate non-punitive purpose.

The district court erred in likening the temporary restriction on federal funding to statutes that permanently barred individuals from pursuing their professions or continuing in their government employment based on their allegedly "subversive beliefs" or political affiliations. In striking down those provisions, the Court condemned the unsound "suggestion that membership in the Communist Party, or any other political organization" demonstrates general unfitness for government employment, United States v. Brown, 381 U.S. 437, 455 (1965), and emphasized that lifetime bars on employment, like other punishments traditionally imposed by bills of attainder, are "a mode of punishment commonly employed against those legislatively branded as disloyal," and thus implicate the traditional understanding of a bill of attainder as punishment of "persons considered disloyal to the Crown or State," Nixon v. Admin'r of Gen. Servs., 433 U.S. 425, 474 (1977).

In sharp contrast to those cases, the current legislation directly furthers the legitimate, non-punitive purpose of promoting effective use of taxpayer money in the face of clear evidence of mismanagement and inadequate employee oversight. Congress's decision to temporarily stop the flow of federal funds is plainly not legislative "punishment" within the meaning of the bill of attainder clause.

At bottom, the district court's ruling rests on the mistaken premise that Congress cannot constitutionally single out a corporation for even temporary restrictions on the receipt of federal funding, and that the findings of "a congressional or executive report" cannot provide a constitutionally permissible rationale for such a restriction. SA-48. The Supreme Court and this Court have made clear that the bill of attainder clause does not impose such sweeping restrictions on Congress's appropriations powers and that it does not prohibit Congress from legislating with specificity or from imposing burdens on even a single named individual. See Consolidated Edison Co. v. Pataki, 292 F.3d 338, 350 (2d Cir. 2002). The bill of attainder restriction is triggered, instead, when legislation is enacted on the basis of impermissible criteria and bears no relation to legitimate, prospective government interests. The district court's ruling expands the bill of attainder clause well beyond the limits recognized by the Supreme Court and should be reversed.

STANDARD OF REVIEW

This Court reviews the grant of a permanent injunction for abuse of discretion. Reynolds v. Giuliani, 506 F.3d 183, 189 (2d Cir. 2007). A district court abuses its discretion "when (1) its decision rests on an error of law (such as application of the wrong legal principle) or a clearly erroneous factual finding, or (2) its decision—though not necessarily the product of a legal error or a clearly erroneous factual finding—cannot be located within the range of permissible decisions." Kickham Hanley P.C. v. Kodak Ret. Income Plan, 558 F.3d 204, 209 (2d Cir. 2009). This Court reviews "questions of law and applications of law to undisputed fact" de novo. Ascencio-Rodriguez v. Holder, 595 F.3d 105, 110 (2d Cir. 2010).

This Court reviews a district court's decision to grant declaratory relief de novo. Sprint Spectrum LP v. Conn. Siting Council, 274 F.3d 674, 676 (2d Cir. 2001).

ARGUMENT

I. The Provisions In The Appropriations Acts That Prohibit Distribution Of Federal Funds To Plaintiffs Are Not Unconstitutional Bills of Attainder.

The Constitution provides that "[n]o Bill of Attainder . . . shall be passed." U.S. Const., art. I, § 9, cl. 3. A constitutionally forbidden bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." Nixon v. Admin'r of Gen. Servs., 433 U.S. 425, 468 (1977); Selective Serv. Sys. v. Minn. Pub. Interest Research

Group, 468 U.S. 841, 846-47 (1984).

The Supreme Court has made clear that "[t]he proscription against bills of attainder reaches only statutes that inflict punishment on the specified individual or group." Selective Serv. Sys., 468 U.S. at 851 (emphasis added). The Court has invalidated legislation on this basis on only five occasions. Of these five cases, three involved Civil War era laws that imposed statutory disabilities on persons who refused to take an oath that they had not supported the Confederacy. Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866); Ex parte Garland, 71 U.S. (4 Wall.) 333 (1866); Pierce v. Carskadon, 83 U.S. (16 Wall.) 234 (1872). The two 20th century cases involved congressional attempts to punish "subversives" or members of the Communist Party by barring them from certain jobs. United States v. Lovett, 328 U.S. 303 (1946); United States v. Brown, 381 U.S. 437 (1965).

The Supreme Court has distilled from these decisions a three-part inquiry that reflects the limited scope of this constitutional restriction. To determine whether an Act of Congress constitutes legislative punishment, a court considers whether a statute (1) "falls within the historical meaning of legislative punishment;" (2) whether it "further[s] nonpunitive legislative purposes;" and (3) whether the legislative record "evinces a congressional intent to punish." Selective Serv. Sys., 468 U.S. at 852. These three factors are considered as a whole, and "only the clearest proof could

suffice to establish the unconstitutionality of a statute" on the basis of impermissible congressional motive alone. Flemming v. Nestor, 363 U.S. 603, 617 (1960).

A. The District Court's Ruling Expands the Scope of the Bill of Attainder Clause's Restriction on Legislative Punishment Beyond that Recognized by the Supreme Court.

1. Historically, bills of attainder involved "imprisonment, banishment, and the punitive confiscation of property" by the sovereign. Selective Serv. Sys., 468 at 852. Like these traditional subjects of bills of attainder, "legislative bars to participation by individuals or groups in specific employments or professions," ibid., are "a mode of punishment commonly employed against those legislatively branded as disloyal," Nixon, 433 U.S. at 474, and implicate the traditional understanding of a bill of attainder as punishment of "persons considered disloyal to the Crown or State," ibid. See also BellSouth Corp. v. FCC, 162 F.3d 678, 686 (D.C. Cir. 1998) (explaining that the Supreme Court "extended 'punishment' to include employment bars . . . because it was concerned that the government had imposed restrictions that violated the fundamental guarantees of political and religious freedom"). Indeed, four of the five statutes invalidated by the Supreme Court as bills of attainder have involved such employment bars. See United States v. Brown, 381 U.S. 437 (1965) (statute barring Communist Party members from offices in labor unions); United States v. Lovett, 328 U.S. 303 (1946) (statute permanently barring three named government employees

from compensated federal positions); Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866) (statute conditioning practice as a clergyman on recital of a loyalty oath); Ex parte Garland, 71 U.S. (4 Wall.) 333 (1866) (statute barring lawyers from the practice of law).[8]

2. The restrictions on appropriations of federal funds that plaintiffs challenge in this case differ in crucial respects from the provisions that the Court has found to fall within the scope of historically recognized legislative punishment.

First, this case does not concern a permanent bar to an individual's ability to pursue a chosen profession, and the contrast with Lovett, a case on which the district court heavily relied, is illuminating. The statute in Lovett terminated the salaries of three individuals who "had been for several years working for the Government," id. at 304, and precluded them from all future government employment. The Court declared that the "permanent proscription from any opportunity to serve the

---

[8] In Cummings, a Reconstruction-era Missouri statute barred persons from various professions unless they stated under oath that they had not given aid or comfort to persons engaged in armed hostility to the United States and had never "been a member of, or connected with, any order, society, or organization, inimical to the government of the United States," id., at 279, a provision designed to effect a punishment for having associated with the Confederacy. The decision in Ex parte Garland, which was announced on the same day, concerned a similar oath that was required for admission to practice law in the federal courts. The fifth bill of attainder decision, Pierce v. Carskadon, 83 U.S. (16 Wall.) 234 (1872), struck down a West Virginia statute conditioning access to the courts on recital of a loyalty oath similar to those invalidated in Cummings and Ex parte Garland.

Government is punishment, and of a most severe type," and "is a type of punishment which Congress has only invoked for special types of odious and dangerous crimes." Id. at 316.

In distinction, the appropriations provisions at issue here are a temporary measure pending the findings of ongoing investigations. Even in that one-year period, they do not expel an individual from her chosen profession or employment. Instead, they restrict a corporation's ability to seek discretionary contracts and grants from one of its sources of revenue in FY 2010.[9]

Second, the district court's analogy to the lifetime employment bars held invalid by the Supreme Court makes no attempt to grapple with the distinctions inherent in the application of the bill of attainder clause to a corporation rather than an individual. The Supreme Court has never held that the bill of attainder clause applies to corporations. Cf. First Nat'l Bank v. Bellotti, 435 U.S. 765, 778 n.14 (1978) ("Certain 'purely personal' guarantees . . . are unavailable to corporations and other organizations because the 'historic function' of the particular guarantee has been limited to the protection of individuals.") (quoting United States v. White, 322 U.S. 694, 698-701 (1944)). Although this Court has concluded that the bill of attainder

[9] As noted, the Office of Legal Counsel opinion, which is binding on all federal agencies, concluded that the Continuing Resolution "does not direct or authorize [agencies] to refuse payment on binding contractual obligations that predate the Continuing Appropriations Resolution." See A229–32.

clause protects corporations as well as individuals, Consolidated Edison Co. v. Pataki, 292 F.3d 338, 346-49 (2d Cir. 2002) ("Con Ed"), it has also recognized that "[t]here may well be actions that would be considered punitive if taken against an individual, but not if taken against a corporation," id. at 354.[10] As the D.C. Circuit has similarly observed, "it is obvious that there are differences between a corporation and an individual under the law" and therefore "any analogy between prior cases that have involved individuals and this case, which involves a corporation, must necessarily take into account this difference." BellSouth Corp., 162 F.3d at 683–84. The series of reorganizations that have taken place even since the initiation of this litigation highlight some of these differences. See Ian Urbina, Acorn on Brink of Bankruptcy, Officials Say, N.Y. Times, Mar. 19, 2010 ("[ACORN's] California and New York chapters, two of the largest, have severed their ties to the national group and have independently reconstituted themselves with new names. Several other state groups are also re-forming outside the Acorn umbrella."), available at http://www.nytimes.com/2010/03/20/us/politics/20acorn.html; see also A-782 (plaintiff NYAHC changed its name in the course of the litigation to MHANY Management, Inc.); A-865 (noting that a successor to ACORN's California operation,

[10] The government's argument here, which is governed by circuit precedent, does not waive any arguments regarding the application of the bill of attainder clause to corporations that the government might present to the Supreme Court or to this court en banc.

called ACCE, has emphasized that it is no longer a part of ACORN).

The one-year corporate appropriations restrictions here differ from the permanent, individual employment bars in a third significant way. The restrictions challenged in this case do not implicate the punishment of "persons considered disloyal to the Crown or State," which is the historical hallmark of a bill of attainder. Nixon, 433 U.S. at 474. In both Lovett and Brown, the Supreme Court emphasized the illegitimate nature of the legislative purpose underlying the permanent employment bans at issue, and emphasized that membership in an undesirable political group cannot properly be thought to reflect general unfitness for all government employment. See Brown, 381 U.S. at 455 ("In a number of decisions, this Court has pointed out the fallacy of the suggestion that membership in the Communist Party, or any other political organization, can be regarded as an alternative, but equivalent, expression for a list of undesirable characteristics."); Lovett, 328 U.S. at 314 (noting that the purpose of the statute at issue "clearly was to 'purge' the then existing and all future lists of Government employees of those whom Congress deemed guilty of 'subversive activities' and therefore 'unfit' to hold a federal job"); see also Navegar, Inc. v. United States, 192 F.3d 1050, 1066 (D.C. Cir. 1999) (observing that the cases in which the Supreme Court has struck down statutes which bar specific parties from employment "all involved situations in which the ban was used as a 'mode of punishment . . . against those legislatively branded as disloyal'")

(quoting Nixon, 433 U.S. at 474).

By contrast, the restrictions here on the distribution of federal funds to a corporation are not a judgment of suitability based on "subversive" beliefs or membership in a political organization. They reflect, instead, an entirely proper government concern about providing federal funds to an organization with a documented history of mismanagement, embezzlement at high levels, and misconduct (including, in some cases, criminal misconduct) by ACORN employees. Neither the holdings nor the reasoning of Lovett and Brown suggest that the challenged appropriations restrictions fall within the compass of historically recognized punishment.

B. The Provisions In the Appropriations Acts Serve A Legitimate, Non-Punitive Legislative Purpose.

1. "[E]ven if [an] Act singles out an individual on the basis of irreversible past conduct, if it furthers a nonpunitive legislative purpose, it is not a bill of attainder." SeaRiver Mar. Fin. Holdings Inc. v. Mineta, 309 F.3d 662, 674 (9th Cir. 2002); see also Hawker v. New York, 170 U.S. 189, 196 (1898) (rejecting bill of attainder and ex post facto challenges to a statute barring ex-felons from the practice of medicine); DeVeau v. Braisted, 363 U.S. 144 (1960) (upholding statute barring felons from holding office in waterfront labor organization).

The district court did not suggest that ACORN's uncontroverted management

problems are irrelevant to Congress's concern with the expenditure of federal funds. The court acknowledged that Congress has the "right to protect the public treasury from fraud, waste and abuse." SA-31. As the Supreme Court has observed, "[t]he power to keep a watchful eye on expenditures and on the reliability of those who use public money is bound up with congressional authority to spend in the first place." Sabri v. United States, 541 U.S. 600, 608 (2004); id. at 605 (holding that Congress has authority under the Spending Clause "to see to it that taxpayer dollars appropriated under that power are in fact spent for the general welfare, and not frittered away in graft or on projects undermined when funds are siphoned off").

Nor did the district court suggest that a reasonable legislature would be unconcerned by the evidence of ACORN mismanagement. Indeed, as noted, the states of Georgia, Louisiana, Minnesota, and New York, as well as the City of New York, have ordered the suspension of their government contracts with ACORN pending investigations. See A-688, 693, 694, 705, 707. And, in response to evidence of ACORN's widespread problems, the Internal Revenue Service and the Census Bureau had ended their relationships with ACORN and its affiliates in September 2009, prior to enactment of the Continuing Resolution. See A-598–99, 654–55.[11]

[11] Private donors likewise responded to evidence of ACORN's mismanagement by withdrawing their support. See Ian Urbina, Acorn on Brink of Bankruptcy, Officials Say, N.Y. Times, Mar. 19, 2010, available at http://www.nytimes.com/2010/03/20/us/politics/20acorn.html ("[P]rivate

Many of the systemic management problems of ACORN are laid out in the 2009 Harshbarger Report commissioned by ACORN. The Harshbarger Report acknowledged that "[t]he serious management challenges detailed in our report are the fault of ACORN's founder and a cadre of leaders who, in their drive for growth, failed to commit the organization to the basic, appropriate standards of governance and accountability. As a result, ACORN not only fell short of living its principles but also left itself vulnerable to public embarrassment." A-259. The report noted that notwithstanding some efforts to respond to past scandals, "key policing mechanisms and staffing, such as a chief financial officer, or independent members of boards of trustees, have not been integrated into the organization." A-266–67. Despite the initiation of some reforms, ACORN continued to focus insufficient attention on "key management, human resources and field operation functions, creating vulnerabilities for the entire organization." A-267. The report found that "[m]ost local offices still tend to be overly influenced by the person running that office, largely due to the organization's informal and loose operational structure;" that "[s]upervision also appears to be ad-hoc, if not lax;" that "[e]mployees routinely are charged with responsibilities beyond their experience;" and that "promotions appear to be awarded

---

donations from foundations to Acorn all but evaporated . . . [a]fter the activists' videos came to light [showing Acorn workers providing advice and counseling in support of proposed prostitution].").

based on effective organizing, not on management, skills." Ibid.

2. A decision to temporarily suspend dealings with an organization beset with management problems of these dimensions plainly furthers a proper, prospective government purpose of protecting against the potential misuse of federal funds. Although it did not take issue with the nature and extent of ACORN's problems, the district court nevertheless declared that it could not "discern any valid, non-punitive purpose for Congress enacting the legislation challenged in this case." SA-51.

The apparent inconsistency in the district court's reasoning reflects a fundamental misunderstanding of the restrictions that the bill of attainder clause places on Congress. In the district court's view, the bill of attainder clause precludes Congress from singling out any organization when Congress imposes appropriations restrictions. The district court reasoned, in essence, that executive branch procedures for administering contracts and grants are adequate to protect the government's monetary interests. SA-49–50. Because Congress could have relied on those procedures, the court concluded that Congress's purpose in enacting appropriations restrictions was necessarily punitive. SA-50. Going further, the court held that, regardless of the evidence of mismanagement or misconduct provided by congressional reports or executive branch reports, restrictions on appropriations to ACORN would constitute unconstitutional punishment absent judicial findings of guilt. See SA-48 (holding that "Congress could not rely on the negative results of a

congressional or executive report as a rationale" to enact the appropriations bar).

This reasoning extends the bill of attainder clause far beyond the limits recognized by the Supreme Court, and the district court's reliance on Lovett again underscores the errors of its analysis. In Lovett, as in Brown, it was critical to the Supreme Court's invalidation of the legislative employment bars that those bars were based on the constitutionally repugnant premise that political affiliation could predict an individual's propensity to engage in future misconduct. The district court did not suggest that circumstances similar to Lovett are present here, and its reliance on Lovett overlooks these crucial parts of the Supreme Court's opinion.

Nor did Lovett suggest that Congress is barred from legislating with specificity, and the Court's subsequent decision in Nixon makes any such reading untenable. In Nixon, the Court addressed the constitutionality of a statute enacted in response to an agreement signed by the former President regarding the disposition of his presidential records. 433 U.S. at 432. The statute overrode the agreement and established rules governing disposition of the former President's records. The statute applied to no other records and repeatedly referred to the former President by name. Id. at 433–34. As the Court observed, Congress was motivated in significant part by "the desire to restore public confidence in our political processes by preserving the materials as a source for facilitating a full airing of the events leading to [President Nixon's] resignation," and the "need to understand how those political processes had in fact

operated in order to gauge the necessity for remedial legislation." Id. at 453.

In challenging the statute as a bill of attainder, former President Nixon urged that "Congress acted on the premise that he had engaged in 'misconduct,' was an 'unreliable custodian' of his own documents, and generally was deserving of a 'legislative judgment of blameworthiness.'" Id. at 468 (emphasis in original) (quoting Nixon's briefs). The "essence" of former President Nixon's position, explained the Court, was that "the Constitution is offended whenever a law imposes undesired consequences on an individual or on a class that is not defined at a proper level of generality. The Act in question therefore is faulted for singling out appellant, as opposed to all other Presidents or members of the Government, for disfavored treatment." Id. at 469–70 (emphasis added).

The Court rejected this contention in no uncertain terms: this "view would cripple the very process of legislating, for any individual or group that is made the subject of adverse legislation can complain that the lawmakers could and should have defined the relevant affected class at a greater level of generality." Id. at 470.

Contrary to the implicit assumption underlying the district court's reasoning here, specificity is not the touchstone of bill of attainder analysis. A statute's specificity does not render it suspect; equally, a statute affecting an open-ended class of individuals may be fatally flawed. That was the case in the Court's 19th century decisions in Cummings and Ex parte Garland, which struck down laws excluding all

persons from the bar and the ministry unless they took an oath to attest that they had not supported the Confederacy. The flaw was not that the statutes were targeted too precisely. Instead, the statutory requirements were deemed penal because "these oaths had no relation to the fitness or qualification of the two parties[.]" Hawker, 170 U.S. at 198 (emphasis added); see Cummings, 71 U.S. at 320 (describing the loyalty oath as a qualification "hav[ing] no possible relation to [ ] fitness" for the profession). The Supreme Court summarized in Flemming v. Nestor, 363 U.S. 603 (1960): "[t]he question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation." Id. at 614 (citation omitted); see also Atonio v. Wards Cove Packing Co., 10 F.3d 1485, 1496 (9th Cir. 1993) (sustaining statute directed at "a class composed solely of these plaintiffs on the basis of their having brought this action against the canneries," even though "it appears that Congress' primary concern, or at least the concern of the Members who offered the amendment, was to relieve the canneries from the cost of additional litigation," because although "[t]hat concern may have been a product of special interest lobbying . . . it was nevertheless a permissible legislative end").

3. This Court's decision in Con Ed illustrates the application of these principles. The state statute at issue barred Con Ed from passing on to consumers

costs resulting from the failure of a generator at its Indian Point nuclear power plant. The Court concluded that "the legislature considered Con Ed guilty of wrongdoing" in a "single, past incident" and imposed a sanction. 292 F.3d at 349. The Court noted that the statute "makes explicit findings about the outage," is "limited to the [Indian Point] incident," and "imposes liability 'determined by no previous law or fixed rule.'" Ibid. (quoting Lovett, 328 U.S. at 317).

The Court made clear, however, that these features did not render the statute unconstitutional. The Court explicitly noted that the legislature could have legitimately barred Con Ed from passing along the costs of the Indian Point failure that were due solely to the utility's own negligence. 292 F.3d at 351–54. The Court explained that such legislation would have served the legitimate prospective purpose of protecting consumers from absorbing the costs of Con Ed's negligence and of deterring similar future conduct by Con Ed and other public utilities. Id. at 352, 354. The statute was constitutionally flawed because the statute barred the utility from passing along costs that in no way resulted from its negligence—costs that would have been incurred even if Con Ed had acted "as a prudent, model corporate citizen" by replacing the generators during a scheduled outage. Id. at 354. "There is no connection," the Court held, "between these [non-negligently incurred] costs" and the legitimate purposes of the statute. Ibid. The statute thus "clearly deprived Con Ed of a property interest by prohibiting the ordinarily permitted pass-through of costs . . .

depriv[ing] Con Ed of approximately $250 million that it would otherwise have been able to obtain from its customers." Id. at 351.

The district court's ruling cannot be squared with Con Ed or the Supreme Court decisions that it applied. Unlike the statute in Con Ed, the appropriations restrictions at issue in this case serve a governmental interest in ensuring the effective expenditure of taxpayer dollars. They provide a temporary response to incontrovertible evidence of mismanagement pending the findings of ongoing investigations, including the investigation by the Comptroller General, which is due to Congress by June 14, 2010. See Consolidated Appropriations Act of 2010, Pub. L. No. 111-117, Division B, § 535, 123 Stat. at 3157–58.

4. The district court's fundamental misunderstanding of the scope of the bill of attainder clause is highlighted by its conclusion that plaintiffs' challenge to the Continuing Resolution continues to present a live controversy even though the Continuing Resolution expired on December 18, 2009. The court held that "plaintiffs suffered a reputational injury that continues regardless of whether [the Continuing Resolution] continues to cut off any funds to plaintiffs." SA-59 n. 18. That holding rests on the deeply mistaken premise that the stop-gap appropriations restriction was tantamount to a congressional finding of "guilt." See SA-56–57 ("[P]laintiffs have suffered from the congressional determination of plaintiffs' guilt . . . ."). A temporary suspension of financial dealings with a corporation plagued

by mismanagement is not a finding of "guilt"; it is a means of ensuring that government monies will be used effectively. The Supreme Court's bill of attainder decisions make clear that asserted reputational injury resulting from a measure of this kind does not give rise to cognizable claim under the bill of attainder clause.

The district court's reliance on Foretich v. United States, 351 F.3d 1198, 1204 (D.C. Cir. 2003), SA-56–57, 59 n. 18, in finding cognizable reputational injury is likewise symptomatic of its misunderstanding of the bill of attainder clause and of the legislation at issue. Foretich held that Congress had overstepped constitutional bounds in resolving a custody dispute in favor of a child's mother on the "basis of a judgment that [the father had] committed criminal acts of child sexual abuse[.]" 351 F.3d at 1204. The D.C. Circuit noted that Congress had passed the statute after the D.C. Superior Court had dismissed these allegations of sexual abuse. The Court declared: "The Act memorializes a judgment by the United States Congress that Dr. Foretich is guilty of horrific crimes. Congress reached this determination despite the repeated and unwavering rejection of such claims by every court that considered them." Id. at 1223.

Congress's determination that a corporation should not receive federal funds during a fiscal year in light of demonstrated problems in management and financial oversight cannot plausibly be analogized to a legislative determination that a father

has abused his daughter and should therefore be deprived of custody rights notwithstanding a judicial dismissal of such charges.

C. The Legislative History Does Not Cast Doubt On the Legitimate Prospective Purpose of the Funding Restrictions in the Appropriations Acts.

The Supreme Court has made clear that "[j]udicial inquiries into Congressional motives are at best a hazardous matter, and when that inquiry seeks to go behind objective manifestations it becomes a dubious affair indeed." Flemming, 363 U.S. at 617. The Court has thus cautioned that "only the clearest proof could suffice to establish the unconstitutionality of a statute" on the basis of impermissible congressional motive. Ibid. A legislative record cannot support a conclusion that a law is motivated by a desire to "punish" affected persons unless it presents "unmistakable evidence of punitive intent." Selective Serv. Sys., 468 U.S. at 856 n.15 (emphasis added). Thus, in Selective Service, the Supreme Court refused to find that the challenged statute was punitive even though opponents of the measure considered it punitive and there were "several isolated statements" among the statute's supporters "expressing understandable indignation over the decision of some nonregistrants to show their defiance of the [draft] law." 468 U.S. at 856 n.15.

This Court has similarly recognized that "[t]he legislative record by itself is insufficient evidence for classifying a statute as a bill of attainder unless the record reflects overwhelmingly a clear legislative intent to punish," and that "[s]tatements by

a smattering of legislators do not constitute the required unmistakable evidence of punitive intent." Con Ed, 292 F.3d at 354 (citation and quotation omitted); see also United States v. O'Brien, 391 U.S. 367, 384 (1968) ("What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it."); Butler v. Apfel, 144 F.3d 622, 626 (9th Cir. 1998) (requiring "unmistakable evidence of a punitive motive" and rejecting a bill of attainder challenge based on legislative remarks).

The legislative record amply demonstrates Congress's concern about ensuring the effective expenditure of taxpayer monies. Senator Johanns, who introduced the provisions at issue, described the appropriations restriction in the Continuing Resolution as being necessary to "defend taxpayers against waste, fraud, and abuse" and said the later legislation "will continue to protect taxpayer dollars." 155 Cong. Rec. S9517 (daily ed. Sept. 17, 2009); 155 Cong. Rec. S11313 (daily ed. Nov. 10, 2009). Senator Bond described the legislation as necessary because of ACORN's "endemic systemwide culture of fraud and abuse" and that Congress had "the opportunity to end this relationship now." 155 Cong. Rec. S9314 (daily ed. Sept. 14, 2009). The district court's conclusion that these and similar statements evidence a punitive purpose, SA-52–53, reflects, in part, the court's mistaken view, discussed above, that Congress is barred from legislating with specificity in the face of evidence of mismanagement and misconduct.

Consistent with its forward-looking purpose, the Consolidated Appropriations Act of 2010 directs the Comptroller General to "conduct a review and audit of Federal funds received by" ACORN and its subsidiaries and affiliates to determine whether any federal funds were misused, steps that can be taken to recover misused funds and prevent the misuse of funds, and whether all necessary steps were taken to prevent the misuse of funds. See Consolidated Appropriations Act of 2010, Pub. L. No. 111-117, Division B, § 535, 123 Stat. at 3157–58. That investigation must be completed and reported to Congress within 180 days. Ibid. The legislative history of the challenged provisions reflects the purpose of suspending contracts and grants to an organization with serious, documented problems pending the conclusion of investigations, including that mandated by the statute itself.

II. Plaintiffs Would, In Any Event, Lack Standing To Sue the Secretary of Defense and the Director of the Office of Management and Budget.

For the reasons discussed, the district court erred in ruling that the challenged appropriations provisions constitute prohibited bills of attainder and the judgment below therefore should be reversed in total.

Even if that were not the case, however, reversal of the judgment would be required as it pertains to two of the defendants, the Secretary of Defense and the Director of the OMB, because plaintiffs lack standing with respect to their claims against those defendants. Article III standing requires a plaintiff to allege (1) an actual

or imminent personal injury (2) fairly traceable to the challenged conduct and (3) likely to be redressed by a favorable judicial decision. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992). Plaintiffs cannot show an actual or imminent injury fairly traceable to any current or anticipated actions taken by the Secretary of Defense or the Director of OMB.

The Department of Defense has no grants or contracts with or applications from plaintiffs. A-499. Nor do plaintiffs alleges that they have applied for or received any grants from the Department of Defense. Instead, plaintiffs admit that "neither ACORN nor any ACORN subsidiary has ever applied for or received any Defense Department funding, nor is there any interest whatsoever within ACORN of applying for Defense Department grants for the fiscal year 2010, even if the funding bar would be lifted." A-499, 797.

Plaintiffs also lack standing to bring suit against the Director of OMB. Plaintiffs allege that they were harmed by OMB's issuance of an October 7, 2009, memorandum that provided guidance to federal agencies on implementing section 163 of the Continuing Resolution. A-478–83, 496. As discussed, the Continuing Resolution expired on December 18, 2009, and has no present effect. Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010, Division B–Further Continuing Appropriations, 2010, § 101, Pub. L. No. 111-88, 123 Stat. at 2972. Therefore, the October 7 OMB Memorandum has no effect either, and

plaintiffs cannot show any injury based on OMB's actions. In any event, OMB has no authority to enforce federal statutes, and therefore, no ability to injure plaintiffs even if the appropriations provisions at issue in this case were deemed unconstitutional.

CONCLUSION

For the foregoing reasons, the judgments of the district court should be reversed.

Respectfully submitted,

TONY WEST
Assistant Attorney General

BENTON J. CAMPBELL
United States Attorney

MARK B. STERN
(202) 514-5089
MICHAEL S. RAAB
(202) 514-5089
BENJAMIN S. KINGSLEY
(202) 353-8253
HELEN L. GILBERT
(202) 514-4826
Attorneys, Appellate Staff
Civil Division, Room 7261
Department of Justice
950 Pennsylvania Ave., NW
Washington, D.C. 20530

APRIL 2010

CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)(B)

I hereby certify that this brief complies with the type-face and volume limitations set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) because the type face is Garamond, proportionally spaced, fourteen-point font, and the number of words in this brief is 8,468 according to the count of Corel Wordperfect 14.

_____
Helen L. Gilbert
Attorney for Defendants-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2010, I caused copies of the foregoing brief to be filed with the Court by Federal Express overnight delivery and by e-mail to agencycases@ca2.uscourts.gov, and caused additional copies to be served upon the following counsel by Federal Express overnight delivery and by e-mail:

Darius Charney
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012
(212) 614-6464
Fax: (212) 614-6499
Email: dcharney@ccrjustice.org

Jules Lobel
3900 Forbes Avenue
Pittsburgh, PA 15260
Tel: (412) 334-1379
Email: jll4@pitt.edu

_____
Helen L. Gilbert
Attorney for Defendants-Appellants