No. 10-1 01068 FEB 22 2011

IN THE

Supreme Court of the United States

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.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a congressional ban on federal funds and contracting to one specific, named corporation and all of its subsidiaries, affiliates and undefined "allied corporations" constitute a Bill of Attainder in the circumstances presented by this case?

PARTIES TO THE PROCEEDINGS

Petitioners:

The Association of Community Organizations for Reform Now (ACORN), ACORN Institute, Inc. (AI) and MHANY Management Inc. (MHANY), formerly known as New York Acorn Housing Company, Inc. were the plaintiffs in the district court, appellees in the court of appeals, and are the petitioners in this Court.

Respondents:

The United States of America and the United States officials sued in their official capacity and listed below were the defendants in the district court, appellants in the court of appeals and are the respondents in this Court:

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.

Amici Curiae:

The following *Amici Curiae* presented their views to the Court of Appeals:

Wayne County, Michigan.

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.

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.

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.

CORPORATE DISCLOSURE STATEMENT

Petitioners have no parent corporations. No publicly held company owns 10% or more of a corporation's stock the disclosure of which is required under Rule 29.6.

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The opinion of the court of appeals (App. A, 1a-32a) is reported at 618 F.3d. 125, and the two opinions of the district court (App. B, 33a-77a; App. C, 78a-105a) are reported at 692 F. Supp 2d 260 and 662 F. Supp 2d 285.

JURISDICTION

The court of appeals issued its opinion vacating the district court judgment on August 13, 2010. The court of appeals denied petitioners timely motion for a rehearing *en banc* on November 23, 2010. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Bill of Attainder Clause, Article I, Section 9, which provides that "No Bill of Attainder ... shall be passed." Various Congressional appropriations statutes are challenged as Bills of Attainder: Continuing Appropriations Resolution of 2010, Pub. L. No. 111-68, § 163, 123 Stat. 2023, 2053 (2009) (App. E, 108a-109a); Consolidated Appropriations Act of 2010, Pub. L. No. 111-117, § 418, 123 Stat. 3034, 3112 (2009); *id.* at §§ 534-535, 123 Stat. 3034, 3157-8; *id.* at § 511, 123 Stat. 3034, 3311 (App. G, 112a-114a); Department of Defense Appropriations Act of 2010, Pub. L. No. 111-118, § 8123, 123 Stat. 3409, 3458 (2009) (App. H, 115a); Department of the Interior, Environment, and Related Agencies Appropriations Act of 2010, Pub. L. No. 111-88, § 427, 123 Stat. 2904, 2962 (App. F, 110a-111a).

STATEMENT OF THE CASE

ACORN and two separate corporations, Acorn Institute (AI) and MHANY, which have been considered by the government to be "allied organizations" of ACORN[1], challenge unprecedented congressional appropriations statutes banning them from receiving federal contracts or funds.[2] Never before in American history has Congress

1. Defendants consider plaintiff AI to be an "allied organization" of ACORN and until shortly after the appellate oral argument, also treated MHANY as an "allied organization" and barred contracts and other funding to it. After appellate oral argument, the Department of Housing and Urban Development (HUD) determined that it would no longer consider MHANY to be an allied organization. However, other Federal and New York City (NYC) agencies, particularly the NYC Housing Preservation and Development, still treat MHANY as an allied organization, thus preventing MHANY from accessing federal funds or grants from those agencies. In addition various private entities continue to be reluctant to contract with MHANY because of the continuing taint of its having been barred from Federal funds. Moreover, HUD's voluntarily-changed position does not moot MHANY's claims against HUD because HUD's new position could easily be reversed if the statutory bar is not repealed or enjoined. *Parents Involved in Community Schools v. Seattle School Dist. No 1*, 551 U.S. 701, 719 (2007).

2. In substantial part due to the Congressional ban imposed here and its effect not only on federal contracts and funding, but also, as the district court found, on private and state funding, ACORN and ACORN Institute have filed for bankruptcy under Chapter 7, and bankruptcy proceedings are now pending before Judge Elizabeth S. Stong in the Eastern District of New York. The Bankruptcy Trustee, David J. Doyoga Esq. has authorized counsel to file this petition on behalf of ACORN and ACORN Institute as special counsel to the Trustee, *nunc pro tunc*, and an application for an order to that effect has been filed with the Bankruptcy Court.

barred a specific, named corporation from being awarded federal funds or contracts. Indeed, counsel has found only one instance in which a State legislature denied a specific corporation the opportunity to obtain state contracts, and a Federal District Court enjoined that law as an unconstitutional Bill of Attainder. *Fla. Youth Conservation Corps., Inc. v. Stutler*, 2006 U.S. Dist. LEXIS 44732, at *2 (N.D. Fla. June 30, 2006).

These statutes are not only unprecedented, but also unusually broad in scope. In contrast to the regulatory regime that governs federal contractors, these statutes automatically bar not only the corporation accused of wrongdoing, but any of its subsidiaries, affiliates and undefined "allied organizations." The bar resulted in the suspension and effective termination of plaintiffs' existing federal contracts. The challenged statutes also circumvent a well established administrative process which regulates the debarment and suspension of corporations from federal contracting or grants, but accords the affected corporations due process protections.

The decision below constitutes a dangerous precedent that would permit Congress or State legislators to single out unpopular corporations or organizations for a ban on contracts or funding based on public clamor against that entity for alleged wrongdoing. The historical, core separation of powers function of the Bill of Attainder Clauses protects against legislative determinations that a specific named individual or entity is guilty of misconduct and deserves to be deprived of rights or privileges others enjoy. The danger posed by legislative debarment or suspension of individual corporations, and the potential undermining of the current non-punitive administrative framework for debarment, led the

American Bar Association to recently adopt a resolution opposing "legislation that would mandate suspension or debarment of a single entity or class without reliance on the existing and carefully developed regulatory framework for suspension and debarment determinations." A.B.A., *Resolution 116*, REPORT TO THE HOUSE OF DELEGATES (2010), *available at* http://www2.americanbar.org/SiteCollectionDocuments/116.pdf.

This case raises the important question of what standard of review courts should utilize in analyzing Bill of Attainder claims that Congress has improperly imposed a serious burden on a specified individual or group.

1. The Challenged Statutes and Their Effect on Plaintiffs

Section 163 of the Continuing Appropriation Resolution for Fiscal Year 2010, effective October 1, 2009, extended on October 31, 2009, and expired December 18, 2009, provided that, "*[n]one* of the funds made available by this joint resolution or *any prior Act* may be provided to the Association of Community Organization for Reform Now (ACORN) or any of its affiliates, subsidiaries, or *allied* organizations." App. E, 108a; App. F, 111a (emphasis added).

On December 16, 2009, President Obama signed the 2010 Consolidated Appropriations Act which similarly barred funding to ACORN and certain affiliates for all of the many agencies covered by the Act.[3] App. G, 112a.

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3. The Consolidated Act consists of six subdivisions, three of which contain Defund ACORN language. Section 511 of Division E of the Act states "that none of the funds made

The bar contained in the 2010 Appropriations Act has been continued in the 2011 Continuing Resolution and is contained in the 2011 Appropriation Acts yet to be adopted.[4] The ban thus continues to date.

The district court found, and it is undisputed, that the Congressional bar has resulted in: a) the suspension and de facto termination of plaintiffs' existing federal contracts, subcontracts and grant agreements; b) the rescission of grants previously awarded where a signed contract had not been entered into; c) the denial to plaintiffs of the opportunity to apply for and receive new grants and contracts; d) the deprivation of the opportunity to apply for contracts with state or private entities involving federal funds. App. C, 101a-103a, 82a-83a; App. B 38a, 72a-73a. The district court also determined that the "record establishes" that the Congressional ban "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." App. B, 68a-9.

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available in this division or *any other division* in this Act may be distributed to the Association of Community Organizations for Reform Now (ACORN) or its subsidiaries," and thus covers the entire consolidated appropriations act. App. G, 114a. Section 418 of Division A of the Act, which provides appropriations for the Transportation and Housing and Urban Development (HUD) agencies, the largest source of federal funding for plaintiffs, contains identical language to the Continuing Resolution. App. G, 112a.

4. Transportation, Housing and Urban Development, and Related Agencies Appropriations Act of 2011, H.R. 5850, 111th Cong. § 416 (2010).

2. Legislative Background

In July, 2009, Representative Darrell Issa of California, then the ranking Republican member of the House Committee on Oversight and Governmental Reform, released an 88-page staff report entitled, *Is ACORN Intentionally Structured as a Criminal Enterprise?* [hereinafter *Issa Report*].[5] The *Issa Report* concluded that ACORN and numerous organizations associated or allied with it constituted "a criminal enterprise" that had "repeatedly and deliberately engaged in systemic fraud," is "a shell game," and had "committed a conspiracy to defraud the United States by using taxpayer funds for partisan political activities." *Id.* at 3-4. The Report also accused ACORN of improperly aiding Democratic candidates. *Id.* at 5, 7. The Report called for "piercing the corporate veil" "to remove the distinction between ACORN and its affiliates." *Id.* at 13. It also appended a list of 361 organizations including trade unions, public radio stations, political parties and grassroots community organizations that it asserted composed the ACORN "council." *Id.* at 74-81.

The Executive Summary of the *Issa Report* was read into the Congressional Record by Senator Mike Johanns (R-NE) when he introduced the amendment that eventually became Section 418 of Division A of the Consolidated Appropriations Act of 2010 on September 14, 2009.[6]

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5. *See* STAFF OF H. COMM. ON OVERSIGHT AND GOVERNMENT REFORM, 111TH CONG., IS ACORN INTENTIONALLY STRUCTURED AS A CRIMINAL ENTERPRISE? (Comm. Print 2009), *available at* http://republicans.oversight.house.gov/images/stories/Reports/20091118_ACORNREPORT.pdf.

6. 155 CONG. REC. S9308, 9309-10 (daily ed. Sep. 14, 2009).

Senator Johanns, who also introduced the amendments that became the other four FY 2010 appropriations statutes challenged here,[7] described ACORN as "an organization that is besieged by corruption, by fraud, and by illegal activities, all committed on the taxpayers' dime," and declared that "somebody has to go after ACORN," and that "that 'somebody' is each and every member of the Senate."[8]

On September 17, 2009, Congressman Issa and Senator Johanns introduced legislation to permanently bar ACORN and any ACORN affiliates from receiving any federal funds.[9] Issa stated that his purpose was "to put an immediate stop to federal funding to this crooked bunch."[10] The House passed that legislation the same day with no debate by vote of 345-75.[11]

These Congressional actions introducing both permanent and FY 2010 appropriation bans were spurred by the release of videotapes purporting to show ACORN employees engaged in misconduct, videos now shown to have been heavily edited for partisan purposes. During the debate on the Continuing Resolution and the

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7. *See* 155 CONG. REC. S9499, 9517-9518 (daily ed. Sep. 17, 2009); 155 CONG. REC. S9683, 9685 (daily ed. Sep. 22, 2009); 155 CONG. REC. S10181, 10207 (daily ed. Oct. 7, 2009); 155 CONG. REC. S11313 (daily ed. Nov. 10, 2009).

8. 155 Cong. Rec. S9308, 9310, 9317.

9. 155 CONG. REC. S9554, 9555 (daily ed. Sep. 17, 2009); 155 CONG. REC. H9675, 9699 (daily ed. Sep. 18, 2009).

10. 155 Cong. Rec. H9675, at 9700 (statement of Representative Issa).

11. *Id.* at 9700-9701.

challenged FY 2010 Appropriations Acts, *every* member of Congress who spoke in favor of these provisions accused ACORN of serious criminal conduct or attacked it for impermissable partisan political activities. ACORN was excoriated for: "their repeated assistance for housing, tax and mortgage fraud;"[12] helping "facilitate child prostitution," maintaining "a culture of ... child prostitution," "involvement" in "corrupting our election process," and "a practice of shaking down lenders" equivalent to the "Mafia";[13] engaging in "racketeering enterprises" and "committing investment fraud";[14] "furthering the trafficking of illegal aliens, minor girls into childhood prostitution and child abuse";[15] being in the "criminal hall of fame";[16] being associated with "voter fraud";[17] being "a parasitic organization,"[18] and being "a reprehensible enterprise" engaged in "outrageous and

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12. 155 CONG. REC. S9308, 9314 (daily ed. Sept. 14, 2009) (statement of Senator Bond).

13. 155 CONG. REC. H9946, 9948-9950 (daily ed. Sep. 24, 2009) (statement of Representative King).

14. 155 CONG. REC. H9784, 9785-88 (daily ed. Sep. 22, 2009) (statement of Representative Carter).

15. 155 CONG. REC. H9946, 9952 (daily ed. Sep. 24, 2009) (statement of Representative Bachman).

16. 155 CONG. REC. H10129 (daily ed. Sep. 30, 2009) (statement of Representative Franks).

17. 155 CONG. REC. H11080 (daily ed. Oct. 7, 2009) (statement of Representative Inglis).

18. 155 CONG. REC. H9784, 9785, 9787 (daily ed. Sep. 22, 2009) (Statement of Representative Gohmert).

illegal activity."[19] ACORN was also attacked as "a get-out the vote organization for Democrats,"[20] and a "partisan political organization."[21] No opportunity was afforded ACORN by Congress to respond to any of these charges.

The FY 2010 Consolidated Appropriations Act also contained a provision requiring the United States Government Accountability Office (GAO)[22] to investigate ACORN's activities and submit a report within 180 days. App. G, 113a (§ 535). The legislative debarment of plaintiffs, however, is not tied to the results of the investigation and continued for the entire year irrespective of the conclusions the GAO might reach. App. B, 57a.

3. Regulatory Scheme

The Code of Federal Regulations contains extensive regulations providing for government-wide debarment and immediate suspension of federal grantees or contractors in certain circumstances.[23] In suspending or debarring organizations, the Federal Regulations require that the affected entity receive due process, including written

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19. 155 CONG. REC. H9555 (daily ed. Sep. 16, 2009) (statement of Representative Bilirakis).

20. 155 CONG. REC. H9946, at 9949 (statement of Representative King).

21. 155 CONG. REC. S9308, 9314 (daily ed. Sep. 14, 2009) (statement of Senator Hatch).

22. The statute refers specifically to the "Comptroller General of the United States," who is the official head of the U.S. Government Accountability Office. App. G, 113a.

23. *See* 2 C.F.R. § 180

notice of the reasons for the agency action and a reasonable opportunity to contest the action.[24]

PROCEEDINGS BELOW

The plaintiffs brought this action challenging Section 163 of the Continuing Resolution as a Bill of Attainder and a violation of the Fifth Amendment's Due Process Clause and the First Amendment. On December 11, 2009, the district court granted the plaintiffs motion for a preliminary injunction, holding that the plaintiffs had shown a likelihood of success on the merits of their Bill of Attainder claim. App. C, 78a. Later in December, President Obama signed into law FY 2010 Appropriations acts containing language similar to the Continuing Resolution ban on ACORN funding. The plaintiffs then filed a second amended complaint challenging the new FY 2010 appropriation laws, and moved for a declaratory judgment and a preliminary and permanent injunction.

On March 10, 2010, the district court held the challenged statutes to be Bills of Attainder. The court first found that the deprivation of existing contracts and the denial of the opportunity to be awarded future contracts or funds fit comfortably within the meaning of punishment as set forth in *United States v. Lovett*, 328 U.S. 303 (1946), where this Court declared a statute permanently barring appropriations to pay the salaries of specific, named government employees accused of being subversives to be an unconstitutional Bill of Attainder. App. B, 52a. The court also concluded that from a functional perspective the

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24. *See id.* §§ 180.610, 180.715, 180.720, 180.805, 180.825; Exec. Order 12,549, 3 C.F.R. 6370 (1986).

statutes imposed punishment, rejecting the government's argument that a formal finding of guilt was required, and holding that the "nature of the bar and the context within which it occurred make it unmistakable that Congress determined ACORN's guilt before defunding it." *Id.* at 53a. The court held that the fact that plaintiffs had no right to government contracts was not dispositive since the *Lovett* court did not rely on any right to government employment. *Id.* at 49a. Furthermore, that the ban was not necessarily permanent did not defeat plaintiffs' claims, since punishment need not be permanent. *Id.* at 54a-56a.

The district court rejected the government's argument that Congress could rely on a variety of investigations to impose a funding ban on a specific named organization, holding that a legislative determination of an individual entity's wrongdoing based on investigative reports would constitute the substitution of legislative for judicial determination of guilt which is the hallmark of a bill of attainder. App. B, 56a-57a. The court also found that "the unavailability of any means for ACORN to overcome the funding ban if the [GAO] investigation report is favorable underscores the lack of a connection between the burdens of the statute and Congress's purpose in enacting it." *Id.* at 58a.

Finally, the district court recognized that while not every statute directed at a single individual or entity constitutes a bill of attainder, those judicial decisions such as *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), holding that Congress had created a "legitimate class of one" were premised on the government's articulation of a non-punitive rationale to treat the individual or organization *uniquely*. By contrast,

in this case the "government has offered no similarly unique reason [as in *Nixon* and the *Bell Operating Cases*] 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." App. B, 60a-61a.

The court of appeals reversed. The court rejected the plaintiffs' argument that corporate suspension and debarment from federal contracts should be treated similarly to employees' debarment from government employment, arguing that unlike penalties levied against individuals, a temporary one year bar on federal contracting to a corporation may be "more an inconvenience than punishment." App. A, 20a. The court also held that "plaintiffs were not prohibited from any activities; they are only prohibited from receiving federal funds to continue their activities," ignoring the fact that plaintiffs were precluded from completing ongoing, existing contracts and barred from obtaining new federal contracts. *Id.* at 21a.

The court of appeals also rejected the district court's analysis that a statute targeting a specific entity required the government to articulate some non-punitive rationale to treat the entity uniquely. Instead, the court determined that Congress must have the authority to suspend federal funds to an organization that has "admitted to significant mismanagement," and need not explain why Congress targeted this organization and not the many others who have either admitted to or been convicted of mismanagement or more serious misconduct. *Id.* at 21a, 25a, 27a. The court cited to nothing in the record

indicating that ACORN admitted to being afflicted with significant organizational mismanagement in September 2009. Indeed, as the district court noted, ACORN has throughout this litigation contested the allegations against it. App. B, 36a; App. C, 79a. Finally, the court distinguished *Lovett* from this case, holding that here, unlike in *Lovett*, "there is no congressional *finding* of guilt," implicitly rejecting the district court's holding that the nature and structure of the ban implied a Congressional finding of guilt. App. A, 31a.

REASONS FOR GRANTING THE PETITION

Review is warranted for four reasons. First, the Second Circuit's failure to require the government to articulate a non-punitive reason to single out a specific organization for a significant deprivation conflicts with rulings in the D.C. Circuit and this Court. Second, the court of appeals' refusal to consider whether less burdensome alternatives existed conflicts with decisions of the Ninth Circuit and D.C. Circuit, a prior holding of another Second Circuit panel, and decisions of this Court. Review is thus warranted for the first two reasons in order for this Court to resolve conflicts among the circuits as to the proper standard of review for Bill of Attainder claims involving Congressional statutes that single out a specific individual or group for a significant deprivation. Third, the court of appeals differing treatment of corporations and individuals for purposes of the Bill of Attainder Clause is at odds with this Court's first amendment jurisprudence, results in a conflict with this Court's decision in *Lovett*, and poses a serious danger to the administrative and regulatory regime that governs federal contractors. Finally, the court of appeals refusal

to find that Congress determined ACORN's guilt in enacting these statutes conflicts with the *Lovett* decision and decisions of this Court and other courts holding that a legislative determination of guilt need not be formally expressed by Congress.

A. The Decision Below conflicts with Rulings of the D.C. Circuit and this Court in permitting Congress to Impose a Serious Deprivation on a Specific Named Corporation and its allies where the Government has not Asserted Any Non-Punitive Reason to Treat that Corporation Uniquely

The statutes challenged here are not only unprecedented in debarring a specific federal contractor, but represent one of the exceedingly rare instances in our history where Congress has sought to impose a significant *deprivation* on a specific, named individual or organization. The undoubted reason for the scarcity of Congressional legislation of this type is the recognition by all three branches of government that the separation of powers principles underlying the Bill of Attainder Clause deny Congress the power to determine that a specific individual or organization is guilty of misconduct and deprive that person of "any rights, civil or political" without the due process protections afforded by a judicial trial, or an administrative proceeding. *Cummings v. Missouri*, 71 U.S. 277, 320, 322 (1866).

It has long been understood that the Bill of Attainder Clause serves a vital separation of powers function, reflecting "the Framer's 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." United States v. Brown*, 381 U.S. 437, 445 (1965) (emphasis added); *see also Lovett*, 328 U.S. at 317 (founders understood the danger inherent in special legislative acts which take away the life, liberty or property of particular named persons). Both Madison and Hamilton viewed the Clause as an important "constitutional bulwark in favor of personal security and private rights," and a vital barrier ensuring that the legislature would not perform the functions of the judiciary. THE FEDERALIST No. 44, at 218 (James Madison) (Terrence Ball ed., 2003); *Brown*, 381 U.S. at 444 (quoting Alexander Hamilton). The Constitution's twin Bill of Attainder Clauses "have deep roots in rule-of-law ideology." AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 124 (Random House) (2005). Thus, the question in Bill of Attainder cases imposing deprivations on specific individuals or entities is not whether the legislature had a reasonable basis for finding that a particular entity committed misconduct, but rather whether the legislature is entitled to make that judgment.

The importance and well recognized constitutional protection against legislative targeting of specific individuals or groups is reflected in the fact that to counsel's knowledge, there is only one other reported case in the past decade where Congress sought to impose a significant burden on a named individual, and that statute was declared an unconstitutional Bill of Attainder by the D.C. Circuit in *Foretich v. Morgan*, 351 F.3d 1198 (D.C. Cir. 2003). The *Foretich* Court employed a markedly different and inconsistent analysis, approach and test than that utilized by the Second Circuit here.

In *Foretich*, the court decided that a statute denying Dr. Foretich visitation rights with his minor daughter without her consent constituted a Bill of Attainder, in large part because the Government "offers no answer to the question of why the ... standard of the Act was not made available in other child custody cases." *Id.* at 1223. The D.C. Circuit held that the "narrow application of a statute to a specific person or class of persons raises suspicion, because the Bill of Attainder Clause is principally concerned with 'the *singling out*' of an individual for legislatively prescribed punishment." *Id.* at 1224 (quoting *Selective Serv. Sys. v. Minn. Pub. Interest Research Group*, 468 U.S. 841, 847 (1984) (emphasis in original)). The D.C. Circuit recognized that Congress could in certain circumstances legislate against particular individuals, *Id.* at 1217, 1224, but held that "the selectivity or scope of a statute may indicate punitiveness where *the differential treatment* of the affected party or parties cannot be explained 'without resort to inferences of punitive purpose.'" *Foretich*, 351 F.3d at 1222 (internal quotations omitted) (emphasis added). The Court stated that in "this case, it is the Act's specificity that renders the asserted non-punitive purposes suspect" because the government had proffered no non-punitive reason to treat Dr. Foretich uniquely. *Id.* at 1224.

The Second Circuit's decision here, in contrast to the D.C. Circuit's *Foretich* decision and that of the district court, did not consider Congressional legislation imposing a serious burden on a specific named entity suspect, and never questioned whether the government had articulated a non-punitive reason to distinguish between ACORN and the many other federal contractors who are accused of, admit to, or convicted of misconduct, mismanagement,

fraud or criminal activities and have never been suspended or debarred by Congressional legislation.[25] Rather, the court reasoned that a reasonable reason to suspend ACORN would suffice, even though the reasonable reason asserted – ACORN's purportedly admitted serious mismanagement – itself constituted a Congressional determination that ACORN was guilty of misconduct, and did not support Congress' determination to subject ACORN to *unique* treatment. The Circuit's analysis would allow Congress to single out particular corporations, academic researchers, government employees, banks or other institutions for significant deprivations and defeats the important protection afforded by the Bill of Attainder Clause. As one recent commentator has observed, "the deferential stance that the court [below] took toward Congress on the question of ACORN's culpability undermined the very purpose of the Bill of Attainder Clause." *The Second Circuit Holds That Law Barring ACORN From Receiving Federal Funds is Not a Bill of Attainder*, 124 HARV. L. REV. 859, 864 (2011).

The court of appeals reasoning is also inconsistent with the only three cases in the past 50 years that have upheld statutes imposing a significant burden on specific,

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25. Hundreds if not thousands of government contractors not only have "management" problems but have received contract awards despite having engaged in serious proven or admitted misconduct. Kate M. Manuel, *Debarment and Suspension of Government Contractors: An Overview of the Law Including Recently Enacted and Proposed Amendments*, CONG. RES. SERV., Nov. 19, 2008, at 12-13; U.S. GEN. ACCT. OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, GOVERNMENT CONTRACTING ADJUDICATED VIOLATIONS OF CERTAIN LAWS BY FEDERAL CONTRACTORS 5 (2002).

named individuals or organizations. In each of those cases, the court articulated a non-punitive reason that expressed no implied judgment of misconduct or guilt on the named entity and explained why Congress' could legitimately impose a *unique* burden upon the specific individual or corporation.

This Court, in *Nixon*, held that Congress could legitimately create a class of one because the statute's singling out of Nixon was "easily explained by the fact that at the time of the Act's passage, only his materials demanded immediate attention." 433 U.S. at 472. "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.* It was that unique depository agreement that made Nixon a "*legitimate* class of one, and this provides the *basis* for Congress' decision to proceed with dispatch with respect to his materials." *Id.* (emphasis added). The *Nixon* Court determined that the statute involved there did not "rest upon a congressional determination of guilt and a desire to punish him," because Congress wanted to preserve Nixon's documents and negate the unique Nixon-Sampson agreement permitting their destruction, and not because Congress believed him guilty of past wrongdoing. *Id.* at 475-484.

So too, the D.C. Circuit and the Fifth Circuit followed *Nixon* in upholding a statute in which Congress specifically singled out the Bell Operating Companies for differing treatment from other telephone companies because of the "unique infrastructure controlled by the BOCS" which permitted them, and only them, to exercise monopoly

power. *See, e.g., BellSouth Corp. v. FCC*, 162 F.3d 678, 689–90 (D.C. Cir. 1998); *SBC Commc'n. v. FCC*, 154 F.3d 226, 243 (5th Cir. 1998). Because of their unique position, "the differential treatment of the BOCs and non BOCs, is neither suggestive of punitive purpose nor particularly suspicious." *BellSouth Corp.*, 162 F.3d at 690 (quoting *BellSouth Corp. v. FCC*, 144 F.3d 58, 67 (D.C. Cir. 1998)).

The court of appeals failure to determine whether the "class of one" created here was "legitimate" because Congress had some reason to treat ACORN and its allies uniquely eviscerates the Bill of Attainder Clause's important separation of powers function, and has the effect of improperly merging Attainder jurisprudence with that of the Equal Protection Clause. Unlike the Equal Protection Clause, the Attainder Clause is not primarily concerned with over-inclusive or under-inclusive *classifications*, but rather with the legislature's improper determination of *individual* guilt and deprivation of *specific* individuals or organizations rights. *Brown*, 381 U.S. at 447 (Clause must "be read in light of the evil the framers had sought to bar: Legislative punishment of any form or severity, of specially designated persons or groups."); *Nixon*, 433 U.S. at 480 (Bill of Attainder Clause concerned with "the fear that the legislature, in seeking to pander to an inflamed popular constituency, will find it expedient to assume the mantle of judge—or, worse still, lynch mob."); 2 Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 270 (4th ed. 1833) (when the "legislature assumes judicial magistracy, pronouncing upon the guilt of the party without any of the common forms and guards of trial," it exercises "what may properly be deemed an irresponsible despotic discretion....").

Therefore, the test for whether a law singling out a specific group or individual constitutes "punishment" cannot be the general "rational basis" equal protection test questioning whether the legislature can proffer any legitimate non-punitive purpose justifying the law. Because the historic function of the Attainder Clause is to prevent the legislature from singling out specific individuals, a law targeting a specific individual or firm for a serious deprivation is presumptively suspicious, and to avoid the conclusion that it imposes "punishment," the legislature must show some non-punitive reason that would not merely justify the regulation of a class of individuals but explain why the affected entity is in a unique situation that demands special treatment irrespective of whether it is guilty of misconduct. That the legislature has the legitimate power to bar subversive individuals from government positions during war, or individuals likely to instigate political strikes from union positions, or child abusers from having custody of their children, did not save statutes specifically targeting named individuals or groups for such deprivations from being Bills of Attainder.

The court of appeals decision attempted to avoid this Court's and the D.C. Circuit's Bill of Attainder jurisprudence by arguing that because the challenged statutes not only debarred ACORN but also "hundreds of unnamed 'allied' and 'affiliate' organizations," they "are similar to a rule of general applicability and are less likely to have a punitive purpose." App. A, 26a.

The court's view that the challenged statutes are akin to a "rule of general applicability" conflicts with this Court's and the historical definition of the term. This Court has defined a "generally applicable rule" for Bill of Attainder purposes as one which defines the proscribed

group or individual by whether the entity "commits certain acts or possesses certain characteristics." *Brown*, 381 U.S. at 450; *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 84–85 (1961) (distinguishing between "restricting a group or individual by name" versus regulating "not enumerated organizations but *designated activities*"); *Fleming v. Nestor*, 363 U.S. 603, 614 (1960) (distinguishing statutes regulating a category of activities or a status from those "where the statute in question is aimed at the person or class of persons disqualified").[26] As Chief Justice Warren put it in *United States v. Brown*, it is the "command—of the Bill of Attainder Clause—that a legislature can provide that persons containing certain characteristics must abstain from certain activities, but must leave to other tribunals the task of deciding who possesses those characteristics. ..." *Brown*, 381 U.S. at 455 n.29.

Indeed, in viewing these statutes as imposing a "rule of general applicability," the Circuit ignored not only this Court's holdings, but the historic practice of Bills of Attainders and of Pains and Penalties, which not only imposed penalties on the targeted individual, but often "condemned a named person and his adherents." *Lovett*, 328 U.S. at 327 (Frankfurter, J., concurring).[27] Thus, the

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26. The Circuit's citation of *Fleming* underscores its error: In *Fleming*, Congress barred "the great majority of those deported" for a variety of reasons from receiving Social Security benefits. This Court found that Congress was concerned with the "fact of deportation... a far cry from situations ... where legislation was on its face aimed at particular individuals." *Fleming*, 363 U.S. at 619.

27. *See, e.g., Act for the Attainder of Thomas Fitzgerald, Earl of Kildare*, 1534, 26 Hen. 8, c. 6 (priv.) (not only punishing the Earl, but also "all suche persons whiche be or hereafter have ben conffortours abbetours partakers confederates or adherents unto

Brown Court rejected the Solicitor General's argument that the statute was not a traditional Bill of Attainder because it did not single out named individuals, but rather applied to thousands of unnamed individuals associated with the Communist Party. *Brown*, 381 U.S. at 441–42, 461.

The statutes challenged here do not set forth a "rule of general applicability" because they bar federal funds to organizations based not on their misconduct or any other general characteristics or activity, but solely because of their undefined association with a specific named organization. They target the organization and its associates, not the characteristics the organization is alleged to posses or the activity it is alleged to have engaged in.

This case is therefore different than Bill of Attainder cases challenging Congressional legislation against a *class* of individuals or organizations narrowly defined by a set of characteristics involving their activities or status, and not targeting enumerated individuals or organizations.[28]

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the said Erie"); *see* 3 Lord Macauley, THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES THE SECOND (London 1855) (Bill of Attainder listing several thousand people considered enemies of James); *Brown*, 381 U.S. at 441-42 (citing Bills of pains and penalties which excluded sons of a designated party from sitting in Parliament).

28. Similarly, *Navegar v. U.S.*, 192 F. 3d 1050 (D.C. Cir. 1999) involved a statute which did not specify any person or corporation for specific harm, but rather barred categories of weapons. *Id.* at 1067 (statute "regulate(s) an entire class of weapons"). The restriction challenged in *SeaRiver Maritime Financial Holdings v. Mineta*, 309 F. 3d 662, 666 (9th Cir. 2002) did not apply to only

See Selective Serv. Sys. v. Minn. Pub. Interest Research Group, 468 U.S. 841 (1984) (any person who fails to register for the draft disqualified for student financial aid); *Fleming*, 363 U.S. at 614 (1960) (persons deported for a wide variety of reasons including membership in the Communist Party denied social security benefits); *DeVeau v. Braisted*, 363 U.S. 144 (1960) (convicted felons prohibited from serving as officers of a waterfront union). In contrast to those cases, were Congress to target only one individual and his associates from amongst those who had failed to register for the draft, or one felon and his allies, a court should consider whether Congress had a non-punitive basis for singling out that individual or specific group, and not simply whether congress had a rational reason to prohibit student aid for non-registrants or proscribe felons from union positions.

The statute under review is a "historical departure from an unbroken American practice and tradition." *See* ROBERT JACKSON, MEMORANDUM CONCERNING H.R. 9766 ENTITLED "AN ACT TO DIRECT THE DEPORTATION OF HARRY RENTON BRIDGES," *reprinted in* S. REP. NO. 76-2031, pt. 1, at 9 (1940). It represents the first time that an act of Congress singled out a named corporation for debarment or suspension. What this Court noted in *Plaut v. Spendthrift Farm*, 514 U.S. 211, 230 (1995), applies equally here: "Apart from the statute we review

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one specific, named corporation, but rather defined a narrow class of vessels because of their conduct, namely all vessels that spilled over a million gallons of oil into a marine environment after a certain date. *Dehainaut v. Pena*, 32 F. 3d 1066 (7th Cir. 1994) rejected a challenge to a Presidential order prohibiting the re-employment with the FAA of *all* air traffic controllers who had been terminated due to their strike participation.

today, we know of no instance where Congress [has taken this kind of action]. That prolonged reticence would be amazing if such interference were not understood to be constitutionally proscribed."

B. The Court Below's Refusal to Consider Whether Narrower, Less Burdensome Alternatives Existed By Which the Legislature Could have Achieved Its Asserted Objectives Conflicts With Holdings of this Court, the Ninth and D.C. Circuits and A Prior Decision of the Second Circuit.

This Court and various Circuits have held that a relevant inquiry in determining whether the legislature sought to inflict punishment on an individual, group or class, is the "existence of less burdensome alternatives" by which the government could have achieved its purportedly legitimate non-punitive objectives. *See Nixon*, 433 U.S. at 482; *Foretich*, 351 F.3d at 1222; *SeaRiver Maritime Financial Holdings v. Mineta*, 309 F. 3d 662, 677-8 (9th Cir. 2002); *Consolidated Edison Co. of N.Y., Inc. v. Pataki*, 292 F.3d. 338, 354 (2d Cir. 2002) (when a statute imposes a 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 non-punitive objectives.'"). This judicial inquiry flows from *Nixon*'s holding that a statutory burden which is obviously disproportionate or excessive to achieve the legislature's putative interest belies any non-punitive goal.

In conflict with these holdings, the court below deemed irrelevant the obviously less burdensome alternatives that Congress could have used to achieve the government's

asserted interest in protecting the public fisc from the misuse of federal funds. App. A, 28a (approvingly citing a D.C. Circuit opinion, *BellSouth Corp. v. FCC*, 162 F.3d 678, 687 (D.C. Cir. 1998), for the proposition "that even if there were alternative ways of fulfilling legitimate government interests, 'it is up to the legislature to make this decision."). The challenged statutes here are clearly overbroad in two important respects.

First, the statutory provisions debarred ACORN and its associated organizations for a year until October 1, 2010, irrespective of the results of the Comptroller General's investigation. Thus, even had the Comptroller General concluded within the 180 days allotted for the investigation that ACORN had not committed any misuse of federal funds, the statutory bar continued for at least a year.[29] As the district court noted, "the unavailability of any means for ACORN to overcome the funding ban if the investigative report is favorable underscores the lack of a connection between the burdens of the statute and Congress' purpose in enacting it." App. B, 58a.

In contrast, any regulatory investigation in connection with a suspension of a federal contractor or grantee would reinstate the suspended contractor if the investigation

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29. As it turned out, although the Comptroller General was unable to submit a final report within the mandated 180 days, it did file a preliminary report within that time period, which found no evidence whatsoever of any misuse of or mismanagement of federal funds by ACORN or any affiliated or allied organization. *See* U.S. GEN. ACCT. OFFICE, PRELIMINARY OBSERVATIONS ON FUNDING, OVERSIGHT, AND INVESTIGATIONS AND PROSECUTIONS OF ACORN OR POTENTIALLY RELATED ORGANIZATIONS (June 14, 2010), *available at* http://www.gao.gov/new.items/d10648r.pdf.

concluded that no misconduct occurred. 2 C.F.R. § 180.605. Indeed, Congress had an easily available less burdensome and often used appropriation technique of barring the use of certain funds unless an Executive agency (here the Government Accountability Office) certifies that certain conditions have been met, a technique it used in other sections of the challenged statutes unrelated to ACORN.[30]

Nonetheless, in conflict with *Nixon* and lower Court holdings, the court of appeals held that although there is "no provision in the appropriation laws that ties the GAO investigation with ACORN's status to receive federal funds," that obvious alternate, less burdensome ways of fulfilling legitimate government interests exist is irrelevant. App. A, 28a. The court below argued that Congress could "modify the appropriation laws following the GAO investigation." *Id.* However, the question is not what Congress might do, but whether the statute it enacted constituted punishment. What possible justification other than punishment could Congress have had to *not* tie the funding ban to the results of the GAO investigation and continue the ban even if the GAO investigation exonerated ACORN of wrongdoing.[31]

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30. *See, e.g.*, Supplemental Appropriations Act of 2010, Pub. L. No. 111-32, § 1102 (2009) (authorizing certain funds for Afghanistan only if the Secretary of State reports that certain organization is cooperating with USAID in investigating past use of funds); Department of Defense Appropriations Act of 2010, Pub. L. No. 111-118, § 9003, 123 Stat. 3464 ($500 million in funds shall not be available until 5 days after the Secretary of Defense has completed review and reported to congressional committees). *See also id.* §§ 8046, 8048, 8050, 8060, 9011.

31. Nor do these statutes contain any provision for ACORN to overcome the debarment by demonstrating that it had undertaken significant reform efforts, as ACORN asserts it had, as the non-

Second, the sweeping prohibition on any federal funding for any ACORN affiliated or "allied organization," whether or not it is independently organized or incorporated, and whether the organization has itself committed any misconduct is overbroad and a less burdensome alternative is obvious. Congress could have defunded only those entities which had allegedly engaged in misconduct or were mismanaged, or found to be controlled by ACORN.

The court of appeals refused to consider whether any less burdensome alternatives existed to a statutory scheme barring any undefined "allied organization" of ACORN. Instead it held that "because ACORN and its related entities make up such an amorphous and sprawling family of organizations ... 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 mismanagement." App. A, 26a. The court ignored the statutory text, which doesn't permit the agencies discretion to make a determination of which ACORN allies or affiliates should be excluded to further the congressional purpose of protecting the public fisc, but mandates the exclusion of *all* ACORN's allied

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punitive regulatory process allows. This Court has often noted that one indicia of a punitive and not merely regulatory statute is whether the statute contains a provision affording the affected party the opportunity to lift the disqualification. *Selective Service*, 468 U.S. at 851 ("'Far from attaching ... to past and ineradicable actions,' ineligibility of Title VI benefits 'is made to turn upon continuingly contemporaneous fact,' which a student who wants public assistance can correct." *Id.* at 851 (quoting *Communist Party of United States v. Subversive Activities Control Bd.*, 367 U.S. 1, 87 (1961)).

organizations, irrespective of whether they are guilty of management or are under the control of ACORN.

Finally, the court below's determination that it was reasonable to bar all allied organizations of ACORN from federal funding conflicts with *United States v. Brown*, 381 U.S. 437 (1965). The *Brown* Court rejected a broad ban on all Communists from trade union positions because "even assuming that Congress had reason to conclude that some Communists would use union positions to bring about political strikes, "it cannot *automatically* be inferred that all members shar[e] their evil purposes or participat[e] in their illegal purpose. *Brown*, 381 U.S. at 456 (emphasis added). Here, the court below erred in upholding a statute that "automatically" infers that all of ACORN's allied organizations share mismanagement.

C. The Lower Court Treated Corporations Differently Than Individuals For Bill of Attainder Purposes in Contrast to This Court's Treatment of Corporations Under the First Amendment and in Conflict With This Court's Decision in *Lovett*.

In *United States v. Lovett*, 328 U.S. 303 (1946), this Court held that a congressional statute barring appropriations for three named government employees was an unconstitutional Bill of Attainder. The District Court relied on *Lovett* here, rejecting the government's attempts to distinguish that case. App. B 48a-52a.

The court of appeals distinguished *Lovett* on several grounds. First, while recognizing that the Second Circuit had held that corporations were afforded the protections of the Bill of Attainder Clause, it sought to distinguish

individuals from corporations, noting that certain actions may be punitive if taken against individuals, but not against a corporation. "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." App. A, 20a (emphasis added).

However, this Court in *O'Hare Truck Service Inc. v. City of Northlake*, 518 U.S. 719, 722–23 (1996), held that a corporation was entitled to the same First Amendment protections with respect to deprivation of government contracts as an individual employee has with respect to employment. *See also Lefkowitz v. Turley*, 414 U.S. 70, 83 (1973) (no "difference of constitutional magnitude between the threat of job loss to an employee of the state, and a threat of loss of contracts to a contractor" in finding plaintiffs disqualification for contracts was a "penalty" in Fifth Amendment context); *see Bd. of County Comm'rs. v. Umbehr*, 518 U.S. 668, 679 (1996) (listing cases). This Court has also "rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'" *Citizens United v. FEC*, ___U.S.__, 130 S. Ct. 876, 900 (2010). As the D.C. Circuit put it, "[a] corporation may contract and may engage in the common occupations of life, and should be afforded no lesser protection under the Constitution than an individual to engage in such pursuits." *Old Dominion Dairy v. Secretary of Defense*, 631 F.2d 953, 962 (D.C. Cir. 1980).

While the *Lovett* ban was permanent (although unlike here, Lovett could be reemployed at any time

with the advice and consent of the Senate[32]) and the ban here is not, various Circuits have explicitly disagreed with the court below's conclusion that a one year bar on government contracting (which now is a two year bar and may be continued indefinitely), is a "mere inconvenience." The D.C. Circuit and other circuits have recognized that even a temporary ban on government contracting can have "harsh" consequences and is a "very serious matter" for government contractors. *Sloan v. Dep't of Housing and Urban Dev.*, 231 F.3d 10, 17 (D.C. Cir. 2000); *Gonzalez v. Freeman*, 334 F.2d 570 (D.C. Cir. 1964). Because of these serious consequences and the stigma to an organization's reputation, these courts have accorded corporations a liberty interest in avoiding even a short-term debarment or suspension. *Reeve Aleutian Airways, Inc. v. United States*, 982 F.2d 594, 598 (D.C. Cir. 1993) (four-month suspension of airline by DOD that was then lifted "imposed a sure stigma [on airline]; branding the airline unsafe creates a lasting blemish on a company's reputation"); *Transco SEC v. Freeman*, 639 F.2d 318, 321 (6th Cir. 1981) ("One who has been dealing with the government on an ongoing basis may not be blacklisted, whether by suspension or debarment, without being afforded procedural safeguards"); *Trifax Corp. v. District of Columbia*, 314 F.3d 641, 643 (D.C. Cir. 2003).

The court below also sought to avoid *Lovett*'s conclusion that a cutoff of appropriations to named employees constituted punishment by asserting that the corporate "plaintiffs are not prohibited from any activities; they are only prohibited from receiving federal funds to continue their activities." App. A, 21a. This assertion misunderstands the nature of the burden

32. 328 U.S. at 305.

imposed on these corporations and is in direct conflict with *Lovett*. The Circuit ignored the undisputed fact that plaintiffs' contracts were terminated and suspended, and failed to explain how plaintiffs "are not prohibited from any activities" when they can no longer perform the contractual services that HUD and other agencies agreed they should perform. The Circuit's analysis was also explicitly rejected in *Lovett*, where this Court dismissed the argument that Congress had not precluded Lovett from engaging in his work, but simply being paid by federal appropriations. *Lovett*, 328 U.S. at 313.

The Second Circuit's decision permitting Congress' temporary debarment or suspension of a specific corporation from government contracting because the entity was significantly mismanaged poses a serious danger to the long established regulatory regime for suspension and debarment of government contractors, and the due process requirements recognized as constitutionally mandated by both courts and the executive branch. *See* A.B.A., *supra* at 1. The danger that the decision will encourage Congress to single out other corporations warrants this Court's review.

D. The Court of Appeals Set an Impermissibly High Bar to Determine Whether Congress Had Found an Individual Entity Guilty of Misconduct that Conflicts with This Court's Holding in *Lovett* and the D.C. Circuit's Holding in *Foretich*, and is Inconsistent with the History and Purpose of the Bill of Attainder Clause

A critical component of a Bill of Attainder is the legislature's determination of an individual's guilt. This Court in *Lovett* and other cases made clear that a formal

legislative determination of guilt is not an essential component of an Attainder, but rather the guilt can be ascertained from the context, nature and circumstances of the legislative action. *Lovett*, 328 U.S. at 313-16; *Brown*, 381 U.S. at 460, *Foretich* 351 F. 3d supra at 1226

Despite *Lovett*'s holding, the court below stressed that "the appropriations laws themselves do not mention ACORN's guilt in any way," and that "unlike *Lovett*, here, there was no congressional 'trial' to determine ACORN's guilt." App. A, 22a. However, the court of appeals claim that there was a "congressional finding of guilt in that case [Lovett]" is erroneous. App. A, 31a (emphasis in original) The *Lovett* statute made no mention of guilt; the guilty "verdict" was that of a House committee, not of Congress, and the Senate pointedly refused to concur in finding guilt. *Lovett*, 328 U.S. at 305 n.1, 312–13, 316. Here, while no committee "tried" ACORN, the funding ban was largely based on the 88-page *Issa Report*, the executive summary of which was entered into the Congressional Record by Senator Johanns, the sponsor of all of the challenged statutes in the Senate.[33] The decision below leads to the odd result that a statute enacted after a House committee trial is a Bill of Attainder, yet a statute enacted based on a report by a committee leader that certain organizations constitute a "criminal enterprise," affording the organizations no opportunity at all to refute the charges, is not. *See also The Second Circuit Holds That Law Barring ACORN From Receiving Federal Funds is Not a Bill of Attainder*, *supra* at 864. ("The Second

33. 155 CONG. REC. S9308, 9309-10 (daily ed. Sep. 14, 2009); 155 CONG. REC. S9499, 9517-9518 (daily ed. Sep. 17, 2009); 155 CONG. REC. S9683, 9685 (daily ed. Sep. 22, 2009); 155 CONG. REC. S10181, 10207 (daily ed. Oct. 7, 2009); 155 CONG. REC. S11313 (daily ed. Nov. 10, 2009).

Circuit's reasons for holding that the provisions at issue were not intended to impute guilt ... were unconvincing.").

Here not only is there overwhelming evidence that members of Congress supported this ban because they believed ACORN guilty of serious misconduct, see *supra* pp. 6-9, but as the district court correctly observed, "[wholly] apart from the vociferous comments by various members of Congress as to ACORN's criminality and fraud ... no reasonable observer could suppose that such severe action would have been taken in the absence of a conclusion that misconduct had occurred." App. B, 53a.

Moreover, the court of appeals implicitly held that Congress found ACORN guilty of significant mismanagement in reasoning that Congress could bar funding to a corporation that has "admitted to significant mismanagement." App. A, 21a; *see also* 26a (statute designed to protect public fisc against ACORN's admitted mismanagement). But ACORN has not admitted to any current corporate mismanagement, and the court cites to nothing in the record to support its conclusion that ACORN "admitted" that it was guilty of "significant mismanagement" at the time the ban was enacted. As the district court found, ACORN disputed the allegations against it, terminated employees found guilty of misconduct, acknowledged that it had made mistakes in the past, and claimed that it had instituted significant reforms prior to Congress' decision to bar it from federal funding.[34] App. B, 36a, 35a. A crucial, disputed

34. The independent Harshbarger report, commissioned by ACORN but not an ACORN-authored report, pointed out past managerial problems, stated that the ACORN management had undertaken significant reforms, and noted that management weaknesses remained, a far cry from "admitted significant

issue was whether at the time ACORN was debarred, it was in fact guilty of any significant mismanagement or misconduct warranting such action. It would be punitive to impose the ban because of the past embezzlement by ACORN's CEO a decade earlier or the conviction of some lower level ACORN employees without any showing that ACORN in 2009 was engaged in any misconduct or mismanagement, and ACORN has certainly not admitted to that. That Congress, according to the court below, determined ACORN to be guilty of "admitted significant mismanagement" and banned ACORN and its entire "web" of allied organizations in response to that determination of guilt, simply illustrates the punitive nature of the bar.

CONCLUSION

For all of the above reasons, petitioners urge this Court to grant review in this case.

Dated: New York, New York
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mismanagement." *See* Scott Harshbager, *An Independent Governance Assessment of ACORN: A Path to Meaningful Reform* (Dec. 7, 2009), *available at* http://www.proskauer.com/files/uploads/report2.pdf.