UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

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ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW, INC, ACORN INSTITUTE, INC., NEW YORK ACORN HOUSING COMPANY, INC.,

Civil Action No.

Plaintiffs,

vs

UNITED STATES OF AMERICA;
SHAUN DONOVAN, Secretary of the Department of Housing and Urban Development;
PETER ORSZAG, Director, Office of Management and Budget; and
TIMOTHY GEITHNER, Secretary of the Department of Treasury of the United States,

Defendants.

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PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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STATEMENT OF THE CASE

Plaintiffs seek preliminary and permanent injunctive relief and a declaratory judgment barring the enforcement of Section 163 of the Continuing Appropriation Resolution which provides 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.[1]

Section 163 went into effect on October 1, 2009. On October 31, 2009 it was extended, and is currently due to expire on December 18, 2009, unless it is extended again.[2]

This appropriation resolution is unprecedented. It does not appear that Congress has ever singled out a particular corporation or organization for a total statutory ban on all federal funding or contracts.

Moreover, the Continuing Resolution, as implemented by the Office of Management and Budget (OMB), sweeps broadly, denying without any hearing, not only ACORN, but any affiliated and "allied" organization, access to *any* federal grant or funds whatsoever. It not only bars federal funds to plaintiffs that are made available by the Continuing Resolution, but also any "funding that was made available for fiscal year 2009 and prior fiscal years, as well as funding that is or will be made available for fiscal year 2010." Peter R. Orszag, Director Office of Management and Budget, Memorandum for the Heads of Executive Departments or Agencies, Guidance on Section 163 of the Continuing Resolution regarding the Association of Community

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[1] Continuing Appropriations Resolution, 2010, H.R. 2918, 111th Cong. § 163 (2009) (enacted), Division B of Public Law No. 111–68 (CR) Section 163.

[2] *See also* Further Continuing Appropriations Resolution, 2010, H.R. 2996, 111th Cong. § 101 (2009) (enacted), Division B of Pub. L. No. 111-88. Section 101 extends the Continuing Resolution until December 18, 2009.

Organizations for Reform Now (ACORN), October 7,2009 [hereinafter OMB Memo] Annexed as Ex. A. All affected organizations are therefore precluded from applying for and securing any grants for 2010 that are decided before the end of this year.

The statute also bars plaintiffs from receiving funds or grants that a federal agency had already determined should be given to them, but had not entered into a contractual agreement to do so. Even more broadly, the statute interferes with existing contracts that plaintiffs have with federal agencies, forcing agencies to suspend or terminate " an existing contract or grant agreement with ACORN or its affiliates" where "permissible." (OMB Memo, Ex. A.) Indeed, plaintiffs have had existing contracts suspended or effectively terminated solely as a result of the Continuing Resolution, and have not even been reimbursed for work performed they had already performed under those contracts. (*See gen.* Brennan Griffin Aff., Ex. B.) Moreover, other organizations that contract with a federal agency and subcontract with ACORN or an affiliated organization are required to immediately suspend their subcontract with ACORN and find another subcontractor to perform the work.[3]

The Continuing Resolution not only denies all federal funds to ACORN and its subsidiaries, but also sweeps so broadly as to deny such funds to undefined "affiliates or allied organizations". While this phrase is not defined in the statute, government agencies interpret it to include at least all organizations on a list prepared by the staff of the House Committee on Oversight and Government Reform on behalf of the ranking member of that Committee, Congressman Darrell Issa.[4]

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[3] *See* Griffin Aff. ¶ 11, Ex. B; *see also* Bartholow letter, Annexed hereto as Ex. C (on behalf of California Association of Food Banks thanking ACORN for its past work but stating that the USDA will not permit it to subcontract with ACORN).

[4] *See* Department of Labor Training and Guidance Letter No 8-09, Guidance on Section 163 of the Continuing Resolution, October 19,2009, Attachment 2 (listing of organizations) Annexed as Ex. D. The list of organizations includes trade unions, radio stations, and community groups who, the staff believe, have some connection to ACORN. *Id.; see also* Issa Report, *infra* n.5, App. 1.

This unprecedented broad prohibition of all past awarded, current and potential future federal funds, grants and contracts to ACORN and any organization associated with it can only be understood in the context of an even broader legislative effort in Congress to label and punish ACORN as a "criminal enterprise,"[5] "to enact a comprehensive ban on federal funding to this corrupt and criminal organization,"[6] and in the words of the sponsor of some of this legislation "to go after ACORN."[7] The supporters of the legislation attacked ACORN as a "militant left wing community organization,"[8] and a "partisan political organization."[9] All this without a hearing and with no judicial adjudication of guilt. This broader effort has led both the House and Senate to enact various bills defunding ACORN, including legislation that would permanently defund ACORN or any organization that shares directors, employees or independent contractors with ACORN.[10] Although the permanent ban on funding ACORN has not yet been enacted as law,[11] these bills and the legislative history surrounding them provide the immediate context behind the Continuing Resolution.

Section 163 of the Continuing Resolution violates core principles of our Constitution. It substitutes trial by legislature with no procedural protection whatsoever, for a judicial proceeding that affords the protections of due process. It singles out one individual organization and its

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[5] STAFF OF HOUSE COMM. ON OVERSIGHT AND GOVERNMENT REFORM, 111TH CONG. IS ACORN INTENTIONALLY STRUCTURED AS A CRIMINAL ENTERPRISE? (Comm. Print 2009) [hereinafter Issa Report] App. 1.
[6] 155 CONG. REC. H9675 (daily ed. Sep. 17, 2009) (statement of Rep. Issa).
[7] 155 CONG. REC. 59308 (daily ed., Sept. 14, 2009) (statement of Sen. Johanns).
[8] 154 CONG. REC. H10281 (daily ed. Sept. 27, 2008) (statement of Rep. Foxx).
[9] 155 CONG. REC. S9308 (daily ed. Sep. 14, 2009) (statement of Sen Hatch).
[10] In addition to the Continuing Resolutions, there are a number of other legislative efforts including: Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010, H.R. 2996, 111th Cong. § 427 (2009) (enacted), Division B of Pub. L. No. 111-88; Student Aid and Fiscal Responsibility Act of 2009, H.R. 3221, 111th Cong. §§ 601-602 (2009) (Includes Defund ACORN Act language); Defund ACORN Act, H.R. 3571, 111th Cong. (2009); Department of Transportation, Housing and Urban Development Appropriations Act, 2010, H.R. 3288, 111th Cong. § 415 (2009); Commerce, Justice, Science, and Related Agencies Appropriations Act, 2010, H.R. 2847, 111th Cong. §§ 533-534 (2009); Department of Defense Appropriations Act, 2010, H.R. 3326 111th Cong. § 9012 (2009); Protect Taxpayers From ACORN Act, S. 1687, 111th Cong. (2009).
[11] At least one appropriation law already enacted for the Fiscal Year 2010 does contain a prohibition on funding ACORN. Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010, H.R. 2996, § 427, 111th Cong. (2009) (enacted), Division B of Pub. L. No. 111-88.

allies for punishment and imposes such overarching restrictions against that organization so that its purpose can only be punitive. Moreover, its sweep is so broad so as to not only punish ACORN, but any organization with which ACORN has a relationship, with no right to a hearing, and regardless of either evidence of any wrongdoing or the good work being done by that organization. The Continuing Resolution therefore constitutes an unconstitutional Bill of Attainder, violates plaintiffs' right to freedom of association, and violates plaintiffs' right not to be deprived of liberty and property without due process.

In this Motion, plaintiffs seek a preliminary injunction and temporary restraining order preventing defendants from implementing the ban on federal funding contained in the Continuing Resolution. That ban has caused immeasurable and immediate harm to plaintiff organizations. They have been cut off from a significant source of their funding, which for Acorn Institute has caused them to lay off close to 85% of their employees. (Griffin Aff. ¶ 7, Ex B.) They have been ruled ineligible for grants that federal agencies had already decided they should receive and upon which they depend for their continuing existence. They have had grant agreements violated and suspended. Indeed, the government has not been willing to even reimburse them for work their employees or agents have *already* performed. As set forth in the sworn Affidavit of Brennan Griffin, Executive Director of the ACORN Institute [hereinafter AI], "unless the total ban on federal funds is immediately ended, AI is likely to either dissolve or declare itself bankrupt." (Griffin Aff. ¶ 18, Ex B.)

In addition, plaintiffs have been stigmatized, tainted and defamed by the smear campaign launched in Congress and in certain news outlets so that it is increasingly difficult for them to raise funds from other sources. For these reasons, they seek immediate preliminary injunctive relief barring the enforcement of Section 163 of the Continuing Resolution. They also seek an

immediate restraining order preventing federal agencies from awarding contracts to other entities where plaintiffs had already applied for and/or been selected to receive such grants.

PRELIMINARY INJUNCTION STANDARD

To obtain a preliminary injunction, a party must demonstrate (1) that he or she will be irreparably harmed if an injunction is not granted; and (2) either: (a) a "likelihood of success on the merits"; or (b) "sufficiently serious questions going to the merits and a balance of the hardships decidedly tipped in the movant's favor." *Lusk v. Village of Cold Spring*, 475 F.3d 480, 485 (2d Cir. 2007); *see also Bronx Household of Faith v. Bd. of Educ.*, 331 F.3d 342, 348–49 (2d Cir. 203). "The standard for preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success." *Lusk*, 475 F.3d at 485 (quoting *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 546 n.12 (1987)). In this case, plaintiffs can demonstrate both irreparable harm and a strong likelihood of success on the merits.

ARGUMENT

I. PLAINTIFFS CAN SHOW LIKELY SUCCESS ON THE MERITS

A. Section 163 of the Continuing Resolution Constitutes an Unconstitutional Bill of Attainder

The Constitution, Art. I, § 9, cl. 3 expressly prohibits Congress from enacting a Bill of Attainder. As clearly established by the Supreme Court, this constitutional prohibition extends not only to criminal statutes, but to all "legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial." *United States v. Lovett*, 328 U.S. 303, 315

(1946). It is equally well established in this Circuit that corporations, as well as individuals, may not be singled out for punishment under the Bill of Attainder Clause. *Consol. Edison Co. of N.Y. Inc. v. Pataki*, 292 F.3d 338, 349 (2d Cir. 2002). The Clause thus bars a legislative determination of guilt and the infliction of punishment resulting from "trial by legislature." *United States v. Brown*, 381 U.S. 437, 442 (1965). A central function of the Clause has been to ensure the procedural protections of the judicial process for the attribution of guilt and imposition of punishment. *Consol. Edison Co.*, 292 F.3d at 347.

The Clause is thus deeply rooted in separation of powers and the framers' well founded distrust of legislative trials. As the Supreme Court noted, "the Bill of Attainder Clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply -- trial by legislature." *Brown*, 381 U.S. at 442. The framers understood that 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, being governed solely by what it deems political necessity or expediency . . . ." 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 270 (4th ed. 1833). The Bill of Attainder Clause is thus at the core of our constitutional democracy and underlines the importance of preserving the integrity of the separation of powers and due process in this country.

A major concern that underlayed the Bill of Attainder prohibition was "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." *Nixon v. Admin. of Gen. Serv.*, 433 U.S. 425, 480 (1977). *See also Brown*, 381 U.S. at 445 (legislature is "peculiarly susceptible to

popular clamor" (quoting 1 COOLEY, CONSTITUTIONAL LIMITATIONS 536–37 (8th ed. 1927))). The Clause is thus integrally related to rights guaranteed by procedural due process. *Consol. Edison Co.*, 292 F.3d at 347; *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 468–69 (7th Cir. 1988). The facts of this case are dramatically on point with the framers' concerns.

A statute constitutes a Bill of Attainder if: (1) specific individuals readily ascertainable members of a group or corporate entity are singled out in the statute, and (2) the legislature inflicts punishment on those individuals or entities without the due process protections of a judicial trial. *Nixon*, 433 U.S. 425, 485 (1977) (citing *Lovett*, 328 U.S. at 315-316). Both those criteria are clearly met here.

1. The Continuing Resolution Indisputably Meets the Specificity Requirement of a Bill of Attainder

The Continuing Resolution unquestionably singles out ACORN and every single organization considered to be one of ACORN's "affiliates, subsidiaries, or allied organizations." Only ACORN, along with its "affiliates" and "allies" are expressly barred from receiving any federal funds by the statute. *Consol. Edison Co.*, 292 F.3d at 346. Therefore Section 163 fits the historic practice of a Bill of Attainder which specifically named designated persons or groups. *Selective Serv. Sys. et al. v. Minnesota Public Interest Research Group et al.*, 468 U.S. 841, 847 (1984).

The essence of an unconstitutional Bill of Attainder is that the legislature determines the guilt and punishes specified individuals or groups, as opposed to setting forth a general rule of conduct which can then be applied by courts or administrative agencies to persons determined to fit within their proscriptions. *Lovett*, 328 U.S. at 317 (Bill of Attainder inflicts punishment "determined by no previous law or fixed rule"); LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-4, at 643 (2d ed. 1988). In *United States v. Brown*, the Court noted that Congress'

legitimate legislative authority permits it to set forth "a generally applicable rule decreeing that any person who commits certain acts or possesses certain characteristics" shall not hold certain positions or obtain certain benefits, but explicitly leaves "to courts and juries the job of deciding what persons have committed the specified acts or possess the specified characteristics." 381 U.S. at 450. Congress exceeds its legitimate authority by enacting a Bill of Attainder when, rather than establishing a general proscription, it specifically designates the persons or groups who have allegedly committed the prohibited acts or who allegedly possess the feared characteristics. *Id.* Congress has clearly done so here.

The legislative disqualification set forth in the Continuing Resolution is based not on what any group or entity has been adjudicated to have done, or even on what general characteristics it possesses. Rather, the disqualification is based simply on their undefined association, affiliation or alliance with ACORN. The total ban on federal funding for plaintiffs therefore clearly meets the specificity requirement of a Bill of Attainder.[12]

2. The Continuing Resolution Imposes Punishment

The Continuing Resolution also clearly imposes punishment. The Supreme Court has set forth three factors to be considered in determining whether a statute directed at a specified individual or group is punitive:

> (1) whether the challenged statute falls within the meaning of historical punishment; (2) whether the statute, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes; and (3) whether the legislative record evinces a congressional intent to punish.

[12] While Congress did not define allied, or affiliated in the statute, the Staff Report of the Committee on Oversight and Government Reforms contains an appendix listing 361 entities composing the ACORN Council which government agencies are now utilizing to determine who is ineligible for federal funds. *See* Issa Report, App. 1. *See* DOL memo, Ex. D. How this Congressional Staff report determined who was to be included is unclear, but the list includes ostensible Trade Unions, radio and television stations, and political parties.

Selective Serv. Sys., 468 U.S. at 892 (quoting *Nixon*, 433 U.S. at 473, 475–76, 478). A statute need not fit all three factors to be considered a Bill of Attainder. *Consol. Edison Co.*, 292 F.3d at 338, 350; *Foretich v. United States*, 351 F.3d 1198, 1218 (D.C. Cir. 2003); *Elgin v. United States*, 594 F. Supp. 2d 133, 140 (D. Mass. 2009) (a statute need not evidence all three of these factors); *In re Extradition of McMullen*, 769 F. Supp. 1278, 1287 (S.D.N.Y. 1991) ("three alternative tests").

(a) "Historical Punishment" Test

The Continuing Resolution fits comfortably within the traditional and historical notions of a Bill of Attainder. The Supreme Court has viewed such historical notions of Bill of Attainder broadly and has cautioned that the clause is not to "be given a narrow historical reading" but rather 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." *Brown*, 381 U.S. at 447. *See also Foretich*, 351 F.3d at 1220 ("while not squarely within the historical meaning of legislative punishment, [the harm] is not dissimilar to the types of burdens traditionally recognized as punitive"); *Consol. Edison Co.*, 292 F.3d at 351 ("A statute need not fit within the historical category of punishment to be considered as such."). The Court has therefore applied the Bill of Attainder Clause beyond its original, historical scope of decreeing death for specified individuals to: statutes prohibiting employment in certain professions;[13] to an appropriation law which cut off the pay of certain named individuals;[14] and to an act of Congress making it a crime for a member of the Communist Party to serve as an officer of a labor union.[15] Here, the Continuing Resolution fits within the list of historical punishments already recognized by the Supreme Court for several reasons.

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[13] *Cummings v. Missouri*, 71 U.S. 277, 321 (1866), *Ex parte Garland*, 71 U.S. 333, 394 (1866).
[14] *United States v. Lovett*, 328 U.S. 303 (1946).
[15] *United States v. Brown*, 381 U.S. 437 (1965).

First, the complete ban of federal funds to ACORN is analogous to the cutoff of pay to specified government employees already held by the Supreme Court to constitute punishment for purposes of the Bill of Attainder Clause. *Lovett*, 328 U.S. at 317-318. While this case involves independent government contractors and not government employees, the Supreme Court has repeatedly held in various constitutional contexts that there is 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." *Lefkowitz v. Turley*, 414 U.S. 70, 83 (1973) (finding plaintiffs disqualification for contractors was a "penalty" in Fifth Amendment context); *Bd. of County Comm'rs. v. Umbehr*, 518 U.S. 668, 679 (1996) (listing cases). As the Court noted in holding that there was no constitutional difference between independent contractors and employees in the First Amendment context, "[i]ndependent government contractors are similar in most relevant respects to government employees." *Bd. of County Comm'rs.*, 518 U.S. at 684.

In *Lovett*, Congressman Dies, in 1942, named 39 government employees, including the plaintiffs Lovett, Watson, and Dodd, as being "subversive" and "unfit to 'hold a government position'" due to their "beliefs and past associations." *Lovett*, 328 U.S. at 308–09. In response, the House established a special Appropriations subcommittee to determine, without any public hearing or judicial trial, whether these 39 employees should have their salaries cut off. *Id.* at 309–10. The subcommittee held secret hearings, where the employees were not permitted the right to counsel, and where the subcommittee presented self-serving evidence collected by both congressional and FBI investigators. *Id.* at 310–11. Ultimately, the subcommittee reported that Lovett, Watson, and Dodd had engaged in "subversive activity" and were therefore unfit for government service. *Id.* at 311–12. Congress consequently enacted a Section 304 of the Urgent

Deficiency Appropriation Act of 1943, 57 Stat. 431, 450, which barred the plaintiffs, along with the other 36 employees, from thereafter receiving any salary from the federal government.

The Supreme Court, in a compelling opinion by Justice Black, decisively held that this statute was an unconstitutional Bill of Attainder:

> Those who wrote our Constitution well knew the danger inherent in special legislative acts which take away the life, liberty, or property of particular named persons because the legislature thinks them guilty of conduct which deserves punishment. They intended to safeguard the people of this country from punishment without trial by duly constituted courts.. [...] When our Constitution and Bill of Rights were written, our ancestors had ample reason to know that legislative trials and punishments were too dangerous to liberty to exist in the nation of free men they envisioned. And so they proscribed bills of attainder. Section 304 is one. Much as we regret to declare that an Act of Congress violates the Constitution, we have no alternative here.

Id. at 317.

In a strikingly similar repetition of history, the events that led to Congress' enactment of pay freeze against Lovett, Watson, and Dodd in 1942 strongly resemble the circumstances that have led to the current ACORN defunding provisions. In both cases Congress succumbed to the temptation of misuse power to "pander to an inflamed popular constituency." *Seariver Mar. Fin. Holdings, Inc. v. Mineta*, 309 F.3d 662, 676 (9th Cir. 2002) (quoting *Nixon*, 433 U.S. at 480).

Just as in *Lovett*, where Congressman Dies listed individuals tied to "subversive activities," here Representative Darrell Issa, the ranking member of the House Committee on Oversight and Governmental Reform, commissioned an 88-page staff report that concludes that ACORN as a whole is a "criminal enterprise," along with an appended list of other organizations considered by its authors to be a part of that alleged "criminal enterprise." *See* Issa Staff Report, Appendix 1. No hearing or even any rudimentary form of due process was afforded ACORN to dispute or defend against these charges. In both cases, the means of imposing punishment is

economic, i.e. withdrawing monetary compensation.[16] In addition, in both of these instances the punitive measures were accomplished through appropriation bills that on their face did not directly assign blame to those affected.

Like the pay freeze in *Lovett*, the Continuing Resolution and the other defunding provisions present no "mere question" "of appropriations," but rather have been introduced merely "because the legislature thinks [that ACORN and its affiliates are] guilty of conduct which deserves punishment." *Lovett*, 328 U.S. at 314, 317. The Lovett Court's admonition is equally applicable here: "The fact that the punishment is inflicted through the instrumentality of an Act specifically cutting off the pay of certain named individuals found guilty of disloyalty, makes it no less galling or effective than if it had been done by an Act which designated the conduct as criminal." *Id.* at 316. As in *Lovett*, the Continuing Resolution does not simply bar plaintiffs' participation in one program, but "bar[s] their being hired by any other government agency." *Id.* at 314. While *Lovett* involved a permanent bar on government employment, to continue that total bar here for much longer would in effect work a permanent deprivation on ACORN Institute, which may be forced to dissolve or declare bankruptcy, as well as a serious hardship on the other plaintiffs. Moreover, the Continuing Resolution is only the first enacted law of a legislative effort to permanently ban all government funding for ACORN, and a bill to that effect has already been enacted in the House of Representatives.[17] *See supra* n.10 (discussing the DEFUND ACORN ACT, and other legislative attempts).

Second, statutory provisions such as Section 163 of the Continuing Resolution, which have as their effect to mark specified persons or groups with a brand of infamy or ignominy have historically been viewed as Bills of Attainder. *Foretich*, 351 F.3d at 1219. As William

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[16] *See also Consol. Edison Co.*, 292 F.3d at 348 ("punishment can frequently take the form of economic injury").
[17] In fact, Congress has already passed a bar in the 2010 budget. *see supra* n.11.

Blackstone's *Commentaries* noted, an attainder "sets a note of infamy upon him . . . . He is then called attaint, *attinctus*, stained or blackened. He is no longer of any credit of reputation." 4 William Blackstone, *Commentaries* 380, quoted in *SBC Communications, Inc. v. FCC*, 154 F.3d 226, 235 (5th Cir. 1998). In *Lovett*, the Court emphasized that "the congressional act stigmatized [the plaintiffs'] reputation and seriously impaired their chance to earn a living." 328 U.S. at 314.

Here, the breadth of the statutory language tellingly exposes the "note of infamy" the statute is designed to impose, for the statute taints any group affiliated or allied with ACORN. The statutory message is clear, telling the world that ACORN is a monstrous organization that must be shunned, banished and avoided. Here, as in *Lovett*, the legislature's act "stigmatized" plaintiffs' reputation and "seriously impaired their chance" to raise funds necessary to permit them to survive.

Moreover, the statutory text cannot be viewed in isolation of "the circumstances of its passage." *Lovett*, 328 U.S. at 313; *see also Selective Serv. Sys.*, 468 U.S. at 852 ("each case has turned on its own highly particularized context"). As the D.C. Circuit pointed out in *Foretich*, where the D.C. Circuit held unconstitutional a statute specifically intended to deprive the plaintiff of visitation rights to his daughter: "It makes little sense to view the Act in isolation, divorced from the legislative process that produced it. The statute represents the culmination of that process, and its memorializes judgments about Dr. Foretich that Congress formed during the course of that process." 351 F.3d at 1215. As in *Lovett* or *Foretich*, that the statute does not explicitly state plaintiffs' guilt or misconduct, is not dispositive when the circumstances of passage make clear the "note of infamy" the statute imposes. *See also Consol. Edison Co.*, 292 F.3d at 349 ("Although on its face Chapter 190 does not speak in terms of guilt or innocence, we have no doubt that the legislature considered Cons Ed guilt of wrongdoing").

The "circumstances of passage" of the Continuing Resolution herein amply illustrates the determination of guilt and infamy that Congress, has imposed on ACORN. The main sponsor of the Senate Amendment to defund ACORN inserted portions of the Issa Report into the record, quoting the title that ACORN was "Intentionally Structured as a Criminal Enterprise," 155 CONG. REC. (daily ed., Sept. 14, 2009) (statement of Sen. Johanns when he introduced the statute). The summary of the Issa Report inserted into the Congressional Record states that ACORN has "engaged in systemic fraud," is "a shell game," is "a criminal enterprise," and has "committed a conspiracy to defraud the United States by using taxpayer funds for partisan political activities." *Id.*; *see also* Issa Report. None of these allegations have ever been proven in a court of law, or even in an administrative proceeding.

Similarly, after proposing the Defund ACORN Act in the House on September 17, 2009, Representative Darrell Issa (R-CA) stated that the purpose of the legislation is "to put an immediate stop to Federal funding to this crooked bunch" and to "enact a comprehensive ban on Federal funding for this corrupt and criminal organization." 155 CONG. REC. H9675 (daily ed. Sept. 17, 2009) (statement of Rep. Issa). The text of the Continuing Resolution barring funds for any ACORN affiliated or allied organization, whether or not it has itself engaged in any fraud or corruption, reflects this legislative process of treating any entity associated with ACORN as part of a criminal enterprise or conspiracy.

Third, historically the Bill of Attainder Clause was designed to prevent "legislative acts" which take away "life, *liberty or property*" of particular named persons. *Lovett*, 328 U.S. at 317 (emphasis added); *see also Nixon*, 433 U.S. at 473–74; *Consol. Edison Co.*, 292 F.3d at 351 (confiscation of property rights within historical meaning of clause). Here, plaintiffs have been deprived of both liberty and property without due process.

A long line of judicial decisions has held that government debarment or suspension of a government contractor without due process for reasons of misconduct constitutes a deprivation of liberty. *See* Point I C infra, pp 33-34. In addition, the statute operates not merely to bar plaintiffs from any future contract, but also to require the immediate suspension or effective termination of existing contractual obligations which can only be terminated or suspended for cause. (*See* agreements annexed to Griffin Aff., and OMB Circular A-110, Uniform Administrative Requirements for Grants and Agreements With Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations, ¶¶ 60, 61 (awards may be terminated or suspended only by the Federal awarding agency if a recipient materially fails to comply with the terms and conditions of an award or with the recipient's consent)). The statute also bars the release of funds to plaintiffs such as, ACORN Institute, for work already performed under those existing contracts. The statute therefore works an interference with already existing contractual obligations and a confiscation of property and property rights that fits within historic notions of punishment.

Nonetheless, even were this Court were to conclude that the total defunding of ACORN and its affiliates and allied organizations does not fall within the historical meaning of punishment, that conclusion does not render the Act constitutional. *Foretich*, 351 F.3d at 1219; *Consol. Edison Co.*, 292 F.3d at 351 (need not decide whether Act imposes a traditional attainder). For here, as in *Foretich and Consol. Edison Co.*, the Continuing Resolution is functionally punishment, regardless of the historical meaning of the term.

(b) The Continuing Resolution Meets the "Functional Test"

The second component, or "functional" analysis of whether a challenged statute constitutes an unlawful Bill of Attainder, requires a determination of "whether the law under

challenge, viewed in terms of the type of severity of the burdens imposed, reasonably can be said to further non-punitive legislative purposes." *Nixon*, 433 U.S. at 476. While the goal of preventing the expenditure of federal funds to organizations which commit fraud or other law violations certainly could be a legitimate legislative purpose, the Continuing Resolution here cannot be viewed as serving any "wholly non-punitive purpose." *Consol. Edison Co.*, 292 F.3d at 351 (discerning no "wholly non-punitive purpose" justifying the statute).

First, the Supreme Court has viewed statutes as punitive and not regulatory where, as here, they contain no provision affording the affected party the opportunity to lift their disqualification. For example, in *Brown v. United States*, the Court focused on whether the class affected by the statute could extricate themselves from the statute's structures as probative of a preventive non-punitive goal. *Brown*, 381 U.S. at 457–58. So too, in *Selective Serv. Sys.*, the Court determined that the statute denying students aid if they failed to register for the draft was non-punitive because it left open the possibility of lifting the disqualification, and thereby qualifying for aid, simply by registering late. The statute in question in *Selective Service Sys.* therefore promoted compliance with the law and was not merely punitive. 468 U.S. at 853 (students "carry the keys of their prison in their own pockets"). As the Supreme Court said, "'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). As Professor Laurence Tribe reminds us, there "is a basic difference between laws disadvantaging a fixed class from which persons are unable to escape, and laws encouraging departure from an open class by conditioning benefits upon such departure." TRIBE, at 648.

Here, under the explicit terms of the Continuing Resolution, no ACORN affiliated or allied group can relieve itself from the complete bar on all federal funding. Had the statute merely had the regulatory purpose of ensuring that federal funds would not be used for fraudulent purposes, Congress could have provided that ACORN affiliated groups terminate any employees found to be engaged in improper conduct or take other measures designed to ensure that any improper conduct would not continue in the future. Indeed, ACORN has already taken measures that attempt to correct any mistakes it may have made, and ensure that improper conduct will not occur in the future. (Bertha Lewis Aff. ¶ 19, Ex. C.) That Congress failed to provide a way out of the total bar indicates a punitive, not merely regulatory function to the bill.

Second, the incredibly broad, sweeping prohibition on any federal funding for any ACORN affiliated or allied organization, whether or not they are independently organized, structured or incorporated, and whether or not the organization has itself committed any fraud or misconduct clearly is punitive and serves no legitimate regulatory purpose. This case is similar to *Consol. Edison Co. of NY Inc. v. Pataki*, where this Circuit found that the New York statute denying *Consolidated Edison Co.* a cost-pass-through was overbroad because the statute denied not only costs that could be attributed to the company's own negligence that ratepayers should not have to bear, but also costs that had no connection to lax monopolistic conduct that utility regulation would ordinarily seek to deter. 292 F.3d at 352–54. The Court held that:

> If the entirety of the cost-pass-through prohibition served the economic-regulatory function described above, we might be willing to conclude that Chapter 190's deterrent function was non-punitive. Our view of the "type and severity of burdens imposed" by Chapter 190, however leads us to a different conclusion.

Id. at 352.

So too, here Congress has not only barred funding to those organizations or individual programs that it alleges actually committed fraud, but has also denied funds to any ACORN

program or affiliated or allied organization, whether or not such program or organization had an exemplary record of serving the public, or whether or not there were any allegations of fraud or corruption at that organization. For example, there are absolutely no allegations that ACORN Institute, or any employee thereof has committed any misconduct or impropriety, or that any grant administered by ACORN Institute was involved in any misconduct. Nonetheless, that group and similarly situated blacklisted groups are totally banned from receiving federal funds. In *Consol. Edison Co.*, the denial of funds to the corporation was overbroad in covering costs not associated with the corporation's alleged culpability; here the denial of funds is likewise overbroad in covering organizations and programs not even allegedly fraudulent. In both cases, the overbroad prohibition cannot be tied to a legitimate regulatory goal and thus must be viewed as punishment for purposes of the attainder clause.

Indeed, the only possible rationale for excluding any ACORN related, affiliated or allied organization from funding would be that Congress chose to treat any ACORN related organization as, in the words of the Issa Report and congressional statements, "a criminal enterprise." But that rationale is of course punitive, not merely regulatory.

Third, the disproportionality of the statutory bar to the regulatory goal is also demonstrated where there "are less burdensome alternatives by which the legislature . . . could have achieved its legitimate non-punitive objectives." *Nixon*, 433 U.S. at 482; *Consol. Edison Co.*, 292 F.3d at 354; *Foretich*, 351 F.3d at 1222; *Seariver Mar. Fin. Holdings*, 309 F.3d at 677–78. In this case, there are obvious less burdensome alternatives that Congress could have considered. For example: Congress could have defunded only those particular programs that have been adjudicated to be fraudulent; or Congress could have defunded corporations which have actually been convicted of criminal violations. Those alternatives would still raise serious

Bill of Attainder questions if they were enacted not under general rules but as bars of particular corporations, but would have been at least less burdensome than the comprehensive ban on any organization deemed by the staff of a particular congressional committee to be associated with ACORN. As in *Consol. Edison Co.*, the legislature made no effort to tailor the prohibition to the alleged misconduct. Rather, "by lumping all" of ACORN's programs and so-called "affiliated and allied" corporations together, the legislature acted in an unconstitutionally punitive, not regulatory manner. *See Consol. Edison Co.*, 292 F.3d3d at 354.

Most importantly, Congress could have accomplished its undeniably legitimate goal of ensuring that government funds are not used for fraudulent purposes by enacting a law of general applicability. As the Court explained in *Brown*:

> We do not hold today that Congress cannot weed dangerous persons out of the labor movement, any more than the Court held in *Lovett* that subversives must be permitted to hold sensitive government positions. Rather, we make again the point made in *Lovett*: that Congress must accomplish such results by rules of general applicability. It cannot specify the people upon whom the sanction it prescribes is to be levied. Under our Constitution, Congress possesses full legislative authority, but the task of adjudication must be left to other tribunals.

381 U.S. at 461.

Fourth, defendants here circumvented an elaborate, and critically important, regulatory process established pursuant to law for determining whether and under what circumstances the federal government bars corporations from government funds and grants. Moreover, the statutory bar enacted here conflicts with that regulatory process' remedial, nonpunitive approach. That there is already in place a constitutionally acceptable administrative procedure to vindicate the interest in protecting government funds from fraudulent or corrupt contractors is strong evidence that Congress' interest in enacting the Continuing Resolution is not merely regulatory. As the Second Circuit held in *Consol. Edison Co.*:

> Although an established procedure existed for determining whether Cons Ed has been "imprudent" in increasing the costs associated with the outage, the legislature bypassed it and, in a single stroke, found guilt on the facts of Cons Ed's case. The legislature retains the power to reclaim authority over rate setting from the PSC. However, the decision to bypass the PSC reinforces our conclusion that the legislature's decision was to find guilt and order punishment directly.

292 F.3d at 349. The Circuit further recognized that:

> [A]lthough New York unquestionably has an interest in investigating, regulating, and prosecuting the malfeasance of corporations within its borders, it has no interest in inflicting punishment for such malfeasance on the corporation's shareholders through the legislative process.

Id. at 348. If the legislature believes that the established regulatory process is inadequate, it may "enact generally applicable legislation modifying that process." *Id. See also Foretich*, 351 F.3d at 1224 (Congress believed that existing standards were adequate and instead of amending the statutory standard in general, "singled out" one individual for different treatment).

Here, the Code of Federal Regulations contains extensive regulations establishing who is eligible to receive federal grants or benefits and providing for government-wide debarment and suspensions of eligibility in certain circumstances. 2 C.F.R. Ch. 1, Part 180. For example, an agency may suspend a participant in a program or activity based on: an indictment, conviction, civil judgment, or other official findings by federal, state, or local bodies against the participant. The agency has significant discretion in making this decision, but is required to consider a variety of particularized criteria to make its determination.[18]

Moreover, extensive regulations exist providing for the debarment or suspension of federal contractors from contracting with the government.[19] Federal agencies are precluded from entering into new contractual dealings with contractors whose prior violations of federal or state

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[18] 2 C.F.R. § 180.705.

[19] *See generally* CRS Report RL34753, *Debarment and Suspension of Government Contractors: An Overview of the Law Including Recently Enacted and Proposed Amendments*, by Kate M. Manuel (hereinafter CRS Debarment and Suspension Report).

law, or failure to perform under contract, suggest they are nonresponsible.[20] Due process requires that contractors receive written notice of proposed debarments and of debarring officials' decisions, as well as the opportunity to present evidence within the decision-making process for all debarments except those based upon contractors' convictions.[21]

So too, the IRS also provides an extensive regulatory, administrative scheme for tax exempt organizations. The IRS has the authority to investigate, penalize and revoke the tax exempt status of § 501(c)(3) organizations which are accused of participating in partisan political campaigns, as members of Congress have accused ACORN and its affiliates of doing.[22] Unlike the Continuing Resolution at issue in this litigation, however, these penalties are subject to judicial review.[23]

Thus, if Congress believed that ACORN or any of its affiliates committed wrongful fraudulent conduct there is an extensive regulatory and statutory regime that already exists by which government contractors can be debarred or suspended. Not only did Congress bypass that regulatory process, but it did so in a manner that flies in the face of the regulatory framework and belies a non-punitive rationale.

First, unlike administrative debarments which are not designed to be punitive, and therefore accord agencies ample discretion to consider any changed circumstance suggesting that a contractor is unlikely to repeat post misconduct, such as changes in personnel or procedures, the Continuing Resolution and implementing OMB Memo provide for no such Agency

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[20] *See id.* ("Debarment and suspension are discretionary actions that . . . are appropriate means to effectuate [the] policy [of dealing only with responsible contractors].").
[21] 48 C.F.R. § 9.406-3. When debarment is based on a conviction, the hearing that the contractor received prior to the conviction suffices for due process in the debarment proceedings.
[22] I.R.C. § 4955(d)(1). BRUCE R. HOPKINS, THE LAW OF TAX EXEMPT ORGANIZATIONS 887 (2007).
[23] *Ctr. on Corporate Responsibility v. Shultz*, 368 F. Supp. 863, 879 (D.D.C. 1973) (Court issued injunction to prevent defendants from denying plaintiff tax exempt status).

discretion.[24] *See* CRS Debarment and Suspension Report, at CRS-8 (noting that the provision according the agency discretion is designed to ensure that the agency acts simply to ensure the proper future use of funds as opposed to punishing corporations for past abuse). In contrast to the administrative debarments, the statutory debarment in this case, like other statutory debarments, is "punishment" and not simply regulatory in large part precisely because of its mandatory component, thereby denying the applicable federal agencies discretion to waive the prohibition. *See gen.* Manuel, CRS Debarment and Suspension Report. The administrative regulations therefore parallel the Supreme Court's Bill of Attainder jurisprudence which distinguishes between irrevocable and escapable conditions for purposes of determining a punitive versus regulatory interest.

Moreover, while administrative exclusion is limited to particular "divisions, organizational elements, or commodities" of a company if agency officials find that only segments of a business engaged in wrongdoing, the Continuing Resolution broadly bars not only all of ACORN but all affiliated or allied organizations irrespective of any showing that the organizations in question committed any wrongdoing. *Id.* at (b). *See, e.g.*, *Peter Kiewit Sons' Co. v. Army Corp. of Eng'rs*, 534 F. Supp. 1139, 1155 (D.D.C. 1982), *rev'd on other grounds*, 714 F.2d 170 (D.C. Cir. 1983) (holding that an agency cannot properly debar a corporation-contractor based upon the misconduct of two subsidiaries and a corporate division).

[24] Moreover, agencies can use administrative agreements as alternatives to debarment. Office of Management and Budget, *Suspension and Debarment, Administrative Agreements, and Compelling Reason Determinations*, Aug. 31, 2006, *available at* http://www.whitehouse.gov/omb/memoranda/fy2006/m06-26.pdf ("Agencies can sometimes enter into administrative agreements . . . as an alternative to suspension or debarment."). In these agreements, the contractor generally admits its wrongful conduct and agrees to restitution; separation of employees from management or programs; implementation or extension of compliance programs; employee training outside auditing; agency access to contractor records; or other remedial measures. ALAN M. GRAYSON, SUSPENSION AND DEBARMENT 37–38 (1991). The agency, for its part, reserves the right to impose additional sanctions, including debarment, in the future if the contractor fails to abide by the agreement or engages in further misconduct.

As the Congressional Research Service concluded in determining that the related DEFUND ACORN ACT raised serious Bill of Attainder questions:

> [T]o make a per se assumption that all entities affiliated with a disqualified entity should also be disqualified, however, is not consistent with the goals of the current regulations, which require that such matters be considered individually .... The further step of finding that just one organization would be subject to such limitations jointly and severally seems even further from the existing regulatory scheme.

Kenneth R. Thomas, Cong. Research Serv., *The Proposed "Defined ACORN Act": Is it a Bill of Attainder?*, 10 (Sept. 22, 2009).

In addition, even when future contracts are barred by agency remedial action, generally contracts that are currently in effect remain ongoing unless they are terminated for default or for convenience under separate provisions of the FAR.[25] Nonetheless, in this case, the Continuing Resolution requires that all existing contracts should be reevaluated and "immediately suspended" if possible. (OMB Memo, Ex. A.)

In addition to this extensive administrative regulatory regime, a number of federal statutes explicitly include provisions requiring debarment and suspension of contractors from future federal contracts who engage in certain conduct prohibited by the statute. *See* CRS Debarment and Suspension Report at CRS 2–4 (listing statutes). These statutes are all of general applicability. None single out one contractor. That Congress has chosen in this particular case to single out one organization for special treatment when it has done so in no other case in this area, is further evidence of a punitive purpose.

Moreover, Congress' singling out ACORN cannot be considered establishing a "legitimate class of one," because of the uniqueness of ACORN's situation. *Nixon*, 433 U.S. at 472. Rather, unlike the situation with the uniqueness of former President Nixon's materials and

[25] *See* 48 C.F.R. § 49.000-607. The overwhelming majority of claims of grantee or contractor wrongdoing are settled by way of such an agreement. Cite.

documents, there have been numerous high profile examples of contractor misconduct that have drawn congressional attention. As one Congressional Research Service concluded, some federal contractors have reportedly received contract awards despite having previously engaged in serious misconduct, such as failing to pay taxes, bribing foreign officials, falsifying records submitted to the government, and performing contractual work so poorly that fatalities resulted." *See* Manuel, CRS Debarment and Suspension Report *supra*, at 13. Kathleen Day, *Medicare Contractors Owe Taxes, GAO Says*, WASH. POST, Mar. 20, 2007, at D1 (failure to pay taxes); *Contract Fraud Loophole Exempts Overseas Work*, GRAND RAPIDS PRESS, Mar. 2, 2008, at A9 (bribery of foreign officials); Ron Nixon & Scott Shane, *Panel to Discuss Concerns on Contractors*, N.Y. TIMES, July 18, 2007, at A15 (falsified records); Terry Kivlan, *Shoddy Standards Blamed for Troop Electrocutions in Iraq*, NATIONAL JOURNAL'S CONGRESS DAILY, PM ED., July 11, 2008 (poor quality work causing fatalities).

For example an independent oversight organization reported in 2002 that:

> [S]ince 1990, 43 of the government's top contractors paid approximately $3.4 billion in fines/penalties, restitution, and settlements. Furthermore, four of the top 10 government contractors have at least two criminal convictions. And yet, only one of the top 43 contractors has been suspended or debarred from doing business with the government, and then, for only five days.[26]

That same year, the General Accounting Office found that numerous federal contractors were awarded substantial contracts despite convictions or judgments that they had violated federal laws. The GAO identified 39 contractors, among the 16,819 contractors that were awarded new federal contracts in amounts of at least $100,000 during fiscal year 2000 that were found by a federal court or adjudicated administrative decision to have violated one or more

[26] Project on Government Oversight, *Federal Contractor Misconduct: Failure of the Suspension and Debarment System* (2002), *available at* http://www/pogo/org/pogo-files/reports/contract-oversight/federal-contractor-misconduct/co-fcm-20020510.html.

federal environmental, labor and employment, or antitrust laws between 1997 and 1999. In addition, the GAO identified another 3,403 contractors that were involved in enforcement agencies' cases (not including IRS tax penalty assessments) during this three-year period. Most of those cases were resolved through some form of "administrative agreement" or "settlement" with the government in which the contractor typically did not admit—and sometimes specifically denied—the violation charged and which did not constitute a judgment or adjudicated administrative decision that a violation had actually occurred. United States General Accounting Office, *Report to Congressional Requesters, Government Contracting Adjudicated Violations of Certain Laws by Federal Contractors*, Nov. 2002, at 5.

Despite these congressional, independent and GAO reports and newspaper stories documenting contractors receiving substantial government contracts despite proven serious misconduct adjudicated by the courts or administrative agencies, Congress has not singled out any of these contractors for debarment or suspension. Instead, Congress chose to debar only ACORN and its so-called "affiliated or allied organizations," despite the lack of any adjudicated criminal convictions or administrative findings against these organizations.

Moreover, Congress has not adopted various legislative efforts to provide for mandatory debarments of general applicability for various types of contractor misconduct. Manuel, *supra*, at 15. For example, Congress in 2003 and again in 2006 and 2007 refused to adopt a proposed statute which would have provided that government contractors or grantees be deemed non-responsible and hence subject to debarment if the entity has been convicted of similar or the same offenses within a three year period. Contractors and Federal Spending Accountability Act of 2007, H.R. 3033, 110th Cong. (2007); Contractors Accountability Act of 2006, H.R. 6243, 109th Cong. (2006); Contractors Accountability Act of 2003, H.R. 2767, 108th Cong. (2003).

Congress' refusal to adopt laws of general applicability for federal contractors convicted of numerous serious offenses and instead singling out one organization (which has not been convicted of any crimes) constitutes the essence of punishment that is prohibited under the Bill of Attainder Clause. *Foretich*, 351 F.3d at 1223–24 ("that Dr. Foretich was *singled out* for this severe burden belies the claim that Congress' purposes were non-punitive"). As Justice Stevens has written:

> [t]he concept of punishment involves not only the character of the deprivation, but also the manner in which that deprivation is imposed. It has been held permissible for Congress to deprive Communist deportees, as a group, of their social security benefits, but it would surely be a bill of attainder for Congress to deprive a single, named individual of the same benefit.

Nixon, 433 U.S. at 485 (citing *Flemming*, 363 U.S. at 614) (Stevens, J., concurring).

Justice Stevens went on to say that had the legislation considered in *Flemming* been so targeted, "[t]he very specificity of the statute would mark it as punishment, for there is rarely any valid reason for such narrow legislation." *Nixon*, 433 U.S. at 485–86 (Stevens, J., concurring). *See also* TRIBE, § 10-4 ("The identification of an individual by name should raise an almost conclusive presumption of constitutionally suspect specification."). And indeed, apart from Nixon's unique status as a "legitimate class of one," the Supreme Court has never upheld a statute specifically singling out a named individual or organization for the denial of government benefits. *See Communist Party v. Subversive Activities Control Board*, 367 U.S. 1, 84, 86 (1961). As the Court stated in *Communist Party*, there is a "crucial constitutional difference" between outlawing the party by name and "a statutory program regulating not enumerated organizations but designated activities." *Id.* at 84. The registration requirement in *Community Party* was deemed not a Bill of Attainder because "[i]t attaches not to specified organization but to described activities in which an organization may or may not engage." *Id.* at 86.

Finally, in Nixon the Court held that the statute was not punitive because Congress had provided safeguards and rights that belied the claim that the statute was punitive. *Nixon*, 433 U.S. at 477, 482. In contrast, here Congress has not provided any protective measures designed to safeguard the rights of the individual or class harmed. *See also Foretich* (viewing such inclusion of protective measures as weighing against a finding that the statute is a Bill of Attainder). Moreover, Congress bypassed a regulatory scheme which does provide due process protections and has prohibited plaintiffs herein from obtaining any federal funds without any due process protections whatsoever.

(c) Motivational Test

The legislative record surrounding the enactment of the Continuing Resolution overwhelmingly reflects a clear legislative intent to punish ACORN and its affiliates and allies. *Consol. Edison Co.*, 292 F.3d at 354 (setting forth standard); *Lovett*, 328 U.S. 308–12 (setting forth extensive record of legislative intent). Here there is no mere smattering of legislators' statements illustrating a punitive purpose. *See* legislative history outline as set forth *supra*, at pp 14-16. amply demonstrates, the whole intent from the beginning of the issuance of Congressman Issa's committee staff report was to "get ACORN," and to punish an organization deemed a "criminal enterprise," and "corrupt." It would be hard to find a legislative process more clearly motivated by legislators' punitive intent than the one that has thus far resulted in the Continuing Resolution challenged here and the various Defund ACORN statutes enacted by each House of Congress.

B. The Continuing Resolution Violates Plaintiffs' First Amendment Rights

The Continuing Resolution totally bars any government funding for ACORN, and any subsidiary, or affiliated or allied organization. On its face, the statute forces organizations into a

draconian choice: either forego or abandon a close association with ACORN, or have all government contracts or funds cut off.

Even worse, Congress did not define the phrase "affiliates, subsidiaries or allied organizations." The vagueness and over breadth of the terms will, and indeed has, undoubtedly dissuaded groups from associating with ACORN for fear of being classified an "allied organization." (*See* Ismene Speliotis Aff., Ex. E.)

The burden on any group, corporation or association of a total ban from government funds or contracts is obviously "potentially harsh," as "disqualification from government contracting is a very serious matter" for organizations or corporations that do a significant amount of government work. *Sloan v. Dep't of Housing & Urban Dev.*, 231 F.3d 10, 17 (D.C. Cir. 2000). *See also Myers & Myers v. United States Postal Serv.*, 527 F.2d. 1252, 1259 (2d Cir. 1975) ("disqualification from bidding or contracting . . . directs the power and prestige of government at a particular person and . . . may have a serious economic impact on that person"). Where, as here, the burden on associational rights is "direct and substantial," raising a significant likelihood groups will refuse to associate with the targeted group, the challenged statute or regulation must be subject to strict scrutiny, requiring it to be narrowly tailored to serve a compelling government interest. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 919–20 (1982). This statute is clearly not narrowly tailored.

Freedom of association flows naturally from freedom of expression, and receives equally vigorous protection. *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). The government may not deny disfavored speakers the ability to unite and associate. *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449 (1958). Freedom of association is particularly valuable "in preserving political and cultural diversity and in shielding dissident expression from suppression by the

majority." *Jaycees*, 468 U.S. at 622; *see also NAACP v. Button*, 371 U.S. 415, 431 (1963). "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *Patterson*, 357 U.S. at 460.

While purely business relationships do not qualify for First Amendment protection, so long as an organization engages in "expressive association" it must be accorded the protections of the First Amendment's freedom to associate. *Sanitation & Recycling Indus. v. City of New York*, 107 F.3d 985, 996 (2d Cir. 1997); *Boy Scouts of Am. et al. v. Dale*, 530 U.S. 640, 648 (2000). Here plaintiffs all engage in expressive association in that the main purpose of their organizations is to promote the civil rights, social justice and economic interests of poor and working people. The organizations' activities are expressive and political: voter registration campaigns, advocating for rights, educating people about their rights, working on behalf of poor people, etc.

To avoid being considered an allied or affiliated organization, groups are forced to choose between a total bar on government grants and contracts and their rights to associate. In *Abood v. Bd. of Education*, 431 U.S. 209 (1977), teachers challenged a mandatory fee for union representation that was required by the school district. *Id.* This exaction made it likely that at least some teachers would forgo association with the union in order to maintain their employment. *Id.* at 234. The Court held that "government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment." *Id.*

While this case involves government contractors and not employees, the principle is the same. Indeed, the Supreme Court has held that for First Amendment purposes, government contractors, as well as employees, should be accorded similar constitutional protections. *Bd. of*

County Comm'rs, 518 U.S. at 684 ("there is no difference of constitutional magnitude between independent contractors and employees in the [the first amendment] context." "Independent government contractors are similar in most relevant respects to government employees."). *Id.* *See also Lefkowitz*, 414 U.S. at 83 (in the context of the privilege against self-incrimination, "we fail to see a 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").

Here the deprivation of government contracts is not based on a group's conduct, but purely on whether the group associates with ACORN. To condition government benefits "solely on association" is suspect. *Lloyd v. Philadelphia*, 1990 U.S. Dist. LEXIS 8073 at *16–17. As the Supreme Court noted in *Lyng v. Int'l Union*,

> Exposing the members of an association to physical and economic reprisals or to civil liability merely because of their membership in that group poses a much greater danger to the exercise of associational freedoms than does the withdrawal of a government benefit based not on membership in an organization but merely for the duration of one activity that may be undertaken by that organization.

485 U.S. 360, 367, N.5 (U.S. 1988).

The Continuing Resolution's ban on funds to ACORN and "affiliated and allied organizations" is clearly vague, overbroad and not narrowly tailored to meet a compelling governmental interest. A statute is vague if it requires "persons of common intelligence . . . necessarily [to] guess at its meaning and [to] differ as to its applicability." *Connally v. Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). The degree of precision required increases with the gravity of the penalty imposed and the importance of the rights at stake. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498–99 (1982). The statute at issue here is subject to the most stringent vagueness scrutiny on two grounds: it imposes a severe sanction of mandatory cut off of all government funding to contractors, and it trenches on speech and associational rights.

Sanitation & Recycling Indus. v. City of New York, 107 F.3d 985, 999 (2d Cir. 1997) illustrates the deficiency with this statute. In *Sanitation* the City of New York denied carting licenses not only to those who had been convicted of crimes, but also to anyone who (1) shared membership in a trade organization with a suspected or convicted carter, or who (2) harbored a "knowing association" with suspected or convicted racketeers. *Id.*

The *Sanitation* court found the restrictions "troublesome," in that they would likely squelch "even lawful expressive association for purely political purposes having nothing to do with the carting industry." *Id.* at 998. Ultimately the court did not invalidate, but instead read the statute narrowly to avoid these constitutional infirmities. *Id.* As to "knowing association," the court read in the requirement that the association must have had connections both to the carting industry and to the sorts of improprieties that the statute was meant to remedy. *Id.* As to trade associations, the court imposed an additional requirement that penalties only accrue if the trade association itself has been convicted. *Id.* at 999. In the end, the court properly required a high level of proven nefarious conduct before mere association could be used as a proxy for proof of wrongdoing. *Id.* Here, neither ACORN nor any of the groups potentially affected by the statute have been convicted of any crime. Moreover, there can be no question that barring funding for any undefined group "allied or affiliated" with ACORN is both vague and overbroad, and has had and will continue to have the effect of preventing foundations, banks and other organizations from associating with ACORN.

C. Section 163 of the Continuing Resolution Deprives Plaintiffs of Both a Liberty Interest and Property Right Without Due Process

The Continuing Resolution deprives plaintiffs of the right to bid on any government contract, including grants or contracts that would run for several years. (*See, e.g.*, Griffin Aff., Ex. B (ACORN Institute precluded from applying for 3 year, $6 million grant). In addition it

suspends or terminates contracts already in existence. It also prevents plaintiffs from being reimbursed for work already performed under those contracts, even if the government does not dispute that plaintiffs are otherwise entitled to be reimbursed. In the context of the legislative process that led to Section 163's enactment as well as the language of the statute, there can also be no doubt that these deprivations are based exclusively on unproven charges of fraud, corruption, criminal activity, illegal political partisanship and other misconduct. These allegations serve to stigmatize plaintiffs and damage their reputation and business.

In addition to being a Bill of Attainder, the Continuing Resolution thus also deprives Plaintiffs of a constitutionally protected liberty interest without due process. Under a well-established line of cases in this and other circuits, plaintiffs have "a liberty interest in avoiding the damage to its reputation and business caused by a stigmatizing suspension." *Reeve Aleutian Airways, Inc. v. United States*, 982 F.2d 594 (D.C. Cir. 1993); *see also Trifax Corp. v. District of Columbia*, 314 F.3d 641, 643 (D.C. Cir. 2003) ("[F]ormally debarring a corporation from government contract bidding constitutes a deprivation of liberty that triggers the procedural guarantees of the Due Process Clause.") (citing *Old Dominion Dairy Prods., Inc. v. Sec'y of Defense*, 631 F.2d 953, 961–62 (D.C. Cir. 1980)); *Bank of Jackson County v. Cherry*, 980 F.2d 1362, 1367 (11th Cir. 1993) ("[S]uspension or debarment of a government contractor on the basis of stigmatizing allegations deprives the contractor of liberty under the due process clause"). "An agency may not impose even a temporary suspension without providing the 'core requirement' of due process: adequate notice and a meaningful hearing." *Sloan v. Department of Housing & Urban Development*, 231 F.3d 10, 18 (D.C. Cir. 2000); *Hellenic Am. Neighborhood Action Committee v. City of New York*, 933 F. Supp. 286 (S.D.N.Y. 1996) (non-responsibility finding has a powerful stigmatizing effect that substantially limits a contractor's

opportunities and thus a liberty interest is implicated.), *rev'd on other grounds*, 101 F.3d 877 (2d Cir. 1996); *Ousama Karawia & Int'l Services Inc. v. United States Department of Labor*, 627 F. Supp. 2d 137, 153 (S.D.N.Y. 2009) ("[W]ithout the required notice and opportunity to be heard, adverse agency action which effectively precludes a contractor from obtaining government work violates due process."); *AFC Enter. v. NY City School Constr. Auth.*,1999 U.S. Dist. LEXIS 23401 (E.D.N.Y. 1999) (defendant's misrepresentation stigmatizing contractor resulting in its suffering a de facto debarment from city contracts set forth a liberty interest).

Here defendants have defamed plaintiffs, and smeared their "good name, reputation, honor and integrity." *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1991). As the legislative context makes clear, total debarment of ACORN and all "affiliated and allied organizations" is based on false—clearly unproven—allegations that plaintiffs are part of a "criminal enterprise" and a "corrupt" organization. Those congressional allegations indisputably show they have been barred from government work "amid allegation of dishonest, illegal or immoral conduct" and thus are "stigmatized enough to be unconstitutionally deprived of liberty." *AFC Enter.*, 1999 U.S. Dist. LEXIS at *34 (quoting *Esposito v. Metro-North Commuter R.R. Co.*, 856 F. Supp. 799, 804 (S.D.N.Y 1994).

It is also indisputable that none of the plaintiffs have been afforded any due process prior to or subsequent to the deprivation of their liberty. They never received any hearing, nor notification of and an opportunity to respond to the allegations of misconduct leveled against them. Nor have they received any of the procedural protections that a federal agency is required to provide even a temporarily suspended or debarred government contractor or grantee. The text of Section 163 requires debarment and provides for no hearing. The Continuing Resolution thus deprives plaintiffs of their liberty without due process.

While not as clearly established as the liberty interest, plaintiffs also have property rights to not have their contracts terminated or suspended without cause, and to reimbursement for work already completed on those contracts. (*See* Griffin Aff., and Ex. 4 (HUD Contracts with ACORN Institute and OMB Circular A 110 (providing for termination or suspension for cause)). Moreover, here the statute does not merely suspend or terminate a particular contract; it bars plaintiffs from even bidding on any government contract or grant, and requires private contractors to suspend their subcontracts with plaintiffs. That broad denial also deprives plaintiffs not only of their liberty, but also of property. *Hellenic Am.,* 933 F. Supp. at 295-96; *Myers & Myers*, 527 F.2d 1252. As then Judge Sotomayor said in *Hellenic Am.*, "the teaching of the Supreme Court and this Circuit recognize a Due Process property protection for a plaintiff's status as an entity eligible to bid on government contracts, where state law fetters discretion to debar or suspend bidders." *Helenic Am.*, 933 F. Supp. at 295–96.

Federal regulations clearly fetter the government's discretion to debar or suspend bidders. Under the applicable regulation "a suspension is justified *only* where there is 'adequate evidence' of wrongdoing *and* immediate action is necessary to protect the public interest. *Sloan*, 231 F.3d at 15 (citing 24 C.F.R. § 24.400(b)); *see also* 2 C.F.R. § 180.700 (dealing with suspension by federal agencies of grants); 48 C.F.R. § 9.407 (FAR regulations dealing with suspension). A contractor or grantee may only be suspended for eight reasons, and a suspension requires informal procedures "consistent with fundamental fairness" including, at minimum, notice of the reasons of suspension and an opportunity to respond. 48 C.F.R. § 9.407-2, 3; 2 C.F.R. § 180.610. In addition OMB Circular A-110 only allows the termination or suspension of a non-profit organization's grant for cause or with the consent of the grantee.

Moreover, as this Circuit has stated, government debarment or suspension of a corporation is far different from a mere denial of a particular contract or grant application. "Where a federal agency takes action to debar a private firm from further business relations with that agency, the effect is far different from that of simply denying an application for a contract." *Myers v. Myers*, 527 F.2d at 1258. *Myers* goes on to assert:

> Disqualification from bidding or contracting . . . directs the power and prestige of government at a particular person and . . . may have a serious economic impact on that person. . . . The governmental power must be exercised in accordance with accepted basic legal norms. Considerations of basic fairness require administrative regulations establishing standards for debarment and procedures which will include notice of specific charges, opportunity to present evidence and to cross-examine adverse witnesses, all culminating in administrative findings and conclusions based upon the record so made.

Id. (quoting *Gonzalez v. Freeman*, 334 F.2d 570 (D.C. Cir. 1964)).

Plaintiffs here have been denied any business relationship with any government or private agency subcontracting with federal funds, without any consideration of basic procedural fairness required by both the Constitution and the government's own regulations. They have been deprived of both liberty and property without due process.

II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM ABSENT A PRELIMINARY INJUNCTION

Plaintiffs allege constitutional deprivations of their rights under the Bill of Attainder Clause and the First and Fifth Amendments to the Constitution. "When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable harm is necessary." *Brewer v. The W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 744 (2d Cir. 2000) (quoting *Bery v. City of New York*, 97 F.3d 689, 699 (2d Cir. 1996) (equal protection violation sets forth necessary showing of irreparable harm); *Covino v. Patrissi*, 967 F.2d 73, 77 (2d Cir. 1992) (same, in the context of a Fourth Amendment violation); *Jolly v. Coughlin*, 76 F.3d 468,

482 (1996) (alleged violation of Eighth Amendment creates a presumption of irreparable injury); *Hellenic Am.*, 933 F. Supp. at 302 (Fourteenth Amendment due process violation based on contractor's suspension from city contracts constitutes irreparable harm).

Moreover, the First Amendment deprivation of freedom of speech and association alleged here always constitute irreparable harm. The Supreme Court and this Circuit have held that "even minimal impairments on [the right to free speech], create irreparable injury." *Able v. United States*, 88 F.3d 1280, 1288 (2d Cir. 1996) (citing *Elrod v. Burns*, 427 U.S. 347 (1976); *Air Transp. Int'l, LLC v. Aerolease Fin Group, Inc.*, 993 F. Supp. 118, 125 (D. Conn. 1998) (even "temporary deprivation" of a First Amendment right "is viewed of such qualitative importance as to be irremediable by any subsequent relief").

In addition, the deprivation of plaintiffs' constitutional rights has caused major disruption to plaintiffs' operations, and in the case of Acorn Institute, threatens its very existence. Plaintiff organizations which rely significantly on federal grants and contracts have had all of those funds cut off. Their working relationships with other federal contractors who subcontract with them have also been severed—perhaps permanently—if those contractors find other subcontractors to work with them. Federal grants lasting in some cases several years will be irretrievably lost to plaintiffs unless the bar on funding is immediately lifted.

For example, the economic hardship to ACORN Institute is draconian. It has laid of 85% of its employees in the little more than one month that the total bar from federal funding has existed. This Circuit has recognized that the "[M]ajor disruption of a business can be as harmful as termination, and a 'threat to the continued existence of a business can constitute irreparable injury.'" *Nemer Jeep-Eagle Inc. v. Jeep-Eagle Sales Corp.*, 992 F.2d 430, 435 (2d Cir. 1993)

(internal citation omitted). As the Court said in *Hellenic American* in granting a city contractor preliminary injunctive relief:

> [T]he bare facts of this case are that irreparable damage has and will continue to be done to HANAC's reputation and revenue by the City's indefinite debarment of HANAC, while HANAC is precluded from a meaningful opportunity to challenge that action by the City's short-circuiting of the administrative appeals process. Within a few months, HANAC stands to lose approximately 40% of its revenue, and would lose 70% if the City's policy were to remain in force as all of HANAC's City contracts come up for renewal. It also stands to lose its state and federal contracts because these entities rely on the VENDEX as well.

933 F. Supp. at 302.

Plaintiffs' clearly meet the test for irreparable harm. Therefore, plaintiffs are entitled to a preliminary and permanent injunction barring the continued enforcement of Section 163 of the Continuing Resolution and a temporary restraining order requiring defendants not to award grants or contracts that plaintiffs applied for until plaintiffs' motion for preliminary injunction is decided.[27]

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[27] Plaintiffs request that the Court waive the bond requirement of FRCP 65(c). While Rule 65(c) of the Federal Rules of Civil Procedure provides in part that "no restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper", the Courts have recognized an exception to the requirement where the plaintiffs seek to enforce an important public interest. Pharmaceutical Soc'y of New York, Inc. v. New York State Dep't of Soc. Servs., 50 F.3d 1168, 1174-5 (2d Cir. 1995); Ward v. State of New York 291 F.Supp. 2d 188, 211(W.D. NY 2003); Cosgrove v. Bd. of Educ. Of the Niskayuna Central Sch. Dist., 175 F. Supp. 2d 375, 398 (N.D.N.Y. 2001). In addition, courts have exercised their discretion to waive requiring security where suit is brought on behalf of poor people or where the effect of requiring security would deny access to judicial review. Pinoleville Indian Cmty. v. Mendocino Co. 684 F.Supp 1042,1047 (N.D. Cal 1988), People of California v. Tahoe Regional Planning Agency 766 F. 2d 1319, 1325-6 (9th Cir. 1985)

This lawsuit seeks to enforce important constitutional principles and is therefore in the public interest. Moreover, it would be ironic if the government could deprive an organization of its funds and then effectively deny it access to the courts by requiring a significant security bond in order to obtain preliminary relief. Moreover, the government would suffer no hardship by simply allowing plaintiffs to continue the work that they were performing to agencies satisfaction prior to October 1, and to allow ACORN to bid on awards and contracts in the future. Agencies still, of course, retain the ability to not provide awards to plaintiffs based on the merits of their proposals, or terminate them from specific contracts based on cause after according them due process protections.

CONCLUSION

For the reasons set forth above, Plaintiffs' motions for a temporary restraining order and preliminary injunction should be granted.

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Respectfully submitted,

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