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Case Record:

10-1068

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ACORN, ACORN INSTITUTE, INC., and MHANY MANAGEMENT, INC., f/k/a New York Acorn Housing Company, Inc.,

Petitioners,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

RECORD FOR USE BY COMPETITORS

THE RECORD

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SUPREME COURT OF THE UNITED STATES

No. 10-1068

ACORN, ACORN INSTITUTE, INC., and MHANY MANAGEMENT, INC., f/k/a New York Acorn Housing Company, Inc.,

v.

UNITED STATES OF AMERICA, et al.

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

June 20, 2011

Case below, 618 F.3d 125.

Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit, is granted limited to the following Question: Whether a congressional ban on federal funds and contracting to one specific, named corporation and all of its subsidiaries, affiliates, and undefined "allied corporations" constitutes a Bill of Attainder in the circumstances presented by this case.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2009

Docket Nos. 09-5172-cv (L); 10-0992-cv (CON)

Argued: June 24, 2010 Decided: August 13, 2010

ACORN, ACORN INSTITUTE, INC., and MHANY MANAGEMENT, INC., f/k/a/ New York Acorn Housing Company, Inc.,

Plaintiffs-Appellees,

- v.-

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.

Before: MINER, CABRANES, and WESLEY, Circuit Judges.

Defendants-appellants appeal from a preliminary injunction entered on December 11, 2009, and a permanent injunction and declaratory judgment entered on March 10, 2010, in the United States District Court for the Eastern District of New York (Gershon, J.), declaring various appropriations laws unconstitutional bills of attainder and enjoining defendant from enforcing those laws against plaintiffs-appellees, the court having concluded that (1) the plaintiffs have Article III standing to challenge the appropriation laws against all of the defendants; and (2) the appropriations laws singling out plaintiffs from obtaining federal funds (a) fell within the historical meaning of legislative punishment, (b) did not further a non-punitive legislative purpose, and (c) were supported by a legislative record that evinced an intent to punish.

Affirmed in part, vacated in part, and remanded.

JULES LOBEL, Darius Charney, and William Quigley, Center for Constitutional Rights, Pittsburgh, PA and New York, NY; William Goodman and Julie Hurwitz, Goodman & Hurwitz, P.C., Detroit, MI; Arthur Schwartz, New York, NY, for plaintiffs-appellees.

MARK B. STERN, Michael S. Raab, Benjamin S.

Kingsley, and Helen L. Gilbert, Appellate Staff, Civil Division, U.S. Department of Justice (Tony West, Assistant Attorney General, Civil Division, U.S. Department of Justice; Benton J. Campbell, U.S. Attorney, Eastern District of New York), Washington, D.C. and Brooklyn, NY, for defendants-appellants.

Daniel R. Murdock, Patton Boggs LLP, New York, NY; Haaris Ahmad, Assistant Corporation Counsel, Wayne County, Michigan, Detroit, MI, for amicus curiae Wayne County, Michigan.

David B. Rankin and Mark Taylor, Rankin & Taylor, New York, NY, for amici curiae Alliance for Justice; Citizen Action of New York; Hakeem Jeffries; Labor Education & Research Project; Legal Aid Society of New York City; Marty Markowitz; Kevin Powell; Western States Center; and Jumaane D. Williams.

Mark D. Stern, Somerville, MA; John C. Philo, Maurice & Jane Sugar Law Center for Economic & Social Justice, Detroit, MI, for amici curiae United Electrical, Radio & Machine Workers of America; Communications Workers of America; Communications Workers of America Local 1180; Transport Workers Union of America; Transport Workers Union of America of Greater New York; Jobs with Justice; Interfaith Worker Justice; and Maurice & Jane Sugar Law Center for Economic & Social Justice.

Charles S. Sims and Anna G. Kaminska, Proskauer Rose LLP, New York, NY; Stephen I. Vladeck, Washington, D.C. for amici curiae Constitutional Law Professors Bruce Ackerman, Erwin Chemerinsky, David D. Cole, Michael C. Dorf, Mark Graber, Seth F. Kreimer, Sanford V. Levinson, Burt Neuborne, and Stephen I. Vladeck.

MINER, Circuit Judge:

Defendants-appellants, Shaun Donovan, Secretary of Housing and Urban Development ("HUD"); Peter Orszag, Director of the Office of Management and Budget ("OMB"); Timothy Geithner, Secretary of the Treasury; Lisa Jackson, Administrator of the Environmental Protection Agency ("EPA"); Gary Locke, Secretary of Commerce; Robert Gates, Secretary of

Defense; and the United States (collectively, the "government" or "defendants"), appeal from a preliminary injunction entered on December 11, 2009, and a permanent injunction and declaratory judgment entered on March 10, 2010, in the United States District Court for the Eastern District of New York (Gershon, J.).

Plaintiffs-appellees, Association of Community Organizations for Reform Now ("ACORN"), Acorn Institute , and New York Acorn Housing Company[1] ("New York Acorn" or, collectively with ACORN and Acorn Institute, the "plaintiffs") brought this action challenging provisions in several federal appropriations laws barring the distribution of federal funds to ACORN and its affiliates, subsidiaries, and allied organizations. The District Court struck down the challenged provisions, holding that (1) the plaintiffs have Article III standing to challenge the appropriations laws against all of the defendants, including the Secretary of Defense and the Director of OMB; and (2) the appropriations laws singling out ACORN and its affiliates from obtaining federal funds (a) fell within the historical meaning of legislative punishment, (b) did not further a non-punitive legislative purpose, and (c) were supported by a legislative record that evinced an intent to punish. Accordingly, the court enjoined the defendants from enforcing the challenged provisions of the appropriations laws.

I. BACKGROUND

A. The Plaintiffs

ACORN is a non-profit Arkansas corporation that organizes low- and moderate-income persons "to achieve social and economic justice." Specifically, ACORN has helped over two million people register to vote, advocated for increasing the minimum wage, worked against predatory lending, prevented foreclosures, assisted over 150,000 people file their tax returns, and "worked on thousands of issues that arise from the predicaments and problems of the poor, the homeless, the underpaid, the hungry and the sick." ACORN has 500,000 members located in 75 cities across the United States, with its national offices located in Brooklyn, New York,

[1] New York Acorn has recently changed its name to MHANY Management, Inc.

Washington, D.C., and New Orleans, Louisiana. ACORN has received 10% of its funding from the federal government and otherwise has received funding from various national and local sources.

Acorn Institute is a non-profit New Orleans corporation that has a "separate corporate existence from ACORN, with a separate board of directors and separate management." Acorn Institute, however, collaborates closely and contracts with ACORN to carry out many of the grants which Acorn Institute receives from, inter alios, the federal government. Similar to ACORN, Acorn Institute is involved with civil rights, employment, housing, and social-service issues of low-income communities. As of September 2009, Acorn Institute employed twenty employees, with its office located in New Orleans, Louisiana.

New York Acorn is a non-profit New York corporation that "owns, develops and manages housing affordable to low income families." New York Acorn controls over 140 buildings and 1,200 apartments located throughout the boroughs of New York City. New York Acorn is a separate entity from ACORN but is considered an ally or affiliate of ACORN.[2] New York Acorn receives part of its funds by way of subcontracting-grants from the New York State Housing Finance Agency, which, in turn, receives federal funds from HUD for such subcontracting purposes. New York Acorn employs an office staff of thirteen persons and a maintenance staff of twenty-four persons.

The legal and governance structure of ACORN and its "separate but interrelated components," such as Acorn Institute and New York Acorn, is "incredibly complex," and at one point the ACORN "[f]amily" was estimated at approximately 200 entities. As found in an internal report issued by ACORN in 2008, however, the ACORN family — which still included Acorn Institute and New York Acorn — had diminished to 29 entities by that time.

B. Mismanagement, Fraud, and Congressional Response

[2] Following oral argument, HUD determined for purposes of its appropriations law that New York Acorn "is not an affiliate, subsidiary or allied organization of ACORN." Post-Argument Letter of the United States (dated July 8, 2010).

In 1999 and 2000, Dale Rathke, the brother of ACORN's founder Wade Rathke, embezzled nearly $1 million from the organization. Upon discovery of the embezzlement, "a small group of executives decided to keep the information from almost all of the group's board members and not to alert law enforcement." A restitution agreement was signed in which the Rathke family "agreed to repay[, beginning in 2001], the amount embezzled in exchange for confidentiality." In June 2008, however, a whistleblower forced ACORN to disclose the embezzlement, and at that time ACORN's mismanagement came under serious public scrutiny. ACORN immediately prepared an internal report noting, among other issues, "potentially improper use of charitable dollars for political purposes" as well as possible violations of federal law by ACORN and its "web" of nearly 200 affiliated organizations.

ACORN's reputation suffered further upon accusations of voter registration fraud, for which ACORN's workers had been convicted in prior years. Between October 2008 and May 2009, two more ACORN workers were charged with, and convicted of, voter registration fraud. While ACORN adopted "several good-governance policies" to address the problems identified in the internal report, a new scandal arose in the summer of 2009 when "hidden camera" videos revealed ACORN employees and volunteers providing advice and counseling in support of a proposed prostitution business.

In response to these events, ACORN commissioned an independent report to analyze "the videos that caused this summer's uproar" and "the entire organization, its core weaknesses and inherent strengths." The report, referred to as the "Harshbarger Report" because it was prepared by Scott Harshbarger, cited many of the problems of management previously noted in the internal report issued in 2008. Although the Harshbarger Report revealed that the hidden-camera videos were heavily edited, "manipulated," and "distorted," the report nonetheless criticized ACORN's "organizational and supervisory weakness" and overall failure to provide adequate organizational infrastructure necessary to manage and oversee its operations.

In September 2009, the U.S. Census Bureau and the Internal Revenue Service, both of

which collaborated with ACORN on certain programs, ended their relationship with ACORN due to its negative publicity. That same month, members of Congress asked the Government Accountability Office ("GAO") to initiate an investigation into ACORN's activities because "there remain[ed] significant concern that millions of taxpayer dollars were used improperly, and possibly criminally, by the organization." Several states suspended their funding of ACORN and its affiliates. In the State of Nevada, ACORN and two of its employees were charged with participating in an illegal voter registration scheme.

On October 1, 2009, Congress passed a "stop-gap" appropriations law to fund federal agencies prior to the enactment of the 2010 Fiscal Year appropriations. See Continuing Appropriations Resolution ("Continuing Resolution"), 2010, Pub. L. No. 111-68, Div. B, § 163, 123 Stat. 2023, 2053 (2009). Section 163 of the Continuing Resolution singled out ACORN as follows:

> None 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.

Id. The provisions of the Continuing Resolution — including Section 163 — were set to expire on December 18, 2009. See 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).

In a memorandum dated October 7, 2009, the Director of OMB advised the heads of all executive agencies, inter alia, (1) that Section 163 prohibited them from providing any federal funds to ACORN and its affiliates, subsidiaries, and allied organizations during the period of the Continuing Resolution; (2) to suspend any existing contracts with ACORN and its affiliates "where permissible"; and (3) to take steps "so that no Federal funds are awarded or obligated by your grantees or contractors to ACORN or its affiliates as subcontractors, or other subrecipients." In a subsequent memorandum, the Office of Legal Counsel clarified that Section 163 would not prohibit funds to be paid pursuant to binding contractual obligations that predated

the exclusion.

C. Entry of Preliminary Injunction and Subsequent Developments

On November 12, 2009, the plaintiffs commenced an action in the District Court to enjoin the United States, the Secretary of the Treasury, the Secretary of HUD, and the Director of OMB from enforcing Section 163. In its complaint, the plaintiffs argued that the appropriations laws violated the First Amendment, the Due Process Clause, and the Bill of Attainder Clause. The plaintiffs then moved for a preliminary injunction, which the court granted in an opinion and order filed on December 11, 2009, after concluding that the plaintiffs showed a likelihood of success on its bill-of-attainder claim. The District Court did not address the plaintiffs' remaining First Amendment and due process claims. In response to the District Court's ruling, the OMB rescinded its memorandum addressing the heads of all executive agencies on Section 163. See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, M-10-02, GUIDANCE ON SECTION 163 OF THE CONTINUING RESOLUTION REGARDING THE ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW (ACORN) (Oct. 7, 2009), available at http://www.whitehouse.gov/omb/assets/memoranda_2010/m10-02.pdf (last visited Aug. 10, 2010).

Meanwhile, Congress passed appropriations laws for fiscal year 2010, which President Obama signed into law. See Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, 123 Stat. 3034 (2009); Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, 123 Stat. 3409 (2009). One section of the appropriations laws used identical language to that of Section 163 and specifically excluded ACORN and its "affiliates, subsidiaries, and allie[s]" from federal funding. Four sections of the appropriations laws similarly excluded ACORN and its "subsidiaries" from federal funding.[3] In addition to the specific exclusion of ACORN from

[3] The Department of the Interior, Environment, and Related Agencies Appropriations Act of 2010, Pub. L. No. 111-88, Division A, Section 427; Consolidated Appropriations Act of 2010, Pub. L. No. 111-117, Division A, Section 418; Consolidated Appropriations Act of 2010, Pub. L. No. 111-117, Division B, Section 534; Consolidated Appropriations Act of 2010, Pub. L.

federal funding, the appropriations laws included Section 535, which directed the GAO to "conduct a review and audit of the Federal funds received by ACORN or any subsidiary or affiliate of ACORN" to determine

> (1) whether any Federal funds were misused and, if so, the total amount of Federal funds involved and how such funds were misused;
>
> (2) what steps, if any, have been taken to recover any Federal funds that were misused;
>
> (3) what steps should be taken to prevent the misuse of any Federal funds; and
>
> (4) whether all necessary steps have been taken to prevent the misuse of any Federal funds[.]

Commerce, Justice, Science, and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-117, Div. B, § 535, 123 Stat. 3034, 3157–58 (2009). Section 535 required the GAO to submit its report "[n]ot later than 180 days after the enactment of this Act." Id. at 3158.

D. Declaratory Relief and Permanent Injunction

On consent of the government, the plaintiffs filed an amended complaint challenging the five sections of the latest appropriations laws, in addition to the by-then-expired Section 163. The amended complaint included the three remaining defendants in this appeal: the Administrator of the EPA; the Secretary of Commerce; and the Secretary of Defense.

In a judgment filed on March 10, 2010, the District Court granted the plaintiffs' request for declaratory relief and a permanent injunction. Specifically, the District Court held that the appropriations laws constituted unconstitutional bills of attainder; that the plaintiffs possessed standing to bring these claims against the named defendants; and that a permanent injunction was warranted in light of the unconstitutionality of the appropriations laws and the irreparable injuries suffered by the plaintiffs. As with its granting of the plaintiffs' motion for a preliminary injunction, the District Court again declined to reach the plaintiffs' First Amendment and due

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No. 111-117, Division E, Section 511; and The Department of Defense Appropriations Act of 2010, Pub. L. No. 111-118, Division A, Section 8123.

process claims in light of its determination that the challenged laws were bills of attainder.

The government timely appealed the District Court's judgment, and we subsequently granted the government's motion to stay the injunction pending the appeal. On appeal, the government argues (1) that the plaintiffs lack standing against two of the defendants, namely, the Secretary of Defense and the Director of OMB, because the plaintiffs cannot show an actual injury that is fairly traceable to any current or anticipated actions by these two defendants; and (2) that the District Court erroneously determined the appropriations laws to be bills of attainder, because (a) the challenged laws are not congruent with any historical understanding of punishment; (b) the challenged laws do not constitute punishment as a functional matter; and (c) the legislative record does not evince an unmistakably punitive purpose.

II. DISCUSSION

A. Standard of Review

We review a district court's 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) (internal quotation marks omitted). Our review of questions of law is de novo. See, e.g., Spiegel v. Schulmann, 604 F.3d 72, 76 (2d Cir. 2010); Ascencio-Rodriguez v. Holder, 595 F.3d 105, 110 (2d Cir. 2010); Donk v. Miller, 365 F.3d 159, 164 (2d Cir. 2004).

B. Standing to Sue the Secretary of Defense and the Director of OMB

The jurisdiction of the federal courts is limited to the resolution of "cases" and "controversies." U.S. Const. art. III, § 2. The corollary of this restriction is that the challenging party must have "standing" to pursue its case in federal court. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992). Standing is established where (1) the challenging party

has "suffered an 'injury in fact' — an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, rather than conjectural or hypothetical"; (2) there is "a causal connection between the injury and the challenged conduct"; and (3) it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Gully v. Nat'l Credit Union Admin. Bd., 341 F.3d 155, 160–61 (2d Cir. 2003) (internal quotation marks omitted). "The party invoking federal jurisdiction bears the burden of establishing these elements." Id. at 161.

The government challenges the plaintiffs' standing to sue the Secretary of Defense and the Director of OMB. The government argues that, unlike the other defendants in this appeal, the plaintiffs have never received — and do not intend to apply for — grants or contracts from the Department of Defense. The government also argues that the plaintiffs have not suffered any injury caused by OMB because Section 163 is no longer effective; OMB rescinded its memorandum advising the heads of all the executive agencies; and, in any event, OMB has no authority to enforce federal statutes.

The plaintiffs cannot be said to lack standing to sue a government agency constrained to enforce a law that specifically names ACORN and prevents the plaintiffs from receiving federal funds. Cf. Foretich v. United States, 351 F.3d 1198, 1213 (D.C. Cir. 2003) (holding that plaintiff had standing to challenge as a bill of attainder a statute that deprived him of his child visitation rights — even though his child was eighteen and the statute no longer had any effect on his right to see her — because "Congress's act of judging [Foretich] and legislating against him on the basis of that judgment . . . directly give[s] rise to a cognizable injury to his reputation"); see also 5 U.S.C. § 702 (when enjoining the United States for agency actions, the court is required to name all officials who are responsible for compliance with the injunction). Even if the plaintiffs are not and never will be interested in applying for grants or funding from the Department of Defense, the fact that the defense department's appropriations law specifically prohibits ACORN and its affiliates from being eligible for federal funds affects the plaintiffs' reputation with other

agencies, states, and private donors. See Gully, 341 F.3d at 162 ("The Supreme Court has long recognized that an injury to reputation will satisfy the injury element of standing.").

The government's argument that the plaintiffs lack standing to sue the Director of OMB is similarly misplaced. Although the government asserts that OMB has no authority to enforce federal statutes, OMB "oversee[s] the execution" of the federal budget and has a continuing responsibility to explain appropriations provisions to agencies. See U.S.C.A. Reorg. Plan 2 1970, 84 Stat. 2085, as amended by Pub. L. No. 97-258, § 5(b), 96 Stat. 1068, 1085 (1982) (stating that the OMB performs the "key function of assisting the President in the preparation of the annual Federal budget and overseeing its execution"). See generally id. ("While the budget function remains a vital tool of management, . . . [t]he new Office of Management and Budget will place much greater emphasis on the evaluation of program performance . . . [and] expand efforts to improve interagency cooperation."). To that end, OMB's now-rescinded memorandum — which is the basis for the plaintiffs' claim of reputational injury with respect to Section 163 — was issued. As explained by the District Court, notwithstanding the rescission of the OMB memorandum and expiration of Section 163, the OMB memorandum continues to exert influence over the plaintiffs' reputation:

> Following [the District Court's entry of a preliminary injunction], OMB did send an email to all federal agencies' general counsels informing them of the injunction entered . . . and that the government was considering appeal, but OMB did not direct them to inform their agencies, grantees, and grantees' subcontractors of this court's ruling. The reputational harm, therefore, continues, as the original advice from OMB to the hundreds, if not thousands, of recipients of that advice has never been rescinded.

Indeed, the OMB memorandum providing guidance for application of Section 163 is still available on OMB's website. See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, M-10-02, GUIDANCE ON SECTION 163 OF THE CONTINUING RESOLUTION REGARDING THE ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW (ACORN) (Oct. 7, 2009), available at http://www.whitehouse.gov/omb/assets/memoranda_2010/m10-02.pdf (last visited Aug. 10, 2010). Although the website states that the memorandum has been rescinded, there is

also a notation that "the enacted restrictions on funding ACORN and affiliates . . . remain in force" in light of this Court's granting the government's motion for a stay pending appeal. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, MEMORANDA 2010, http://www.whitehouse.gov/omb/memoranda_default/ (last visited Aug. 10, 2010). Thus, what is called a rescission in fact functioned in no such way. In light of OMB's actual and continuing responsibility to oversee the management of the budgets of Executive Branch agencies, and its consequent impact on the plaintiffs' reputation, the plaintiffs have shown sufficient injury to bring suit against the Director of the OMB.

We therefore affirm the judgment of the District Court with regard to the issue of standing.

C. Bill of Attainder

The Constitution prohibits the enactments of "bills of attainder." See U.S. Const. art. I, § 9 (prohibiting Congress); id. § 10 (prohibiting states). Historically, a bill of attainder

> was a device often resorted to in sixteenth, seventeenth and eighteenth century England for dealing with persons who had attempted, or threatened to attempt, to overthrow the government. In addition to the death sentence, attainder generally carried with it a "corruption of blood," which meant that the attainted party's heirs could not inherit his property. The "bill of pains and penalties" was identical to the bill of attainder, except that it prescribed a penalty short of death, e.g., banishment, deprivation of the right to vote, or exclusion of the designated party's sons from Parliament. Most bills of attainder and bills of pains and penalties named the parties to whom they were to apply; a few, however, simply described them. While some left the designated parties a way of escaping the penalty, others did not.

United States v. Brown, 381 U.S. 437, 441–42 (1965) (footnotes omitted).

The scope of the Bill of Attainder Clause, however, has been interpreted as wider than the historical definition of a "bill of attainder." See Matter of Extradition of McMullen, 989 F.2d 603, 606–07 (2d Cir. 1993) (en banc) ("[T]he Bill of Attainder Clause broadly . . . prohibit[s] bills of pains and penalties as well as bills of attainder."); South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966) (stating that the Bill of Attainder Clause provides "protections for individual persons and private groups"); Brown, 381 U.S. at 442 (stating that the

Constitution's prohibition against bills of attainder "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"). Indeed, it can be said that the broadness of the American prohibition of bills of attainder under Article I, section 9 is more a reflection of the Constitution's concern with fragmenting the government power than merely preventing the recurrence of unsavory British practices of the time. See generally Roger J. Miner, Identifying, Protecting and Preserving Individual Rights: Traditional Federal Court Functions, 23 SETON HALL L. REV. 821, 826–30 (1992–1993) (discussing bills of attainder).

In its contemporary usage, the Bill of Attainder Clause prohibits any "law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." Selective Serv. Sys. v. Minn. Pub. Interest Research Grp., 468 U.S. 841, 846–47 (1984). That is, the Supreme Court has identified three elements of an unconstitutional bill of attainder: (1) "specification of the affected persons," (2) "punishment," and (3) "lack of a judicial trial." Id. at 847. Although the Supreme Court has never had occasion to rule on the issue, we have held that the scope of the "specification of the affected persons" element includes corporate entities. See Con. Edison Co. of N.Y., Inc. v. Pataki, 292 F.3d 338, 349 (2d Cir. 2002) ("We therefore hold that corporations must be considered individuals that may not be singled out for punishment under the Bill of Attainder Clause." (internal quotation marks, alteration, and citation omitted)).

With respect to the existence vel non of punishment, three factors guide our consideration: (1) whether the challenged statute falls within the historical meaning of legislative punishment (historical test of punishment); (2) whether the statute, "viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes" (functional test of punishment); and (3) whether the legislative record "evinces a [legislative] intent to punish" (motivational test of punishment). Selective Serv. Sys., 468 U.S.

at 852. All three factors need not be satisfied to prove that a law constitutes "punishment"; rather, "th[e] factors are the evidence that is weighed together in resolving a bill of attainder claim." Con. Edison, 292 F.3d at 350.

Because the government does not challenge the District Court's determination that the specificity and lack-of-judicial-trial elements are satisfied in this case, we focus on whether the laws constitute the type of "punishment" that runs afoul of the Bill of Attainder Clause.

1. Historical Test of "Punishment"

The Supreme Court has recognized that certain types of punishment are "so disproportionately severe and so inappropriate to nonpunitive ends that they unquestionably have been held to fall within the proscription of the [Bill of Attainder Clause]." Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 473 (1977). "The classic example is death, but others include imprisonment, banishment, the punitive confiscation of property, and prohibition of designated individuals or groups from participation in specified employments or vocations." Con. Edison, 292 F.3d at 351 (internal quotation marks, alteration, and ellipsis omitted). A familiar theme in these classic examples of punishment is the initial determination by the legislature of "guilt." See De Veau v. Braisted, 363 U.S. 144, 160 (1960) ("The distinguishing feature of a bill of attainder is the substitution of a legislative for a judicial determination of guilt.").

Here, the plaintiffs analogize the appropriations laws to the "cutoff of pay to specified government employees held to constitute punishment for purposes of the Bill of Attainder Clause [in United States v. Lovett, 328 U.S. 303, 317–18 (1946)]." In the plaintiffs' view, that the appropriations laws do not constitute a permanent ban or disqualification of ACORN from federal funds is immaterial because "the consequences of even a temporary ban on government funding for government contractors can be potentially harsh." Moreover, the plaintiffs argue that the appropriations laws precluding ACORN from receiving federal funds, despite having an expiration date, could be renewed every year and therefore constitute a de facto permanent ban.

The withholding of appropriations, however, does not constitute a traditional form of

punishment that is "considered to be punitive per se." See Con. Edison, 292 F.3d at 351. Congress's decision to withhold funds from ACORN and its affiliates constitutes neither imprisonment, banishment, nor death. The withholding of funds may arguably constitute a punitive confiscation of property at some point, but the plaintiffs do not assert that they have property rights to federal funds that have yet to be disbursed at the agency's discretion. We note, further, 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. In comparison to penalties levied against individuals, a temporary disqualification from funds or deprivation of property aimed at a corporation may be more an inconvenience than punishment. While ACORN claims that it will be "drive[n] close to bankruptcy" and may suffer a "corporate death sentence" without federal funds, the Harshbarger Report reveals that ACORN only derives 10% of its funding from federal grants. Thus, we doubt that the direct consequences of the appropriations laws temporarily precluding ACORN from federal funds are "so disproportionately severe" or "so inappropriate" as to constitute punishment per se. See Nixon, 433 U.S. at 472 ("Forbidden legislative punishment is not involved merely because the Act imposes burdensome consequences.").

As asserted by the plaintiffs, the appropriations laws "attaint ACORN with a note of infamy . . . [and] encourage others to shun ACORN." But the plaintiffs are not prohibited from any activities; they are only prohibited from receiving federal funds to continue their activities. Although the appropriations laws may have the effect of alienating ACORN and its affiliates from their supporters, Congress must have the authority to suspend federal funds to an organization that has admitted to significant mismanagement. The exercise of Congress's spending powers in this way is not "so disproportionately severe and so inappropriate to nonpunitive ends" as to invalidate the resulting legislation as a bill of attainder. See Nixon, 433 U.S. at 473; cf. Sabri v. United States, 541 U.S. 600, 605 (2004) ("Congress has authority under the Spending Clause to appropriate federal moneys to promote the general welfare, and it has corresponding authority under the Necessary and Proper Clause to see to it that taxpayer dollars

appropriated under that power are . . . not frittered away in graft or on projects undermined when funds are siphoned off or corrupt public officers are derelict about demanding value for dollars." (internal citations omitted)). And, in any event, according to the plaintiffs, at least one state that had previously suspended funding to the plaintiffs has restored funding to New York Acorn. See 28(j) Letter on Behalf of ACORN (dated June 22, 2010). Thus, the plaintiffs' claim of alienation — that is, their claim that they have been tainted with "a note of infamy" — is not as severe as the plaintiffs assert.

Of course, as discussed in more detail infra Analysis II(B)(3) (Motivational Test of Punishment), there is some evidence in the record indicating that ACORN was precluded from receiving federal funds upon the legislature's determination that ACORN was guilty of abusive and fraudulent practices. This evidence points in the direction of a traditional form of punishment. See De Veau, 363 U.S. at 160. "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." Lovett, 328 U.S. at 316. Nonetheless, despite statements about ACORN's guilt on the legislative floor, the appropriations laws themselves do not mention ACORN's guilt in any way. Cf. Con. Edison, 292 F.3d at 344 (the challenged law expressly found that Consolidated Edison had failed "to exercise reasonable care"). Moreover, unlike Lovett, here, there was no congressional "trial" to determine ACORN's guilt. Cf. Lovett, 328 U.S. at 310–12 (involving a secret congressional trial for engaging in subversive Communist activities, with the suspected Communists allowed to testify in their defense). As the Supreme Court noted in Flemming v. Nestor, 363 U.S. 603, 617–19 (1960), where a court is left only with the legislative history of a law that is impugned as a bill of attainder, there must be "unmistakable evidence of punitive intent [in the legislative history] . . . before a Congressional enactment of this kind may be struck down." Although there is some evidence of a determination of guilt in the legislative history of the appropriations laws, for the reasons stated

infra Analysis II(B)(3) (Motivational Test of Punishment), there is not "unmistakable evidence" of congressional intent to punish within the contemplation of the Bill of Attainder Clause. We therefore find no basis for drawing the conclusion that the challenged appropriations laws constitute "punishment" as it was historically understood.

2. Functional Test of Punishment

The functional test of punishment looks to whether the challenged law, "viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes." Nixon, 433 U.S. at 475. "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." Foretich, 351 F.3d at 1222. Thus, "[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." Id.; accord Con. Edison, 292 F.3d at 350 ("Where a statute establishing a punishment declares and imposes that punishment on an identifiable party . . . 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." (internal quotation marks, ellipsis, and alterations omitted)).

Initially, the plaintiffs appear to suggest that the appropriations laws are presumptively unconstitutional bills of attainder because they specifically named ACORN for exclusion from federal funds. But Congress may single out an entity or person in its legislation. See Nixon, 433 U.S. at 469–72 (rejecting the argument 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"); Con. Edison, 292 F.3d at 350 ("A legislature may legitimately create a 'class of one' for many purposes."). Although the specific naming of ACORN in the appropriations laws satisfies one classic mark of a bill of attainder — and is certainly relevant in assessing the plausibility of the alleged punitive purposes of the challenged law, see Foretich,

351 F.3d at 1224 — such specificity does not create a presumption of unconstitutionality. Because the party challenging a congressional law as an unconstitutional bill of attainder bears the burden of proof, see Con. Edison, 292 F.3d at 350 ("The party challenging the statute has the burden of establishing that the legislature's action constituted punishment and not merely the legitimate regulation of conduct." (internal quotation marks and alteration omitted) (emphasis added)), we accord no presumption that the appropriations laws specifying ACORN for exclusion constitute bills of attainder.

With respect to the non-punitive purpose for the appropriations laws, the government argues that Congress was motivated by its desire to "ensur[e] the effective expenditure of taxpayer dollars." According to the government, the appropriations laws at issue here "provide a temporary response to incontrovertible evidence of mismanagement by organizations that are part of a complex, poorly-managed family of organizations, pending the findings of ongoing investigations." While acknowledging that Congress has a legitimate interest in ensuring the proper use of taxpayer money, the plaintiffs argue that the specificity of the affected parties, the uniqueness of the congressional action, and the breadth of restrictive action in this case render the appropriations laws disproportionately severe and thus "punitive" under the functional test of punishment. Specifically, the plaintiffs argue: (1) Congress singled out ACORN for exclusion despite other contractors having similar problems with mismanagement; (2) the appropriations laws, which affect ACORN and its affiliates, subsidiaries, and even allied organizations, is "clearly overbroad" in relation to the laws' purported legitimate purposes; (3) the appropriations laws bypass existing regulations that address concerns about funding mismanaged organizations, such as ACORN; and (4) the appropriations laws unnecessarily preclude ACORN's obtaining federal funds for one year, regardless of the results of the GAO's investigation of ACORN's operations, i.e., even if the GAO concluded that ACORN was no longer plagued with mismanagement, the exclusion from federal funds would continue for the fiscal year.

We note that the plaintiffs' claim that the appropriations laws are punitive because they

single out ACORN is undermined by the plaintiffs' claim that the appropriations laws are also punitive because they affect hundreds of unnamed "allied" and "affiliated" organizations. If the appropriations laws affect such broad groups of organizations, then they are similar to a rule of general applicability and are less likely to have a punitive purpose. See, e.g., Flemming, 363 U.S. at 620 (rejecting claim that a law excluding certain deportees, i.e., criminal, subversive, or illegal, from receiving social security benefits was not a bill of attainder because the law affected "the great majority of those deported" and because there was not unmistakable evidence that the law had a punitive purpose); cf. Foretich, 351 F.3d at 1224 ("[N]arrow 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." (internal quotation marks, alteration, and emphasis omitted)). Indeed, because ACORN and its related entities make up such an amorphous and sprawling family of organizations — at one time consisting of approximately 200 entities governed by a structure that was "incredibly complex" — it was entirely reasonable for Congress to broadly exclude ACORN's affiliates, subsidiaries, and allies from federal funds, and leave it to the agencies to determine which organizations would be excluded to further the congressional purpose of protecting the public fisc from ACORN's admitted failures in management. See, e.g., Post-Argument Letter of the United States (dated July 8, 2010) (responding to the plaintiffs' post-argument submission by attaching an agency letter dated July 8, 2010, stating that HUD "has determined that [New York Acorn] is not an affiliate, subsidiary or allied organization of ACORN").

The plaintiffs' assertion that the appropriations laws are punitive because they bypass administrative procedures is also unpersuasive. Although a law that bypasses administrative procedures may "reinforce[]" the conclusion that the law was intended "to find guilt and order punishment directly," Con. Edison, 292 F.3d at 349, the same inference is difficult to draw when a congressional appropriations law is at issue. Cf. id. (finding violation of Bill of Attainder

Clause where the legislative act, which prohibited Consolidated Edison from recovering costs from its ratepayers, was aimed at the allocation of private funds). While withholding federal funds may constitute punishment in certain circumstances, a temporary ban on federal assistance to the groups at issue here — ACORN (which admitted to mismanagement and embezzlement and suffered numerous convictions of its workers), and Acorn Institute and New York Acorn (which were part of a complex web of interrelated entities with ACORN) — is not comparable to congressional acts of punishment such as permanent disqualification from a certain vocation or criminalizing past conduct. See, e.g., Brown, 381 U.S. at 455; Pierce v. Carskadon, 83 U.S. 234 (1872); Ex Parte Garland, 71 U.S. 333 (1867); Cummings v. Missouri, 71 U.S. 227 (1867); cf. Selective Serv. Sys., 468 U.S. at 853 (upholding law that withheld federal student assistance to men who had not registered for the draft); Flemming, 363 U.S. at 618–21 (upholding law that excluded certain deportees from receiving social security benefits). Compare Am. Commc'ns Ass'n, C.I.O. v. Douds, 339 U.S. 382, 413–15 (1950) (rejecting bill-of-attainder challenge against a law that required union officers to file affidavits — that they were not Communist Party members and that they did not favor the overthrow of the United States government by force or violence — in order to invoke the assistance and services of the NLRB), with Brown, 381 U.S. at 455 (declaring unconstitutional a law that made it a crime for a member of the Communist Party to serve as a union officer or manager).

Finally, we reject the plaintiffs' argument that the appropriations laws are punitive because they disqualify ACORN from federal funds even if the GAO investigation results in a favorable disposition for ACORN. Although there is no provision in the appropriations laws that ties the GAO investigation with ACORN's status to receive federal funds, Congress could, of course, modify the appropriations law following the GAO's investigation."[4] See BellSouth

[4] A preliminary report issued by the GAO states that "the information in this report is preliminary and subject to change. We plan to issue a report later this year with our final results related to ACORN and potentially related organizations." U.S. GOV'T ACCOUNTABILITY OFFICE, WASHINGTON, D.C., PRELIMINARY OBSERVATIONS ON FUNDING, OVERSIGHT, AND INVESTIGATIONS AND PROSECUTIONS OF ACORN OR POTENTIALLY RELATED ORGANIZATIONS

Corp. v. FCC, 162 F.3d 678, 687 (D.C. Cir. 1998) (noting that even if there were alternate ways of fulfilling legitimate government interests, "it [is] up to the legislature to make this decision"). On the facts of this case, Congress's response is not so out of proportion to its purported non-punitive goal of protecting public funds from future fraud and waste so as to render the funding bans punitive in nature.

In sum, the plaintiffs have failed to show that the appropriations laws constitute "punishment" under the functional test.

3. Motivational Test of Punishment

The 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. See Flemming, 363 U.S. at 617 ("[O]nly the clearest proof could suffice to establish the unconstitutionality of a statute on [the] ground [of legislative history.]"); see also Lovett, 328 U.S. at 308–12 (recounting extensive evidence of punitive intent in the legislative record). Statements by a smattering of legislators "do not constitute [the required] unmistakable evidence of punitive intent." Selective Serv. Sys., 468 U.S. at 856 n.15 (internal quotation marks omitted).

Here, as the plaintiffs argue, the legislative record reveals much concern about protecting the expenditure of taxpayer money against "waste, fraud, and abuse." 155 Cong. Rec. S9517 (daily ed. Sept. 17, 2009) (Senator Johanns); see also 155 Cong. Rec. S11313 (daily ed. Nov. 10, 2009). Senator Bond described the exclusion as necessary because of ACORN's "endemic and systemwide culture of fraud and abuse" and stated that Congress had "the opportunity to end this relationship now." 155 Cong. Rec. S9314 (daily ed. Sept. 14, 2009). Congressman Issa published an eighty-eight-page staff report that concluded that ACORN and organizations associated or allied with it constituted "a criminal enterprise" that had "repeatedly and deliberately engaged in systemic fraud" and "committed a conspiracy to defraud the United

(June 14, 2010), http://www.gao.gov/new.items/d10648r.pdf.

States by using taxpayer funds for partisan political activities." This report was read into the Congressional Record when one of the challenged appropriation laws was introduced. See 155 Cong. Rec. S9308, 9309–10, 9317 (daily ed. Sept. 14, 2009) (Senator Johanns) (describing ACORN as "besieged by corruption, by fraud, and by illegal activities, — all committed on the taxpayers' dime").

According to the plaintiffs, nearly ten members of the House of Representatives assailed ACORN as "this crooked bunch," "this corrupt and criminal organization," and being involved in "child prostitution," "shaking down lenders," "corrupting our election process," "trafficking illegal aliens," and being in the "criminal hall of fame," among other epithets and accusations. See 155 Cong. Rec. H9946–10129. There were also, however, representatives who opposed the exclusion of ACORN during these debates. For example, Senator Durbin stated: "[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." 155 Cong. Rec. S10181, 10211 (daily ed. Oct. 7, 2009). Senator Leahy similarly protested the attack on ACORN: "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." 155 Cong. Rec. S9541–42 (daily ed. Sept. 17, 2009).

Despite the evidence of punitive intent on the part of some members of Congress, unlike in Lovett, there is no congressional finding of guilt in this case. In Lovett, a secret trial was held by Congress to determine the guilt or innocence of the accused subversives. Upon a finding of guilt, Congress passed the law denying the accused their salary for federal service. Thus, in Lovett, the congressional record was "unmistakably" clear as to Congress's intent to punish the subject individuals. Here, at most, there is the "smattering" of legislators' opinions regarding ACORN's guilt of fraud. See 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."); cf. Selective Serv. Sys., 468 U.S. at 855–56 (upholding law denying federal financial assistance for higher education to male students who failed to register for the draft; in that case, as here, many legislators commented that the men who failed to register for the draft had committed a "felony, they have violated the law, and they are not entitled to these educational benefits"); BellSouth Corp., 162 F.3d at 690 (sustaining provision that placed special restrictions on Bell operating companies and dismissing a "few scattered remarks referring to . . . abuses allegedly committed by [Bell operating companies] in the past" as not providing the kind of "'smoking gun' evidence of congressional vindictiveness").

To be sure, a congressional finding following a legislative trial is not the only way to establish the "unmistakable evidence" of punitive intent in the legislative record; however, here, the statements by a handful of legislators are insufficient to establish — by themselves — the clearest proof of punitive intent necessary for a bill of attainder. Nor is the legislative record sufficient to demonstrate "punishment" cumulatively with the historical and functional tests of punishment analyzed above.

III. CONCLUSION

In accordance with the foregoing, the judgment of the District Court is affirmed in part and vacated in part. We remand for further proceedings as to the plaintiffs' First Amendment and due process claims.

tions in a timely manner may waive a right to appeal the District Court order. *See* 28 U.S.C. § 636(b)(1); Fed.R.Civ.P. 6(a), 72; *Small v. Sec'y of Health & Human Servs.*, 892 F.2d 15, 16 (2d Cir.1989).

SO ORDERED.

Dated: Brooklyn, New York.

January 19, 2010

ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW; Acorn Institute, Inc.; and Mhany Management, Inc., f/k/a New York Acorn Housing Company, Inc., Plaintiffs,

v.

UNITED STATES of America; Shaun Donovan, Secretary of the Department of Housing and Urban Development; Peter Orszag, Director, Office of Management and Budget; Timothy Geithner, 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.

No. 09–CV–4888 (NG).

United States District Court,
E.D. New York.

March 10, 2010.

Background: National organization that advocated for affordable housing and other causes, and two of its affiliates, brought action challenging as an unconstitutional bill of attainder provisions of consolidated appropriations act barring organization and its affiliates from receiving federal funds. Plaintiffs moved for declaratory relief and a permanent injunction, and both parties moved for summary judgment.

Holdings: The District Court, Gershon, J., held that:

(1) provisions amounted to unconstitutional bill of attainder;

(2) plaintiffs had standing to challenge provisions that barred them from receiving funding from the Department of Defense, the Environmental Protection Agency (EPA), and the Commerce Department;

(3) plaintiffs had standing to sue the Secretary of the Treasury and the Director of the Office of Management and Budget (OMB); and

(4) irreparable harm and absence of adequate remedy at law justified issuance of permanent injunction.

Motions granted in part, and denied in part.

1. Constitutional Law ⚿1096

A "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. U.S.C.A. Const. Art. 1, § 9, cl. 3.

See publication Words and Phrases for other judicial constructions and definitions.

2. Constitutional Law ⚿1096

Enacted as a bulwark against tyranny by Congress, the Bill of Attainder Clause was intended not as a narrow, technical 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. U.S.C.A. Const. Art. 1, § 9, cl. 3.

3. Constitutional Law ⚿1096

Three factors guide a court's determination of whether a statute directed at a named or readily identifiable party is punitive, as will violate the Bill of Attainder Clause: first, whether the challenged statute falls within the historical meaning of legislative punishment; second, whether the statute, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes, an inquiry sometimes referred to as the "functional test"; and third, whether the legislative record evinces a legislative intent to punish. U.S.C.A. Const. Art. 1, § 9, cl. 3.

4. Constitutional Law ⚿1096

A statute need not fit all three of the factors that guide a court's determination of whether a statute is a bill of attainder; rather, those factors are the evidence that is weighed together in resolving a bill of attainder claim. U.S.C.A. Const. Art. 1, § 9, cl. 3.

5. Constitutional Law ⚿1096

Some types of legislatively imposed harm are considered to be punitive per se, and thus, violative of the Bill of Attainder Clause, such as death, imprisonment, banishment, the punitive confiscation of property, and prohibition of designated individuals or groups from participation in specified employments or vocations. U.S.C.A. Const. Art. 1, § 9, cl. 3.

6. Constitutional Law ⚿1100(1)
United States ⚿82(3.1)

Consolidated appropriations act provisions, barring national organization that advocated for affordable housing and its affiliates from receiving federal funds, were an unconstitutional "bill of attainder"; the provisions had no valid non-punitive purpose for funding deprivations, the provisions singled out only one organization and its affiliates without any valid justification, the act did not afford any opportunity to overcome the funding ban, provisions were punitive in their intent, in light of multiple statements by legislators concerning organization's alleged illegal activities, funding ban was severe, as it was imposed for one year, permanently depriving organization and affiliates from applying for federal funding for that year, and inclusion in act of directive to investigate organization did not demonstrate nonpunitive purpose. U.S.C.A. Const. Art. 1, § 9, cl. 3; Department of the Interior, Environment and Related Agencies Appropriations Act, 2010, § 427, 123 Stat. 2904; Consolidated Appropriations Act, 2010, §§ 418, 511, 534, 123 Stat. 3034; Department of Defense Appropriations Act, 2010, § 8123, 123 Stat. 3409.

7. Constitutional Law ⚿1097

A deprivation of the opportunity to apply for federal funding in fits within the definition of "punishment" for bill of attainder purposes. U.S.C.A. Const. Art. 1, § 9, cl. 3.

See publication Words and Phrases for other judicial constructions and definitions.

8. Constitutional Law ⚿1097

The 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. U.S.C.A. Const. Art. 1, § 9, cl. 3.

9. Federal Courts ⚿12.1

Article III's case-or-controversy requirement limits federal court jurisdiction to actual, ongoing controversies between the parties. U.S.C.A. Const. Art. 3, § 2, cl. 1.

10. Constitutional Law ⚿725

National organization that advocated for affordable housing and its affiliates had standing to challenge as bill of attainder provisions of consolidated appropriations

act, barring organization and its affiliates from receiving funding from the Department of Defense, the Environmental Protection Agency (EPA), and the Commerce Department; even if organization and affiliates had no expectation of receiving specific grant or funds from those agencies, declaratory and injunctive relief prohibiting the enforcement of the provisions would remedy the reputational injuries suffered by organization and affiliates as result of punitive act, and provisions also affected organization's ability to obtain funding from private entities fearful of being tainted because of the act. U.S.C.A. Const. Art. 1, § 9, cl. 3; Department of the Interior, Environment and Related Agencies Appropriations Act, 2010, § 427, 123 Stat. 2904; Consolidated Appropriations Act, 2010, §§ 418, 511, 534, 123 Stat. 3034; Department of Defense Appropriations Act, 2010, § 8123, 123 Stat. 3409.

11. Federal Civil Procedure ⚿103.2

Even where there is no direct economic injury, reputational injury, can be an injury-in-fact for standing purposes.

12. Constitutional Law ⚿725

National organization that advocated for affordable housing and its affiliates had standing to sue the Secretary of the Treasury and the Director of the Office of Management and Budget (OMB), in action challenging as bill of attainder provisions of consolidated appropriations act, barring organization and its affiliates from receiving federal funding; OMB sent memorandum to agencies explaining the appropriations provisions, and the Treasury Department was responsible for disbursing federal funds, which could not be disbursed without authorization in accordance with appropriations act. U.S.C.A. Const. Art. 1, § 9, cl. 3; Department of the Interior, Environment and Related Agencies Appropriations Act, 2010, § 427, 123 Stat. 2904; Consolidated Appropriations Act, 2010, §§ 418, 511, 534, 123 Stat. 3034; Department of Defense Appropriations Act, 2010, § 8123, 123 Stat. 3409.

13. Injunction ⚿9

To obtain a permanent injunction, a plaintiff must succeed on the merits and show the absence of an adequate remedy at law and irreparable harm if the relief is not granted.

14. Civil Rights ⚿1453

National organization that advocated for affordable housing and its affiliates established irreparable harm and absence of adequate remedy at law, justifying issuance of permanent injunction, in action challenging as unconstitutional bill of attainder provisions of consolidated appropriations act barring organization and its affiliates from receiving federal funds; it was undisputed that prior to funding ban, organization and affiliates had received significant amounts of federal funding, either directly or indirectly as subcontractors, that grants from the government were suspended, and that they could not receive renewals or new grants under the challenged legislation, the government's sovereign immunity prevented organization and affiliates from bringing suit against the government for monetary damages for these injuries, Court found violation of Bill of Attainder Clause, the amount of money organization and affiliates would have received from government but for unconstitutional provisions was impossible to calculate, and organization and affiliates established significant reputational injuries from unconstitutional provisions. U.S.C.A. Const. Art. 1, § 9, cl. 3; Department of the Interior, Environment and Related Agencies Appropriations Act, 2010, § 427, 123 Stat. 2904; Transportation, Housing, and Urban Development, and Related Agencies Appropriations Act, 2010, §§ 418, 511, 534, 123 Stat. 3034; Department of Defense Appropriations Act, 2010, § 8123, 123 Stat. 3409.

15. Civil Rights ⇨1450

A finding of significant violation of constitutional rights also supports the finding of irreparable harm, for purpose of permanent injunction.

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Held Unconstitutional

26 U.S.C.A. § 9504
Pub.L. 111–88, Division A, § 427
Pub.L. 111–117, Division A, § 418
Pub.L. 111–117, Division B, § 534
Pub.L. 111–117, Division E, § 511
Pub.L. 111–118, Division A, § 8123

Jules Lobel, Darius Charney, William Quigley, Josh Rosenthal, Center for Constitutional Rights, New York, NY, William Goodman, Julie H. Hurwitz, Goodman & Hurwitz, Detroit, MI, Arthur Z. Schwartz, Schwartz, Lichten & Bright, New York, NY, for Plaintiffs.

Peter D. Leary, Bradley H. Cohen, U.S. Dept of Justice, Washington, DC, F. Franklin Amanat, United States Attorneys Office, Brooklyn, NY, for Defendants.

OPINION AND ORDER

GERSHON, District Judge:

Plaintiffs, the Association of Community Organizations for Reform Now, Inc. ("ACORN"), and two of its affiliates, challenge as an unconstitutional bill of attainder a group of appropriations provisions enacted by Congress that bar plaintiffs from receiving federal funding. On December 11, 2009, a preliminary injunction against the enforcement of Continuing Resolution 163, the only provision then at issue, was entered. *ACORN v. United States*, 662 F.Supp.2d 285 (E.D.N.Y.2009) ("*ACORN I*"), In an amended complaint, plaintiffs have added the remainder of the challenged 2010 appropriations provisions and have named as defendants the officials responsible for enforcing them. The parties have now agreed to consolidate plaintiffs' motions for preliminary and permanent relief and, in effect, both sides have moved for summary judgment. *See* Fed R. Civ. P. 56, 65. While there are minor disputes about factual matters, the parties agree that there are no material issues of fact that prevent resolution of this case without a trial.

As was noted in *ACORN I*, in bringing this action plaintiffs ask this court to consider the constitutionality of legislation that was approved by both houses of Congress and signed into law by the President. I again emphasize that such a task can be approached only with the utmost gravity, because legislative decisions enjoy a high presumption of legitimacy. This is particularly true where the challenge is brought under a rarely-litigated provision of the Constitution, the Bill of Attainder Clause, which has been successfully invoked only five times in the Supreme Court since the signing of the Constitution.

ACORN's critics consider it responsible for fraud, tax evasion, and election law violations, and members of Congress have argued that precluding ACORN from federal funding is necessary to protect taxpayer money. ACORN, by contrast, while acknowledging that it has made mistakes, characterizes itself as an organization dedicated to helping the poor and argues that it has been the object of a partisan attack against its mission. 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 Clause.

BACKGROUND

ACORN describes itself as "the nation's largest community organization of low-and-moderate income families." ACORN, in addition to its own work, has affiliations with a number of other organizations, including its co-plaintiffs ACORN Institute, Inc. and MHANY Management, Inc., which was formerly known as New York ACORN Housing Company, Inc. Plaintiffs have in past years received millions of dollars in federal funding from a variety of grants, embodied in contractual agreements, from various federal agencies. ACORN itself does not receive federal grants, but it has been a frequent subcontractor of ACORN affiliates such as ACORN Institute.

Numerous accusations have been made against ACORN. Most prominently, ACORN came under attack after publication of hidden-camera videos in September of 2009, in which employees of an ACORN affiliate are seen to advise a purported prostitute and her boyfriend about how to engage in various illegal activities and evade law enforcement while doing so. Other allegations include that ACORN violated tax laws governing non-profit organizations, misused taxpayer dollars, committed voter fraud, and violated federal election laws by playing an impermissibly partisan role in its voter registration campaign. ACORN has been and is currently the subject of numerous investigations.[1] ACORN answers that it has responded by terminating staff members found to have engaged in misconduct, reorganizing its board of directors, and hiring Scott Harshbarger, Esq., a former Massachusetts Attorney General, to conduct an internal investigation. Both sides rely on Mr. Harshbarger's report, issued on December 7, 2009, which identifies problems with ACORN's internal management, discusses reforms already being undertaken, and suggests others; it also raises issues regarding the integrity of the videotapes.

In the fall of 2009, in the absence of 2010 appropriations acts for all federal agencies and programs, Congress enacted, and President Obama signed into law, a Continuing Appropriations Resolution ("Continuing Resolution"). That Continuing Resolution included one of the provisions at issue in this case, referred to here as "Section 163" which was the subject of *ACORN I*. Continuing Appropriations Resolution, 2010, Pub.L. No. 111–68, Div. B, § 163, 123 Stat.2023, 2053 (2009). Section 163 provides that:

> None 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.

The Continuing Resolution containing Section 163 went into effect on October 1, 2009, and was extended on October 31, 2009 to December 18, 2009. Further Continuing Appropriations Resolution, 2010, Pub.L. No. 111–88, Div. B, § 101, 123 Stat. 2904, 2972 (2009). The extension of the Continuing Resolution was included in the same law as the 2010 appropriations act for the "Department of the Interior, Environment, and Related Agencies." Another division of this Act prohibits federal funds

1. The Congressional Research Service has prepared a list of all pending and previous investigations relating to ACORN. *See* Memorandum from Congressional Research Service to House Judiciary Committee re: Association of Community Organizations for Reform Now (Dec. 22, 2009).

from being "made available" under the Act to ACORN or "its subsidiaries." Dep't of the Interior, Environment and Related Agencies Appropriations Act, 2010, Pub.L. No. 111–88, Div. A, § 427, 123 Stat 2904, 2962 (2009).

On October 7, 2009, Peter Orszag, the Director of the Office of Management and Budget ("OMB") and a defendant here, issued a memorandum to the heads of all executive branch agencies regarding the implementation of Section 163 ("OMB Memorandum"). The OMB Memorandum directs, *inter alia*, that "[n]o agency or department should obligate or award any Federal funds to ACORN or any of its affiliates, subsidiaries or allied organizations (collectively 'affiliates') during the period of the [Continuing Resolution]," even where the agencies had already determined that funds should be awarded to ACORN, but had not yet entered into binding agreements with the organization to do so. This prohibition applied not just to the 2010 fiscal year, but also to appropriations made in Fiscal Year 2009, and to any funds left over from prior years' appropriations. In addition, the OMB Memorandum states that agencies should, "where permissible," suspend performance and payment under existing contracts with ACORN and its affiliates, and ask for guidance on any legal considerations from the agencies' own counsel, OMB, or the Department of Justice. Finally, turning to subcontractors, the OMB Memorandum instructs agencies to "take steps so that no Federal funds are awarded or obligated by your grantees or contractors to ACORN or its affiliates" and recommends that each agency notify federal grant and contract recipients about Section 163. On November 19, 2009, HUD gave notice to plaintiff ACORN Institute that it was suspending several of its contracts with the organization because of Section 163.

Plaintiffs filed suit in this court on November 12, 2009, arguing that Section 163 is an unconstitutional bill of attainder and that it violates their rights under both the First Amendment and the Due Process Clause. In their initial complaint, plaintiffs alleged that, as a direct consequence of Section 163, agencies have refused to review their grant applications; that grants they were told they would receive have been rescinded; that previously-awarded grants have not been renewed; and that HUD had refused to pay on its contractual obligations even for work already performed. Plaintiffs also alleged that other organizations, such as private corporations and foundations, have cut ties to them as a result of Section 163.

Following the dissemination of the OMB Memorandum, the Department of Justice Office of Legal Counsel ("OLC") responded to a request for guidance from HUD as to whether Section 163 prohibits payments to ACORN to satisfy contractual obligations that arose prior to Section 163's enactment.[2] The OLC memorandum advises HUD that "[S]ection 163 should not be read as directing or authorizing HUD to breach a pre-existing binding contractual obligation to make payments to ACORN or its affiliates, subsidiaries, or allied organizations where doing so would give rise to contractual liability," To read Section 163 otherwise, the memorandum notes, would "undo a binding governmental contractual promise." The memorandum explains that its construction of Section 163 not only avoids abrogating "binding governmental contractual promises," but also avoids constitutional concerns, in particular those arising from the Bill of Attainder

2. Although the OLC memorandum is dated October 23, 2009, it was not publicly released until late November 2009.

Clause, that "may be presented by reading the statute, which applies to specific named entities, to abrogate such contracts, including even in cases where performance has already been completed but payment has not been rendered."

Plaintiffs sought emergency relief on November 13, 2009, arguing that Section 163 was an unconstitutional bill of attainder and that it violated their rights under both the First Amendment and the Due Process Clause. On December 11, 2009, I preliminarily enjoined then—defendants the United States, Peter Orszag, in his official role as Director of OMB, Shaun Donovan, in his official role as Secretary of HUD, and Timothy Geithner, in his official role as Secretary of the Treasury, from enforcing the provision, on the grounds that plaintiffs had shown irreparable harm and a likelihood of success on the merits of their claim that Section 163 is a bill of attainder.[3] *ACORN I,* 662 F.Supp.2d at 299–300.

On December 16, 2009, President Obama signed into law the 2010 Consolidated Appropriations Act. Consolidated Appropriations Act, 2010, Pub.L. No. 111–117, 123 Stat. 3034 (2009). This Act, described by the government as a "minibus" Act, is a consolidation of various appropriations acts for Fiscal Year 2010.

Several of the consolidated acts contain provisions prohibiting the award of funding to ACORN.[4] Section 418 of Division A of the Act, which appropriates funding for "Transportation, Housing and Urban Development, and Related Agencies," precludes federal funding to ACORN in language identical to that of Section 163. *See* Transportation, Housing, and Urban Development, and Related Agencies Appropriations Act, 2010, Pub.L. No. 111–117, Div. A, § 418, 123 Stat. 3034, 3112 (2009).[5] Section 534 of Division B of the Act, which covers appropriations for "Commerce, Justice, Science, and Related Agencies," provides that "[n]one of the funds made available under this Act may be distributed to the Association of Community Organizations for Reform Now (ACORN) or its subsidiaries." Commerce, Justice, Science, and Related Agencies Appropriations Act, 2010, Pub.L. No. 111–117, Div. B, § 534, 123 Stat. 3034, 3157 (2009).

Section 511 of the "Military Construction and Veterans Affairs and Related Agencies" appropriations act provides that "[n]one of the funds made available in this division or any other division in this Act may be distributed to [ACORN] or its subsidiaries." Military Construction and Veterans Affairs and Related Agencies Appropriations Act, 2010, Pub.L. No. 111–117, Div. E, § 511, 123 Stat. 3034, 3311

3. The government appealed that decision on December 16, 2009, but has not moved in the Second Circuit to expedite the appeal. By letter dated February 12, 2010, the government asked for a due date of May 13, 2010 for its opening brief in the Court of Appeals, which request was ''so ordered'' on February 17, 2010.

4. The government has identified three Fiscal Year 2010 appropriations acts passed shortly after Section 163 that do not include a ban on funding ACORN. *See* Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2010, Pub.L. No. 111–80, 123 Stat.2090 (2009); Department of Homeland Security Appropriations Act, 2010, Pub.L. No. 111–83, 123 Stat. 2142 (2009); Energy and Water Development and Related Agencies Appropriations Act, 2010, Pub.L. No. 111–85, 123 Stat. 2845 (2009).

5. The parties agree that Section 418's ''prior Act'' language bars funding of ACORN from HUD funds left over from prior years' appropriations, but disagree as to whether that language extends to other agencies' funds from prior years. Plaintiffs and the government agree that this dispute need not be resolved to decide this case.

(2009). In contrast to the other provisions in the minibus, which limit the funding prohibitions to one single division, the funding restriction in Division E applies to the entirety of the minibus, except insofar as it may conflict with other ACORN-related provisions within another division.

Following the enactment of the minibus bill, Congress passed and the President signed into law the final outstanding appropriations bill, the Department of Defense Appropriations Act of 2010, which prohibits distribution of funds under the act to ACORN or "its subsidiaries." Department of Defense Appropriations Act, Pub.L. No. 111–118, § 8123, 123 Stat. 3409, 3458 (2009). Once this final appropriations act was passed, the Continuing Resolution, and thus Section 163 included in it, expired.

On consent of the government, plaintiffs filed a second amended complaint including all five Fiscal Year 2010 appropriations provisions that prohibit funding to ACORN as well as Section 163.[6] Plaintiffs named three new defendants: Lisa P. Jackson, Administrator of the Environmental Protection Agency ("EPA"); Gary Locke, Secretary of Commerce; and Robert Gates, Secretary of Defense.

Plaintiffs and defendants agree that, for the purposes of the bill of attainder argument, the challenged provisions should be analyzed as one statute. Although several of the full year appropriations acts use language slightly different from that of Section 163, neither plaintiffs nor defendants have suggested that any of these differences is significant, either practically or legally. Similarly, although the challenged provisions differ somewhat in whether they prohibit funding to "ACORN or its subsidiaries" or "ACORN, or any of its affiliates, subsidiaries, or allied organizations," at least for plaintiffs' bill of attainder argument, any difference between these terms is immaterial. For purposes of simplicity, I refer to the group as "ACORN and its affiliates."

Plaintiffs acknowledge that HUD, pursuant to the OLC memorandum, has paid, or has agreed to pay, for work already performed under existing contracts. They contend that congressional suspension of existing contracts and the denial of the opportunity to obtain future contracts amounts to punishment that violates the Bill of Attainder Clause.

The defendants recognize that ACORN has been singled out by Congress and that there has been no judicial trial at which ACORN has been found guilty and deserving of punishment, but argue that the challenged legislation is not a bill of attainder because it does not impose punishment. The government relies heavily on Section 535 of Division B of the 2010 Consolidated Appropriations Act, which directs the United States Government Accountability Office ("GAO") to "conduct a review and audit of the Federal funds received by [ACORN] or any subsidiary or affiliate of ACORN" to determine

> (1) whether any Federal funds were misused and, if so, the total amount of Federal funds involved and how such funds were misused; (2) what steps, if any, have been taken to recover any Federal funds that were misused; (3) what steps should be taken to prevent the misuse of any Federal funds; and (4) whether all necessary steps have

6. Following the enactment of the 2010 appropriations acts, plaintiffs had amended their initial complaint to include challenges to these acts, and they moved to "Amend/Correct/Supplement" the preliminary injunction issued in *ACORN I*. This motion was denied on procedural grounds, after which plaintiffs, on consent, filed the second amended complaint now at issue.

been taken to prevent the misuse of any Federal funds.

Commerce, Justice, Science, and Related Agencies Appropriations Act, 2010, Pub.L. No. 111–117, Div. B, § 535, 123 Stat. 3034, 3157–58 (2009). Section 535 directs that within 180 days of enactment of the Act, the Comptroller General "shall submit to Congress a report on the results of the audit . . ., along with recommendations for Federal agency reforms." *Id.* Plaintiffs do not challenge the Section 535 provision as a bill of attainder, but the government relies on the investigation to argue that Congress had a non-punitive reason for passing the challenged provisions.

DISCUSSION

I. *Bill of Attainder Analysis*

[1, 2] Article I, Section 9, of the Constitution provides that "No Bill of Attainder or ex post facto Law shall be passed." [7] A 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. Adm'r of Gen. Servs.*, 433 U.S. 425, 468, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977). Enacted as a "bulwark against tyranny" by Congress, "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." *United States v. Brown*, 381 U.S. 437, 443, 442, 85 S.Ct. 1707, 14 L.Ed.2d 484 (1965). This principle of separation of powers animates bill of attainder jurisprudence; its prohibition "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." *Id.* at 445, 85 S.Ct. 1707.[8]

[3, 4] Three factors "guide a court's determination of whether a statute directed at a named or readily identifiable party is punitive": first, "whether the challenged statute falls within the historical meaning of legislative punishment"; second, "whether the statute, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes," an inquiry sometimes referred to as the "functional test"; and third, "whether the legislative record evinces a legislative intent to punish." *Consol. Edison Co. of N.Y., Inc. v. Pataki* ("*Con Ed*"), 292 F.3d 338, 350 (2d Cir. 2002) (internal quotation marks and alterations omitted). A statute "need not fit all three factors to be considered a bill of attainder; rather, those factors are the evidence that is weighed together in resolving a bill of attainder claim." *Id.*

A. *Historical Meaning of Legislative Punishment*

[5] As the Second Circuit has explained, "[s]ome types of legislatively imposed harm . . . are considered to be punitive per se." *Con Ed*, 292 F.3d at 351. "The classic example is death, but others include imprisonment, banishment, . . . the punitive confiscation of property, and pro-

7. The Constitution includes two clauses prohibiting bills of attainder. Article I, Section 9, implicated here, restricts Congress; Article I, Section 10, restricts state legislatures.

8. As the government acknowledges, the Second Circuit has determined that the Bill of Attainder Clauses protect corporations as well as individuals. *See Consol. Edison Co. of N.Y. v. Pataki*, 292 F.3d 338, 346–47 (2d Cir.2002). Defendants have reserved the right to challenge the applicability of the Bill of Attainder Clause to corporations in any appellate proceedings in this case.

hibition of designated individuals or groups from participation in specified employments or vocations." *Id.* (internal quotation marks and alterations omitted).[9]

Any consideration of the "historical" meaning of punishment in this context must begin with the handful of Supreme Court cases finding statutes to be bills of attainder. In each of the five cases in which the Supreme Court has found legislation to violate the Bill of Attainder Clause, the context of the Court's ruling was protection of political Liberty.[10] In *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 18 L.Ed. 356 (1866), for example, the Court concluded that a statute that barred persons from certain professions unless they took an oath that they had never been connected to an organization "inimical to the government of the United States" was punishment for past association with the Confederacy. *Accord Ex parte Garland*, 71 U.S. (4 Wall.) 333, 18 L.Ed. 366 (1866); *Pierce v. Carskadon*, 83 U.S. (16 Wall.) 234, 21 L.Ed. 276 (1872). Similarly, in *United States v. Brown*, 381 U.S. 437, 85 S.Ct. 1707, 14 L.Ed.2d 484 (1965), the Court held that a statute making it a crime for a member of the Communist Party to serve as an officer or employee of a labor union was a bill of attainder. In the fifth case, *United States v. Lovett*, 328 U.S. 303, 106 Ct.Cl. 856, 66 S.Ct. 1073, 90 L.Ed. 1252 (1946), the Court held that a statute that permanently barred three government employees who had been accused of being communists from government service was an unconstitutional bill of attainder.

[6] As acknowledged in *ACORN I*, the idea that the deprivation of the opportunity to apply for discretionary federal funds is "punitive" within the meaning of the Bill of Attainder Clause at first blush seems implausible. Neither the Supreme Court nor the Second Circuit has been faced with such a claim. This is not surprising: Plaintiffs assert, and defendants do not dispute, that this is the first time Congress has denied federal funding to a specifically named person or organization in this way. One district court, however, in a case much like this one, has concluded that denial of the opportunity to apply for *state* government contracts amounts to punishment under Article I, Section 10. *See Fla. Youth Conservation Corps., Inc. v. Stutler*, No. 06–275, 2006 WL 1835967, at *2 (N.D.Fla. June 30, 2006). For the reasons explained below, I agree with the district court in Florida and conclude that the discretionary nature of governmental funding does not foreclose a finding that Congress has impermissibly singled out plaintiffs for punishment.

Lovett is particularly instructive in this regard. In *Lovett*, a congressman attacked thirty-nine specifically named government employees, including plaintiffs, as "irresponsible, unrepresentative, crackpot, radical bureaucrats," and affiliates of "communist front organizations." *Lovett*, 328 U.S. at 308–09, 66 S.Ct. 1073. Following secret hearings, Congress passed an act that no appropriation could then, or later, be used to pay plaintiffs' government salaries. *Id.* at 312–13, 66 S.Ct. 1073.

The Supreme Court concluded that the appropriations act "clearly accomplishes the punishment of named individuals without a judicial trial." *Id.* at 316, 66 S.Ct. 1073. That Congress placed the prohibi-

9. The history of the bill of attainder, and its roots in fourteenth-century England, have been described elsewhere. *See, e.g., Brown*, 381 U.S. at 441–49, 85 S.Ct. 1707; *In re Extradition of McMullen*, 989 F.2d 603, 604–06 (2d Cir.1993).

10. Here, plaintiffs allege that ACORN has been punished both for alleged misconduct, such as fraud, and its alleged impermissible partisanship.

tion in an *appropriations* bill carried no weight "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," the Court concluded, "makes it no less galling or effective than if it had been done by an Act which designated the conduct as criminal." *Id.*

The government attempts to distinguish *Lovett* on the ground that plaintiffs in that case had a "vested property interest" in their jobs, whereas here, as plaintiffs unequivocally acknowledge, they have no *right* to the award of a grant or contract from the federal government. But the Court in *Lovett* did not base its decision on a property rights analysis. The Supreme Court found a deprivation amounting to punishment under the Bill of Attainder Clause, not only because plaintiffs were deprived of their earned income from existing government jobs, but also because they were deprived of any *future opportunity* to serve the government. As the Court stated, "[t]his permanent proscription from any opportunity to serve the Government is punishment, and of a most severe type." *Id.* That plaintiffs had no right to any particular future job was of no moment.[11]

The government relies on two Supreme Court cases to argue that the denial of the opportunity to apply for federal funding cannot be punishment. In *Flemming v. Nestor*, 363 U.S. 603, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (1960), the plaintiff argued that a statute denying Social Security benefits to a category of deported aliens was a bill of attainder. The Supreme Court disagreed, describing the deprivation as the "mere denial of a noncontractual government benefit" and finding no punitive intent in the design of the statute. *Id.* at 617, 80 S.Ct. 1367. The government also points to *Selective Service System v. Minnesota Public Interest Research Group* ("*Selective Service*"), 468 U.S. 841, 853, 104 S.Ct. 3348, 82 L.Ed.2d 632 (1984), where the Court concluded that a statute barring persons who had not registered for the draft from federal student aid did not constitute punishment.

This case is closer to *Lovett* than to *Flemming* or *Selective Service.* The Supreme Court in both *Flemming* and *Selective Service* found the statutes at issue to be nonpunitive. In *Flemming,* the Court concluded that the legislative record "falls short of any persuasive showing that Congress was in fact concerned alone with the grounds of deportation," which, in the plaintiff's case, was prior membership in the Communist party. *Flemming,* 363 U.S. at 619, 80 S.Ct. 1367. In *Selective Service,* the Court reasoned that the statute had the valid goal of encouraging a class of persons to do what they were already legally obligated to do—register for the draft. *See Selective Service,* 468 U.S. at 860, 104 S.Ct. 3348. As discussed further below, I cannot discern any valid, non-punitive purpose for Congress enacting the legislation challenged in this case. Further, unlike the plaintiffs affected by the statute at issue in *Selective Service,* plaintiffs here cannot avoid the restrictions imposed upon them. Nothing in the challenged provisions affords plaintiffs an opportunity to overcome the funding ban. *Cf. SBC Commc'ns, Inc. v. FCC,* 154 F.3d 226, 243 (5th Cir.1998) (upholding against

11. The government also argues that in *Lovett* the ban on plaintiffs' government employment was permanent, and that it was the permanency of the legislative action that made the statute unconstitutional. But, as I address at length below, the year-long duration of the ban does not foreclose a bill of attainder finding, particularly given that even a short deprivation of the opportunity to apply for or receive federal funding has long-term ramifications for plaintiffs.

a bill of attainder challenge a statute that sought to encourage competition in the telecommunications industry by imposing restrictions on a specific group of companies because, *inter alia*, the companies "[would] be allowed to enter each of the affected areas as soon as the statutory criteria regarding competition in their local service markets are met").

Notably, in neither *Flemming* nor *Selective Service* did Congress single out any particular individual or entity for adverse treatment; rather, each statute applied to an entire category of people. Here, in contrast, the congressional deprivation is imposed only on ACORN and its affiliates. *See Flemming,* 363 U.S. at 619, 80 S.Ct. 1367 (reasoning that, even if the legislative history were read "as evidencing Congress' concern with the grounds [of prior Communist party membership], rather than the fact, of deportation," "[t]his would still be a far cry from the situations involved in [prior Supreme Court cases] where the legislation was on its face aimed at particular individuals"); *Nixon,* 433 U.S. at 485, 97 S.Ct. 2777 (Stevens, J. concurring) (stating that "[i]t has been held permissible for Congress to deprive Communist deportees, as a group, of their social security benefits, but it would surely be a bill of attainder for Congress to deprive a single, named individual of the same benefit.... The very specificity would mark it as punishment, for there is rarely any valid reason for such narrow legislation[.]").

[7] Accordingly, a close reading of the cases indicates that a deprivation of the opportunity to apply for funding in fact fits comfortably within the definition of "punishment" for bill of attainder purposes.

B. *The Functional Test*

I next consider whether the challenged provisions further non-punitive legislative purposes in light of the type and severity of the burdens they impose.

The Court of Appeals for the Second Circuit explored this factor at length in *Consolidated Edison of New York, Inc. v. Pataki,* in which the Court concluded that an act of the New York state legislature constituted an unconstitutional bill of attainder under Article I, Section 10 of the Constitution. 292 F.3d at 345. Based on a finding that Consolidated Edison ("Con Ed") had "failed to exercise reasonable care on behalf of the health, safety and economic interests of its customers," when it failed to promptly replace steam generators it knew to be faulty, and which then failed, the New York legislature passed a law forbidding Con Ed from passing along the costs associated with the outage to the ratepayers. *Id.* at 344–45.

The Second Circuit found that the State had no valid non-punitive reason that justified singling out Con Ed. It rejected the State's argument that the statute had the legitimate non-punitive purpose of preventing innocent ratepayers from paying for Con Ed's mistakes. The statute, the Court concluded, did more than simply redistribute or minimize costs. Rather, the "type and severity of the burdens imposed" belied the legitimacy of the regulatory justification. *Id.* at 353. There was little question that Con Ed could have passed on the cost of obtaining power elsewhere if it had replaced the generators during a *scheduled* outage; "[w]hat then," the Court asked, "other than punishment can justify forcing Con Ed to absorb these same costs after the accidental outage?" *Id.* Further, the legislature could have enacted "less burdensome alternatives" to achieve its legitimate objectives, such as excluding "those substantial costs that would have been incurred absent misconduct on Con Ed's part." *Id.* at 354.

In attempting to articulate a non-punitive rationale for the challenged provisions,

the government now presses the same non-punitive justifications as it did in *ACORN I*. The government again argues that, because there was no formal congressional finding of misconduct against ACORN, the year-long bar on all funding to ACORN is not punitive. But, as in *Con Ed*, the nature of the bar and the context within which it occurred make it unmistakable that Congress determined ACORN's guilt before defunding it. *See Nixon*, 433 U.S. at 480, 97 S.Ct. 2777 (noting that a "formal legislative announcement of moral blameworthiness or punishment" is not a necessary element of a bill of attainder). In sum, wholly apart from the vociferous comments by various members of Congress as to ACORN's criminality and fraud, as described below, no reasonable observer could suppose that such severe action would have been taken in the absence of a conclusion that misconduct had occurred. *See Con Ed*, 292 F.3d at 349 (noting that "[a]nother indispensible element of a bill of attainder is its retrospective focus: it defines past conduct as wrongdoing and then imposes punishment on that past conduct.").

The government also argues that Congress withheld funds from plaintiffs for the non-punitive reason of protecting "the public fisc," not to penalize ACORN for past wrongdoing. But Congress's interest in preventing *future* misconduct does not render the statute regulatory rather than punitive. Deterring future misconduct, as *Con Ed* stressed, is a traditional justification of punishment *See Con Ed*, 292 F.3d at 353; *see also Brown*, 381 U.S. at 458, 85 S.Ct. 1707; *Selective Service*, 468 U.S. at 851–52, 104 S.Ct. 3348 ("Punishment is not limited solely to retribution for past events, but may involve deprivations inflicted to deter future misconduct."). Incapacitation, too, is often a reason for punishment *But cf. SeaRiver Maritime Fin. Holdings, Inc. v. Mineta*, 309 F.3d 662 (9th Cir.2002) (upholding a statute restricting "tank vessels that have spilled more than 1,000,000 gallons of oil into the marine environment" from operating in Prince William Sound against a bill of attainder challenge because the statute had a non-punitive purpose.).

Turning to consideration of the "type and severity" of the burdens the challenged provisions impose, the government argues that the appropriations provisions, unlike the "permanent" ban on funding in *Lovett*, are only "temporary." But the year-long duration of the ban does not foreclose a bill of attainder finding. As a preliminary matter, it is far from settled that punishment must be a permanent measure. *See Brown*, 381 U.S. at 447, 85 S.Ct. 1707 (noting that the Bill of Attainder clause bars legislative punishment "of any form or severity"). If Congress determined that a person was to be jailed for a year and then released, the government would be hard pressed to argue that only a life sentence would constitute "punishment." [12]

And, contrary to the government's contention, the challenged provisions are no less permanent than the statute at issue in *Con Ed*. The New York legislature deprived Con Ed of the opportunity to recover the costs of its outage through a one-

12. The government's argument also ignores the fact that appropriations acts, even if renewed indefinitely, are by their very nature limited in time; if plaintiffs are precluded from challenging a funding restriction on the basis of the "temporariness" of a year-long appropriations provision, plaintiffs could never challenge a ban in an appropriations bill that was renewed indefinitely. Such a situation would raise difficulties akin to those controversies the Supreme Court has found "capable of repetition, yet evading review" in the mootness context. *See, e.g., Davis v. Fed. Election Comm'n*, —— U.S. ——, 128 S.Ct. 2759, 2769–70, 171 L.Ed.2d 737 (2008).

time rate increase, but Con Ed was not precluded from recovering costs of *future* outages from ratepayers. In the same way, the ban on ACORN may last only one year, but ACORN is permanently deprived of the opportunity to apply for Fiscal Year 2010 funding. This may affect multi-year grants and contracts (although such grants and contracts may be contingent on congressional appropriations in another fiscal year). In addition, the backward-looking provision in the HUD appropriations act, imposing limits on funding ACORN out of available appropriations from prior acts, also extends the impact beyond a single appropriations year. *See supra* note 5. Most importantly, although the government's brief refers to the limitations as "temporary," as "suspensions of funding," and as a "moratorium" on funding, plaintiffs are permanently harmed now even if their opportunity to apply for federal funding is restored in the future.

One difference between Section 163 and the newly-challenged provisions features prominently in one of the government's proffered non-punitive rationales: the inclusion in Section 535 of a directive to GAO to investigate grants to ACORN. Citing this investigation, the government argues mat the challenged provisions "further the non-punitive legislative purposes of investigating the possible misuse of federal funds and exercising oversight of executive branch agencies' expenditure of funds." Gov't's Mem. in Opp. to Pls.' Motion for Perm. Relief 15. The government points to the investigation as evidence that Congress's rationale in enacting these various provisions was not to punish plaintiffs, but rather to learn about their activities to be able to determine whether to fund them in the 2011 appropriations year.

This argument rests on the faulty assumption that Congress can constitutionally rely on the results of a congressional investigation to single plaintiffs out and to deny them funding. Congress is entitled to investigate ACORN and to determine whether the executive agencies with whom plaintiffs have contracted have properly held them to account. But Congress could not rely on the negative results of a congressional or executive report as a rationale to impose a broad, punitive funding ban on a specific, named organization; explicit non-judicial findings of guilt would exacerbate, rather than mitigate, the punitive nature of the challenged provisions. *See De Veau v. Braisted*, 363 U.S. 144, 160, 80 S.Ct. 1146, 4 L.Ed.2d 1109 (1960) ("The distinguishing feature of a bill of attainder is the substitution of a legislative for a judicial determination of guilt"). The same is true for the variety of investigations of ACORN the government relies on to justify Congress's action. Similarly, legislative determinations of plaintiffs' wrongdoing did not save the statutes in *Lovett* or *Con Ed.*

In any event, the inclusion of a direction to the GAO to investigate does not support the plausibility of the government's rationale. To the extent the government argues that the investigation evidences Congress's non-punitive purpose of investigating the possible misuse of federal funds, nothing in the challenged legislation, or in Section 535, indicates that the investigation ordered by Congress is linked to the bans on funding in the way that government counsel suggests. Nor does anything in the legislative record support this rationale; the government has cited no legislator who articulated it; [13]

13. The government notes that two members of the House, Representative Lamar Smith and Representative Darrell Issa, wrote a letter to the GAO requesting an investigation into ACORN's use of federal funds, as did twenty senators. *See, e.g.,* Letter from Congressmen Smith and Issa to The Honorable Gene Dodaro, Acting Comptroller General (Sept. 23,

and in fact, the proponent of the investigation, Senator Richard Durbin, argued *against* the funding prohibitions.[14] Further, as noted previously, the unavailability of any means for ACORN to overcome the funding ban if the investigation report is favorable underscores the lack of a connection between the burdens of the statute and Congress's purpose in enacting it.

Moreover, the government ignores the existence of comprehensive regulations promulgated to address the very concerns Congress has expressed about ACORN. For example, the Code of Federal Regulations establishes a formal process for determining when federal contractors can be suspended or debarred. *See, e.g.,* 2 C.F.R. Ch. 1, Part 180. Subpart G of this part provides that a suspending official may impose suspension after considering a range of factors; the official can even take "immediate action" if "needed to protect the public interest." *See* 2 C.F.R. § 180.705 ("In deciding whether immediate action is needed to protect the public interest, the suspending official has wide discretion. . . ."). By noting these regulations, I do not suggest that Congress is precluded from exercising its oversight powers if it is concerned that agencies are not adequately implementing their authority. But the existence of these regulations militates against the need for draconian, emergency action by Congress.

That ACORN alone was singled out for adverse treatment further belies any claim that non-punitive reasons explain the challenged provisions. It is true that not every statute directed at a single individual or entity will necessarily be a bill of attainder. In *Nixon,* for example, the Supreme Court found that a statute naming former President Nixon was not a bill of attainder. The specific mention of his name was "easily explained by the fact that at the time of the Act's passage, only his [papers and recordings] demanded immediate attention." 433 U.S. at 472, 97 S.Ct. 2777. Nixon, and only Nixon, had entered into an agreement with a depository which called for destruction of the materials upon Nixon's death. Thus, Nixon "constituted a legitimate class of one, and this provide[d] a basis for Congress' decision to proceed with dispatch with respect to his materials

2009); Letter from Twenty Senators to Acting Comptroller General Dodaro (Sept. 22, 2009).

But, as plaintiffs point out, Representatives Smith and Issa wrote their letter only after they had voted to prohibit ACORN from receiving federal funds on a *permanent* basis. *See* Defund ACORN Act, H.R. 3571, 111th Congress (passed in the House September 17, 2009). Moreover, several of the senators requesting an investigation had previously introduced Senate Bill 1687, the Protect Taxpayers from ACORN Act, sponsored by Senator Mike Johanns, which would also have permanently prohibited ACORN and ACORN affiliates from receiving any federal funding. And, indeed, the same members of Congress voted for the funding prohibition in the Department of Interior's appropriations act before they knew whether the GAO would investigate at all.

14. In proposing the investigation, Senator Durbin stated that "[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." 155 Cong. Rec. S10181, S10211 (daily ed. Oct. 7, 2009). He continued:

> 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. And you don't necessarily penalize an entire organization because of the sins or crimes of a limited number of employees. First, we should find out the facts.

Id.

while accepting the status of his predecessors' papers and ordering the further consideration of generalized standards to govern his successors." *Id.*

Similarly, the D.C. Circuit in *BellSouth Corp. v. FCC,* 162 F.3d 678 (D.C.Cir. 1998), held that a statute that specifically restricted the operations of the Bell Operating Companies ("BOCs") in order to promote competition in the telecommunications market was not a bill of attainder because of the "unique infrastructure controlled by the BOCs" which allowed them to exercise monopoly power. Because of this "unique infrastructure," the D.C. Circuit concluded that the differential treatment was "neither suggestive of punitive purpose nor particularly suspicious." *Id.* at 689–90 (internal quotation marks omitted). The Fifth Circuit, addressing another challenge to the same legislation, similarly stated that the "[BOCs] can exercise bottleneck control over both ends of a [long distance] telephone call in a higher fraction of cases" than other companies, and that it was therefore "rational to subject them to additional burdens in order to achieve the overall goal of competitive local and long distance service." *See SBC Commc'ns Inc.,* 154 F.3d at 243.

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. In *Con Ed,* the Second Circuit established a rigorous standard for evaluating legislatures' purported justifications in the bill of attainder context New York State argued numerous seemingly non-punitive reasons for the legislation in question, including deterrence and protection of public safety. The Circuit examined each rationale closely and systematically, and it found each one lacking a non-punitive purpose. As in *Con Ed,* none of the government's justifications stand up to scrutiny. I can discern no non-punitive rationale for a congressional ban on plaintiffs, and plaintiffs alone, from federal funding.

C. *Legislative History*

[8] The third, and final, element in determining whether an act is punitive is legislative intent. *See Selective Service,* 468 U.S. at 852, 104 S.Ct. 3348. "The 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." *Con Ed,* 292 F.3d at 354. Determining Congress's intent is often a difficult exercise; the stated comments of one legislator do not necessarily represent the unspoken thoughts of others who voted for a bill. Nevertheless, since the Supreme Court instructs that legislative intent is a key part of the framework for determining whether a legislative act is a bill of attainder, I must consider it. *See Nixon,* 433 U.S. at 478, 97 S.Ct. 2777.

Here, the task is made easier because the government fails to offer any legislative history that would indicate a non-punitive intent In *ACORN I,* in justifying Section 163, the government relied on the statements of Senator Mike Johanns, who introduced all of the challenged provisions in this case. For example, the government cited Senator Johanns's statement, in support of the provision defunding ACORN in the 2010 Department of Interior's appropriations act, that he was proposing the legislation "to defend taxpayers against waste, fraud, and abuse." 155 Cong. Rec. S9517 (daily ed. Sept. 17, 2009). The government also relied on Senator Johanns's statement that ACORN was "in an absolute free fall when it comes to allegations of illegal activity" and was "besieged by allegations of fraud and corruption and employee wrongdoing." *Id.* Such state-

ments require an implicit finding of wrongdoing by plaintiffs; protection of taxpayers' money is a logical justification for a funding ban only if wrongdoing is assumed.[15]

When introducing the challenged 2010 appropriations provisions, Senator Johanns made it clear that the purpose of the new provisions was to continue the prohibition enacted in Section 163. He explained that, because the Continuing Resolution was about to expire, Congress "need[s] to continue passing this amendment; therefore, [he] need[s] to continue to offer it." Senator Johanns also noted that he "do[es] have a piece of legislation pending that would take care of this across the Federal system, but that has not come to a vote yet. So I am offering today this amendment on ACORN. This amendment will continue to protect taxpayer dollars." 155 Cong. Rec. S11313 (daily ed. Nov. 10, 2009); *see also* 155 Cong. Rec. S9317 (daily ed. Sept. 14, 2009) (statement of Sen. Johanns) ("Somebody has to go after ACORN. Madam President, I suggest this afternoon that 'somebody' is each and every Member of the Senate.").

Statements by other legislators echoed the punitive purpose of the legislation. *See, e.g.,* 155 Cong. Rec. S9314 (daily ed. Sept. 14, 2009) (statement of Sen. Kit Bond) (stating that ACORN's problem is not one of "a handful of rogue employees, but, regrettably, an endemic systemwide culture of fraud and abuse" and that "Congress has the opportunity to end this relationship now"). In addition, the staff of Representative Darrell Issa authored an 88–page report entitled "Is ACORN Intentionally Structured as a Criminal Enterprise?", which states that "ACORN has repeatedly and deliberately engaged in systemic fraud" and accuses ACORN of conspiring to use taxpayer funds for partisan purposes.[16] The government correctly notes that the Issa Report was authored solely by Representative Issa's office and was not commissioned by Congress. Nevertheless, because Senator Johanns himself requested that its executive summary be entered into the congressional record, the Issa Report is relevant to this inquiry. *See* 155 Cong. Rec. S9309 (daily ed. Sept. 14, 2009) (statement of Sen. Johanns introducing Issa Report in support of what would become Section 418 of the HUD appropriations bill).

Without more, the legislative history would not be enough to render the legislation a bill of attainder. But these statements underline the punitive nature of the legislation. *See Con Ed,* 292 F.3d at 355 ("[T]he stated intent of at least some legis-

15. At least one representative, Representative Rush Holt, voiced his concern that Section 163 was a bill of attainder. *See* 115 Cong. Rec. H9975 (daily ed. Sept. 25, 2009). In his comments, Rep. Holt referenced a report from the Congressional Research Service. This report, which was written regarding a different bill, ''the Defund ACORN Act,'' which has not been enacted, analyzed that bill and concluded that ''a court would have a sufficient basis to overcome the presumption of constitutionality and find that the Defund ACORN Act violates the prohibition against bills of attainder.'' Kenneth Thomas, Congressional Research Service Report for Congress: The Proposed ''Defund ACORN Act'': Is it a ''Bill of Attainder''? (Sept. 22, 2009).

16. With respect to plaintiffs' allegations that the challenged provisions are intended to punish ACORN for its impermissible partisanship, a statement Representative Issa made in response to OLC's October 23, 2009 memorandum construing the scope of Section 163 is noteworthy. In that statement, Representative 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.'' Press Release, Rep. Darrell Issa, Issa Blasts Administrative Decision to Fund ACORN—Recks of Political Cronyism (Nov. 27, 2009).

lators—most notably one of the floor managers of the legislation—to punish Con Ed reinforces our independent conclusion that a substantial part of the legislation cannot be justified by any legislative purpose but punishment.").

The Supreme Court counseled in *Flemming* that each attainder case "turn[s] on its own highly particularized context." *Flemming,* 363 U.S. at 616, 80 S.Ct. 1367. Here, as in *Lovett,* Congress deprived plaintiffs of an opportunity available to all others. Especially where plaintiffs have received federal funds from many federal grants and contracts over the years, it cannot be said that such deprivation is anything short of punishment as that has been understood in the bill of attainder cases. The challenged provisions, by singling out ACORN and its affiliates for severe, sweeping restrictions, constitute punishment under the three factors the Supreme Court has articulated for making this determination.[17]

II. *Remedies*

A. *Standing/Remedies As To Certain Defendants*

[9] Before considering particular remedies, I address the government's arguments that the court lacks jurisdiction to award any remedy against certain defendants. The government relies on Article III's case-or-controversy requirement, which limits federal jurisdiction to actual, ongoing controversies between the parties. *See Northwestern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville,* 508 U.S. 656, 663, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993). The government does not challenge plaintiffs' standing against the United States and the Secretary of HUD, but raises issues as to the remaining defendants.

In essence, the government claims that plaintiffs have no standing as to two categories of named defendants. The first category of defendants consists of the heads of three of the government departments/agencies whose funds ACORN is barred from receiving: the Department of Defense, the EPA, and the Department of Commerce. The government contends that plaintiffs cannot point to any funding they might receive from these three that is affected by the challenged provisions. The second category is comprised of the heads of OMB and the Department of the Treasury, because, the government contends, neither enforces the restrictions on funding.

i. *Department of Defense, EPA, and Department of Commerce*

[10] The challenged provisions include bans on funding from the Defense Department, the EPA, and the Commerce Department. It is not disputed that plaintiffs have received funding from the EPA, either directly or indirectly, and that they have an interest in future funding from both the EPA and Commerce. The defendants simply argue that ACORN cannot identify a specific grant from the EPA or Commerce that ACORN is being deprived of at the moment; plaintiffs dispute this contention, but the parties' disagreements as to the particulars of a few specific grant opportunities are immaterial. There is no dispute that the funding prohibitions bar ACORN and its affiliates from obtaining federal funding either directly from a grant, or indirectly as a subcontractor, from the EPA or the Commerce Department. Plaintiffs have never sought funding from the Department of Defense and agree that they have no expectation of seeking funding from that Department.

17. Because I find the challenged provisions unconstitutional under the Bill of Attainder Clause, I do not reach plaintiffs' claims under the First Amendment and the Due Process Clause.

[11] But even where there is no *direct* economic injury, reputational injury, as the government acknowledges, can be an injury-in-fact for standing purposes. In *Gully v. National Credit Union Administration Board,* 341 F.3d 155, 162 (2d Cir.2003), for example, the Second Circuit concluded that the plaintiff had standing to challenge a ruling of misconduct, even though the reprimand was not accompanied by a suspension of any kind, because "[i]t is self-evident that Gully's reputation will be blackened by the Board's finding of misconduct and unfitness." *Id.* Similarly, in *Foretich v. United States,* 351 F.3d 1198 (D.C.Cir.2003), the D.C. Circuit considered whether a plaintiff could challenge as a bill of attainder a statute that deprived him of his child visitation rights, even though his child was eighteen, and the statute no longer had any practical effect on his right to see her. The D.C. Circuit concluded that his reputational injuries formed the basis for standing, reasoning that "Congress's act of judging Dr. Foretich and legislating against him on the basis of that judgment—the very things that, as we will see, render the Act an unconstitutional bill of attainder—directly give rise to a cognizable injury to his reputation. . . ." *Id.* at 1213.

The primary argument the government makes in opposition to reputational standing in this case is that plaintiffs' own highly publicized misdeeds, and not the challenged provisions, were the cause of any reputational harms, and that, consequently, judicial relief would not remedy the damage. In *Foretich,* the D.C. Circuit rejected that argument for reasons equally applicable to this case. The court acknowledged that "[i]t may be true . . . that the damage to Dr. Foretich's reputation comes in part from the publicity surrounding the custody dispute and [his ex-wife's] allegations, not solely from the [challenged statute]." But

> [T]his misses the point The Act itself has caused significant harm to Dr. Foretich. Therefore, by vindicating Dr. Foretich's assertion that Congress unfairly and unlawfully rendered a judgment as to his character and fitness as a father, declaratory relief will provide a significant measure of redress sufficient to satisfy the requirements of Article III standing. Here, a decision declaring the Act unlawful would make clear that Congress was wrong to pass judgment on Dr. Foretich and wrong to single him out for punishment on the basis of that judgment.

Id at 1216. Similarly, in *Gully,* the Second Circuit characterized as "facile" the government's argument that the reprimand itself had not caused plaintiff's injuries. There, the Circuit wrote that "[i]t is the Board's *determination,* not Gully's reprehensible conduct, that has sullied her reputation in the credit union industry. . . ." *Gully,* 341 F.3d at 162.

The same reasoning applies here; plaintiffs have suffered from the congressional determination of plaintiffs' guilt, and relief in this action "would make clear that Congress was wrong to pass judgment on [plaintiffs] and wrong to single [them] out for punishment on the basis of that judgment" *Foretich,* 351 F.3d at 1216. Moreover, the record establishes that the reputational injury has an economic component. 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. Accordingly, even apart from plaintiffs' direct economic injuries, their reputational injuries provide an independent basis not only for standing against all of the defendants, but also for relief against them.

ii. *OMB and the Department of the Treasury*

[12] The government asserts that the Director of OMB and the Secretary of the Treasury are not properly-named defendants on the ground that neither enforces the challenged provisions. This argument takes too narrow a view of these agencies' roles in the federal appropriations process. OMB's acknowledged practice is to notify agencies of recently-enacted provisions of broad importance, as illustrated by OMB's issuance of a memorandum after Section 163 was passed. Because that memorandum is one of the primary sources of plaintiffs' reputational harms, and considering OMB's continuing responsibility to explain appropriations provisions to agencies, plaintiffs have sufficiently alleged an injury-in-fact to support standing against the OMB's Director. As for the Treasury Department, it is responsible for disbursing federal funds, which "may not be disbursed or drawn down from the treasury of the United States unless authorized in accordance with an appropriation act." Decl. of Rita Bratcher, Gov't's Mem. of Law in Opp. to Mot. for Perm. Relief, Ex. B. Although the certifying officials of grant-making agencies may have the primary role in determining whether a disbursement is authorized, the plain language of the challenged provisions prohibits the Treasury Department as the disbursing agency from "providing" or "distributing" funds to ACORN, and provides a basis for standing against the Secretary of the Treasury.

Both OMB and the Department of the Treasury therefore play key roles in administering the appropriations process, and the government has offered no sound reason not to include all agencies that participate in enforcing the unconstitutional provisions, In fact, when enjoining the United States, the court is required to name all officials responsible for compliance with the injunction. Here that includes the Director of OMB and the Secretary of the Treasury. *See* 5 U.S.C. § 702 ("The United States may be named as a defendant in [a challenge to agency action or inaction seeking relief other than monetary damages], and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance.").

B. *Availability of Permanent Relief Against Section 163*

Because Section 163 has now expired, the government argues that a judgment that Section 163 is unconstitutional would not offer plaintiffs any relief. The expiration of the Continuing Resolution, however, did not end Section 163's impact on plaintiffs. As described above, OMB sent a memo to every federal agency in Section 163's wake, informing the agencies that Congress had cut off funding to plaintiffs, and directing them to inform their grantees, and their grantees' subcontractors, of the funding ban on plaintiffs. The reach of this memo was broad, and its effect, lasting. For example, the EPA sent an email to nearly all EPA financial assistance recipients and procurement contractors informing them of the broad scope of the funding prohibitions. Following *ACORN I*, OMB did send an email to all federal agencies' general counsels informing them of the injunction entered in *ACORN I* and that the government was considering appeal, but OMB did not direct them to inform their agencies, grantees, and grantees' subcontractors of this court's ruling. The reputational harm, therefore, continues, the original advice from OMB to the hundreds, if not thousands, of recipients of that advice has never been rescinded.[18]

18. The government has separately moved to vacate the December 11, 2009 Injunction and

C. *Declaratory and Injunctive Relief*

The Declaratory Judgment Act provides that "[i]n a case of actual controversy within its jurisdiction ... any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought;" 28 U.S.C. § 2201; *see also* Fed.R.Civ.P. 57. For the reasons explained above, I now direct entry of a declaratory judgment that the challenged provisions are unconstitutional because they violate the Bill of Attainder Clause.

[13, 14] In addition to the declaratory judgment, plaintiffs seek a permanent injunction to undo the damage the challenged provisions are causing. "To obtain a permanent injunction, a plaintiff must succeed on the merits and show the absence of an adequate remedy at law and irreparable harm if the relief is not granted." *Roach v. Morse*, 440 F.3d 53, 56 (2d Cir.2006) (internal quotation marks omitted). Plaintiffs have prevailed on their bill of attainder claim. As for irreparable harm, it is undisputed that prior to the funding ban, plaintiffs had received significant amounts of federal funding, either directly or indirectly as subcontractors; that grants with the government have been suspended; and that they cannot receive renewals or new grants under the challenged legislation.[19] Because the government's sovereign immunity prevents plaintiffs from bringing suit against the government for monetary damages for these injuries, these harms are, by definition, irreparable.

[15] Putting aside the role of sovereign immunity in barring the recovery of damages in this case, and any other limitations on the recovery of damages by government contractors where sovereign immunity has been waived, the amount of money plaintiffs might have been awarded had they been allowed to compete for contracts is, as the government acknowledges, impossible to calculate. *See Lion Raisins, Inc. v. United States*, 52 Fed.Cl. 115, 119–20 (Fed.Cl.2002) (noting that injunctive relief is "the most common remedy" for a contractor wrongfully, suspended from bidding on government contracts, and that "the specter of lost profits often constitutes the irreparable harm upon which injunctive relief is based"). Even in non-constitutional cases that involve suspension or debarment from federal contracting, courts have granted injunctive relief where money damages will not be available and where the contractor has made a sufficient showing on the merits of its claim. *See, e.g., Alf v. Donley*, 666 F.Supp.2d 60, 70

Order, referred to in this opinion as *ACORN I*, on the ground that the preliminary injunction became moot before the government had the opportunity to appeal. The government takes the position that the subject of the decision, Section 163 of the Continuing Resolution, was ''without effect'' through ''happenstance'' as the Continuing Resolution had expired on its own terms on December 18, 2009.

The government's motion to vacate is denied. As described in the text, the expiration of the Continuing Resolution did not end Section 163's impact on plaintiffs. In *ACORN I*, as here, I concluded that Congress made a determination of plaintiffs' guilt in its enactment of Section 163. Like Dr. Foretich, discussed above, plaintiffs suffered a reputational injury that continues regardless of whether Section 163 continues to cut off any funds to plaintiffs. For that reason, plaintiffs' claims relating to Section 163 survive its expiration, and there is no basis for vacating *ACORN I* as moot. Of course, the relief to be entered today will supersede the decision in *ACORN I*, which was limited to preliminary relief.

19. Only because of the OLC Memo of October 23, 2009, described above, which raised the possibility of a bill of attainder issue if they were not paid, were plaintiffs paid on the suspended contracts for work they had already performed.

(D.D.C.2009) (taking into account the plaintiff's inability to recoup lost income because of sovereign immunity as a factor in finding irreparable harm). A finding of significant violation of constitutional rights also supports the finding of irreparable harm. *See Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir.1984) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."); *see also* 11A Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, Federal Practice and Procedure § 2948.1 (2d ed.2009) (same).

In addition to their irreparable economic harms, plaintiffs have also established reputational injuries for which they can never recover damages at law from the defendants. All of these injuries may continue in the absence of injunctive relief from this court. In determining the nature of the injunctive relief to be awarded, I have considered the acknowledged role of OMB in explaining appropriations provisions to federal agencies, as exemplified by its issuance of the Section 163 memorandum. To date OMB has not rescinded that memorandum. Therefore, injunctive relief will issue to assure that, so far as possible, the harms caused by the unconstitutional legislation will be undone.

CONCLUSION

Plaintiffs have prevailed on their bill of attainder claim. They have also established irreparable harm and the need for both declaratory and injunctive relief. Therefore plaintiffs' motion for declaratory relief and a permanent injunction is GRANTED. The government's "cross-motion to dismiss and for summary judgment" is DENIED. The government's motion to vacate *ACORN I* DENIED.

A judgment in the following form shall issue: It is hereby

DECLARED that, pursuant to Article I, Section 9, of the United States Constitution, the following Acts of Congress are unconstitutional: The Continuing Appropriations Resolution, 2010, Public Law 111–68, Division B, Section 163; the Department of the Interior, Environment, and Related Agencies Appropriations Act of 2010, Public Law 111–88, Division A, Section 427; Consolidated Appropriations Act of 2010, Public Law 111–117, Division A, Section 418; Consolidated Appropriations Act of 2010, Public Law 111–117, Division B, Section 534; Consolidated Appropriations Act of 2010, Public Law 111–117, Division E, Section 511; and the Department of Defense Appropriations Act of 2010, Public Law 111–118, Division A, Section 8123.

An injunction in the following form shall issue:

Defendants the **UNITED STATES OF AMERICA; SHAUN DONOVAN,** in his official capacity as Secretary of the Department of Housing and Urban Development; **PETER ORSZAG,** in his official capacity as Director of the Office of Management and Budget; **TIMOTHY GEITHNER,** in his official capacity as Secretary of the Department of Treasury of the United States; **LISA P. JACKSON,** in her official capacity as Administrator of the Environmental Protection Agency; **GARY LOCKE,** in his official capacity as Secretary of Commerce; and **ROBERT GATES,** in his official capacity as Secretary of Defense; and all those acting in concert with them, are hereby permanently

ENJOINED from enforcing the Department of the Interior, Environment, and Related Agencies Appropriations Act of 2010, Public Law 111–88, Division A, Section 427; Consolidated Appropriations Act of 2010, Public Law 111–117,

Division A, Section 418; Consolidated Appropriations Act of 2010, Public Law 111–117, Division B, Section 534; Consolidated Appropriations Act of 2010, Public Law 111–117, Division E, Section 511; and the Department of Defense Appropriations Act of 2010, Public Law 111–118, Division A, Section 8123; and Defendant **PETER ORSZAG,** in his official capacity as Director of the Office of Management and Budget, is hereby permanently

(1) **ENJOINED** from instructing or advising federal agencies to enforce any of the legislative provisions declared unconstitutional by this court;

(2) **ENJOINED** to officially rescind the October 7, 2009 OMB memorandum entitled "Memorandum for the Heads of Executive Departments and Agencies" providing "[g]uidance on [S]ection 163 of the Continuing Resolution regarding the Association of Community Organizations for Reform Now (ACORN)" ("the OMB Memorandum");

(3) **ENJOINED** (a) to advise all federal agencies to whom he or his agents sent the OMB Memorandum that the legislative provisions which are the subject of this injunction have been declared unconstitutional; and (b) to instruct all federal agencies that they should advise their contractors or grantees that those legislative provisions have been declared unconstitutional by this court.

SO ORDERED.

Wesley MARTIN, Plaintiff,

v.

COUNTY OF NASSAU, Police Detective Charles Decaro, in his professional and individual capacities, Police Commissioner Lawrence W. Mulvey, in his professional capacity, Police First Deputy Commissioner Robert McGuigan, in his professional capacity, Police Assistant Commissioner, Denis Monette, in her professional capacity, Police Chief of Department Anthony Rocco, in his professional capacity, Police Chief of Detectives Patrick O'Conner and Nassau County Prosecutor, Defendants.

No. 08–cv–4548 (ADS)(WDW).

United States District Court,
E.D. New York.

March 12, 2010.

Background: Arrestee brought action under § 1983 and § 1985 against county and police officers, among others, seeking damages for violations of various constitutional rights, and asserting state law claims for, among other things, false arrest and malicious prosecution. Defendants moved for judgment on the pleadings.

Holdings: The District Court, Spatt, J., held that:

(1) it would sua sponte disregard documents attached to defendants' answer in considering motion;

(2) cause of action for malicious prosecution accrued when grand larceny charges were dropped against arrestee;

(3) arrestee failed to state claim for conspiracy to interfere with civil rights;

(4) arrestee failed to state § 1983 claim against administrative employees of police department;

verely limit employees' protection from a sudden change in an employment relationship.

While retention of a quarter of a predecessor's workforce might be insufficient to establish a basis for substantial continuity of the business enterprise absent the circumstances specific to this case and the above-highlighted indicia, given the particular facts of this case, the court is satisfied that the totality of factors is sufficient. Therefore, defendant's motion for summary judgment is granted.

III. *CONCLUSION*

For the foregoing reasons the plaintiff's motion for summary judgment is denied. The defendant's motion for summary judgment for an order compelling arbitration and dismissing the case is granted.

SO ORDERED.

ACORN; Acorn Institute, Inc.; and New York Acorn Housing Company, Inc., Plaintiffs,

v.

UNITED STATES of America; Shaun Donovan, Secretary of the Department of Housing and Urban Development; Peter Orszag, Director, Office of Management and Budget; and Timothy Geithner, Secretary of the Department of Treasury of the United States, Defendants.

No. 09–cv–4888 (NG).

United States District Court,
E.D. New York.

Dec. 11, 2009.

Background: National organization that advocates for affordable housing and other causes, and two of its affiliates, brought action challenging as an unconstitutional bill of attainder a continuing appropriations resolution enacted by Congress barring organization and its affiliates, subsidiaries, and allied organizations from receiving federal funds. Organization and affiliates moved for preliminary injunction barring enforcement of the continuing appropriations resolution.

Holdings: The District Court, Gershon, J., held that:

(1) organization and affiliates had likelihood of success on the merits of their claim;

(2) organization and affiliates would likely suffer irreparable harm in absence of injunction; and

(3) injunction would serve the public interest.

Motion granted.

1. Injunction ⚿138.46

A district court may enter a preliminary injunction staying government action taken in the public interest pursuant to a statutory or regulatory scheme only when the moving party has demonstrated that [the party] will suffer irreparable injury, and that there is a likelihood that the party will succeed on the merits of [its] claim.

2. Constitutional Law ⚿1096

A "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. U.S.C.A. Const. Art. 1, § 9, cl. 3.

See publication Words and Phrases for other judicial constructions and definitions.

3. Constitutional Law ⚿1096

Enacted as a bulwark against tyranny by Congress, 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. U.S.C.A. Const. Art. 1, § 9, cl. 3.

4. Constitutional Law ⚿1097

Three factors guide a court's determination of whether a statute directed at a named or readily identifiable party is punitive, and thus a bill of attainder: (1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes, an inquiry sometimes referred to as the functional test; and (3) whether the legislative record evinces a legislative intent to punish. U.S.C.A. Const. Art. 1, § 9, cl. 3.

5. Constitutional Law ⚿1096

A statute need not fit all three of the factors that guide a court's determination of whether a statute is a bill of attainder; rather, those factors are the evidence that is weighed together in resolving a bill of attainder claim. U.S.C.A. Const. Art. 1, § 9, cl. 3.

6. Civil Rights ⚿1457(7)

National organization that advocates for affordable housing and other causes and two of its affiliates, which sought preliminary injunction barring enforcement of a continuing appropriations resolution enacted by Congress barring organization and its affiliates, subsidiaries, and allied organizations from receiving federal funds, had likelihood of success on the merits of their claim that the resolution was an unconstitutional bill of attainder; congressional deprivation was imposed only on organization and its affiliates and could not be avoided by organization through any conduct on its part, act was punitive in its intent, given statements by legislators concerning organization's alleged illegal activities, asserted rationale for resolution of protecting taxpayers' money would have been a logical justification for the resolution only if wrongdoing was assumed, no congressional investigation of organization was initiated as part of the resolution, nor did Congress order any agency of government to conduct an investigation. U.S.C.A. Const. Art. 1, § 9, cl. 3; Continuing Appropriations Resolution, 2010, § 163, 26 U.S.C.A. § 9504.

7. Constitutional Law ⚿1097

The 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. U.S.C.A. Const. Art. 1, § 9, cl. 3.

8. Injunction ⚿138.6

Irreparable harm is perhaps the single most important prerequisite for the issuance of a preliminary injunction.

9. Injunction ⚿14

If an injury can be compensated by monetary damages, then no irreparable injury may be found to justify specific injunctive relief.

10. Injunction ⚿14

Irreparable harm supporting injunctive relief may be found where damages are difficult to establish and measure.

11. Injunction ⚿138.66

National organization that advocates for affordable housing and other causes and two of its affiliates would likely suffer irreparable harm in absence of preliminary

injunction barring enforcement of a continuing appropriations resolution enacted by Congress barring organization and its affiliates, subsidiaries, and allied organizations from receiving federal funds; organization and affiliates had been the recipients of significant federal grants, affiliate had ongoing contracts with Department of Housing and Urban Development (HUD) which were suspended due to the resolution, and resolution deprived organization and affiliates of the opportunity to obtain renewals of existing contracts and to compete for other contracts, which was noncompensable by money damages. Continuing Appropriations Resolution, 2010, § 163, 26 U.S.C.A. § 9504.

12. Civil Rights ⚿1450

A finding of significant violation of constitutional rights supports the finding of irreparable harm required to obtain injunctive relief.

13. Civil Rights ⚿1457(7)

Issuance of a preliminary injunction barring enforcement of a continuing appropriations resolution enacted by Congress barring national organization that advocates for affordable housing and other causes, its affiliates, subsidiaries, and allied organizations from receiving federal funds would serve the public interest; appropriations resolution implicated a fundamental issue of separation of powers, organization and affiliates were singled out by Congress for punishment that directly and immediately affected their ability to continue to obtain federal funding, in the absence of any judicial, or even administrative, process adjudicating guilt, the public would not suffer harm by allowing the organization and affiliates to continue work on contracts duly awarded by federal agencies, which was stopped solely by reason of the resolution, and or grants for which the organization and affiliates have applied, or for which they will apply, each agency would be able to use its discretion to determine the merit of the application and to suspend the contracts for cause. U.S.C.A. Const. Art. 1, § 9, cl. 3; Continuing Appropriations Resolution, 2010, § 163, 26 U.S.C.A. § 9504.

14. Injunction ⚿138.15

In deciding preliminary injunction motions, courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.

West Codenotes

Validity Called into Doubt

26 U.S.C.A. § 9504

Darius Charney, Jules Lobel, William Quigley, Center for Constitutional Rights, New York, NY, William Goodman and Julie H. Hurwitz, Goodman & Hurwitz, Detroit, MI, Arthur Z. Schwartz, Schwartz, Lichten and Bright, New York, NY, for Plaintiffs.

F. Franklin Amanat, U.S. Atty., Brooklyn, NY, Bradley H. Cohen, U.S. Dept. of Justice, Washington, DC, Peter D. Leary, Dept. of Justice, Washington, DC, for Defendants.

OPINION AND ORDER

GERSHON, District Judge:

The plaintiffs in this case, the Association of Community Organizations for Reform Now, Inc. ("ACORN") and two of its affiliates, challenge as an unconstitutional bill of attainder a continuing appropriations resolution enacted by Congress that bars ACORN and its affiliates, subsidiaries, and allied organizations from receiving federal funding from the government, even under its ongoing contracts with federal agencies. In doing so, the plaintiffs ask this court to consider the constitutionality of a provision that was approved by both houses of Congress and signed into law by the President. Such a task can be approached only with the utmost gravity; legislative decisions enjoy a high presump-

tion of legitimacy. This is particularly true where the challenge is brought under a rarely-litigated provision of the Constitution, the Bill of Attainder Clause, which has been successfully invoked only five times in the Supreme Court since the signing of the Constitution.

ACORN's critics consider it responsible for fraud, tax evasion, and election violations, and members of Congress have argued that precluding ACORN from federal funding is necessary to protect taxpayer money. ACORN, by contrast, while acknowledging that it has made mistakes, characterizes itself as an organization dedicated to helping the poor, and argues that it has been the object of a partisan attack against its mission. 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 the Constitution allows Congress to declare that a single, named organization is barred from all federal funding in the absence of a trial. Because it does not, and because the plaintiffs have shown the likelihood of irreparable harm in the absence of an injunction, I grant the plaintiffs' motion for a preliminary injunction.

BACKGROUND

On this motion for a preliminary injunction, I have considered the complaint and the various documents and declarations submitted by the parties, who have agreed that there are no disputed issues of fact that need to be decided for the purposes of the motion.

ACORN describes itself as "the nation's largest community organization of low-and-moderate income families." ACORN, in addition to its own work, has affiliations with a number of other organizations, including its co-plaintiffs ACORN Institute, Inc. and New York ACORN Housing Company, Inc. ("NYAHC"). The plaintiffs have, in past years, received millions of dollars in federal funding from a variety of grants, embodied in contractual agreements with various federal agencies, including the Department of Housing and Urban Development ("HUD").

Numerous accusations have been made against ACORN. Most prominently, ACORN came under attack after publication of hidden-camera videos in September of 2009, in which employees of an ACORN affiliate are seen to be advising a purported prostitute and her boyfriend about how to engage in various illegal activities and evade law enforcement while doing so. Other allegations include that ACORN violated tax laws governing non-profit organizations, misused taxpayer dollars, committed voter fraud, and violated federal election laws by playing an impermissibly partisan role in its voter registration campaign. ACORN alleges that it has responded by terminating staff members found to have engaged in misconduct, reorganizing its board of directors, and hiring new counsel, including a former Attorney General of Massachusetts, to conduct an internal investigation.

In the fall of 2009, in the absence of 2010 appropriations acts for all federal agencies and programs, Congress enacted, and President Obama signed into law, a Continuing Appropriations Resolution ("Continuing Resolution").[1] That Continuing

1. A continuing resolution is "[l]egislation in the form of a joint resolution enacted by Congress, when the new fiscal year is about to begin or has begun, to provide budget authority for Federal agencies and programs to continue in operation until the regular appropria-

Resolution included the provision at issue in this case, Section 163. Division B—Continuing Appropriations Resolution, 2010, Pub. L. No. 111–68, § 163, 123 Stat. 2023, 2053 (2009). Section 163 reads:

> None 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.

The Continuing Resolution containing Section 163 went into effect on October 1, 2009, and was extended, on October 31, 2009, to December 18, 2009, when it is now scheduled to expire. Division B—Further Continuing Appropriations Resolution, 2010, Pub. L, No. 111–88, § 101, 123 Stat. 2904, 2972 (2009).[2] As the expiration date for the Continuing Resolution draws near, it is unknown whether there will be a need for a further extension. That will depend on whether all regular appropriations acts are passed; according to the government, only four of the expected thirteen appropriations acts had been enacted as of the date of the preliminary injunction hearing.

On October 7, 2009, Peter Orszag, the Director of the Office of Management and Budget ("OMB") and a defendant here, issued a memorandum to the heads of all executive branch agencies regarding the implementation of Section 163 ("OMB Memorandum"). The OMB Memorandum directs, *inter alia*, that "[n]o agency or department should obligate or award any Federal funds to ACORN or any of its affiliates, subsidiaries or allied organizations (collectively 'affiliates') during the period of the [Continuing Resolution]," even where the agencies have already determined that funds should be awarded to ACORN, but have not yet entered into binding agreements with the organization to do so. This prohibition applies not just to the 2010 fiscal year, but also to appropriations made in fiscal year 2009, and to any funds left over from prior years' appropriations. In addition, the OMB Memorandum states, agencies should, "where permissible," suspend performance and payment under existing contracts with ACORN and its affiliates, and ask for guidance on any legal considerations from the agencies' own counsel, OMB, or the Department of Justice. Finally, turning to subcontractors, the OMB Memorandum instructs agencies to "take steps so that no Federal funds are awarded or obligated by your grantees or contractors to ACORN or its affiliates" and recommends that each agency notify federal grant and contract recipients about Section 163. On November 19, 2009, HUD gave notice to plaintiff ACORN Institute that it was suspending several of its contracts with the organization because of Section 163.

The plaintiffs filed suit in this court on November 12, 2009, arguing that Section 163 is an unconstitutional bill of attainder and that it violates their rights under both the First Amendment and the Due Process Clause. In their complaint, the plaintiffs alleged that, as a direct consequence of Section 163, agencies have refused to review their grant applications; that grants

tions acts are enacted." United States Senate Glossary, http://www.senate.gov/reference/glossary_term/continuing_resolution.htm (last visited Dec. 11, 2009).

2. The extension of the Continuing Resolution was included in the same law as the 2010 appropriations act for the Department of the Interior, Environment, and Related Agencies. Division A—Dep't of the Interior, Environment and Related Agencies Appropriations Act, 2010, Pub. L. No. 111–88, § 427, 123 Stat. 2904, 2962 (2009). That appropriations act also includes a restriction on funding for ACORN, using somewhat different language. Only Section 163 of the Continuing Resolution is at issue in this case.

they were told they would receive have now been rescinded; that previously-awarded grants have not been renewed; and that HUD has refused to pay on its contractual obligations even for work already performed. More generally, the plaintiffs also alleged that other organizations, such as private corporations and foundations, have cut ties to them as a result of Section 163.

On November 13, 2009, I denied the plaintiffs' request for a temporary restraining order, but required the parties to brief the preliminary injunction motion on an expedited schedule, and heard argument on December 4, 2009.

In opposition to the motion for a preliminary injunction, the government argues that Section 163 is not a bill of attainder because, even though it singles out ACORN, it does not do so for the purpose of punishment. The defendants rely in part on a Department of Justice Office of Legal Counsel ("OLC") memorandum, written by David J. Barron, Acting Assistant Attorney General, in response to a request for guidance from HUD as to whether Section 163 prohibits payments to ACORN to satisfy contractual obligations that arose prior to Section 163's enactment.[3] The OLC memorandum advises HUD that "[S]ection 163 should not be read as directing or authorizing HUD to breach a pre-existing binding contractual obligation to make payments to ACORN or its affiliates, subsidiaries, or allied organizations where doing so would give rise to contractual liability." To read Section 163 otherwise, the memorandum notes, would "undo a binding governmental contractual promise." The memorandum explains that its construction of Section 163 not only avoids abrogating "binding governmental contractual promises," but also avoids constitutional concerns, in particular those arising from the Bill of Attainder Clause, that "may be presented by reading the statute, which applies to specific named entities, to abrogate such contracts, including even in cases where performance has already been completed but payment has not been rendered."

The plaintiffs acknowledge that HUD, pursuant to the OLC memorandum, has paid, or has agreed to pay, for work already performed under existing contracts. The plaintiffs, however, complain that the time lag between the release of the OLC memorandum and the notification of suspension prevented them from working, and therefore earning payment, under the existing contracts. They also contend that the government's suspension of existing contracts, based solely on Section 163, violates the Bill of Attainder Clause, as does denial of the opportunity to obtain future contracts, whether renewals or new contracts, for which the plaintiffs are now ineligible.

DISCUSSION

[1] A district court may enter a preliminary injunction "staying government action taken in the public interest pursuant to a statutory or regulatory scheme only when the moving party has demonstrated that [the party] will suffer irreparable injury, and [that] there is a likelihood that [the party] will succeed on the merits of [its] claim." *Alleyne v. N.Y. Educ. Dep't*, 516 F.3d 96, 101 (2d Cir.2008) (internal quotation marks omitted).

3. Although dated October 23, 2009, the memorandum was not released to the plaintiffs or the public until late November. While the memorandum was written specifically for HUD, the government views the memorandum as binding on all agencies of government.

A. Likelihood of Success on the Merits

[2, 3] Article I, Section 9, of the Constitution provides that "No Bill of Attainder or ex post facto Law shall be passed." [4] A 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. Adm'r of Gen. Servs.,* 433 U.S. 425, 468, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977). Enacted as a "bulwark against tyranny" by Congress, "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." *United States v. Brown,* 381 U.S. 437, 443, 442, 85 S.Ct. 1707, 14 L.Ed.2d 484 (1965). This principle of separation of powers animates bill of attainder jurisprudence; its prohibition "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." *Id.* at 445, 85 S.Ct. 1707.[5]

[4, 5] Three factors "guide a court's determination of whether a statute directed at a named or readily identifiable party is punitive": first, "whether the challenged statute falls within the historical meaning of legislative punishment;" second, "whether the statute, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes," an inquiry sometimes referred to as the "functional test"; and third, "whether the legislative record evinces a legislative intent to punish." *See Consolidated Edison Co. of N.Y., Inc. v. Pataki ("Con Ed"),* 292 F.3d 338, 350 (2d Cir.2002) (internal quotation marks and alterations omitted). A statute "need not fit all three factors to be considered a bill of attainder; rather, those factors are the evidence that is weighed together in resolving a bill of attainder claim." *Id.*

1. *Historical Meaning of Legislative Punishment*

As the Second Circuit has explained, "[s]ome types of legislatively imposed harm . . . are considered to be punitive per se." *Id.* at 351. "The classic example is death, but others include "imprisonment, banishment, . . . the punitive confiscation of property, and prohibition of designated individuals or groups from participation in specified employments or vocations." " *Id.*[6]

Any consideration of the "historical" meaning of punishment in the bill of attainder context must begin with the handful of Supreme Court cases finding statutes bills of attainder. In each of the five cases in which the Supreme Court has found legislation to violate the Bill of Attainder Clause, the context of the Court's

4. The Constitution includes two clauses prohibiting bills of attainder. Article I, Section 9, implicated here, restricts Congress; Article I, Section 10, restricts state legislatures.

5. The Second Circuit has concluded that the Bill of Attainder Clause applies both to individuals *and* to corporations. *See Consolidated Edison Co. of N.Y., Inc. v. Pataki,* 292 F.3d 338, 346–47 (2d Cir.2002).

6. The history of the bill of attainder, and its roots in fourteenth century England, has been described elsewhere. *See, e.g., Brown,* 381 U.S. at 441–49, 85 S.Ct. 1707; *In re Extradition of McMullen,* 989 F.2d 603, 604–06 (2d Cir.1993).

ruling was protection of political liberty.[7] In *Cummings v. Missouri,* 71 U.S. (4 Wall.) 277, 18 L.Ed. 356 (1866), for example, the Court concluded that a statute that barred persons from certain professions unless they took an oath that they had never been connected to an organization "inimical to the government of the United States" was punishment for past association with the Confederacy. *Accord Ex Parte Garland,* 71 U.S. (4 Wall.) 333, 18 L.Ed. 366 (1866); *Pierce v. Carskadon,* 83 U.S. (16 Wall.) 234, 21 L.Ed. 276 (1872). Similarly, in *United States v. Brown,* 381 U.S. 437, 85 S.Ct. 1707, 14 L.Ed.2d 484 (1965), the Court held that a statute making it a crime for a member of the Communist Party to serve as an officer or employee of a labor union was a bill of attainder. In the fifth case, *United States v. Lovett,* 328 U.S. 303, 66 S.Ct. 1073, 90 L.Ed. 1252 (1946), the Court held that a statute that permanently barred three government employees, who had been accused of being communists, from government service was an unconstitutional bill of attainder.

At first blush, the idea that the deprivation of the opportunity to apply for discretionary federal funds is "punitive" within the meaning of the attainder clause seems implausible. Neither the Supreme Court nor the Second Circuit has been faced with such a claim. One district court, however, in a case much like this one, has concluded that denial of the opportunity to apply for state government contracts amounts to punishment under Article 1, Section 10. *See Fla. Youth Conservation Corps., Inc. v. Stutler,* No. 06–275, 2006 WL 1835967, at *2 (N.D.Fla. June 30, 2006). For the reasons described below, I agree with the district court in Florida and conclude that the discretionary nature of governmental funding does not foreclose a finding that Congress has impermissibly singled out plaintiffs for punishment.

Lovett is particularly instructive in this regard. In *Lovett,* a congressman attacked thirty-nine specifically named government employees, including the plaintiffs, as "irresponsible, unrepresentative, crackpot, radical bureaucrats," and affiliates of "communist front organizations." *Lovett,* 328 U.S. at 308–09, 66 S.Ct. 1073. Following secret hearings, Congress passed an act that no appropriation could then, or later, be used to pay the plaintiffs' government salaries. *Id.* at 312–13, 66 S.Ct. 1073.

The Supreme Court concluded that the appropriations act "clearly accomplishes the punishment of named individuals without a judicial trial." *Id.* at 316, 66 S.Ct. 1073. That Congress placed the prohibition in an *appropriations* bill carried no weight. "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," the Court concluded, "makes it no less galling or effective than if it had been done by an Act which designated the conduct as criminal." *Id.*

The government attempts to distinguish this case from *Lovett* on the ground that the plaintiffs in that case had a "vested property interest" in their jobs, whereas here, as the plaintiffs unequivocally acknowledge, they have no *right* to the award of a grant or contract from the federal government. But the Court in *Lovett* did not base its decision on a property rights analysis. The Supreme Court found a deprivation amounting to punishment under the Bill of Attainder Clause, not only because the plaintiffs were deprived of their earned income on existing govern-

7. Here, plaintiffs allege that ACORN has been punished both for alleged misconduct, such as fraud, and for its alleged impermissible partisanship.

ment jobs, but also because they were deprived of *any future opportunity* to serve the government. As the Court stated, "[t]his permanent proscription from any opportunity to serve the Government is punishment, and of a most severe type." *Id.* That the plaintiffs had no right to any particular future job was of no moment.[8]

The government relies on *Flemming v. Nestor*, 363 U.S. 603, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (1960), to argue that the denial of the opportunity to apply for federal funding cannot be punishment. In *Flemming,* the plaintiff argued that a statute, which denied Social Security benefits to a limited category of deported aliens, was a bill of attainder. The Supreme Court disagreed, describing the deprivation as only the "mere denial of a noncontractual government benefit" and finding no punitive intent in the design of the statute. *Id.* at 617, 80 S.Ct. 1367. The government also points to *Selective Service System v. Minnesota Public Interest Research Group ("Selective Service"),* 468 U.S. 841, 853, 104 S.Ct. 3348, 82 L.Ed.2d 632 (1984), where the Court upheld a statute barring persons who had not registered for the draft from federal student aid as not constituting punishment.

This case is closer to *Lovett* than to *Flemming* or *Selective Service.* The Supreme Court in both *Flemming* and *Selective Service* found the statutes at issue to be nonpunitive. In *Flemming,* the Court concluded that the legislative record "falls short of any persuasive showing that Congress was in fact concerned alone with the grounds of deportation," which, in the plaintiff's case, was prior membership in the Communist party. *Flemming,* 363 U.S. at 619, 80 S.Ct. 1367. In *Selective Service,* the Court reasoned that the statute had the valid goal of encouraging a class of persons to do what they were already legally obligated to do—register for the draft. *See Selective Service,* 468 U.S. at 860, 104 S.Ct. 3348. As discussed further below, I cannot similarly discern any valid, non-punitive purpose for Congress enacting the legislation in this case.

[6] Also, in neither *Flemming* nor *Selective Service* did Congress single out any particular individual or entity for adverse treatment; rather, each statute applied to an entire category of people. Here, in contrast, the Congressional deprivation is imposed only on ACORN and its affiliates, and, unlike the statute in *Selective Service,* cannot be avoided by ACORN through any conduct on its part. *See Flemming,* 363 U.S. at 619, 80 S.Ct. 1367 (reasoning that, even if the legislative history were read "as evidencing Congress'[s] concern with the grounds [of prior Communist party membership], rather than the fact, of deportation," "[t]his would still be a far cry from the situations involved in [prior Supreme Court cases] where the legislation was on its face aimed at particular individuals."). *Cf. Nixon v. Adm'r of Gen. Services,* 433 U.S. at 485, 97 S.Ct. 2777 (Stevens, J. concurring) (stating that "[i]t has been held permissible for Congress to deprive Communist deportees, as a group, of their social security benefits, but it would surely be a bill of attainder for Congress to deprive a single, named individual of the same benefit.... The very specificity

8. The government argues that, unlike the provision in *Lovett,* the bar here is "temporary." But even if Section 163 proves to be short-lived—a matter in doubt as, according to the government, nine appropriations acts have yet to be enacted—its effect on ACORN may not be "temporary," Plaintiff ACORN Institute, for example, has a pending application with the Department of Commerce and another with the Environmental Protection Agency, both of which would last three years. Compl., Ex. B (Griffin Aff. ¶¶ 8–9). A short deprivation of the opportunity to apply could therefore have long-term ramifications.

would mark it as punishment, for there is rarely any valid reason for such narrow legislation[.]") (citations omitted).

2. *The Functional Test*

I next consider whether Section 163 furthers non-punitive legislative purposes in light of the type and severity of the burdens the statute imposes.

The Court of Appeals for the Second Circuit explored this factor at length in *Consolidated Edison of New York, Inc. v. Pataki*, in which the Court concluded that an act of the New York state legislature constituted an unconstitutional bill of attainder under Article 1, § 10 of the Constitution. 292 F.3d at 345. Based on a finding that Consolidated Edison ("Con Ed") had "failed to exercise reasonable care on behalf of the health, safety and economic interests of its customers," when it failed to promptly replace steam generators it knew to be faulty, and which then failed, the New York legislature passed a law forbidding Con Ed from passing along the costs associated with the outage to the ratepayers. *Id.* at 344–45.

The Second Circuit found that the State had no valid non-punitive reason that justified singling out Con Ed. It rejected the State's argument that the statute had the legitimate non-punitive purpose of preventing innocent ratepayers from paying for Con Ed's mistakes. The statute, the Court concluded, did more than simply redistribute or minimize costs. Rather, the "type and severity of the burdens imposed" by the statute belied the legitimacy of the regulatory justification. *Id.* at 353. There was little question that Con Ed could have passed on the cost of obtaining power elsewhere if it had replaced the generators during a *scheduled* outage; "[w]hat then," the Court asked, "other than punishment can justify forcing Con Ed to absorb these same costs after the accidental outage?" *Id.* Further, the legislature could have enacted "less burdensome alternatives" to achieve its legitimate objectives, such as excluding "those substantial costs that would have been incurred absent misconduct on Con Ed's part." *Id.* at 354.

Here, in defending Section 163, the government argues that, because there was no formal congressional finding of misconduct against ACORN, the bar on all funding to ACORN is not punitive. But, as in *Con Ed*, the nature of the bar and the context within which it occurred make it unmistakable that Congress determined ACORN's guilt before defunding it. Wholly apart from the vociferous comments by various members of Congress as to ACORN's criminality and fraud, as described below, no reasonable observer could suppose that such severe action would have been taken in the absence of a conclusion that misconduct had occurred.

The government also emphasizes that Congress withheld funds from plaintiffs for a limited time for the non-punitive reason of protecting "the public fisc," not to penalize ACORN for past wrongdoing. But Congress's interest in preventing *future* misconduct does not render the statute regulatory rather than punitive. Deterring future misconduct, as *Con Ed* stressed, is a traditional justification of punishment. *See Con Ed*, 292 F.3d at 353; *see also Brown*, 381 U.S. at 458, 85 S.Ct. 1707; *Selective Service*, 468 U.S. at 851–52, 104 S.Ct. 3348 ("Punishment is not limited solely to retribution for past events, but may involve deprivations inflicted to deter future misconduct.").

The government further suggests that there was an emergency requiring immediate suspension of ACORN's funding and the initiation of an investigation. But under *Con Ed*, there must be some connection between the burdens of the statute

and the government's purpose in enacting it. *See Con Ed,* 292 F.3d at 354. Here, although investigations of ACORN by state and federal agencies are underway, no congressional investigation of ACORN was initiated as part of the challenged legislation, nor did Congress order any agency of government to conduct an investigation. This undercuts the asserted emergency rationale.

Moreover, the award of grants and contracts by federal agencies is governed by comprehensive regulations that have been promulgated to address the very concerns Congress has expressed about ACORN. There is no indication that Congress found these available mechanisms for investigation, leading to possible, and even immediate, suspension, by grant-awarding agencies, inadequate to address the various allegations of misconduct. For example, the Code of Federal Regulations establishes a formal process for determining when federal contractors can be suspended or debarred. *See, e.g.,* 2 C.F.R. Ch. 1, Part 180. Subpart G of this part provides that a suspending official may impose suspension after considering a range of factors; the official can even take "immediate action" if "necessary to protect the public interest." *See, e.g.,* 2 C.F.R. § 180.705 ("In deciding whether immediate action is needed to protect the public interest, the suspending official has wide discretion. . . .").

The government also argues that Congress's enactment of three 2010 appropriations acts containing no bar on funding ACORN, out of four signed into law thus far, belies the alleged punitive intent behind Section 163. This argument of course further undercuts the government's emergency rationale: if there were an emergency requiring the draconian action taken by Congress in Section 163, no explanation has been offered by the government as to why that emergency would apply only for some agencies and not others. And, the government agrees that, even for those agencies whose appropriations acts do not limit funding for the plaintiffs for fiscal year 2010, the plaintiffs remain barred from available funds appropriated to those agencies in previous years so long as Section 163 is in force. Prel. Inj. Tr. 14–15, Dec. 4, 2009. *See also* OMB Memorandum (Oct. 7, 2009) ("[T]he text of [S]ection 163 is sufficiently broad to cover funding that was made available for fiscal year (FY) 2009 and prior fiscal years, as well as funding that is or will be made available for FY10."). Most importantly, in the absence of any justification for distinguishing among agencies, that the restriction does not cover every agency's appropriations does not affect its punitive nature.

That ACORN was singled out is obvious and undisputed by the government. In *Nixon,* the Supreme Court found that a statute naming former President Nixon specifically was not necessarily a bill of attainder. The specific mention of his name was "easily explained by the fact that at the time of the Act's passage, only his [papers and recordings] demanded immediate attention." 433 U.S. at 472, 97 S.Ct. 2777. Nixon, and only Nixon, had entered into an agreement with a depository which called for destruction of the materials upon Nixon's death. Thus, Nixon "constituted a legitimate class of one, and this provides a basis for Congress' decision to proceed with dispatch with respect to his materials while accepting the status of his predecessors' papers and ordering the further consideration of generalized standards to govern his successors." *Id.*

Here, the government has offered no similarly unique reason to treat ACORN differently from other contractors and to bar the funding of ACORN without either a judicial trial or the administrative pro-

cess applicable to all other government contractors. The specificity of Section 163 aggravates the punitive nature of the statute.

As in *Con Ed*, none of the government's justifications stand up to scrutiny. I can discern no non-punitive rationale for Congressional preclusion of the plaintiffs, and the plaintiffs alone, from federal funding.

3. *Legislative Intent*

[7] The third, and final, element in determining whether an act is punitive is legislative intent. *See Selective Service*, 468 U.S. at 852, 104 S.Ct. 3348. "The 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." *Con Ed*, 292 F.3d at 354. Determining Congress's intent is often a difficult exercise; the stated comments of one legislator do not necessarily represent the unspoken thoughts of others who voted for a bill. Particular difficulties present themselves in this case, where legislators have discussed ACORN in a variety of contexts, making it difficult to separate out legislative intent for Section 163 in particular. Nevertheless, since the Supreme Court instructs that legislative intent is a key part of the framework for determining whether a legislative act is a bill of attainder, it must be examined.

Here, the task is made easier because the legislative history that the government itself relies on as evidence of non-punitive intent unmistakably indicates *punitive* intent. The government relies on the statements of Senator Mike Johanns, who sponsored a provision defunding ACORN in the Department of Interior's appropriation act, which provision is similar to the language of Section 163. He stated that he was proposing the legislation "to defend taxpayers against waste, fraud, and abuse." 155 Cong. Rec. S9517 (daily ed. Sept. 17, 2009). Senator Johanns also urged Congress to act because ACORN was "in an absolute free fall when it comes to allegations of illegal activity" and was "besieged by allegations of fraud and corruption and employee wrongdoing." *Id.* Such statements require an implicit finding of wrongdoing by the plaintiffs; protection of taxpayers' money is a logical justification for Section 163 only if wrongdoing is assumed.

The punitive nature of the just-quoted comments of Senator Johanns is manifest when they are considered in light of Senator Johanns's other comments about ACORN, in the context of other proposed legislation seeking to defund the organization. *See, e.g.*, 155 Cong. Rec. S9317 (daily ed. Sept. 14, 2009) (statement of Sen. Johanns) ("Somebody has to go after ACORN. Madam President, I suggest this afternoon that 'somebody' is each and every Member of the Senate."). Other legislators echo this punitive sentiment. *See, e.g.*, 155 Cong. Rec. S9314 (daily ed. Sept. 14, 2009) (statement of Sen. Kit Bond) (stating that "[w]e cannot allow taxpayer funds to support groups engaged in repeated voter registration fraud activities, and now their repeated assistance for housing, tax, and mortgage fraud.") In addition, the staff of Representative Darrell Issa authored an 88–page report entitled "Is ACORN Intentionally Structured As A Criminal Enterprise?", which states that "ACORN has repeatedly and deliberately engaged in systemic fraud" and accuses ACORN of conspiring to use taxpayer funds for partisan purposes.[9] The

9. With respect to plaintiffs' allegations that Section 163 is intended to punish ACORN for its impermissible partisanship, a statement Representative Issa made in response to OLC's October 23, 2009 memorandum construing the scope of Section 163 is notewor-

government correctly notes that the Issa Report was authored solely by Representative Issa's office and was not commissioned by Congress. Nevertheless, particularly because Senator Johanns himself requested that its executive summary be entered into the congressional record, it is relevant to this inquiry. *See* 155 Cong. Rec. S9309 (daily ed. Sept 14, 2009) (statement of Sen. Johanns).[10]

Without more, legislative history may not be enough to render the legislation a bill of attainder. But these statements underline the punitive nature of the government's purportedly non-punitive reason. *See Con Ed*, 292 F.3d at 355. ("[T]he stated intent of at least some legislators—most notably one of the floor managers of the legislation—to punish Con Ed reinforces our independent conclusion that a substantial part of the legislation cannot be justified by any legislative purpose but punishment.").

The Supreme Court counseled in *Flemming* that each attainder case "turn[s] on its own highly particularized context." *Flemming*, 363 U.S. at 616, 80 S.Ct. 1367. Here, as in *Lovett*, Congress deprived the plaintiffs of an opportunity available to all others. In these circumstances, where the plaintiffs have received many federal grants and contracts over the years, it cannot be said that such deprivation is anything short of punishment as that has been understood in the bill of attainder cases. Section 163, by singling out ACORN and its affiliates for severe, sweeping restrictions, constitutes punishment under the three factors the Supreme Court has articulated for making this determination. I therefore conclude that the plaintiffs have established a likelihood of success on the merits of their bill of attainder claim.[11]

B. Irreparable Harm

[8–10] That the plaintiffs have shown a likelihood of success on the merits does not alone entitle them to a preliminary injunction. Rather, irreparable harm is "[p]erhaps the single most important prerequisite for the issuance of a preliminary injunction." *Bell & Howell: Mamiya Co. v. Masel Supply Co. Corp.*, 719 F.2d 42, 45 (2d Cir.1983) (internal quotation marks omitted). If an injury can be compensated by monetary damages, then "no irreparable injury may be found to justify specific relief." *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 404 (2d Cir.2004). "But, irreparable harm may be found where

thy. In that statement, Representative 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.'' Press Release, Rep. Darrell Issa, Issa Blasts Administrative Decision to Fund ACORN—Reeks of Political Cronyism (Nov. 27, 2009) (attached to plaintiffs' reply memorandum of law as Exhibit I).

10. At least one representative, Representative Rush Holt, voiced his concern that the provision was a bill of attainder. *See* 115 Cong. Rec. H9975 (September 25, 2009) (statement of Rep. Holt). In his comments, Rep. Holt referenced a report from the Congressional Research Service. This report, which was written regarding a different bill, ''the Defund ACORN Act,'' analyzed that bill and concluded that ''a court would have a sufficient basis to overcome the presumption of constitutionality and find that [the Defund ACORN Act violates the prohibition against bills of attainder.'' Kenneth Thomas, U.S. Congressional Research Service Report for Congress: The Proposed 'Defund ACORN Act': Is it a Bill of Attainder? (Sept. 22, 2009). The Defund ACORN Act has not been enacted, and is not at issue in this case.

11. Because I find Section 163 unconstitutional under the Bill of Attainder Clause, I do not reach the plaintiffs' claims under the First Amendment and the Due Process Clause.

damages are difficult to establish and measure." *Id.*

[11] The plaintiffs have been the recipients of significant federal grants; their expectations of awards of renewals and new grants cannot be dismissed as speculative. The government does not dispute that ACORN Institute has pending contracts that have been suspended while Section 163 is in force. For example, ACORN Institute has six ongoing contracts with HUD, totaling approximately $40,000 to $60,000 per year, to provide services to public housing residents, which contracts have been suspended. Plaintiff NYAHC has a subcontract that was funded by HUD that also was suspended. The government also does not dispute that ACORN Institute has pending applications with federal agencies which will not be considered while Section 163 is in force. For example, ACORN Institute cites pending applications with both the Department of Commerce and the Environmental Protection Agency. It is undisputed that those contracts may be awarded to other parties, and then become unavailable to the plaintiffs. Nor does the government dispute that ACORN Institute had been approved as a subcontractor on a grant funded by the Department of Agriculture, but, before the contract for that grant could be signed, the contractor cancelled the grant because of Section 163. ACORN Institute also asserts that it had another subcontract, also funded by the Department of Agriculture, that would have been renewed if not for Section 163.

The plaintiffs identify these harms, and a wide range of others, as irreparable. Several of the harms that the plaintiffs allege, such as the layoff of a large percentage of ACORN Institute's staff, undoubtedly cannot at this point be attributed solely to Section 163. But the government does not dispute that the deprivation of the opportunity to obtain renewals of existing contracts and compete for other contracts is non-compensable by money damages. *See Lion Raisins, Inc. v. United States,* 52 Fed.Cl. 115 (Fed.Cl.2002) (concluding that the plaintiff, which was wrongfully suspended from government contracting, could not recover its lost profits on a contract that its suspension precluded it from bidding on). Notably, even in non-constitutional cases that involve suspension or debarment from federal contracting, courts have granted preliminary injunctive relief where money damages will not be available and where the contractor has made a sufficient showing on the merits of its claim. *See, e.g., Alf v. Donley,* 666 F.Supp.2d 60, 69–71 (D.D.C.2009) (taking into account the plaintiff's inability to recoup lost income because of sovereign immunity as a factor in finding irreparable harm). Even putting aside the role of sovereign immunity in barring the recovery of damages, and any other limitations on the recovery of damages by government contractors where sovereign immunity has been waived, the amount of money the plaintiffs might have been awarded had they been allowed to compete for contracts is, as the government acknowledges, impossible to calculate.

[12] A finding of significant violation of constitutional rights also supports the finding of irreparable harm. *See Mitchell v. Cuomo,* 748 F.2d 804, 806 (2d Cir.1984) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."); *see also* 11A Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, Federal Practice And Procedure § 2948.1 (2d ed. 2009) (same). For all of the above-described reasons, 1 con-

clude that the plaintiffs have established the likelihood of irreparable harm.

[13, 14] Finally, issuance of a preliminary injunction will serve the public interest. In deciding preliminary injunction motions, courts "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter v. Natural Res. Def. Council, Inc.*, —— U.S. ——, 129 S.Ct. 365, 376, 172 L.Ed.2d 249 (2008). The plaintiffs have raised a fundamental issue of separation of powers. They have been singled out by Congress for punishment that directly and immediately affects their ability to continue to obtain federal funding, in the absence of any judicial, or even administrative, process adjudicating guilt. The potential harm to the government, in granting the injunction, is less. The public will not suffer harm by allowing the plaintiffs to continue work on contracts duly awarded by federal agencies, which was stopped solely by reason of Section 163. For grants for which the plaintiffs have applied, or for which they will apply, each agency will continue to be able to use its discretion to determine the merit of the plaintiffs' proposals, and to suspend the contracts for cause, or even to debar ACORN, if warranted under the terms and procedures in the contracts and applicable regulations. Therefore, balancing "the competing claims of injury," I find a preliminary injunction to be in the public interest.

CONCLUSION

The plaintiffs have established a likelihood of success on the merits of their bill of attainder claim. They have also established the likelihood of irreparable harm absent an injunction and that issuance of a preliminary injunction is in the public interest. Therefore the plaintiffs' motion for a preliminary injunction is GRANTED.[12] A preliminary injunction in the following form shall issue:

> Defendants the **UNITED STATES OF AMERICA; SHAUN DONOVAN,** in his official capacity as Secretary of the Department of Housing and Urban Development; **PETER ORSZAG,** in his official capacity as Director of the Office of Management and Budget; and **TIMOTHY GEITHNER,** in his official capacity as Secretary of the Department of Treasury of the United States; and all those acting in concert with them, are hereby
>
> **ENJOINED,** during the pendency of this action, from enforcing Section 163 of Division B—Continuing Appropriations Resolution, 2010, Pub. L. No. 111–68, § 163, 123 Stat. 2023, 2053 (2009), as renewed by Division B—Further Continuing Appropriations Resolution, 2010, Pub. L. No. 111–88, § 101, 123 Stat. 2904, 2972 (2009), which provides that "None 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." The defendants are hereby further
>
> **ENJOINED,** during the pendency of this action, from enforcing the Office of

12. Although Rule 65 provides that "no restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper," "an exception to the bond requirement has been crafted for, *inter alia,* cases involving the enforcement of 'public interests'...." *Pharmaceutical Soc. of State of New York, Inc. v. N.Y. Dep't of Soc. Services,* 50 F.3d 1168, 1174 (2d Cir.1995). Because I find this action, which implicates important constitutional questions, to be in the public interest, the bond requirement is waived.

Management and Budget Memorandum, entitled "Memorandum for the Heads of Executive Departments and Agencies" providing "[g]uidance on [S]ection 163 of the Continuing Resolution regarding the Association of Community Organizations for Reform Now (ACORN)," dated October 7, 2009.

SO ORDERED.

PRELIMINARY INJUNCTION

The court having granted the plaintiffs' motion for a preliminary injunction pursuant Federal Rule of Civil Procedure 65 by opinion and order dated December 11, 2009:

Defendants the **UNITED STATES OF AMERICA; SHAUN DONOVAN,** in his official capacity as Secretary of the Department of Housing and Urban Development; **PETER ORSZAG,** in his official capacity as Director of the Office of Management and Budget; and **TIMOTHY GEITHNER,** in his official capacity as Secretary of the Department of Treasury of the United States; and all those acting in concert with them, are hereby

ENJOINED, during the pendency of this action, from enforcing Section 163 of Division B—Continuing Appropriations Resolution, 2010, Pub. L. No. 111–68, § 163, 123 Stat. 2023, 2053 (2009), as renewed by Division B—Further Continuing Appropriations Resolution, 2010, Pub. L. No. 111–88, § 101, 123 Stat. 2904, 2972 (2009), which provides that "None 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." The defendants are hereby further

ENJOINED, during the pendency of this action, from enforcing the Office of Management and Budget Memorandum, entitled "Memorandum for the Heads of Executive Departments and Agencies" providing "[g]uidance on [S]ection 163 of the Continuing Resolution regarding the Association of Community Organizations for Reform Now (ACORN)," dated October 7, 2009.

SO ORDERED.

Aneudy CASILLAS, Petitioner,

v.

Timothy P. MURRAY, Respondent.

No. 03–CV–6119(CJS)(VEB).

United States District Court,
W.D. New York.

Sept. 15, 2009.

Background: Following affirmance of his conviction in the New York State Supreme Court, Erie County, 289 A.D.2d 1063, 736 N.Y.S.2d 207, for burglary, attempted robbery, criminal possession of a weapon, and menacing, petitioner sought a writ of habeas corpus.

Holdings: In adopting report and recommendation of United States Magistrate Judge Victor E. Bianchini, the District Court, Charles J. Siragusa, J., held that:

(1) show-up identifications involving victims within 15 or 20 minutes of attempted robbery were not unnecessarily suggestive;

(2) identifications by victims were not unreliable; and

(3) counsel's tactical decision not to call defendant's brother as a witness, given his totally contradictory version of