No. 10-1068



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

v.

UNITED STATES OF AMERICA, et al., RESPONDENTS

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF F OR RESP ONDENT S

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# QUESTION PRESENTED

Did the court of appeals correctly conclude that a temporary congressional ban on discretionary federal funds and contracting to one specific, named corporation and all of its subsidiaries, affiliates, and undefined “allied corporations” does not constitute legislative punishment under the Bill of Attainder Clause?

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# STATEMENT OF THE CASE

## Factual Background and Context

This case concerns the Association of Community Organizations for Reform Now (ACORN)’s eligibility to receive federal funding in the current fiscal year.[[1]](#footnote-1) In the fall of 2009, faced with fears of a pressing budget crisis, 155 CONG. REC. H9790 (daily ed. Sept. 22, 2009) (statement of Rep. Ryan), Congress enacted, and President Obama signed into law, a provision annulling federal subsidies to ACORN, a collection of grass-roots organizations that advocate on behalf of low-income and underserved communities. (R. at 29). ACORN came under fire in September 2009 after reporters brought to light videos showing ACORN workers advising a woman posing as a prostitute how to cheat on taxes and loan applications without detection. *Id.*; (R. at 51).

In light of this evidence of mismanagement and misconduct, government officials reevaluated their relationships with the organization. Both the Internal Revenue Service and the U.S. Census Bureau severed their ties to ACORN in September 2009 in response to evidence of ACORN’s misconduct. (R. at 6-7). At the same time, several states suspended their funding of ACORN and its affiliates. (R. at 7). On the heels of these agencies’ efforts to distance themselves from ACORN, that same month, Congress asked the Government Accountability Office (“GAO”) to initiate an investigation into ACORN’s activities based on its “concern that millions of taxpayer dollars [had been] used improperly, and possibly criminally, by the organization.” *Id.*

Legislation prohibiting funding to ACORN and its affiliates followed. On October 1, 2009, Congress enacted a Continuing Appropriations Resolution prior to the enactment of the 2010 fiscal year appropriations, an amendment to which restricted ACORN’s eligibility for funds during the 2009 fiscal year. (R. at 7). Specifically, Section 163 of the Continuing Resolution provided that: “[n]one of the funds made available by this joint resolution or any prior Act may be provided to the Association of Community Organizations for Reform Now (ACORN), or any of its affiliates, subsidiaries, or allied organizations.” (R. at 29). The Continuing Resolution, including Section 163, was intended as a temporary “stop-gap” measure, and was set to expire on December 18, 2009. (R. at 7).

On October 7, 2009, Peter Orszag, Director of the OMB, issued a memorandum to the heads of all executive branch agencies regarding the implementation of Section 163. (R. at 30). The OMB Memorandum directed that Section 163 prohibited agencies from providing any funds to ACORN or its affiliates while the Continuing Resolution was in effect. (R. at 7). Following the dissemination of the OMB Memorandum, the Department of Justice Office of Legal Counsel was careful to specify, in response to a request for guidance from HUD, that ACORN would not be denied payment for any work already completed on contracts signed prior to Section 163’s enactment. (R. at 30).

## ACORN and Allegations of Corporate Mismanagement

ACORN touts itself as “the nation’s largest community organization of low-and-moderate income families,” campaigning since 1970 on issues such as living wages, better public schools, and expanding homeownership. (R. at 29); STAFF OF H. COMM. ON OVERSIGHT AND GOVERNMENT REFORM, 111th CONG., IS ACORN INTENTIONALLY STRUCTURED AS A CRIMINAL ENTERPRISE?7, 57, 62 (July 23, 2009) [*Issa Report*]. Petitioners have received millions of federal taxpayer dollars, including at least $53 million in federal subsidies from grants contained in contractual agreements with various federal agencies since 1994. *Issa Report* 10*.* Despite these sums, however, ACORN only relies on federal funding for a modest fraction of its overall budget; internal reports show that ACORN derives ten percent of its funding from federal grants, and the rest from various national and local sources. (R. at 5, 16).

With hundreds of affiliates in 41 states, including its co-plaintiffs ACORN Institute, Inc. and MHANY Management, Inc., ACORN’s legal and governance structure has been described as “incredibly complex.” (R. at 29); *Issa Report* 7. At one point, the ACORN “[f]amily” included as many as 200 entities, but has since dwindled to approximately 29 entities. (R. at 5). According to Representative Darrell Issa, Chairman of the House Committee on Oversight and Government Reform, ACORN’s complex organizational structure has the potential to facilitate the commission of fraudulent and illegal acts. *Issa Report* 6.

The publication of the hidden-camera videos, showing employees of an ACORN affiliate advising a purported prostitute and her boyfriend about how to engage in various illegal activities without detection, is the latest in a string of allegations that ACORN suffers from mismanagement. (R. at 6). Allegations surrounding ACORN’s operations began to surface in July 2008, when the *New York Times* revealed that Dale Rathke, the brother of ACORN’s founder, had embezzled nearly $1 million from ACORN in 1999 and 2000, money allegedly spent on personal luxuries such as a “Concorde flight, credit cards, meals and trips.” *Issa Report* 16. For nearly eight years, ACORN kept the embezzlement quiet, choosing to treat the theft “as an internal matter.” *Id.* at 9. Although ACORN commissioned an internal report after the embezzlement was revealed to “determine how ACORN could be improved so embezzlement-like situations could be avoided in the future,” the *Wall Street Journal* reported that ACORN’s “quality-control efforts were `minimal or non-existent’ and largely window dressing.” *Id.* at 10.

Among other allegations, ACORN’s workers have also been convicted of voter registration fraud, obstructing election administration efforts in many states. *Issa Report* 7-8; (R. at 6). According to Nevada Attorney General Catherine Cortez Masto, ACORN’s training manuals “ `clearly detail, condone and . . . require illegal acts,’ such as requiring its workers to meet strict voter- registration targets.” *Issa Report* 8. As a result of such policies, ACORN allegedly submitted 1,500 fraudulent registrations in Philadelphia, and as many as 2,100 in Indiana in 2008. *Id.*

While ACORN claims that it has taken steps towards reform, by, among other things, terminating staff members found to have engaged in misconduct and reorganizing its board of directors, an internal investigation conducted by Scott Harshbarger, a former Massachusetts Attorney General, identified management weaknesses, including a lack of training, improper procedures, and an absence of on-site supervision. (R. at 29); Scott Harshbarger & Amy Crafts, *An Independent Governance Assessment of ACORN* (Dec. 7, 2009), http://www.proskauer.com/files/uploads/report2.pdf [*Harshbarger Report*] at 3.

## Procedural History and The Opinion Below

An action to enjoin enforcement of Section 163 on the grounds that the funding restrictions are an unconstitutional bill of attainder and violate ACORN’s rights to free speech and association under the First Amendment and due process under the Fifth Amendment followed the release of the hidden-camera videos. (R. at 30). On December 11, 2009, the district court held for Petitioners that the provision is likely an unconstitutional bill of attainder and entered a preliminary injunction prohibiting its enforcement. *ACORN v. United States*, 662 F.Supp.2d 285, 297 (E.D.N.Y. 2009). The district court did not address ACORN’s remaining claims. *Id.*

In anticipation of the Continuing Resolution’s expiration, on December 16, 2009, President Obama signed into law a Consolidated Appropriations Act for fiscal year 2010 that contained provisions extending the denial of funding to ACORN. (R. at 31). Among the Act’s provisions, Section 535 of Division B 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 whether federal funds had been misused and what steps were being taken to prevent future misuse of taxpayer dollars. (R. at 32-33). Section 535 required the GAO to submit its report with recommendations within 180 days . (R. at 33).

Petitioners subsequently filed an amended complaint challenging the fiscal year 2010 appropriations laws, in addition to the by-then-expired Section 163 governing fiscal year 2009. (R. at 32). The amended complaint named three new defendants: the Administrator of the EPA; the Secretary of Commerce; and the Secretary of Defense. *Id.* In a judgment filed on March 10, 2010, the district court granted Petitioners’ request for declaratory relief and a permanent injunction, holding that the appropriations laws constituted legislative punishment under the Bill of Attainder Clause. *ACORN v. United States*, 692 F.Supp.2d 260, 281 (E.D.N.Y. 2010). Respondents then appealed the district court’s judgment to the U.S. Court of Appeals for the Second Circuit, which reversed. Considering the three factors that this Court has historically used to determine whether a legislative act constitutes punishment, the court held that the challenged funding restrictions did not amount to legislative punishment because (a) withholding of federal appropriations does not constitute a traditional form of punishment prohibited by the Bill of Attainder Clause; (b) Congress was motivated by a non-punitive desire to ensure the effective expenditure of taxpayer dollars, rather than a desire to single out ACORN for exclusion; and (c) the legislative history fails to satisfy the requirement that there be “unmistakable evidence” of punitive intent in the legislative record. *ACORN v. United States*, 618 F.3d 125, 142 (2d Cir. 2010). This Court granted certiorari.

# SUMMARY OF ARGUMENT

This Court should affirm the court of appeals’ holding that the congressional enactments temporarily restricting federal funding to ACORN do not constitute an imposition of punishment by legislative enactment under Art. I, Section 9, Clause 3 of the Constitution. Leaving to one side the fact that the Court has found legislation to constitute such impermissible legislative punishment in only five cases,[[2]](#footnote-2) this conclusion flows from Congress’s spending power under Art. I, Section 8, Clause 1 of the Constitution and corresponding Necessary and Proper Clause (Art. I, § 8, cl. 18) authority to ensure that tax dollars appropriated under that power are in fact spent to promote the general welfare.

First, Petitioners confuse the historic definition of the constitutional prohibition against bills of attainder in seeking to analogize temporary funding restrictions imposed on a corporation to protect the federal treasury from wasteful appropriation to legislation this Court has struck down as legislative punishment. In all five instances in which this Court has previously invalidated legislation as a bill of attainder, the challenged measures sought to punish individuals or groups for their past and ineradicable affiliation with disfavored political beliefs, with no demonstrable relationship between the characteristics of the individuals targeted and the evil Congress sought to eliminate. By contrast, the funding restrictions here do not punish ACORN for its past affiliation with progressive political views, but are instead incident “to [the] regulation of a present situation,” where there is a close nexus between ACORN’s alleged misuse of federal money and the “waste, fraud, and abuse” Congress sought to eliminate in enacting the prospective funding restrictions. *See* *Flemming v. Nestor*, 363 U.S. 603, 614 (1960).

Second, in sharp contrast to the legislative enactments struck down in those cases, the measures challenged here further a non-punitive legislative purpose in ensuring that taxpayer dollars are used to promote the general welfare and are not appropriated to support an organization plagued with alleged mismanagement. Both the Constitution and judicial precedent establish that Congress’s express constitutional authority to “provide for the common Defence [sic] and general Welfare of the United States” encompasses the authority to suspend subsidies to an organization where it determines that expenditure of funds will not promote the general welfare. *See* U.S. CONST. art. I, § 8, cl. 1.

Third, the legislative history surrounding enactment of the funding restrictions does not undermine the conclusion that Congress legislated pursuant to a legitimate prospective purpose in choosing to suspend discretionary subsidies to ACORN. This Court has consistently held that an otherwise constitutional statute cannot be invalidated simply “on the basis of what fewer than a handful of Congressmen said about it,” as it is notoriously difficult to assign a single Congressional purpose to a legislative enactment where Congress is comprised of a multitude of lawmakers harboring diverse motivations. *United States v. O’Brien*, 391 U.S. 367, 384 (1968) (“[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it.”). That Congress enacted legislation canceling funding to ACORN in a specific fiscal year does not automatically permit the inference that Congress intended to punish ACORN through this decision to restrict funding. Moreover, even if it can be said that Congress’s motivation in enacting the funding restrictions was a dislike of ACORN’s politics, presumed motive cannot supplant express legislative intent. *United States v. Goelet*, 232 U.S. 293, 298 (1914) (“The expectations of those who sought the enactment of legislation may not be used for the purpose of affixing to legislation when enacted a meaning which it does not express.”). Accordingly, the funding restrictions should be regarded as a legitimate exercise of Congress’s constitutionally mandated authority to appropriate money in a manner that promotes the general welfare.

Finally, as a matter of public policy, judicial deference to legislative decision-making cautions against too readily inferring unconstitutional motive from the Congressional Record. Just as the purpose of the Bill of Attainder Clause was to ensure a separation of powers and to guard against legislative encroachment on the judiciary, so, too, it must be remembered that legislative enactments enjoy a “presumption of constitutionality” which forbids courts from too readily invalidating congressional measures. *Flemming*, 363 U.S. at 617 (“the presumption of constitutionality with which this enactment, like any other, comes to us forbids us lightly to choose that reading of the statute’s setting which will invalidate it over that which will save it”). As early as *Fletcher v. Peck*, this Court held that “it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void.” 10 U.S. 87, 128 (1810). Although Petitioners assert that too much legislative deference will enable Congress to easily evade the Constitutional prohibition against bills of attainder, it should not be forgotten that the Bill of Attainder Clause is only one of many Constitutional safeguards designed to protect the liberties of American citizens.

For these reasons, Respondents respectfully request that this Court affirm the court of appeals’ decision in its entirety.

# ARGUMENT

## The Funding Restrictions Temporarily Prohibiting Future Distribution of Federal Taxpayer Dollars to ACORN Are Not An Unconstitutional Bill of Attainder

Article I, Section 9, Clause 3 of the United States Constitution prohibits Congress from enacting bills of attainder. Defined as 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 (1977), the Bill of Attainder Clause was intended by the framers of the Constitution as a safeguard to ensure the separation of powers by preventing legislative encroachment on the judicial function, or “trial by legislature.” *United States v. Brown*, 381 U.S. 437, 442-43 (1965).

As previously noted, the Bill of Attainder Clause has been a rarely litigated constitutional provision. The Court has only struck down legislation as an unconstitutional bill of attainder in five instances since 1789. Three of these involved Civil War era statutes that deprived individuals who refused to affirm that they had not supported the Confederacy of fundamental life, liberty, or property rights. *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1866); *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866); *Pierce v. Carskadon*, 83 U.S. (16 Wall.) 234 (1872). In these cases, the Court concluded that the oath was not a relevant measure of fitness to practice the professions or avocations in question or to file a motion in court, and thus that the purpose of the restrictions imposed was punishment. The two modern cases likewise occurred during a period of ideological division–the “Cold War”–and involved legislative attempts to punish Communist Party members for disfavored political beliefs by *permanently* depriving them of their liberty to pursue employment in certain professions or vocations. *United States v. Lovett*, 328 U.S. 303 (1946); *United States v. Brown*, 381 U.S. 437 (1965).

Because Respondents have previously conceded the district court’s determination that the specificity and lack-of-judicial-trial elements for finding an unconstitutional bill of attainder are satisfied in this case (R. at 15), the focus of the disagreement is on Petitioners’ challenge to the court of appeals’ decision holding that the funding restrictions do not constitute legislative punishment under the Bill of Attainder Clause. Distilling its prior decisions, the Court has applied a three-part test to determine whether an Act of Congress constitutes punishment: whether a statute (1) falls within the historical definition of legislative punishment (historical test); (2) whether the statute, “viewed in terms of the type and severity of burdens imposed, reasonably can be said to further non-punitive legislative purposes” (functional test); and (3) whether the legislative record “evinces a congressional intent to punish” (motivational test). *Nixon*, 433 U.S. at 473, 475-76. All three factors need not be satisfied in order for a statute to qualify, but are instead weighed together by the Court. *Consol. Edison Co. v. Pataki*, 292 F.3d 338, 350 (2d Cir. 2002), *cert. denied*, 537 U.S. 1045 (2002). In determining whether a challenged legislative enactment is punitive, the burden falls to the party challenging the statute to “establish that the legislature’s action constituted punishment and not merely the legitimate regulation of conduct.” *Nixon*, 433 U.S. at 476 n.40.

Analyzing these three factors, the court of appeals’ holding that the funding restrictions do not constitute a bill of attainder should be upheld. Withholding federal appropriations is not an historic form of legislative punishment; Congress had a prospective, non-punitive purpose in ensuring the effective expenditure of taxpayer dollars; and evidence of some punitive intent in the Congressional Record on the part of a handful of congressmen is, alone, insufficient to establish Congress’s punitive intent. The latter standard for determining whether an Act of Congress is a bill of attainder should not be broadened in order to reach duly enacted bi-partisan legislation approved by both houses of Congress and signed into law by the President.

### This Court Should Not Extend the Historic Definition of Legislative Punishment To Encompass Prospective Regulation of Legitimate Government Concern

A temporary prohibition on a corporation’s eligibility to receive discretionary funds does not fall within the historically recognized definition of legislative punishment. When the framers of the Constitution proscribed bills of attainder, they were trying to prevent a specific evil – trial by legislature – that had become prevalent in monarchical England and that had been employed in the colonies, whereby individuals were deprived of their fundamental rights without a judicial trial. As Justice Frankfurter emphasized in *Lovett*, “ `[u]pon this point a page of history is worth a volume of logic.’ ” 328 U.S. at 323 (Frankfurter, J., concurring). In determining whether a congressional enactment falls within the historical definition of legislative punishment, Court precedent has considered a number of factors, among them, the nature of the disability imposed, whether it was historically deemed punishment, whether it is rationally related to a permissible legislative objective, as well as the specificity of the legislature’s designation of the persons to be affected. *See generally* *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). Consideration of these factors supports the court of appeals’ conclusion that the funding restrictions do not fall within the historic definition of legislative punishment.

#### The Funding Restrictions Are Not Analogous to Any of the Categorical Forms of Punishment Held To Run Afoul of the Bill of Attainder Clause or This Court’s Bill of Attainder Precedents

The funding restrictions mandated by Congress do not obviously impose a burden that has historically been identified as punishment. The historical experience with bills of attainder provides a “ready checklist of deprivations and disabilities” so “disproportionately severe” that they have been held to fall within Article I, Section 9’s prohibition against legislative punishment. *Nixon*, 433 U.S. at 473. Early in our country’s history, a bill of attainder was interpreted to refer to legislative acts that sentenced named individuals to death without affording them the benefit of a judicial trial. *See* *BellSouth Corp. v. FCC*, 144 F.3d 58, 62 (D.C. Cir. 1998), c*ert. denied*, 526 U.S. 1086 (1999) (*“BellSouth I”*). Article I, Section 9, however, also prohibits legislative enactments originally referred to as “bill[s] of pains and penalties,” *Cummings*, 71 U.S. at 320, which inflict punishment less than death, such as banishment, deprivation of the right to vote, corruption of blood, or punitive confiscation of property. *Brown*, 381 U.S. at 441-42. Generally addressed to politically subversive individuals considered disloyal to the Crown or State, decisions of this Court since the Civil War that have invalidated legislation under this narrow constitutional provision have focused almost exclusively on legislative enactments barring specific individuals or groups from employment in designated professions or vocations as a result of their past affiliation with disfavored political beliefs in the absence of a legitimate, non-punitive legislative purpose. *See, e.g., Cummings v. Missouri* (barring clergymen from ministry in the absence of subscribing to a loyalty oath); *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866) (requiring attorneys practicing in federal court to take a loyalty oath that they had never supported the rebellion); *United States v. Lovett* (barring individuals from government employment for affiliation with “communist front organizations”); *United States v. Brown* (barring Communist Party members from office in labor unions).

As the court of appeals correctly concluded, the only categorical form of punishment plausibly implicated by the restriction on ACORN’s eligibility for discretionary federal funds is punitive confiscation of property. (R. at 16). All told, the funding restrictions deprive ACORN of approximately $8.5 billion in federal grants and contracts it otherwise would have been eligible to receive. *Issa Report* 10. Petitioners err, however, in asserting that ACORN’s property rights have been impaired by Congress’s decision to suspend funding. As ACORN itself acknowledges, ACORN has “no *right* to the award of a [discretionary] grant or contract from the federal government” they never had any right to expect. (R. at 35). Moreover, the executive branch has always had the discretion under the appropriations laws to deny ACORN the subsidies indefinitely for any non-arbitrary reason without affording ACORN due process. (R. at 38). Given such broad executive discretion, it is difficult to imagine a principled distinction between executive and legislative discretion to deny federal subsidies. Further, denial of discretionary funding to ACORN, unlike subsidies treated as a matter of entitlement, does not implicate the type of fundamental property interest this Court has held is entitled to due process protection before it can be denied. *See Lovett*, 328 U.S. at 321 (“To characterize an act of Congress as a bill of attainder readily enlists . . . the instincts of a free people who are committed to a fair judicial process for the determination of issues affecting life, liberty, or property and naturally abhor anything that resembles legislative determination of guilt”). Thus, while Petitioners claim that the funding restrictions are a punitive confiscation of property, withholding federal funds cannot constitute a punitive confiscation of property where there is no right to receive such funds in the first place. The funding restrictions do not prohibit ACORN from seeking funding from other sources, only from relying on federal assistance to fund its objectives.

Nor are there any past cases that involve the precise situation presented here. Petitioners seek to analogize the denial of discretionary federal subsidies to the “cutoff of pay to specified government employees held to constitute punishment for purposes of the Bill of Attainder clause” in *Lovett*, (R. at 15), where this Court invalidated as an unconstitutional bill of attainder a statute permanently barring appropriations for payment of salaries to Communist government employees accused of being subversives. *Lovett*, 328 U.S. at 315. However, this is a monumental stretch.

First, in contrast to *Lovett*, where the plaintiffs were deprived of pay for work they had already performed when the case was decided, divesting them of a tangible property interest, *id.* at 314, ACORN has itself conceded that they are not entitled to receive federal funds. (R. at 35). Second, unlike in *Lovett*, where the plaintiffs were permanently denied the opportunity to serve their government, *Lovett*, 328 U.S. at 316, the challenged congressional enactments are only temporary, year-to-year restrictions on ACORN’s ability to apply for federal funding. (R. at 16). While Petitioners counter that this distinction is immaterial, since the provisions can be renewed to become a *de facto* permanent ban (R. at 15), the permanent exclusion from federal employment in *Lovett* involved the impairment of the plaintiffs’ liberty to serve their government. *Lovett*, 328 U.S. at 313. By contrast, ACORN is not deprived of the opportunity to engage in any activities, they are merely prohibited from receiving federal assistance to do so. (R. at 16). Third, even if the funding restrictions could be said to infringe upon the type of fundamental right the Bill of Attainder Clause seeks to safeguard, the Bill of Attainder Clause arguably affords different levels of protection to corporations than to individuals. Although this Court has never directly ruled on the Bill of Attainder Clause’s applicability to corporations, its decisions suggest that “[c]ertain `purely personal’ guarantees” that are available to individuals may be “unavailable to corporations and other organizations.” *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 778 n.14 (1978) (quoting *United States v. White*, 322 U.S. 694, 698-701 (1944)). Thus, prospective funding restrictions are not analogous to any of the burdens historically recognized as legislative punishment, whether considered in terms of the categorical forms of punishment held to run afoul of the Bill of Attainder Clause or this Court’s bill of attainder precedents themselves.

Finally, the funding ban precluding ACORN from receiving future grants and contracts is also incongruous with the narrow set of factors the Court has held bear the hallmarks of legislative punishment.

#### The Funding Restrictions Do Not Impair a Fundamental Life, Liberty, or Property Right

First, the Bill of Attainder Clause implicitly requires that a fundamental life, liberty, or property right be impaired in order for a congressional enactment to constitute legislative punishment. As the Court established in *Cummings*, “[t]he theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations . . . all positions, are alike open to everyone . . . . Any deprivation or suspension of any of these rights for past conduct is punishment.” *Cummings*, 71 U.S. at 321-22.

Consistent with this principle, all five cases in which the Court has invalidated a statute as a bill of attainder involved deprivations that impaired a fundamental right. *Ex parte Garland*, in disbarring those who failed to take an oath affirming that they had never supported the Confederacy, deprived attorneys of their liberty to practice in federal court. 71 U.S. 333 (1866). *Cummings v. Missouri*, involving a provision of the Missouri Reconstruction Constitution that required persons to take a loyalty oath affirming that they had never given aid or comfort to the Confederacy as a prerequisite to preaching or teaching as a minister, impaired Cummings’ liberty to serve as a Christian minister. 71 U.S. 277 (1867). *Pierce v. Carskadon* infringed property rights by prohibiting former Confederates from obtaining an order setting aside a default judgment in lawsuits allowed to proceed even where there was neither personal service on the defendant nor substituted service with actual notice. 83 U.S. 234 (1872). *Brown* involved an infringement on individuals’ liberty to serve as an officer or employee of a labor union. 381 U.S. 437 (1965). And *Lovett* implicated both property and liberty rights, as in denying payment of compensation to Communist government employees, the statute deprived employees of their property interest in receiving payment for work they had already performed, and permanently deprived employees of their freedom to pursue government service. 328 U.S. at 313.

Petitioners cannot plausibly claim that the cancelation of funding to ACORN in this case impairs an analogous fundamental right. As the OLC memorandum made express, the funding restrictions do not deny ACORN any payment for work that has already been performed under existing contracts. (R. at 30-31). Nor do the funding restrictions infringe upon ACORN’s liberty to serve poor or underserved communities. As the court of appeals emphasized, the funding restrictions do not prohibit ACORN from engaging in any activity, they merely temporarily prohibit ACORN from receiving federal funds they never had any right to expect in order to continue such activities. (R. at 16). Thus, in contrast to cases where this Court has invalidated legislation as an unconstitutional bill of attainder, the funding restrictions here do not deprive ACORN of a right recognized as entitling due process protection.

#### There Is a Demonstrable Relationship Between ACORN’s Misuse of Federal Funds and the Waste Congress Sought to Eliminate

Second, there is a close nexus between ACORN’s alleged misuse of federal funds and the waste, fraud, and abuse Congress sought to eliminate when it enacted the funding restrictions. *Brown* instructs that in determining whether a challenged enactment qualifies as an historical form of legislative punishment, the Court looks to whether a demonstrable relationship exists between the characteristics of the individuals targeted by the legislation and the evil Congress sought to eliminate. *Brown*, 381 U.S. at 456. In *Brown*, for example, where the Court struck down a statute making it a crime for a member of the Communist Party to serve as an officer or employee of a labor union, the Court wrote that in utilizing the term “members of the Communist Party” to “designate those persons who are likely to incite political strikes,” it “plainly [was] not the case” that “Congress ha[d] merely substituted a convenient shorthand term for a list of the characteristics it was trying to reach.” *Id.* Even if Congress had reason to conclude that some Communists would use union positions to initiate political strikes, it could not be inferred that *all* members of the Communist Party shared the same propensity to engage in illegal conduct. *Id.*

By contrast, there is a demonstrable relationship in this case between ACORN’s alleged misuse of taxpayer dollars and the evil Congress sought to eliminate. In this line, the House and Senate Reports emphasize that Congress’s purpose in enacting the funding restrictions was to guard against future misuse of the public fisc based upon concerns that “millions of taxpayer dollars were used improperly, and possibly criminally, by the organization.” (R. at 7). The challenged congressional enactments therefore satisfy the requirement that the statute must bear a close relationship between the characteristics of the targeted organization and Congress’s purpose in enacting the legislation.

#### The Funding Restrictions Only Limit Subsidies Prospectively

Third, the challenged statutes operate prospectively to prevent future misuse of taxpayer dollars rather than punish ACORN for past beliefs or actions. When a deprivation is imposed on an individual or group, the Court has historically looked to whether the legislation sought to punish that individual for past activity, or whether the restriction imposed is incident to regulation of a present or future situation, where retrospective punishment is traditionally required to run afoul of the Bill of Attainder Clause. *Flemming*, 363 U.S. at 614. The Court thus rejected a bill of attainder challenge in *American Communications Association v. Douds* because the statute in question was “intended to prevent future action rather than to punish past action.” 339 U.S. 382, 414 (1950).

The Court discussed this factor at length in *Communist Party of U.S. v. Subversive Activities Bd.*, upholding a statute that required all “communist-front” organizations to register with the Attorney General and publicly disclose detailed information as to their officers, funds, and membership. 367 U.S. 1 (1961). The Court distinguished legislative acts such as those challenged here that only affect an organization’s current or future activities from other Acts of Congress this Court has invalidated which have imposed irrevocable burdens or deprivations on plaintiffs for past beliefs or affiliations. *Id.* at 86. The Court, in upholding the Act, reasoned that the statute only required registration of organizations that “*after* the date of the Act” were found to be “under the direction, domination, or control of certain foreign powers,” and permitted organizations to avoid the registration requirement by altering their present conduct. *Id.* at 86-87 (emphasis added).

Similarly, in the instant case, the funding restrictions have only deprived ACORN of eligibility for funds after the challenged legislation was enacted to prevent future misuse of federal dollars. Although, as in *Communist Party of U.S.*, ACORN’s activities prior to enactment of the funding restrictions are relevant to determining whether ACORN presently suffers from corporate mismanagement or abuse, this “does not alter the [prospective] operative structure” of the laws. *Communist Party of U.S.*, 367 U.S. at 87. The provisions in no way permit executive agencies to retroactively impose burdens on ACORN by breaching “pre-existing binding contractual obligation[s] to make payments to ACORN or its affiliates,” even in cases where “performance has already been completed but payment has not been rendered.” (R. at 30-31). Nor do the Acts seek to punish ACORN for its past and ineradicable affiliation with liberals or the Obama Administration. Further, although Congress did not make the funding restrictions contingent on the results of the GAO investigation required by the legislation, and thus the congressional enactments are silent as to whether tangible reform would lead Congress to avoid the restrictions in future spending measures, the court of appeals has emphasized that “Congress could . . . modify the appropriations law following the GAO’s investigation.” (R. at 21).

Finally, although *Brown* suggests that the prohibition against bills of attainder may apply to preventive legislation as well as retrospective enactments, *Brown*, 381 U.S. at 458 (“[h]istorical considerations by no means compel restriction of the bill of attainder ban to instances of retribution. A number of English bills of attainder were enacted for preventive purposes . . .”), prohibiting preventive legislation in the context of a federal appropriations measure would trample upon Congress’s ability to fulfill its constitutionally mandated duty under the Necessary and Proper Clause to ensure that funds appropriated under the Spending Clause are in fact spent to promote the general welfare. *See* *Sabri v. United States*, 541 U.S. 600, 605 (2004). Petitioners’ assertion that the suspension of future funds to ACORN seeks to punish ACORN rather than protect against potential misuse of taxpayer dollars is, therefore, incorrect.

#### Congress Had a Legitimate Government Interest In Protecting Taxpayers Against Wasteful Appropriation of Federal Funds

Fourth, while also germane to the question of whether Congress’s actions were *functionally* a form of punishment (*see* *infra* Part B), Congress had a legitimate non-punitive purpose in canceling funding to ACORN. In past cases, this Court has declined to find an historical form of legislative punishment where there is a rational connection between the restriction imposed and a legitimate non-punitive legislative purpose. *See Flemming*, 363 U.S. at 614.

Early decisions highlight this emphasis on the existence of a coherent and reasonable nexus between the burden imposed and the benefit to be gained. *See Nixon*, 433 U.S. at 473 (describing historically recognized bills of attainder as “deprivations and disabilities *so disproportionately severe and so inappropriate to non-punitive ends* that they unquestionably have been held to fall within the proscription of Art. I, § 9”) (emphasis added). For example, this Court has upheld a congressional statute that allowed for expulsion of Chinese laborers found in the United States who could not prove they legally immigrated to the U.S. as a valid exercise of Congress’s plenary authority to fix the conditions under which aliens will be permitted to enter and remain in this country. *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893). Similarly, this Court has upheld laws imposing educational requirements on individuals before bestowing a medical license as rationally related to the State’s power to protect the health and safety of its citizens. *Dent v. West Virginia*, 129 U.S. 114, 122-23 (1889). Even a state’s decision to ban ex-felons from practicing medicine has been deemed a valid exercise of its regulatory power rather than an attempt to punish ex-felons. *Hawker v. New York*, 170 U.S. 189 (1898) (upholding a New York state law preventing convicted felons from practicing medicine); *see also* *De Veau v. Braisted*, 363 U.S. 144 (1960) (upholding a regulation of crime on the waterfront through disqualification of ex-felons from holding union office). By contrast, the loyalty oaths required by the statutes invalidated as bills of attainder in *Cummings* and *Ex parte Garland* bore “no relation” to the restricted individuals’ “fitness for the pursuits and professions designated.” *Dent*, 129 U.S. at 126 (discussing *Cummings*, 71 U.S. (4 Wall.) 277 (1866); *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866)).

Consistent with this line of precedent, the cancelation of federal appropriations to ACORN in order to protect the public fisc is not an historic form of punishment. As the court of appeals held, regardless of any stigma the appropriations laws impose, Congress has the authority under Article I, Section 8, Clause 1 of the Constitution “to suspend federal funds to an organization that has admitted to significant mismanagement.” (R. at 16). This is incident to Congress’s duty to “keep a watchful eye on expenditures” to ensure the effective expenditure of public money as a prerequisite to its congressional authority “to spend in the first place.” *Sabri*, 541 U.S. at 608; *id.* at 605. Petitioners therefore err in their assertion that the funding restrictions are punitive, as they directly further a legitimate, non-punitive legislative purpose.

#### There Has Been No Formal Congressional Determination of Guilt

Fifth, while also relevant to the question of whether Congress *intended* to punish ACORN (*see* *infra* Part C), the absence of any congressional declaration of “guilt” preceding the enactment of the funding restrictions counsels against finding that the challenged enactments constitute an historic form of punishment. (R. at 15) (citing *De Veau*, 363 U.S. at 160 (“The distinguishing feature of a bill of attainder is the substitution of a legislative for a judicial determination of guilt.”)).

In *Lovett*, for instance, the Court’s decision to invalidate a statute denying payment of government salaries to accused subversives turned in part on the fact that a secret trial adjudicating the guilt of the thirty-nine specifically named government employees it indicted as “ `irresponsible, unrepresentative, crackpot, radical bureaucrats’ and affiliates of `communist front organizations’ ” preceded passage of the Act. *Lovett*, 328 U.S. at 308-09. As a result, the Court held that the law in that case “clearly accomplishe[d] the punishment of named individuals without a judicial trial” even though Congress placed the prohibition in a funding measure rather than expressly designating the conduct as criminal. *Id.* at 316-17.

By contrast, in the instant case Congress neither made a quasi or formal adjudication of ACORN’s guilt. Not only was there no proceeding for adjudicating ACORN’s guilt, the formal reasons articulated in the House and Senate Reports urging passage of the funding restrictions did not rest on punishing ACORN, but instead justified passage of the legislation by emphasizing Congress’s constitutional duty to ensure the effective expenditure of taxpayer dollars in order to promote the general welfare. Consistent with this conclusion, Senator Mike Johanns, in introducing the provision to defund ACORN, stated that he was proposing the restriction in order to “defend taxpayers against waste, fraud, and abuse,” 155 CONG. REC. S9517 (daily ed. Sept. 17, 2009) (statement of Sen. Johanns), expressing concern 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.” 155 CONG. REC. S11313 (daily ed. Nov. 10, 2009) (statement of Sen. Johanns). Indeed, to adopt Petitioners’ position that the suspension of funds to ACORN constitutes legislative punishment would mean that Congress could never stop funding an organization unless and until the organization was afforded due process, something that the Founding Fathers never contemplated in granting Congress the Spending Power on the condition that appropriated federal funds be used to promote the general welfare.

Finally, it cannot be said that there has, in fact, been a formal congressional determination of guilt. Although Senator Dick Durbin made statements in opposing the funding restrictions that the challenged measures placed Congress “in the position of prosecutor, judge, and jury,” 155 CONG. REC. S10211 (daily ed. Oct. 7, 2009) (statement of Sen. Durbin), Senator Durbin grossly mischaracterized the proposed legislation as “permanently” cutting off funding to ACORN when the provisions of the 2009 Continuing Resolution, including Section 163, only temporarily suspended funds pending further investigations and were set to expire on December 18, 2009, calling into question the reliability of his hyperbole that “we 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.” *Id.*

Nor are Petitioners correct that the absence of a formal legislative pronouncement of blameworthiness is irrelevant to determining whether the challenged funding restrictions constitute punishment. Although a congressional finding of guilt is not required in order to deem an Act of Congress an historic form of legislative punishment, *Lovett*, at 316, the notable absence from the legislative record of any congressional sentiments suggestive of a punitive congressional purpose is probative of a legitimate, non-punitive congressional motivation and substantially undercuts a major concern that prompted inclusion of the bill of attainder prohibition in the Constitution in the first place: the fear that the legislature, in seeking to pander to an inflamed popular constituency, would find it expedient to “assume the mantle of judge or, worse still, lynch mob.” *Nixon*, 433 U.S. at 480. No such legislative overreaching is involved here.

#### The Funding Restrictions Do Not Fall Within The Historical Definition of Legislative Punishment Simply Because They Single Out ACORN For Adverse Treatment

Finally, the funding restrictions are not punishment merely because they single out ACORN to the exclusion of others. As noted above, Respondents have previously conceded that the funding restrictions are specifically directed at ACORN (R. at 15), and thus satisfy the first element of the three-pronged test for finding an unconstitutional bill of attainder. *Selective Serv. Sys. v. Minn. Pub. Interest Research Group*, 468 U.S. 841, 846-47 (1984). But this Court’s precedents hold that this is not dispositive of whether the challenged funding restrictions constitute an historic form of legislative punishment. As this Court has repeatedly determined, “[l]egislatures may act to curb behavior which they regard as harmful to the public welfare, whether that conduct is found to be engaged in by many persons or by one,” so long as the organization or individuals who engage in the regulated conduct can “escape regulation by altering the course of their own present activities.” *Communist Party of U.S.*, 367 U.S. at 88. Specificity alone does not render a statute a bill of attainder. *See Nixon*, 433 U.S. at 469-72. Although initially this Court’s bill of attainder decisions suggested that a statute will be particularly susceptible to invalidation where its effect is to brand certain individuals as disloyal, *see id.* at 474, it is undeniable today that “virtually all legislation operates by identifying the characteristics of the class to be benefited or burdened.” *BellSouth I*, 144 F.3d at 63 (determining that “it is not clear that the specificity requirement retains any real bite”).

The Court discussed this factor at length in *Nixon*, holding that in certain cases a law may be so specific as to create a “legitimate class of one” without amounting to a bill of attainder unless it also satisfies the “punishment” element of the analysis. *Nixon*, 433 U.S. at 472. There, the Court rejected a bill of attainder challenge to an act directing the Administrator of General Services to take custody of the presidential papers and tape recordings of former President Nixon, reasoning that singling out Nixon was justified because “Congress had reason for concern solely with the preservation of [Nixon’s] materials, because he alone had entered into a depository agreement, the Nixon-Sampson agreement, which by its terms called for the destruction of the materials.” *Id.* Moreover, the Court in dicta reasoned that if it were to deem an individual or organization “attainted” whenever the legislature imposes “burdens which the individual or group dislikes,” this would “cripple the very process of legislating” as “any individual or group that is made the subject of adverse legislation can complain that the lawmakers could and should have defined the relevant affected class at a greater level of generality.” *Id.* at 470. This is particularly true of appropriations measures, where there is a strong need for congressional flexibility to withdraw subsidies based upon the state of the economy or a particular industry.

That Congress chose to target ACORN and its affiliates as opposed to other contractors afflicted with similar problems of mismanagement does not undermine the conclusion that specificity alone does not render a statute a bill of attainder. Following D.C. Circuit Judge Tatel’s reasoning from *Foretich v. United States*, Congress may have decided against legislating more broadly simply because this was the only instance of corporate mismanagement by a recipient of federal grant money it was aware of in light of the heavy publicity ACORN was receiving at the time. *See* *Foretich v. United States*, 351 F.3d 1198, 1127 (D.C. Cir. 2003) (Tatel, J., concurring); (R. at 29).

As a result, while the singling out of ACORN is a useful starting point for identifying a bill of attainder, *Foretich*, 351 F.3d at 1224, it is not conclusive. This Court must also assess the plausibility of non-punitive purposes under the second prong’s so-called “functional test.” *See Selective Serv. Sys.*, 468 U.S. at 855.

### The Funding Restrictions in the Appropriations Laws Further a Legitimate, Non-Punitive Legislative Purpose

As noted above, an Act of Congress will not be a bill of attainder even if it singles out an individual or organization if, viewed in terms of the type and severity of burdens imposed, it can reasonably be said to further a non-punitive legislative purpose. *Nixon*, 433 U.S. at 475-76, 469-72. In determining whether a challenged enactment is punitive, a court must weigh the alleged non-punitive purpose of a statute against the magnitude of the burden it inflicts, where it is not the absolute severity of a statutory burden that matters so much as the magnitude of the burden relative to the purported non-punitive purposes of the statute. *See id.* at 475-76. In addition, other factors – such as the inclusion of protective measures to safeguard the rights of the burdened individual or organization, *id.* at 477, the breadth or scope of a statute, *Navegar, Inc. v. United States*, 192 F.3d 1050, 1067 (D.C. Cir. 1999), *cert. denied*, 531 U.S. 816 (2000); or the unavailability of less burdensome alternatives, *Nixon*, 433 U.S. at 482 – weigh against finding that the funding restrictions are a bill of attainder. Where there is a legitimate congressional purpose for the challenged restriction, the Act will be upheld. *De Veau*, 363 U.S. at 160. Prior decisions suggest that this so-called “functional test” is “invariably” the “ `most important of the three.’ ’” *BellSouth Corp. v. FCC*, 162 F.3d 678, 684 (D.C. Cir.) (1998) (*BellSouth II*) (quoting *BellSouth I*, 144 F.3d at 65).

Two of this Court’s precedents involving federal appropriations measures support the conclusion that the funding restrictions further a legitimate, non-punitive legislative purpose. First, in *Flemming v. Nestor*, a plurality of the Court held that a statute denying Social Security benefits to immigrants deported for Communist Party membership was not legislative “punishment,” as “[t]he fact of [deportation]” was of “obvious relevance” to the question of eligibility since one of the primary purposes of the Social Security system was to encourage national spending by providing payments to the retired and disabled. 363 U.S. at 612, 617. The Court reasoned that the “advantage” of providing Social Security benefits would thus “be lost” were payments to be made to deported immigrants residing abroad. *Id.* Likewise, in *Selective Service System v. Minnesota Public Interest Research Group*, the Court concluded that a statute prohibiting persons who had not registered for the draft from receiving federal student aid was not penal in intent, as Congress had a valid regulatory purpose in “encourag[ing] those required to do so.” 468 U.S. at 854. The Court accepted Congress’s argument that it had “every obligation to see that Federal dollars [were] spent in the most fair and prudent manner possible” during a time of extreme budgetary constraints. *Id.* at 855. Thus, the Court concluded, the statute could be said to further non-punitive goals, as “[c]onditioning receipt of Title IV aid on registration [was] plainly a rational means to improve compliance with the registration requirement.” *Id.* at 854.

As in the latter two cases, applying the functional approach to the funding restrictions here compels the conclusion that the appropriations laws do not rest on a congressional determination of ACORN’s blameworthiness and a desire to punish the organization, but are instead incident to Congress’s constitutional duty to ensure proper expenditure of federal funds. Article I, Section 8, Clause 1 of the Constitution empowers Congress to “lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence [sic] and general Welfare of the United States.” Pursuant to this power, Congress has plenary authority over appropriations, *Lovett*, 328 U.S. at 313, subject to a corresponding duty under the Necessary and Proper Clause, Art. I, § 8, cl. 18, to “see to it that taxpayer dollars appropriated under that power are in fact spent for the general welfare, and not frittered away in graft.” *Sabri*, 541 U.S. at 605.

The House and Senate Reports confirm that Congress was legislating pursuant to this Necessary and Proper Clause authority when it enacted the amendments to restrict funding to ACORN. By denying ACORN receipt of federal funds that it would otherwise have been eligible to receive, Congress protected U.S. taxpayers against wasteful expenditure of federal funds. As noted above (*see* *supra* Part A.5), Senator Mike Johanns urged that “[u]ntil a full investigation is launched into ACORN, no taxpayer money should be used to fund its activities. A vote in favor of [the] amendment is a vote in favor of the taxpayer . . .” 155 CONG. REC. S9310 (daily ed. Sept. 14, 2009) (statement of Sen. Johanns). Likewise, Senator Bond urged passage of the amendment suspending federal funding to ACORN, as the organization’s good deeds helping low-income families “cannot outweigh the numerous and repeated abuse of taxpayer dollars allowed to occur in their name,” and because “[a]ll taxpayers deserve to know their hard-earned tax dollars are not going toward voter, housing, mortgage, or tax fraud assistance.” 155 CONG. REC. S9314 (daily ed. Sept. 14, 2009) (statement of Sen. Bond).

The appropriations laws also reflected Congress’s considered judgment about the appropriate allocation of expenditures in a budget of limited resources. As Senator Mike Johanns stated:

At a time when we are experiencing record deficits and the economy is struggling every day to get back on its feet, how in the world can anyone come to this floor of the Senate and say: I want to cast my vote to continue to fund this organization with taxpayer dollars, hard-earned dollars by American families, when so many questions of legitimacy reign? . . . . I do not see how anybody could cast that vote. To do so, in my judgment, would . . . ignore our responsibility to protect taxpayers from waste and fraud and abuse . . . . 155 CONG. REC. S9310 (daily ed. Sept. 14, 2009) (statement of Sen. Johanns).

Thus, as in *Selective Service*, where one Senator stated: “ `This amendment seeks not only to increase compliance with the registration requirement but also to insure the most fair and just usage of Federal education benefits . . . [at a time] when even the most worthwhile programs are cut back drastically,’ ” *Selective Serv. Sys.*, 468 U.S. at 854-55, Congress justified the funding restrictions by reference to concerns about allocating federal monies only to the most meritorious federal programs.

Safeguards in the appropriations laws also compel the conclusion that the funding restrictions were enacted pursuant to a legitimate, non-punitive legislative purpose. The current funding restrictions, unlike the “permanent” ban on funding in *Lovett*, were only intended to be “temporary.” (R. at 37). Likewise, Section 535’s directive to the GAO to investigate grants to ACORN, although not expressly tied to ACORN’s eligibility to receive federal funds, suggests that Congress intended to rely on the results of the investigation in determining whether to modify the funding restrictions if the GAO investigation resulted in a favorable disposition for ACORN. (R. at 37-38). As to the breadth or scope of the appropriations laws, although they single out ACORN, they also affect hundreds of unnamed “allied” and “affiliated” organizations. As the court of appeals reasoned, because the appropriations laws affect such a broad group of organizations, this pushes more in the direction of a rule of general applicability than a singling out of ACORN. (R. at 20) (citing *Flemming*, 363 U.S. at 620 (holding that a law excluding certain deportees from receiving social security benefits was not a bill of attainder because the law affected “the great majority of those deported”)). Finally, although Petitioners assert that less burdensome alternatives to address Congress’s concerns about ACORN exist, citing a Code of Federal Regulations provision which establishes a formal process for determining when federal contractors can be suspended or debarred (R. at 39),[[3]](#footnote-3) if Congress were to rely on these regulations this would mean abdicating its constitutionally mandated duty to exercise oversight powers under the Necessary and Proper Clause to ensure appropriate expenditure of federal funds.

Based on these facts, Congress’s response to the allegations of mismanagement was not so out of proportion to its purported non-punitive goal of protecting taxpayer funds from future waste and fraud as to render the funding restrictions punitive in nature. Thus, as the court of appeals held, Petitioners have failed to establish that the appropriations laws constitute “punishment” under the functional test.

### The Legislative Record Does Not Undermine The Conclusion That Congress Acted Pursuant to a Legitimate, Non-Punitive Purpose in Enacting Legislation to Defund ACORN

The final test of legislative punishment is “strictly a motivational one: inquiring whether the legislative record evinces a congressional intent to punish.” *Nixon*, 433 U.S. at 478. Under this prong, the Court must inspect the legislation for a congressional purpose to “encroach[] on the judicial function of punishing an individual [or organization] for blameworthy offenses.” *Id.* at 479. Because this Court has made clear that “[j]udicial inquiries into Congressional motives are at best a hazardous matter,” *see Flemming*, 363 U.S. at 617, the legislative record on its own is insufficient to conclude that a legislative enactment was motivated by punitive intent unless there is “unmistakable evidence of punitive intent.” *Selective Serv. Sys.*, 468 U.S. at 856 n.15.

Thus, in *Selective Serv. Sys.*, the Court upheld a law denying receipt of federal financial aid to male students who failed to register for the draft, as “several isolated statements” on the part of legislators who opposed the statute because they thought the statute punished non-registrants do not constitute “ `the unmistakable evidence of punitive intent which . . . is required before a Congressional enactment of this kind may be struck down.’ ” *Selective Serv. Sys.*, 468 U.S. at 855 n.15 (quoting *Flemming*, 363 U.S. at 619).

Likewise, in *Communist Party of U.S.*, the Court rejected arguments that Congress, in passing a statute that compelled all Communist organizations to register with the Attorney General, was motivated by a punitive desire to “abolish the Communist Party by indirection.” *Communist Party of U.S.*, 367 U.S. at 84. The Court emphasized that such an analysis ignored the significance of Congress’s decision not to “outlaw[] the Party by name and accept[] instead a statutory program regulating not enumerated organizations but designated activities.” *Id.* at 85. The Court held that it would be “indulging in a revisory power over enactments as they come from Congress . . . if [it] so interpreted what Congress refused to do and what in fact Congress did; that is, if [the Court] treated this Act as merely a ruse by Congress to evade constitutional safeguards.” *Id.* Thus, the Court concluded, “ `[s]o long as Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power.’ ” *Id.* at 86 (quoting *Barenblatt v. United States*, 360 U.S. 109, 132 (1959); *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941); *Sonzinsky v. United States*, 300 U.S. 506 (1937); *McCray v. United States*, 195 U.S. 27 (1904)).

Similarly, the House and Senate Reports in this case do not display an objective manifestation of punitive intent. Petitioners rely on punitive statements made by approximately a dozen members of the House of Representatives assailing ACORN as, among other things, “a corrupt and criminal organization,” a “crooked bunch” that “shook down lenders.” 155 CONG. REC. H9950 (daily ed. Sept. 24, 2009) (statement of Rep. King); 155 CONG. REC. H9700 (daily ed. Sept. 17, 2009) (statement of Rep. Issa). Nevertheless, despite this “smattering” of statements by a handful of Congressmen, this Court has repeatedly reaffirmed that there must be “unmistakable evidence of punitive intent.” *Selective Serv. Sys.*, 468 U.S. at 856 n.15. “[S]everal isolated statements” are not sufficient to evince punitive intent, *id.*, as they “do not provide the kind of `smoking gun’ evidence of congressional vindictiveness.” *BellSouth I*, 144 F.3d at 67. Given the difficulty of isolating a single congressional purpose in the face of a diverse legislative body comprised of different, and sometimes conflicting, motivations, statements made by a minority of legislators cannot necessarily be interpreted as reflecting the aims of others who supported the bill. *See Flemming*, 363 U.S. at 617; *O’Brien*, 391 U.S. at 384. As a result, where Congress legislates within its constitutionally granted authority, “the Judiciary lacks [the] authority to intervene on the basis of the motives which spurred the exercise of that power.” *Barenblatt v. United States*, 360 U.S. 109, 132 (1959).

Moreover, as previously observed, the House and Senate Reports demonstrate that Congress’s primary legislative objective in enacting the funding restrictions was to assure the effective expenditure of taxpayer dollars. Senator Johanns, in introducing the challenged provisions, stated that the exclusion in the Continuing Resolution was necessary in order “to protect taxpayers from waste and fraud and abuse,” and later in the floor debates emphasized that, “[u]ntil a full investigation is launched into ACORN, no taxpayer money should be used to fund its activities.” 155 CONG. REC. S9310 (daily ed. Sept. 14, 2009) (statement of Sen. Johanns); 155 CONG. REC. S9317 (daily ed. Sept. 14, 2009) (statement of Sen. Johanns). Likewise, Senator Bond urged support of the legislation to end “an endemic system-wide culture of fraud and abuse” that had “occurred repeatedly in Washington, Baltimore, and New York.” 155 CONG. REC. S9314 (daily ed. Sept. 14, 2009) (statement of Sen. Bond). The legislative history surrounding enactment of the appropriations laws thus amply supports the conclusion that Congress’s purpose in cutting off federal grants and contracts to ACORN was to protect taxpayer dollars from future waste pending the results of an investigation mandated by the statute itself. (R. at 9).

What is more, far from constituting a partisan attack against a left-leaning organization with ties to the Obama Administration, Democratic President Obama signed the bipartisan legislation even though President Obama hired an ACORN affiliate during the 2008 presidential election to help him get out the vote. 155 CONG. REC. H9949 (Sept. 24, 2009) (statement of Rep. King). Although Petitioners assert that President Obama’s signature is easily explained by the fact that Congress bundled the funding restrictions with critical spending measures addressing health, transportation, and economic concerns, President Obama expressed no reservations about the legislation. By contrast, in *Lovett*, while the President signed the bill, he was careful to add that he was only signing the legislation because it contained critical war appropriations, but that he could not

“ `so yield without placing on record my view that this provision is not only unwise and discriminatory, but unconstitutional.’ ” *Lovett*, 328 U.S. at 305 n.1, 313.

Finally, as a matter of public policy, it should not be forgotten that there is a strong presumption in favor of upholding congressional legislation that forbids courts from too readily inferring an unconstitutional motive from the legislative record because the challenged enactments deny funding to a long-time advocate of the poor and underserved. *Flemming*, 363 U.S. at 617. Just as the Bill of Attainder Clause was intended as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, so, too,

“ `it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.’ ” *Lovett*, 328 U.S. at 319 (Frankfurter, J., concurring) (quoting *Missouri, Kansas & Texas Ry. Co. of Texas v. May*, 194 U.S. 267, 270 (1904)). Justice Holmes uttered this admonition in one of his earliest opinions and it “needs to be recalled whenever an exceptionally offensive enactment tempts the Court beyond its strict confinements.” *Id.*

The funding restrictions, by temporarily precluding ACORN and its affiliates from receiving future federal funds, thus do not constitute legislative punishment under the three elements this Court has articulated for making this determination.

# CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court AFFIRM the decision of the Court of Appeals for the Second Circuit.

Respectfully submitted,

Nicole Schwartzberg

1. For clarity and ease of exposition, this brief will use the term “Petitioners” when referring to the party to this case. In all other circumstances, this brief will refer to the organization as “ACORN” or “ACORN and its affiliates.” [↑](#footnote-ref-1)
2. *United States v. Brown*, 381 U.S. 437 (1965) (invalidating Section 504 of the Labor Management Act, making it criminal for a member or past member of the Communist Party to serve on the executive board of a labor organization); *United States v. Lovett*, 328 U.S. 303 (1946) (invalidating a congressional act that withdrew appropriation for salaries of three government employees because of “subversive” political beliefs); *Pierce v. Carskadon*, 83 U.S. (16 Wall.) 234 (1872) (invalidating a West Virginia statute that required an out-of-state defendant to take an oath that he had not committed certain public offenses as a prerequisite to appearance); *Ex Parte Garland*, 71 U.S. (4 Wall.) 333 (1867) (invalidating a congressional act requiring attorneys to swear that they had never joined the rebellion against the United States as a prerequisite to practicing in federal court); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867) (invalidating an amendment to the Missouri constitution requiring citizens to take an oath that they had not aided the Confederacy during the Civil War as a prerequisite to serving as a professor or teacher in any church, religious society, or congregation). In addition, the Bill of Attainder Clause has been invoked successfully in the lower federal courts in the following cases: *Crain v. City of Mountain Home*, 611 F.2d 726 (8th Cir. 1979) (invalidating a city ordinance requiring removal of a city attorney from office); *Putty v. United States*, 220 F.2d 473 (9th Cir.) (invalidating an amendment denying a right of prosecution by indictment), *cert. denied*, 350 U.S. 821 (1955); *In re Yung Sing Hee*, 36 F. 437 (C.C.D. Ore. 1888) (invalidating an act exiling an American citizen because of race); *Blawis v. Bolin*, 358 F. Supp. 349 (D. Ariz. 1973) (invalidating statutes disenfranchising members of Communist Party); *Dodge v. Nakai*, 298 F. Supp. 26 (D. Ariz. 1969) (invalidating an action of an Indian tribal council excluding an attorney from a reservation while representing indigent Indians); *Steinberg v. United States*, 163 F. Supp. 590 (Ct. Cl. 1958) (invalidating a statute refusing an annuity or retirement pay to employees invoking the Fifth Amendment in a federal grand jury proceeding); *Davis v. Berry*, 216 F. 413 (S.D. Iowa 1914) (invalidating an act requiring performance of a vasectomy on criminals with two felony convictions), *rev’d for mootness*, 242 U.S. 468 (1917). [↑](#footnote-ref-2)
3. Subpart G of the Code of Federal Regulations provides that a suspending official may impose suspension after considering a range of factors; the official may even take “immediate action” if “needed to protect the public interest.” *See* 2 C.F.R. § 180.705 (“In deciding whether immediate action is necessary to protect the public interest, the suspending official has wide discretion . . . .”). [↑](#footnote-ref-3)