UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW, et al.,	:	Civil Action No. 09-CV-4888 (NG)
Plaintiffs,	:	(Gershon, J.)
vs.	:	(Bloom, M.J.)
UNITED STATES OF AMERICA, et al.,	:	
Defendants.	:	

MOTION AND SUPPORTING MEMORANDUM TO STAY DECLARATORY JUDGMENT AND PERMANENT INJUNCTION PENDING APPEAL OR, IN THE ALTERNATIVE, FOR A TEMPORARY ADMINISTRATIVE STAY PENDING THE COURT OF APPEALS' RESOLUTION OF DEFENDANTS' MOTION PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 8

INTRODUCTION

This Court has enjoined Defendants from enforcing a number of statutes that the Court itself recognized "enjoy a high presumption of legitimacy." March 10, 2010 Opinion and Order (Dock No. 50) at 2 ("Opinion"). Neither the Court of Appeals for the Second Circuit, nor the Supreme Court, has ever held that the withholding of a corporate entity's opportunity to apply for discretionary government funds is "punitive" within the meaning of the bill of attainder clause. Enforcement of the declaratory judgment and injunction prior to review by the Court of Appeals is at odds with the presumption of constitutionality that attaches to every Act of Congress. As explained below, Defendants have a substantial likelihood of success on appeal. Moreover, given the harm to the government from enjoining a presumptively valid Act of Congress prior to appellate review, the specific effects of the injunction on HUD and other agencies, and the likely possibility

that funds will be disbursed to Plaintiffs for which Defendants will be unable to recover, the balance of hardships weigh in Defendants' favor.

STANDARD OF REVIEW

Defendants seek a stay of the permanent injunction pending appeal pursuant to Fed. R. Civ. P. 62(c) which provides that "[w]hen an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal ..." In this Circuit, four factors must considered before staying the actions of a lower court including: (1) whether the movant has demonstrated a substantial possibility, although less than a likelihood of success, on appeal; (2) whether the movant will suffer irreparable injury absent a stay; (3) whether another party will suffer irreparable injury if a stay is issued; and (4) the public interests that may be affected. See Hirschfeld v. Bd. of Elections, 984 F.2d 35, 39 (2d Cir.1993); see also In re World Trade Center Disaster Site Litigation, 503 F.3d 167, 170-71 (2d Cir. 2007).

In Mohammed v. Reno, 309 F.3d 95 (2d Cir. 2002), the Second Circuit surveyed how different courts have analyzed the likelihood of success necessary for issuing a stay, ultimately agreeing with the District of Columbia Circuit's approach, whereby "[t]he necessary 'level' or 'degree' of possibility of success will vary according to the court's assessment of the other [stay] factors." Id. at 101 (*quoting* Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977)). The Court observed: "[t]he probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiff will suffer absent the stay. Simply stated, more of one excuses less of the other." Mohammed, 309 F.3d at 101 (citing Washington Metro. Area Transit Comm'n, 559 F.2d at 843)).

ARGUMENT

A. Defendants Have a Substantial Likelihood of Prevailing on their Appeal

The three-part test articulated by the Supreme Court to determine whether an act of Congress is "punishment" within the meaning of the Bill of Attainder Clause derives from (1) whether the challenged statute "falls within the meaning of legislative punishment;" (2) whether "viewed in terms of the type and severity of burdens imposed, [the statute] reasonably can be said to further nonpunitive legislative purposes;" and (3) whether the legislative record "evinces a congressional intent to punish." Selective Serv. Sys. v. Minn. Public Interest Research Group, 468 U.S. 841, 852 (1984); see also Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 473, 475-76, 478 (1977); Consol. Edison Co. of New York v. Pataki, 292 F.3d 338, 350 (2d Cir. 2002) ("The party challenging the statute has the burden of establishing that the legislature's action constituted punishment . . . .") (citation omitted). When applied here, these principles confirm that the temporary funding suspensions at issue are not "punishment," but instead valid exercises of the Congressional power-of-the-purse to protect the public fisc.

First, it is altogether unclear whether the decision not to appropriate discretionary funds to a corporate entity such as ACORN or its affiliates constitutes punishment within the historical meaning of the bill of attainder clause. As this Court readily acknowledges, the "idea that the deprivation of the opportunity to apply for discretionary federal funds is 'punitive' within the meaning of the attainder clause at first blush seems implausible." Opinion at 12. Noting the lack of guidance from either the Supreme Court or Second Circuit, this Court relies upon the reasoning of an unpublished district court decision in another Circuit regarding a state law. Id. See Fla. Youth Conservation Corps., Inc. v. Stutler, 2006 WL 1835967, at *2 (N.D. Fla. June 30, 2006).

Leaving that unpublished opinion aside, each legislative decision regarding prospective, discretionary funding must be viewed in context. More recently, the Eleventh Circuit Court of Appeals upheld a restriction which withheld government funds from a group of state felons and sex offenders. See Houston v. Williams, 547 F.3d 1357, 1360-61, 1364 (11th Cir. 2008). In that case, despite otherwise meeting federal eligibility requirements, plaintiff's application for federal funds for weatherization assistance was denied because of his criminal history. Id. at 1360. In upholding the prospective, discretionary funding restriction, the Court of Appeals concluded that the district court correctly determined that the policy did not inflict punishment and furthered "the non-punitive goal of allocating resources." Id. at 1364. Although Houston did not involve a federal law, it is worth noting that the Court of Appeals viewed the exclusion of felons and sex offenders as simply motivated by the "non-punitive goal of allocating resources," rather than finding guilt on a specified charge. Thus, there is at least a reasonable possibility that the Second Circuit could also consider non-punitive a decision about how to distribute scarce resources.

"In England a bill of attainder originally connoted a parliamentary Act sentencing a named individual or identifiable members of a group to death." Nixon, 433 U.S. at 473. In American history, the Constitution's ban on bills of attainder was also applied to imprisonment, banishment, and the punitive confiscation of property. See id. at 473-74. More recently, the Supreme Court has expanded the definition of punishment to include "legislative enactment[s] barring designated individuals or groups from participation in specified employments or vocations, a mode of punishment commonly employed against those legislatively branded as disloyal." Id. at 474; see also Selective Serv. Sys., 468 U.S. at 852; Navegar, Inc. v. United States, 192 F.3d 1050, 1066 (D.C. Cir. 1999); Atonio v. Wards Cove Packing Co., Inc., 10 F.3d 1485, 1496 (9th Cir. 1993). Thus, while the

Supreme Court has not strictly limited the Bill of Attainder Clause to the punishments specifically contemplated by the Framers, the Court has found it applicable in only five instances, in each of which Congress had, in fact, inflicted punishment on individuals or groups of individuals for political acts or beliefs.

Plaintiffs here, by contrast, have merely experienced the denial of certain prospective governmental grants and contracts, from only certain agencies, and even then for only a finite period of time. In general, the Supreme Court has indicated that the denial of a benefit does not constitute historical punishment in the bill of attainder context. In Flemming v. Nestor, 363 U.S. 603 (1960), the Court considered whether the denial of Social Security benefits to an eligible alien who was deported constituted a bill of attainder. The Court observed that this denial did not fall within the traditional meaning of a legislative punishment. Id. at 617 ("Here the sanction is the mere denial of a noncontractual governmental benefit."); see also Selective Serv. Sys., 468 U.S. at 853 (quoting Flemming v. Nestor for this point).

Courts considering whether certain legislative acts have constituted punishment for bill of attainder purposes have typically found punishment only when the statutes singled out individuals or groups of individuals for punishment – not corporate entities like plaintiffs here. True, the one notable exception to this historical pattern arose in this Circuit, when the Court of Appeals struck down a state statute in Con. Ed. as a bill of attainder. But a statute which precludes a public utility from setting rates so as to pass on to their ratepayers the legitimate costs associated with restoring power after an outage (costs the utility would normally be entitled to recapture) is a far cry from statutes which temporarily bar a specified corporate entity from receiving discretionary funds to which they have no legal or historical entitlement. Courts have generally looked with skepticism at

claims by corporate entities claiming that certain legislation has punished them, see, e.g., SeaRiver Mar. Fin. v. Mineta, 309 F.3d 662, 673-74 (9th Cir. 2002), and there is a substantial possibility that, notwithstanding Con. Ed., the Second Circuit will do the same here.[1]

Second, even applying the "functional test" to gauge whether the legislation at issue constitutes a bill of attainder, the Court of Appeals may have questions about whether the burdens imposed serve a legitimate, nonpunitive purpose. The functional test inquires:

> whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes. Where such legitimate legislative purposes do not appear, it is reasonable to conclude that punishment of individuals disadvantaged by the enactment was the purpose of the decisionmakers.

Nixon, 433 U.S. at 475-76, 97 S.Ct. 2777 (internal citations omitted); see also Hawker v. New York, 170 U.S. 189, 196 (1898) (rejecting bill of attainder and ex post facto challenges to a statute barring ex-felons from the practice of medicine); SeaRiver, 309 F.3d at 674 ("[E]ven if the Act singles out an individual on the basis of irreversible past conduct, if it furthers a nonpunitive legislative purpose, it is not a bill of attainder.").

The funding suspension provisions at issue here "can be said to further nonpunitive legislative purposes." Selective Serv. Sys., 468 U.S. at 852 (internal quotation marks omitted). Congress chose to deny discretionary financial support to an organization that it had a legitimate reason to fear might misuse the funds. To address these changes, Congress commissioned a GAO investigation of that organization's use of funds and acted to protect appropriated funds. These Congressional concerns

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[1] Moreover, there are reasons to doubt whether a corporate entity really suffers a justiciable injury to its "reputation" when Congress passes a law that cuts off its funding. Notably, the cases relied upon in this Court's opinion regarding reputational injury relate to individuals not corporations. See Foretich v. United States, 351 F.3d 1198, 1213 (D.C. Cir. 2003); Gully v. Nat'l Credit Union Admin. Bd., 341 F.3d 155, 161-62 (2d Cir. 2003).

for preventing future waste, fraud, and abuse, and monitoring agency distribution of funds, coming in the form of withholding discretionary payments, constitutes a nonpunitive purpose and a legitimate exercise of the Article I power-of-the-purse.

Finally, the search for punitive legislative motives is rarely significant. As the Supreme Court explained:

> We observe initially that only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground. Judicial inquiries into Congressional motives are at best a hazardous matter, and when that inquiry seeks to go behind objective manifestations it becomes a dubious affair indeed. Moreover, the presumption of constitutionality with which this enactment, like any other, comes to us forbids us lightly to choose that reading of the statute's setting which will invalidate it over that which will save it.

Fleming v. Nestor, 363 U.S. 603, 617 (1960); see also Selective Serv. Sys., 468 U.S. 841, 855 n.15 (1984) (requiring "unmistakable evidence of punitive intent" by Congress before a statute may be invalidated on bill of attainder grounds) (quoting Fleming, 363 U.S. at 619) (emphasis added). The Court of Appeals for this Circuit has echoed that "[t]he legislative record by itself is insufficient evidence for classifying a statute as a bill of attainder unless the record reflects overwhelmingly a clear legislative intent to punish." Con. Ed., 292 F.3d at 354 (emphasis added). "Statements by a smattering of legislators do not constitute the required unmistakable evidence of punitive intent." Id. (citation and quotation omitted) (emphasis added); see also United States v. O'Brien, 391 U.S. 367, 384 (1968) ("What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it."); Edwards v. Aguillard, 482 U.S. 578, 637-638 (1987) (Scalia, J., dissenting).

B. The Government Will Be Irreparably Harmed Absent a Stay

The Government will suffer irreparable harm absent a stay of this Court's order. The presumption of constitutionality of a valid enactment of Congress is an equity to be considered in Defendants' favor in weighing a stay of an injunction. See Walters v. National Association of Radiation Survivors, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers); see also New Motor Vehicle Board v. Orrin W. Fox Co., 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). This rationale applies to staying declaratory judgments as well. See Bowen v. Kendrick, 483 U.S. 1304, 1304 (1987) (Rehnquist, J., in chambers) (observing that "[i]t has been the unvarying practice of this Court ... to note probable jurisdiction and decide on the merits all cases in which a single district judge declares an Act of Congress unconstitutional. In virtually all of these cases the Court has also granted a stay if requested to do so by the Government.")

The harm from declaring an Act unconstitutional is not simply theoretical, but has a real world impact on the government's ability to effectively administer programs. See, e.g., Ledbetter v. Baldwin, 479 U.S. 1309, 1310 (1986) (Powell, J., in chambers) (finding irreparable harm and granting stay of injunction where district court order holding state regulations unconstitutional would cause state government to incur administrative costs and make payments which would later be unrecoverable); c.f., Forum for Acad. and Inst. Rights, Inc. v. Rumsfeld, 291 F.Supp.2d 269, 322 (D.N.J. 2003) (harm to the government in being precluded from enforcing "presumptively valid" Solomon Amendment outweighed harm to plaintiffs in absence of injunction); Christian Civic League of Maine, Inc. v. F.E.C., 433 F.Supp.2d 81, 90 (D.D.C. 2006) (injunction would "substantially injure" the Federal Election Commission and the public given the presumption of constitutionality and the statutory duty of the Commission to enforce the Bipartisan Campaign Reform Act of 2002). A similar type of real world impact would be felt immediately by Defendants in administering their

respective programs.

In the absence of a stay, Defendant HUD will be forced by the terms of the injunction to provide funds to ACORN Institute and MHANY and perhaps other ACORN affiliates covered by the statute (hereafter referred to as "covered entities").[2] If the current injunction is not stayed–but then is later vacated by the Court of Appeals upon a holding that these provisions are constitutional–ACORN, ACORN Institute, MHANY, and other covered entities are likely to have already performed work in the intervening period under the renewed contract or grant, work for which they will have already received payment. Moreover, given the rather complicated and opaque structure of ACORN and other covered entities, not to mention ACORN's history of maintaining poor internal controls as documented in the previously-submitted Harshbarger Report, it may be difficult to trace exactly which groups received money through subcontracts and determine when and where money was disbursed in the intervening period. At least as significant is that if HUD and/or other agencies award Plaintiffs multi-year government grants during the period of the injunction, and the injunction is vacated on appeal, HUD and other agencies would be forced either to rescind the awards and unwind ongoing federal programs, or (if that is not possible) to continue making payments to Plaintiffs under the obligations undertaken during the period while this Court's injunction is in effect.

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[2]Section 418 of Division A of the Consolidated Appropriations Act 2010, Pub. L. No. 111-117, includes the language "subsidiaries, affiliates, or allied organizations," whereas the other four challenged Acts currently in effect use the terms "ACORN or its subsidiaries." See Department of Interior, Environmental, and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-88, § 427, 123 Stat. 2904, 2962 (2009); Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, Div. B § 534, Div. E § 511, 123 Stat. 3034 (2009); Department of Defense Appropriations Act, Pub. L. No. 111-118, § 8123, 123 Stat. 3409 (2009). The term "covered entities" is used above to encompass all groups that would fall within a respective Appropriations Act.

Under such circumstances where recovery of funds by the government is doubtful, this Court should conclude that the government is likely to be irreparably injured. For example, courts have found irreparable harm where the government would not be able to recover the value of seized property if it were to prevail on appeal, absent a stay pending appellate review. See, e.g., United States v. Fourteen Various Firearms, 897 F. Supp. 271, 273 (E.D. Va. 1995) ("[W]here the failure to enter a stay will result in a meaningless victory in the event of appellate success, the district court should enter a stay of its order.") (citation omitted); United States v. $14,876.00 U.S. Currency, No. 97-cv-1967, 1998 WL 37522 (E.D. La. Jan. 29, 1998) ("[t]he property at issue is easily depleted. Therefore, absent a stay, the Government very likely would suffer irreparable harm if it were to succeed in its appeal."). Thus, given the harm to the government from enjoining a presumptively valid Act of Congress prior to appellate review, the specific injuries associated with the enjoining of HUD and other agencies, and the likely possibility that funds will be disbursed to Plaintiffs and other covered entities for which Defendants will be unable to recover, the balance of hardships weigh in Defendants' favor.

C. Any Harm To Plaintiffs If A Stay Is Granted Is Minimal

The third factor – whether Plaintiffs will suffer substantial injury if a stay is granted – also weighs in favor of Defendants. In examining whether to enforce a permanent injunction, the temporary loss of income does not normally constitute irreparable harm, even if it represents a sizeable amount of funding. See, e.g., Somerset House, Inc. v. Turnock, 900 F.2d 1012, 1018 (7th Cir. 1990); Experience Works, Inc. v. Chao, 267 F.Supp.2d 93, 96 (D.D.C. 2003). That principle is implicated here.

ACORN alleges the funding suspension provisions "have caused, and continue to cause

ACORN irreparable harm," but it does not explain exactly the nature or extent of this harm. Lewis Suppl. Aff. at ¶ 2. Indeed, a claim of "irreparable harm" would run directly counter to ACORN's own December 2009 internal report, which concluded that only 10 percent of ACORN's funding is derived from federal grants. Harshbarger at 7; see also Michael B. Farrell, ACORN Scandal: How Much Federal Funding Does It Get?, The Christian Science Monitor, September 19, 2009 (Exhibit W). Instead, ACORN contends that the funding suspension provisions have had a serious effect on some of its chapters (none of whom are parties here), and that they have caused the umbrella organization to cut back on its services. Lewis Suppl. Aff. at ¶ 2. But even if the "legal and governance structure of ACORN (the 'ACORN Family') is incredibly complex," Harshbarger Report at 6, ACORN cannot claim irreparable injury simply because some of its chapters may be in financial trouble. It is unrealistic to believe the funding provisions alone have caused this damage. And ACORN itself has no expectation of applying for new federal grants or renewals of old grants—by its own admission, it "does not apply for federal grants." Lewis Suppl. Aff. at ¶ 3.

MHANY has not alleged any imminent irreparable injury attributable to Defendant HUD. It has stated that it had a grant with New York State Mortgage Agency to provide mortgage counseling and advice under the National Foreclosure Mitigation Counseling ("NFMC") Program and was told by the New York State Mortgage Agency that it was ineligible for the third round (and potentially a fourth round) of funding of this grant because of Section 418 of the T-HUD Appropriations Act. See Doc. No. 29, Pl. Exhibit E (Suppl. Aff. of Ismene Speliotis), at ¶¶ 2, 3 (filed in hard copy with the Court). But MHANY has not shown that this temporary loss of income constitutes irreparable injury.

ACORN Institute submitted an affidavit in support of Plaintiffs' motion for permanent

injunction, which alleges pending applications for grants with EPA and Commerce, as well as suspended grants with HUD. See Doc. No. 29, Pl. Exhibit C (Suppl. Aff. of Brennan Griffin), at ¶¶ 2, 6, 7 (filed in hard copy with the Court). A closer inspection reveals that most of the injuries ACORN Institute has allegedly suffered no longer exist either because AI has been rejected for the grant in question or remains able to apply. ACORN Institute was considered and rejected on the merits of its proposal for a grant relating to indoor pollutants. Def. Exhibit D (Declaration of Howard F. Corcoran) at ¶¶ 5b, 5c (Doc. No. 38-7). Commerce has stated that ACORN Institute may be considered for the Broadband Technology Opportunities Program ("BTOP") in the Agency's Second Notice of Funds Availability ("NOFA") because section 534 does not apply to financial assistance programs funded by prior Acts, such as the Recovery Act through which the BTOP is funded. Def. Exhibit E (Declaration of Anthony G. Wilhelm) at ¶ 8 (Doc. No. 38-8). There are a small number of suspended ROSS grants, see Suppl. Griffin Aff. at ¶ 7, but the continued suspension of these grants until the Court of Appeals decides the bill of attainder issue does not rise to the level of irreparable injury.

D. The Public Interest Favors A Stay

Finally, the public interest weighs in the Government's favor. In the present case, Congress decided, in the interests of preserving public funds and avoiding potential waste of tax dollars, to enact these temporary funding suspensions. See Virginian Ry. Co. v. Sys. Fed'n No. 40, 300 U.S. 515, 552 (1937) (statutory policy of Congress "is in itself a declaration of the public interest which should be persuasive" to courts); Consumers Power Co. v. Dep't of Energy, 1981 WL 1265, at *8 (E.D. Mich. 1981) (denying motion for preliminary injunction because, inter alia, the public interest would have been disserved by interfering with the implementation of an agency program). The heavy

presumption of legitimacy this Court is obliged to grant these legislative decisions underscores the strong public interest in the maintenance of these currently-valid laws. Refusing to stay the permanent injunction would frustrate that interest. See, e.g., Winter v. NRDC., 129 S.Ct. 365, 376-77 (2008) ("In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.") (citation and quotation omitted); see also Able v. United States, 44 F.3d 128, 131 (2d Cir. 1995) ("[G]overnmental policies implemented through legislation or regulations developed through presumptively reasoned democratic processes are entitled to a higher degree of deference and should not be enjoined lightly."). The public interest would best be served by staying the permanent injunction, so that the Court of Appeals can decide this issue before Defendants begin disbursing funds. Plaintiffs will suffer no irreparable injury under this course of action.

E. In the Alternative, Defendants Request a Temporary Administrative Stay Pending the Court of Appeals Resolution of Defendants' Motion For Stay Pending Appeal Made Under Federal Rule of Appellate Procedure 8

In the alternative, Defendants request that the Court grant a temporary, administrative stay of the injunction to give the Court of Appeals sufficient time to rule on a motion for stay pending appeal pursuant to Federal Rule of Appellate Procedure 8(a)(2). The Solicitor General has authorized an application to the Court of Appeals for such a stay in the event this Court denies the motion for stay pending appeal. Such an administrative stay would give the Court of Appeals the opportunity to consider a stay pending appeal on a non-emergency basis. If this Court enters an administrative stay, Defendants will promptly inform the Court of any decision by the Court of Appeals regarding a stay pending appeal.

WHEREFORE, for good cause shown, Defendants request the Court stay its Declaratory Judgment and Permanent Injunction (Doc. No. 51) pending appeal, or in the alternative, issue a temporary administrative stay pending the Court of Appeals' resolution of Defendants' motion under Federal Rule of Appellate Procedure 8.

Dated: March 17, 2010

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CERTIFICATE OF SERVICE

I, Bradley H. Cohen, hereby certify that on this 17th day of March, 2010, I did cause true and correct copies of the above and foregoing instrument, Defendants' Motion to Stay Permanent Injunction Pending Appeal or, in the Alternative, for a Temporary Administrative Stay, to be served electronically on counsel for plaintiffs.

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