UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HIRAM MONSERRATE, *et al.*,

Plaintiffs,

Index No. 10-CV-1106 (WHP)

-- against --

THE NEW YORK STATE SENATE, *et al.*,

Defendants.

MEMORANDOUM OF LAW IN SUPPORT OF FEDERAL CONSITUTIONAL CHALLENGE TO THE EXPULSION OF HIRAM MONSERRATE SUBMITTED ON BEHALF OF THE NEW YORK CIVIL LIBERTIES UNION AS *AMICUS CURIAE.*

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INTRODUCTION AND INTEREST OF AMICUS

It is a fundamental principle of our democracy that the people retain the right to choose their representative and the have that representative serve. *Powell v. McCormack*, 395 U.S. 486, 547 (1969). This democratic principle finds precedential support in two interrelated doctrinal lines of constitutional authority. The first involves the basic right to vote, a right that the Supreme Court has recognized as fundamental because it is preservative of all other rights. See *Reynolds v. Sims*, 377 U.S. 533, 561 (1964); *Carrington v. Rash*, 380 U.S. 89 (1965); *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 Court only the term before *Powell* was decided. See *Williams v. Rhodes*, 393 U.S. 23, 30 (1968).

The democratic right of the people to representation by their elected legislator is not, however, absolute. Nevertheless, as *Powell* suggests, the power to nullify democratic choice must be narrowly construed. *Powell*, 395 U.S. at 547 ("Had the intent of the framers emerged from these materials with less clarity, we would nevertheless have been compelled to resolve any ambiguity in favor of a narrow construction of the scope of the power to exclude a member-elect.") Moreover, locating the democratic principle of elected-representation as an inherent aspect of the fundamental right to vote and to associate in support of candidates means, as *Powell* suggests, that there is a strong constitutional presumption against efforts to abridge that principle. In this regard, the Court has found that the imposition of substantial burdens upon the right to vote and to associate in support of candidates can only be sustained if found "necessary" and "narrowly tailored" to the pursuit of substantial governmental interests. *Anderson v.*

Celebrezze, 460 U.S. 780, 787 (1983). Accordingly, the decision to expel Senator Hiram Monserrate from the New York State Senate must be measured against that constitutional test. Additionally, because First Amendment rights of political association are implicated by the expulsion decision at issue here, that decision must also be subjected to constitutional vagueness principles and the requirement of clear regulatory standards. Finally, the constitutional prohibition against Bills of Attainder is implicated where, as here, the expulsion of Mr. Monserrate constitutes a punishment specifically directed at a single individual and where the determination of blameworthiness extends beyond the scope of any judicial determination and is unsupported by any law of general applicability.

The New York Civil Liberties Union (NYCLU) is the New York State affiliate of the American Civil Liberties Union. As such, the NYCLU is deeply devoted to the protection of fundamental constitutional rights. Among the most fundamental of rights are the right to vote, to associate in support of candidates and to have elected representatives serve their constituencies. These rights are, as noted, foundational to our democracy. Accordingly, the NYCLU respectfully seeks leave to participate in this litigation as *amicus curiae* in order to address these basic constitutional principles and their application to the expulsion of Hiram Monserrate from the New York State Senate.

This controversy involves a difficult yet important test of our commitment to democratic values. Domestic abuse is a deeply malevolent problem which properly requires both vigorous responses by law enforcement and pointed condemnation by society as a whole. And in the minds of many, if not most people, Mr. Monserrate is believed to have engaged, on the evening of December 19, 2008, in a brutal act of

domestic abuse notwithstanding his acquittal on the more serious charges arising out of the events of that date. In such a circumstance, there may well be a popular impulse to compromise constitutional principles as inconvenient and obstructive of the sincere yet clamorous call for Mr. Monserrate's removal. However, in circumstances such as this, it is important to remain mindful of our most enduring constitutional values. It is a particular responsibility of the NYCLU to insist upon adherence to our most cherished values even in the face of an unpopular cause. We seek leave to submit this *amicus* brief for this reason, as well.

In so doing, this brief will first address the federal rights that are implicated by the expulsion decision and evaluate the decision to expel Mr. Monserrate against the constitutional standards that have developed to protect those rights. In this regard, we conclude that the expulsion decision cannot be sustained where, as here, a censure resolution could have provided a "more narrowly tailored" vehicle to address the Senate's interests. This matter is amplified in Point I of the Argument below.

In Point II, we address the question of whether the absence of substantive statutory standards governing the decision to expel can be reconciled with First Amendment principles that seek to cabin *ad hoc* decision-making by proscribing vague standards in the regulation of expressive or associational activities. We conclude that the absence of clear statutory standards governing the expulsion decision renders that decision impermissible.

Finally, the expulsion decision violates the prohibition against Bills of Attainder where, as here, the *ad hoc*, free-wheeling nature of the Senate's punishment directed specifically at Mr. Monserrate, in this case, rests upon conclusions of blameworthiness

that extend beyond any judicial determinations and where such a decision cannot be said to rest upon a law of general applicability. This matter is addressed in Point III below.

Each of these matters will be addressed, in turn.

ARGUMENT

I. THE EXPULSION OF HIRAM MONSERRATE FROM THE NEW YORK SENATE CANNOT BE SUSTAINED WHERE, AS HERE, THE SENATE'S INTERESTS CAN BE SERVED BY THE MORE "NARROWLY TAILORED" VEHICLE OF CENSURE.

In *Powell v. McCormack*, 395 U.S. 486 (1969), the Supreme 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. 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 representation by their elected officeholders and that this right is burdened whenever an elected representative is denied membership in the Legislature. *Powell*, 395 U.S. at 547.

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.'" *Id.* 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." *Id. Powell's* recognition of these "basic principles" of our

"democratic system" was reaffirmed by the Court in *U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995).

Neither the *Powell* Court nor the *Thornton* Court specifically located 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 basic right to vote which the Court has recognized as embracing the right to representation on a legislative body with other representatives. *Reynolds v. Sims, supra,* (one person, one vote case in which "equal right to vote" is evaluated in terms of its impact on legislative body as a whole) and which the Court has further recognized not as an abstract right of political expression but as an instrumental right to choose officeholders. *Burdick v. Takushi*, 504 U.S. 428, 438 (1992) (the function of elections is "to winnow out and finally reject all but the chosen candidates.").

In striking down a malapportioned legislative districting scheme in *Reynolds v. Sims*, the Court recognized that "[a]s long as ours is a representative form of government and our legislatures are those instruments of government elected directly and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system." *Reynolds, supra* at 561. The impairment that was found impermissible in *Reynolds* involved a dilution of the equal right to vote as it affected the composition of the legislature.

But if the dilution, through malapportionment, of the right to choose legislators is a source of constitutional concern, similar solicitude must also extend to the nullification of a district's electoral choice through the expulsion of that choice by other members of the legislative body. This is not to say that expulsion is never permitted. But, as

discussed below, the right of the voters to representation by their elected representatives should not lightly be abridged.

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). In this regard, the Supreme Court in *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983) looked back at *Williams v. Rhodes, supra,* in recognizing the inter-relationship between the right to vote and to associate in support of candidates. Quoting from *Williams*, the *Celebrezze* Court noted:

> "State laws [affecting the electoral process] place burdens on two different, although overlapping kinds of rights – the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms." *Anderson*, 460 U.S. at 787 citing *Williams*, 393 U.S. at 30-31.

The *Anderson* Court went on to suggest the constitutional standard applicable whenever courts are called upon to evaluate electoral schemes that implicate the right to vote and to associate in support of candidates and, perforce, officeholders. It noted that courts:

> "Must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendment that plaintiff seeks to vindicate. It then must evaluate the precise interests put forward by the State as justifications for the burden imposed by [the restriction]. In passing judgment, [courts] must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights." *Anderson*, 460 U.S. at 789.

Beyond reciting this broad balancing test, however, the *Anderson* Court recognized that where the State significantly burdens the right to vote and to associate in support of an office-seeker, such burdens can only be sustained if found "necessary" and

"narrowly tailored" even where state interests are substantial. *Anderson*, 460 U.S. at 805-806. *See also, Dunn v. Blumstein*, 405 U.S. 330, 342-343 ("In pursuing [an] important interest, the State cannot choose means that unnecessarily burden or restrict constitutionally protected activity.") That is the standard that should apply here.

In this case, the State Senate has chosen to remove an elected representative from the Thirteenth District. This represents a significant nullification of the rights of voters and supporters within Mr. Monserrate's district. The question must therefore be asked as to whether any substantial interest supports the Senate's nullification of the electoral decision reached by the Thirteenth District. In defense of its decision, the Senate has offered a range of explanations as to why it concluded that the expulsion of Mr. Monserrate was justified. See the Senate's Memorandum of Law at 1. At bottom, however, the expulsion decision rested upon a desire to condemn vigorously Mr. Monserrate for his conduct on the evening of December 19, 2008. And, as noted above, this interest in condemning Mr. Monserrate can well qualify as a substantial state interest. But this interest can be just as vigorously advanced by a strong statement accompanying a vote of censure or even removal from his powerful position of committee chair, which is an honor and responsibility granted by the Senate itself, not by the voters. So understood, other measures provides a more "narrowly tailored" remedy to advance the Senate's interest, without implicating the fundamental rights of voters, and expulsion cannot be found "necessary" to that interest. For this reason, the expulsion decision cannot be reconciled with constitutional standards.

II. THE DECISION TO EXPEL MR. MONSERRATE IN THE ABSENCE OF ANY STANDARDS GOVERNING SUCH DECISIONS CANNOT BE RECONCILED WITH REQUIREMENTS OF "PRECISION OF REGULATION" WHERE, AS HERE, FIRST AMENDMENT RIGHTS ARE AT STAKE.

As noted above, the decision to expel a sitting legislator implicates the First Amendment rights of voters to associate in support of a candidate and to have that candidate serve if elected. *Anderson v. Celebrezze*, *supra*. It is further understood that where First Amendment rights are at stake, government must regulate with careful precision. *NAACP v. Button*, 371 U.S. 415, 438 (1963) ("Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms."). This prohibition against vague standards in the regulation of First Amendment activities rests, in part, upon the need to cabin official discretion so that those who are called upon to administer the law fully understand the limits of their discretionary decision-making. *Shuttleworth v. Birmingham*, 382 U.S. 87, 90 (1965).

In this case, the decision to expel Mr. Monserrate was undertaken in the absence of any standards whatever governing the decision to expel. The legislature had enacted a statutory provision, Public Officers Law §30, that deemed a public office vacant, *inter alia*, if the officeholder were found guilty of a felony. But that statutory provision was inapplicable to the Monserrate situation since Mr. Monserrate was not found guilty of a felony.

The Senate was, therefore, left to expel Mr. Monserrate without any statutory guidance at all. The State Senate's assertion of unfettered authority to expel one of its members cannot be reconciled with the First Amendment rights of political association. Under the Senate's view of its authority, for example, it could expel a

member for holding the wrong ideological views. And, indeed, the Report of the New York State Senate Select Committee To Investigate the Facts and Circumstances Surrounding the Conviction of Hiram Monserrate on October 15, 2009 at 47-48 (hereafter "The Report"), cites, with apparent approval, the 1920 exclusion of five members of the State Assembly upon the grounds that they were members of the Socialist Party. And, of course, if members of the Socialist Party can be excluded from the Legislature on ideological grounds it would similarly be permissible to expel any of the current members for holding the wrong opinions or even for changing political parties out of ideological disagreement with their original party.

Amicus does not here contend that the Legislature moved against Mr. Monserrate because of his party-switching in the Spring and Summer of 2009. We accept the good faith and sincerity of those who voted to expel. We raise this issue, however, simply to demonstrate the danger to democratic principles in allowing a legislative body to expel one of its members in the absence of any substantive standards. That is what has taken place in this case.

III. THE DECISION TO PUNISH MR. MONSERRATE BY EXPELLING HIM FROM THE SENATE CONSTITUTES AN UNCONSTITUTINOAL BILL OF ATTAINDER.

Bills of Attainder are unconstitutional. Article I Section 9 of the federal Constitution prohibits Congress from adopting such measures. Article I Section 10 of the Constitution extends such a prohibition to the States. In *United States v. Brown*, 38 U.S. 437 (1965), the Court explained the underlying purposes of these prohibitions. The Court observed:

"[T]he Bill of Attainder Clause[s] not only [were] intended as one implementation of the general principle of fractionalized power, but also reflected the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness, of and levying appropriate punishment upon, specific persons...By banning bills of attainder, the Framers of the Constitution sought to guard against such dangers by limiting legislatures to the task of rule-making. It is the peculiar province of the legislature to prescribe general rules for the government of society; the applications of those rules to individuals in society would seem to be the duty of other departments." *Id.* at 445-46.

Consistent with this constitutional purpose, the Supreme Court has recognized that a legislative measure will constitute a Bill of Attainder if a legislative body attempts to impose punishment upon a specific individual in the absence of a law of general applicability and in the absence of a judicial determination of blameworthiness. *Selective Service v. Minnesota Public Interest Research Group*, 468 U.S. 847, 846 (1984). In this regard, the Court has held that a Bill of Attainder is "a law that legislatively determines the guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Nixon v. Administrator of General Services*, 436 U.S. 425, 468 (1977).

In this case, Public Officers Law §30 offers a law of general applicability. It provides that an office shall be deemed vacant if the officeholder is convicted of "a felony or a crime involving a violation of his oath of office." Put to one side the question of whether so broad a disqualification is consistent with the constitutional principles of "narrow tailoring" articulated above. In this case, the Senate apparently does not – and cannot – rely upon Public Officers Law §30 because Mr. Monserrate was not convicted of a felony or a crime involving a violation of his oath of office.

So understood, the Senate has acted here in an entirely *ad hoc* and free-wheeling manner and in the absence of a law of general applicability. It has undertaken a

legislative finding of blameworthiness that extends well beyond the findings in Mr. Monserrate's criminal case. Senate Report at 12. It has imposed punishment specifically upon Mr. Monserrate even though a law of general applicability, Section 30 of the Public Officers Law, would not apply to Mr. Monserrate's conviction.

Under such circumstances, the punishment imposed upon Mr. Monserrate constitutes an impermissible Bill of Attainder.

CONCLUSION

For the foregoing reasons, the decision to expel Hiram Monserrate from the New York State Senate should be vacated.

Respectfully submitted,

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