

09-5172--cv (L); 10-0992-cv (CON)
ACORN v. United States

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

August Term 2009

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

Argued: June 24, 2010

Decided: August 13, 2010

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

Plaintiffs-Appellees,

- v. -

UNITED STATES OF AMERICA, SHAUN DONOVAN, Secretary of the Department of
Housing and Urban Development, PETER ORSZAG Director Office of Management and
Budget, TIMOTHY R. GEITHNER JR., Secretary of the Department of Treasury of the United
States, LISA P. JACKSON, Administrator of the Environmental Protection Agency, GARY
LOCKE, Secretary of Commerce, and ROBERT GATES, Secretary of Defense,

Defendants-Appellants.

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

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

Affirmed in part, vacated in part, and remanded.

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

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

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

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

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

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

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

37 MINER, Circuit Judge:

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

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

5 Plaintiffs-appellees, Association of Community Organizations for Reform Now
6 (“ACORN”), Acorn Institute , and New York Acorn Housing Company¹ (“New York Acorn” or,
7 collectively with ACORN and Acorn Institute, the “plaintiffs”) brought this action challenging
8 provisions in several federal appropriations laws barring the distribution of federal funds to
9 ACORN and its affiliates, subsidiaries, and allied organizations. The District Court struck down
10 the challenged provisions, holding that (1) the plaintiffs have Article III standing to challenge the
11 appropriations laws against all of the defendants, including the Secretary of Defense and the
12 Director of OMB; and (2) the appropriations laws singling out ACORN and its affiliates from
13 obtaining federal funds (a) fell within the historical meaning of legislative punishment, (b) did
14 not further a non-punitive legislative purpose, and (c) were supported by a legislative record that
15 evinced an intent to punish. Accordingly, the court enjoined the defendants from enforcing the
16 challenged provisions of the appropriations laws.

17 **I. BACKGROUND**

18 A. The Plaintiffs

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

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

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

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

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

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

24 B. Mismanagement, Fraud, and Congressional Response

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

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

11 ACORN's reputation suffered further upon accusations of voter registration fraud, for
12 which ACORN's workers had been convicted in prior years. Between October 2008 and May
13 2009, two more ACORN workers were charged with, and convicted of, voter registration fraud.
14 While ACORN adopted "several good-governance policies" to address the problems identified in
15 the internal report, a new scandal arose in the summer of 2009 when "hidden camera" videos
16 revealed ACORN employees and volunteers providing advice and counseling in support of a
17 proposed prostitution business.

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

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

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

8 On October 1, 2009, Congress passed a “stop-gap” appropriations law to fund federal
9 agencies prior to the enactment of the 2010 Fiscal Year appropriations. See Continuing
10 Appropriations Resolution (“Continuing Resolution”), 2010, Pub. L. No. 111-68, Div. B, § 163,
11 123 Stat. 2023, 2053 (2009). Section 163 of the Continuing Resolution singled out ACORN as
12 follows:

13 None of the funds made available by this joint resolution or any prior Act may be
14 provided to the Association of Community Organizations for Reform Now
15 ACORN, or any of its affiliates, subsidiaries, or allied organizations.

16 Id. The provisions of the Continuing Resolution — including Section 163 — were set to expire
17 on December 18, 2009. See Department of the Interior, Environment, and Related Agencies
18 Appropriations Act, 2010, Division B — Further Continuing Appropriations, 2010, § 101, Pub.
19 L. No. 111-88, 123 Stat. 2904, 2972 (2009).

20 In a memorandum dated October 7, 2009, the Director of OMB advised the heads of all
21 executive agencies, inter alia, (1) that Section 163 prohibited them from providing any federal
22 funds to ACORN and its affiliates, subsidiaries, and allied organizations during the period of the
23 Continuing Resolution; (2) to suspend any existing contracts with ACORN and its affiliates
24 “where permissible”; and (3) to take steps “so that no Federal funds are awarded or obligated by
25 your grantees or contractors to ACORN or its affiliates as subcontractors, or other
26 subrecipients.” In a subsequent memorandum, the Office of Legal Counsel clarified that Section
27 163 would not prohibit funds to be paid pursuant to binding contractual obligations that predated

1 the exclusion.

2 C. Entry of Preliminary Injunction and Subsequent Developments

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

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

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

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

4 (1) whether any Federal funds were misused and, if so, the total amount of
5 Federal funds involved and how such funds were misused;

6 (2) what steps, if any, have been taken to recover any Federal funds that were
7 misused;

8 (3) what steps should be taken to prevent the misuse of any Federal funds; and

9 (4) whether all necessary steps have been taken to prevent the misuse of any
10 Federal funds[.]

11 Commerce, Justice, Science, and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-
12 117, Div. B, § 535, 123 Stat. 3034, 3157–58 (2009). Section 535 required the GAO to submit its
13 report “[n]ot later than 180 days after the enactment of this Act.” Id. at 3158.

14 D. Declaratory Relief and Permanent Injunction

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

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

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

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

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

11 II. DISCUSSION

12 A. Standard of Review

13 We review a district court’s grant of a permanent injunction for abuse of discretion.
14 Reynolds v. Giuliani, 506 F.3d 183, 189 (2d Cir. 2007). A district court abuses its discretion
15 “when (1) its decision rests on an error of law (such as application of the wrong legal principle)
16 or a clearly erroneous factual finding, or (2) its decision — though not necessarily the product of
17 a legal error or a clearly erroneous factual finding — cannot be located within the range of
18 permissible decisions.” Kickham Hanley P.C. v. Kodak Ret. Income Plan, 558 F.3d 204, 209
19 (2d Cir. 2009) (internal quotation marks omitted). Our review of questions of law is de novo.
20 See, e.g., Spiegel v. Schulmann, 604 F.3d 72, 76 (2d Cir. 2010); Ascencio-Rodriguez v. Holder,
21 595 F.3d 105, 110 (2d Cir. 2010); Donk v. Miller, 365 F.3d 159, 164 (2d Cir. 2004).

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

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

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

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

15 The plaintiffs cannot be said to lack standing to sue a government agency constrained to
16 enforce a law that specifically names ACORN and prevents the plaintiffs from receiving federal
17 funds. Cf. Foretich v. United States, 351 F.3d 1198, 1213 (D.C. Cir. 2003) (holding that plaintiff
18 had standing to challenge as a bill of attainder a statute that deprived him of his child visitation
19 rights — even though his child was eighteen and the statute no longer had any effect on his right
20 to see her — because “Congress’s act of judging [Foretich] and legislating against him on the
21 basis of that judgment . . . directly give[s] rise to a cognizable injury to his reputation”); see also
22 5 U.S.C. § 702 (when enjoining the United States for agency actions, the court is required to
23 name all officials who are responsible for compliance with the injunction). Even if the plaintiffs
24 are not and never will be interested in applying for grants or funding from the Department of
25 Defense, the fact that the defense department’s appropriations law specifically prohibits ACORN
26 and its affiliates from being eligible for federal funds affects the plaintiffs’ reputation with other

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

3 The government’s argument that the plaintiffs lack standing to sue the Director of OMB
4 is similarly misplaced. Although the government asserts that OMB has no authority to enforce
5 federal statutes, OMB “oversee[s] the execution” of the federal budget and has a continuing
6 responsibility to explain appropriations provisions to agencies. See U.S.C.A. Reorg. Plan 2
7 1970, 84 Stat. 2085, as amended by Pub. L. No. 97-258, § 5(b), 96 Stat. 1068, 1085 (1982)
8 (stating that the OMB performs the “key function of assisting the President in the preparation of
9 the annual Federal budget and overseeing its execution”). See generally id. (“While the budget
10 function remains a vital tool of management, . . . [t]he new Office of Management and Budget
11 will place much greater emphasis on the evaluation of program performance . . . [and] expand
12 efforts to improve interagency cooperation.”). To that end, OMB’s now-rescinded memorandum
13 — which is the basis for the plaintiffs’ claim of reputational injury with respect to Section 163
14 — was issued. As explained by the District Court, notwithstanding the rescission of the OMB
15 memorandum and expiration of Section 163, the OMB memorandum continues to exert
16 influence over the plaintiffs’ reputation:

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

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

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

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

11 C. Bill of Attainder

12 The Constitution prohibits the enactments of “bills of attainder.” See U.S. Const. art. I, §
13 9 (prohibiting Congress); id. § 10 (prohibiting states). Historically, a bill of attainder
14 was a device often resorted to in sixteenth, seventeenth and eighteenth century
15 England for dealing with persons who had attempted, or threatened to attempt, to
16 overthrow the government. In addition to the death sentence, attainder generally
17 carried with it a “corruption of blood,” which meant that the attainted party’s
18 heirs could not inherit his property. The “bill of pains and penalties” was
19 identical to the bill of attainder, except that it prescribed a penalty short of death,
20 e.g., banishment, deprivation of the right to vote, or exclusion of the designated
21 party’s sons from Parliament. Most bills of attainder and bills of pains and
22 penalties named the parties to whom they were to apply; a few, however, simply
23 described them. While some left the designated parties a way of escaping the
24 penalty, others did not.

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

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

1 Constitution’s prohibition against bills of attainder “was intended not as a narrow, technical (and
2 therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of
3 powers, a general safeguard against legislative exercise of the judicial function, or more simply
4 — trial by legislature”). Indeed, it can be said that the broadness of the American prohibition of
5 bills of attainder under Article I, section 9 is more a reflection of the Constitution’s concern with
6 fragmenting the government power than merely preventing the recurrence of unsavory British
7 practices of the time. See generally Roger J. Miner, Identifying, Protecting and Preserving
8 Individual Rights: Traditional Federal Court Functions, 23 SETON HALL L. REV. 821, 826–30
9 (1992–1993) (discussing bills of attainder).

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

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

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

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

7 1. Historical Test of “Punishment”

8 The Supreme Court has recognized that certain types of punishment are “so
9 disproportionately severe and so inappropriate to nonpunitive ends that they unquestionably have
10 been held to fall within the proscription of the [Bill of Attainder Clause].” Nixon v. Adm’r of
11 Gen. Servs., 433 U.S. 425, 473 (1977). “The classic example is death, but others include
12 imprisonment, banishment, the punitive confiscation of property, and prohibition of designated
13 individuals or groups from participation in specified employments or vocations.” Con. Edison,
14 292 F.3d at 351 (internal quotation marks, alteration, and ellipsis omitted). A familiar theme in
15 these classic examples of punishment is the initial determination by the legislature of “guilt.”
16 See De Veau v. Braisted, 363 U.S. 144, 160 (1960) (“The distinguishing feature of a bill of
17 attainder is the substitution of a legislative for a judicial determination of guilt.”).

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

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

1 punishment that is “considered to be punitive per se.” See Con. Edison, 292 F.3d at 351.
2 Congress’s decision to withhold funds from ACORN and its affiliates constitutes neither
3 imprisonment, banishment, nor death. The withholding of funds may arguably constitute a
4 punitive confiscation of property at some point, but the plaintiffs do not assert that they have
5 property rights to federal funds that have yet to be disbursed at the agency’s discretion. We note,
6 further, that “[t]here may well be actions that would be considered punitive if taken against an
7 individual, but not if taken against a corporation.” Id. at 354. In comparison to penalties levied
8 against individuals, a temporary disqualification from funds or deprivation of property aimed at a
9 corporation may be more an inconvenience than punishment. While ACORN claims that it will
10 be “drive[n] close to bankruptcy” and may suffer a “corporate death sentence” without federal
11 funds, the Harshbarger Report reveals that ACORN only derives 10% of its funding from federal
12 grants. Thus, we doubt that the direct consequences of the appropriations laws temporarily
13 precluding ACORN from federal funds are “so disproportionately severe” or “so inappropriate”
14 as to constitute punishment per se. See Nixon, 433 U.S. at 472 (“Forbidden legislative
15 punishment is not involved merely because the Act imposes burdensome consequences.”).

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

1 appropriated under that power are . . . not frittered away in graft or on projects undermined when
2 funds are siphoned off or corrupt public officers are derelict about demanding value for dollars.”
3 (internal citations omitted)). And, in any event, according to the plaintiffs, at least one state that
4 had previously suspended funding to the plaintiffs has restored funding to New York Acorn. See
5 28(j) Letter on Behalf of ACORN (dated June 22, 2010). Thus, the plaintiffs’ claim of alienation
6 — that is, their claim that they have been tainted with “a note of infamy” — is not as severe as
7 the plaintiffs assert.

8 Of course, as discussed in more detail infra Analysis II(B)(3) (Motivational Test of
9 Punishment), there is some evidence in the record indicating that ACORN was precluded from
10 receiving federal funds upon the legislature’s determination that ACORN was guilty of abusive
11 and fraudulent practices. This evidence points in the direction of a traditional form of
12 punishment. See De Veau, 363 U.S. at 160. “The fact that the punishment is inflicted through
13 the instrumentality of an Act specifically cutting off the pay of certain named individuals found
14 guilty of disloyalty, makes it no less galling or effective than if it had been done by an Act which
15 designated the conduct as criminal.” Lovett, 328 U.S. at 316. Nonetheless, despite statements
16 about ACORN’s guilt on the legislative floor, the appropriations laws themselves do not mention
17 ACORN’s guilt in any way. Cf. Con. Edison, 292 F.3d at 344 (the challenged law expressly
18 found that Consolidated Edison had failed “to exercise reasonable care”). Moreover, unlike
19 Lovett, here, there was no congressional “trial” to determine ACORN’s guilt. Cf. Lovett, 328
20 U.S. at 310–12 (involving a secret congressional trial for engaging in subversive Communist
21 activities, with the suspected Communists allowed to testify in their defense). As the Supreme
22 Court noted in Flemming v. Nestor, 363 U.S. 603, 617–19 (1960), where a court is left only with
23 the legislative history of a law that is impugned as a bill of attainder, there must be
24 “unmistakable evidence of punitive intent [in the legislative history] . . . before a Congressional
25 enactment of this kind may be struck down.” Although there is some evidence of a
26 determination of guilt in the legislative history of the appropriations laws, for the reasons stated

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

5 2. Functional Test of Punishment

6 The functional test of punishment looks to whether the challenged law, “viewed in terms
7 of the type and severity of burdens imposed, reasonably can be said to further nonpunitive
8 legislative purposes.” Nixon, 433 U.S. at 475. “It is not the severity of a statutory burden in
9 absolute terms that demonstrates punitiveness so much as the magnitude of the burden relative to
10 the purported nonpunitive purposes of the statute.” Foretich, 351 F.3d at 1222. Thus, “[a] grave
11 imbalance or disproportion between the burden and the purported nonpunitive purpose suggests
12 punitiveness, even where the statute bears some minimal relation to nonpunitive ends.” Id.;
13 accord Con. Edison, 292 F.3d at 350 (“Where a statute establishing a punishment declares and
14 imposes that punishment on an identifiable party . . . we look beyond simply a rational
15 relationship of the statute to a legitimate public purpose for less burdensome alternatives by
16 which the legislature could have achieved its legitimate nonpunitive objectives.” (internal
17 quotation marks, ellipsis, and alterations omitted)).

18 Initially, the plaintiffs appear to suggest that the appropriations laws are presumptively
19 unconstitutional bills of attainder because they specifically named ACORN for exclusion from
20 federal funds. But Congress may single out an entity or person in its legislation. See Nixon, 433
21 U.S. at 469–72 (rejecting the argument that “the Constitution is offended whenever a law
22 imposes undesired consequences on an individual or on a class that is not defined at a proper
23 level of generality”); Con. Edison, 292 F.3d at 350 (“A legislature may legitimately create a
24 ‘class of one’ for many purposes.”). Although the specific naming of ACORN in the
25 appropriations laws satisfies one classic mark of a bill of attainder — and is certainly relevant in
26 assessing the plausibility of the alleged punitive purposes of the challenged law, see Foretich,

1 351 F.3d at 1224 — such specificity does not create a presumption of unconstitutionality.
2 Because the party challenging a congressional law as an unconstitutional bill of attainder bears
3 the burden of proof, see Con. Edison, 292 F.3d at 350 (“The party challenging the statute has the
4 burden of establishing that the legislature’s action constituted punishment and not merely the
5 legitimate regulation of conduct.” (internal quotation marks and alteration omitted) (emphasis
6 added)), we accord no presumption that the appropriations laws specifying ACORN for
7 exclusion constitute bills of attainder.

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

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

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

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

1 Clause where the legislative act, which prohibited Consolidated Edison from recovering costs
2 from its ratepayers, was aimed at the allocation of private funds). While withholding federal
3 funds may constitute punishment in certain circumstances, a temporary ban on federal assistance
4 to the groups at issue here — ACORN (which admitted to mismanagement and embezzlement
5 and suffered numerous convictions of its workers), and Acorn Institute and New York Acorn
6 (which were part of a complex web of interrelated entities with ACORN) — is not comparable to
7 congressional acts of punishment such as permanent disqualification from a certain vocation or
8 criminalizing past conduct. See, e.g., Brown, 381 U.S. at 455; Pierce v. Carskadon, 83 U.S. 234
9 (1872); Ex Parte Garland, 71 U.S. 333 (1867); Cummings v. Missouri, 71 U.S. 227 (1867); cf.
10 Selective Serv. Sys., 468 U.S. at 853 (upholding law that withheld federal student assistance to
11 men who had not registered for the draft); Flemming, 363 U.S. at 618–21 (upholding law that
12 excluded certain deportees from receiving social security benefits). Compare Am. Commc’ns
13 Ass’n, C.I.O. v. Douds, 339 U.S. 382, 413–15 (1950) (rejecting bill-of-attainder challenge
14 against a law that required union officers to file affidavits — that they were not Communist
15 Party members and that they did not favor the overthrow of the United States government by
16 force or violence — in order to invoke the assistance and services of the NLRB), with Brown,
17 381 U.S. at 455 (declaring unconstitutional a law that made it a crime for a member of the
18 Communist Party to serve as a union officer or manager).

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

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

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

6 In sum, the plaintiffs have failed to show that the appropriations laws constitute
7 “punishment” under the functional test.

8 3. Motivational Test of Punishment

9 The legislative record by itself is insufficient evidence for classifying a statute as a bill of
10 attainder unless the record reflects overwhelmingly a clear legislative intent to punish. See
11 Flemming, 363 U.S. at 617 (“[O]nly the clearest proof could suffice to establish the
12 unconstitutionality of a statute on [the] ground [of legislative history.]”); see also Lovett, 328
13 U.S. at 308–12 (recounting extensive evidence of punitive intent in the legislative record).
14 Statements by a smattering of legislators “do not constitute [the required] unmistakable evidence
15 of punitive intent.” Selective Serv. Sys., 468 U.S. at 856 n.15 (internal quotation marks
16 omitted).

17 Here, as the plaintiffs argue, the legislative record reveals much concern about protecting
18 the expenditure of taxpayer money against “waste, fraud, and abuse.” 155 Cong. Rec. S9517
19 (daily ed. Sept. 17, 2009) (Senator Johanns); see also 155 Cong. Rec. S11313 (daily ed. Nov. 10,
20 2009). Senator Bond described the exclusion as necessary because of ACORN’s “endemic and
21 systemwide culture of fraud and abuse” and stated that Congress had “the opportunity to end this
22 relationship now.” 155 Cong. Rec. S9314 (daily ed. Sept. 14, 2009). Congressman Issa
23 published an eighty-eight-page staff report that concluded that ACORN and organizations
24 associated or allied with it constituted “a criminal enterprise” that had “repeatedly and
25 deliberately engaged in systemic fraud” and “committed a conspiracy to defraud the United

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

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

6 According to the plaintiffs, nearly ten members of the House of Representatives assailed
7 ACORN as “this crooked bunch,” “this corrupt and criminal organization,” and being involved
8 in “child prostitution,” “shaking down lenders,” “corrupting our election process,” “trafficking
9 illegal aliens,” and being in the “criminal hall of fame,” among other epithets and accusations.
10 See 155 Cong. Rec. H9946–10129. There were also, however, representatives who opposed the
11 exclusion of ACORN during these debates. For example, Senator Durbin stated: “[W]e are
12 seeing in Congress an effort to punish ACORN that goes beyond any experience I can recall in
13 the time I have been on Capitol Hill. We have put ourselves — with some of the pending
14 amendments — in the position of prosecutor, judge and jury.” 155 Cong. Rec. S10181, 10211
15 (daily ed. Oct. 7, 2009). Senator Leahy similarly protested the attack on ACORN: “Everyone —
16 except perhaps many of the casual observers who are the target audience of the orchestrated anti-
17 ACORN frenzy — knows that the score-at-any-price partisanship is being mixed in an unseemly
18 way with public policy.” 155 Cong. Rec. S9541–42 (daily ed. Sept. 17, 2009).

19 Despite the evidence of punitive intent on the part of some members of Congress, unlike
20 in Lovett, there is no congressional finding of guilt in this case. In Lovett, a secret trial was held
21 by Congress to determine the guilt or innocence of the accused subversives. Upon a finding of
22 guilt, Congress passed the law denying the accused their salary for federal service. Thus, in
23 Lovett, the congressional record was “unmistakably” clear as to Congress’s intent to punish the
24 subject individuals. Here, at most, there is the “smattering” of legislators’ opinions regarding
25 ACORN’s guilt of fraud. See United States v. O’Brien, 391 U.S. 367, 384 (1968) (“What
26 motivates one legislator to make a speech about a statute is not necessarily what motivates scores

1 of others to enact it.”); cf. Selective Serv. Sys., 468 U.S. at 855–56 (upholding law denying
2 federal financial assistance for higher education to male students who failed to register for the
3 draft; in that case, as here, many legislators commented that the men who failed to register for
4 the draft had committed a “felony, they have violated the law, and they are not entitled to these
5 educational benefits”); BellSouth Corp., 162 F.3d at 690 (sustaining provision that placed special
6 restrictions on Bell operating companies and dismissing a “few scattered remarks referring to
7 . . . abuses allegedly committed by [Bell operating companies] in the past” as not providing the
8 kind of “‘smoking gun’ evidence of congressional vindictiveness”).

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

15 **III. CONCLUSION**

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