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Regarding the proposal to expel Senator Hiram Monserrate from the New York Senate:

It is the position of the NYCLU that any decision by a legislative body to expel one of its members implicates important constitutional principles respecting the right of the people to elect their representative of choice and to have that elected-representative serve. This right is so basic to our representative democracy that any effort to abrogate that right must rest upon the most compelling of governmental interests and must be "narrowly tailored" to the pursuit of those interests. We fully recognize that domestic violence is a serious societal concern. We further understand that the New York State Senate maintains an interest, as it should, in speaking out forcefully against domestic violence. Under the circumstances of the Monserrate case, that interest can be served by the legislative mechanism of censure. Accordingly, the more drastic procedural device of expulsion cannot be justified as "narrowly tailored" under the present circumstances. Our reasons for reaching this conclusion are amplified below.

We begin our analysis with the Supreme Court decision in *Powell v. McCormack*, 395 U.S. 486 (1969). In that case, the Court held that Congress had no authority to exclude from its membership any person who was duly elected by his or her constituents and who met the age, citizenship and residence requirements specified in the federal Constitution. We recognize that in reaching this conclusion, the Court distinguished the exclusion of a member-elect from the expulsion of a sitting member, acknowledging that expulsion is authorized by the text of the federal Constitution which allows each house of Congress to expel a member by a two-thirds vote of that body. Nevertheless, the *Powell* Court clearly recognized the fundamental right of the voters to their elected representatives and that this right is burdened whenever an elected representative is denied membership in the Legislature.

In this regard, the Court observed that a "fundamental principle of our representative democracy is, in Hamilton's words, 'that the people should choose whom they please to govern them.'" The Court further cited Madison for the notion that "this principle is undermined as much by limiting whom the people can select as by limiting the franchise itself." *Powell*, 395 U.S. at 547. The *Powell* Court did not specifically locate the textual or precedential source for its recognition of the people's right to choose their elected representative and to have that representative serve. But two potential sources are apparent. The first involves the inherent right to vote -- a right that the Court has long recognized as fundamental because it is preservative of all

other rights. See *Reynolds v. Sims*, 377 U.S. 533 (1964); *Dunn v. Blumstein*, 405 U.S. 330 (1972). The second precedential source lies in the First Amendment right of voters to associate in support of a candidate, a right recognized by the Supreme Court only the term before *Powell* was decided. *See Williams v. Rhodes*, 393 U.S. 23, 30 (1968).

It is well-settled that legislative mandates that abrogate the fundamental right to vote or that substantially burden the First Amendment right to associate in support of a candidate will trigger heightened judicial scrutiny and will be sustained only if "narrowly tailored" to the pursuit of substantial or compelling governmental interests. *Dunn v. Blumstein, supra.* Moreover, to the degree that First Amendment rights are implicated in the decision of the Senate to expel a member, principles demanding "precision of regulation" come into play. *Keyishian v. Board of Regents*, 385 U.S. 589 (1967). Such principles abhor vague enactments both because they fail to accord adequate notice as to the conduct that is or is not proscribed and because vague standards fail adequately to cabin discretionary decision making on matters touching our most precious freedoms. *Papachristou v. Jacksonville*, 405 U.S. 156 (1972).

When measured against these constitutional standards, the decision to expel Hiram Monserrate cannot be sustained. The interest in speaking out against "domestic violence" is, as noted above, a compelling one. However, this interest can surely be advanced "more narrowly" by a legislative vote to censure Senator Monserrate. Moreover, First Amendment vagueness standards offer an alternative basis for questioning the constitutional legitimacy of any decision to expel. This is the case because the Senate has offered no standards whatever for distinguishing a proper ground for expulsion from one that is improper.

For all of these reasons, we urge that the Senate not act to expel Mr. Monserrate. Censure is an adequate remedy to address the Senate's interests without encroaching upon the rights of voters to choose their elected representative. In the interest of full disclosure, we note in passing that Senator Monserrate was, between 1998 and 2001, a member of the New York Civil Liberties Union Board of Directors. The position that we reach here, however, has nothing whatever to do with Mr. Monserrate's past service to the NYCLU. We reach our conclusion here solely because the protection of fundamental rights lies at the heart of the NYCLU mission and because the right of the people to choose their elected representatives is a fundamental right which lies at the heart of our democracy.