UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-7056

MICHAEL J. QUIGLEY, JOSEPH WARD, PAUL W. GONTER, PATRICIA KOHL, and PAUL MUELLER,

Plaintiffs-Appellants,

v.

VINCENT J. GIBLIN and INTERNATIONAL UNION OF OPERATING ENGINEERS,

Defendants-Appellees.

Appeal from a Final Order and an Order Denying Injunctive Relief
of the United States District Court
for the District of Columbia

BRIEF FOR PLAINTIFFS-APPELLANTS

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CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

A. Parties. Michael J. Quigley, Patricia Kohl, Joseph Ward, Paul W. Gonter and Paul Mueller were plaintiffs below and are appellants in this Court. Vincent Giblin and the International Union of Operating Engineers were defendants below and are appellees here.

B. Rulings Under Review. District Judge Reggie Walton issued an order on March 20, 2008 that denied plaintiffs' motion for a preliminary injunction and for summary judgment, and granted defendants' motion for summary judgment, but purported not to be a "final order subject to appeal" pending issuance of an explanatory memorandum opinion. JA811. On October 22, 2008, Judge Walton issued a memorandum opinion, without issuing any additional order. JA812. The opinion has not been reported.

C. Related Cases. This case has not previously been before this Court, and no related cases are pending.

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MISCELLANEOUS

GLOSSARY OF ABBREVIATIONS

DN	Docket Entry Number in District Court Docket
DefMem	Memorandum in Support of Defendants' Motion for Summary Judgment
GEB	General Executive Board
ISP	Internet Service Provider
IUOE	International Union of Operating Enginees
LMRDA	Labor Management Reporting and Disclosure Act of 1959
PlaintSMF[X]	Plaintiff's Statement of Material Facts [Paragraph X]
RSS	Really Simple Syndication
URL	Uniform Resource Locator (website address)

JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1337 and 29 U.S.C. § 412. This Court has jurisdiction under 28 U.S.C. §§ 1291 and 1292(a). Judge Walton denied plaintiffs' motion for a preliminary injunction and for summary judgment, and granted defendants' motion for summary judgment, while purporting to deny his order's finality, by order dated March 28, 2008. JA811. Plaintiffs appealed on April 25, 2008. JA834. A memorandum opinion explaining the previous order was issued on October 22, 2008. JA812. Plaintiffs filed a renewed notice of appeal on November 21, 2008. JA35. Plaintiffs appeal a final order disposing of all claims in the case.

QUESTIONS PRESENTED

1. Does a union rule requiring members who operate campaign websites to restrict access to other union members unlawfully restrict members' rights to communicate their views to non-members as well as members, in violation of the Union Members' Bill of Rights?

2. Did the union carry its burden of justifying the limitation of campaign websites to union members as reasonable?

3. Is the union's rule void for vagueness?

STATUTE INVOLVED

Section 101(a)(2) of the Labor-Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 411(a)(2), provides:

> (2) Freedom of speech and assembly
>
> Every member of any labor organization shall have the right to meet and assemble freely with other members; **and to express any views, arguments, or opinions**; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: Provided, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

(emphasis added).

STATEMENT

In this case, union members seek to enforce their statutory right to communicate with fellow members and with the public about problems in their union. Like citizens in other walks of life, union members have used the Internet as a vital tool for democracy, breaking the stranglehold that many union incumbents have on the effective channels of intra-union communication, and

as a means of reaching out to the general public to explain their criticisms. After a senior member of the international union's Executive Board lost his campaign for re-election to his local union office, by insurgents who effectively used a website as one means to reach out to the membership, defendants enacted a new union rule that asserts control over members' use of the Internet. The rule forbids members from placing communications about union elections on the Internet unless the websites are "password-protected" so that only members of that union can view them. Because the rule interferes with the right to communicate with members as well as non-members, plaintiffs seek to enjoin implementation of the rule.

A. The Parties

Plaintiffs are members of three local unions of defendant International Union of Operating Engineers ("IUOE"), a union with nearly 400,000 members that represents mostly operating engineers, who work on construction sites, and stationary engineers, who work in building and industrial complexes and in service industries. IUOE is governed by a General Executive Board ("GEB"), which is headed by the General President, defendant Vincent J. Giblin. Plaintiff's Statement of Material Facts ("PlaintSMF") 1-11, JA44-46,79-80,277,

303 (citations to PlaintSMF in the Joint Appendix are accompanied by responses to that Statement; where IUOE either objected to materiality or disputed all or part, we cite plaintiffs' Reply SMF and the supporting evidence). Like most unions, IUOE elects international officers every five years, and its local unions hold their elections every three years, each being the maximum term permitted by the LMRDA. In IUOE locals, elections are held in August, preceded by a nominating period that begins as early as May.

Plaintiffs Michael J. Quigley and Joseph Ward belong to IUOE Local 150, a local with 22,000 members in Illinois, Indiana, and Iowa. Local 150 had an election in August 2007. Quigley's website for the "Team 150" slate, www.150election.com, sets forth Team 150's program and contains harsh attacks on the incumbent leadership. Ward was the Team 150 candidate for Business Manager, the principal office in IUOE locals. When he ran, Ward was the elected Treasurer of Local 150, and in that capacity was employed by Local 150. However, because a local union's staff serve at the pleasure of the Business Manager, Ward's supporters on Local 150's staff were fired once Ward's plan to run for Business Manager became known. PlaintSMF12-18,

JA45-46,80-81,126-127,20,373-374.[1]

Plaintiffs Patricia Kohl and Paul Gonter belong to IUOE Local 18, a local with 15,000 members in Ohio and Northern Kentucky. Kohl and Gonter ran together in the 2005 Local 18 election. During that election, Kohl operated a website at www.local18membersvoice.org, which explained why she and Gonter were running for office, had other information about Local 18, and criticized the incumbents. After the election, Kohl kept the website to serve as a platform for continued commentary on union affairs. Kohl wanted her criticisms of the Local to be read not only by members of the union, but also by the general public, because she believed that public disapproval of wrongdoing by union officers was an important part of holding those officers accountable for their misdeeds. Kohl also intended to use the website to support candidates in the next Local 18 election in August 2008. PlaintSMF19-24, JA46-47,81-82,127-128,629-30,634,639,675-677.

Plaintiff Paul Mueller belongs to IUOE Local 39, a local representing

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[1]Ward's slate lost the election. Because the Business Manager's slate used union and employer funds to win re-election, the Labor Department sued to overturn the election. *Chao v. Local 150*, Case 1:08-cv-05557 (N.D. Ill.) (available on PACER).

17,000 members in Northern California and Nevada. Mueller opened a blog to support his candidacy for office in 2007. PlaintSMF25-27, 31, JA47,84-85, 128. His blog could not be password-protected pursuant to the system that the union adopted. PlaintSMF144, JA61,116.

B. Growing Importance of Internet Speech for Rank-and-File Members

Union members who are dissatisfied with the direction of their unions have seized on the Internet as a way to communicate with each and the public about their concerns. Websites play an increasingly important role both in union elections and in members' efforts to reach out to the broader public to talk about problems in unions, in IUOE and elsewhere. It is undisputed between the parties that the Internet has the potential to transform union politics by providing a cheap yet effective means of political speech. PlaintSMF32, JA47-48,85. As the Supreme Court said in another context:

> From a publisher's standpoint, [the Internet] constitutes a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers and buyers. . . . Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of web pages, . . . the same individual can become a pamphleteer.

Reno v. American Civil Liberties Union, 521 U.S. 844, 853, 870 (1997).

Unions have mailing lists but individual members cannot get copies of that list. Candidates for union office have a statutory right to have campaign mailings sent, at their own expense, to all members, PlaintSMF33-34, JA48,85, 450, but in a local with 15,000 or 22,000 members, a single mailing can cost $10,000 or more (assuming $.42 per letter plus printing and processing costs). In union elections, members can also campaign at the workplace but, particularly in a construction union, there are a large number of work sites, and each worksite has only a small number of members of any given construction union, which reduces the cost-effectiveness of such campaigning. The geographical size of plaintiffs' locals makes campaigning in person throughout the local a particularly daunting task. The various tools for online communication – not just traditional websites, but more contemporary phenomena such as YouTube, MySpace and blogs – provide a crucial alternative to these means of communicating campaign messages. PlaintSMF35-37, JA48, 85,128-129,450-451,628-629.

Although websites have been used both by incumbent candidates and insurgent candidates, they are especially important for insurgent candidates,

because the principal officer of a local union controls the official channels of communication within the local as well as many of the unofficial ones. JA450,560-561,629. The incumbent officers preside at all meetings and control the agenda. There is one union newspaper, controlled by the incumbents and featuring their pictures and activities, which is mailed to every union member. If there is a union website, the union's leader controls its content, too. As a consequence of the Business Manager's ability to hire and fire the staff, including for taking the "wrong" stances with respect to an election, the Business Manager can, in effect, direct all staff to support him in an election at the risk of their jobs.

In Locals 18 and 150, the incumbent enjoys the support of a patronage army of 50 and 200 staff, respectively, most of whom are continually in touch with the membership and can communicate political messages in the course of their union duties. This patronage army goes to work sites at union expense, or receives calls from union members looking for help on workplace problems, and can discuss politics with members "incidental to regular union business." 29 C.F.R. § 452.76. The union leader also controls the staff at affiliated apprenticeship funds and other funds jointly managed with employer

representatives but, as a practical matter, under the union's leadership. In a construction local, members also depend for work referrals on the union hiring hall (run by appointed staff), which gives a leader extra clout when talking to members. PlaintSMF 38-52, JA 48-50,86-90,129-134,555-556,561-562,666-567,570a-570b,588-589,629-630,643a. Given all of these factors, as well as the absence of many of the institutions that support democracy in our national, state, and local governments, observers have long noted that unions operate as one-party states, in which there is a significant need to "level the playing field" to allow effective electoral challenges. Summers, *Democracy in a One-Party State,* 43 Md.L.Rev. 93, 117-118 (1984).

As is true elsewhere, the Internet has the potential to change this dynamic and "level the playing field" for electoral challengers in a labor union. Kohl credits her campaign website, in part, for the "unprecedented" showing by her insurgent slate in the 2005 Local 18 election. PlaintSMF55, JA50,91,629-630. The website operated by the Gold Ticket, an insurgent slate in IUOE's largest local, Local 3 in Northern California, has been credited with playing an important role in that slate's upset victory in 2006. *See* Zeltzer, *IUOE Seeks to Thwart Open Labor Websites,* www.labornet.org/news/0407/iuoecrit.htm

(JA419-421). IUOE's GEB adopted the rule at issue here in January 2007, immediately after that election. PlaintSMF56, JA50,91.

C. The Union's Password-Protection Rule

IUOE's new rule restricts "campaign websites" operated by "candidates and their supporters" in IUOE local union elections. PlaintSMF56, JA50. The GEB is comprised of IUOE's General President, defendant Vincent J. Giblin, its Secretary Treasurer, and fourteen vice-presidents, each of whom serves simultaneously as the Business Manager of an IUOE local union, PlaintSMF 6, JA45, and thus has an intense interest in a campaign method that threatens to undercut their control of the channels of communication with union members. The resolution provided that such websites must be "password-protected," so that only union members could view the websites. The purported purpose for this rule is to ensure that "sensitive information" about the union does not get into the hands of employers. PlaintSMF56-57, JA50,91-92,134. By its terms, the prohibition was limited to "campaign websites" that relate to union elections. PlaintSMF67, JA52,94,135.

According to Giblin, anything that union members say about union organizing, negotiating, or strategies, as well as about undefined other topics,

necessarily implicate "sensitive information" that reveals union "secrets." For example, at his deposition, Giblin claimed that a union leader's statement that the local would "reward its friends and punish its enemies" in the political arena reveals a union "secret" and thus could not be mentioned on a public website. PlaintSMF64(a), JA51,93-95,135,327-328,387-388. This dictum, a watchword of the labor movement since the days of Samuel Gompers, is now claimed to be a union "secret" whose disclosure threatens the interests of the union. Giblin believes that the union has the power to prohibit a member from discussing such issues in forums open to non-members.

As justification for its extraordinary new rule, IUOE identified only two incidents, one in Local 30 seven years before, and one in Local 66 two years before. The alleged events in Local 30 emerged at a hearing attended in the year 2000 by defendant Giblin, who was at the time an IUOE Vice-President, to decide whether to place Local 30 in trusteeship. During the hearing, Giblin heard members say that employers had been reading internal union websites, and had quoted statements on those websites to the union's disadvantage in both organizing campaigns and contract negotiations. Thus, according to Giblin, the new website resolution was required to protect union "secrets" from employers

who could misuse them to the union's disadvantage.

No admissible evidence was submitted to show that union secrets were actually revealed to employers on campaign websites, even back in 2000. Indeed, the union acknowledged that it did not submit an affidavit recounting what Giblin said he heard for the truth of the alleged facts, but only to show what Giblin had heard from members. JA96 ¶75. The union has the transcript of that hearing, JA319, but decided not use the document to establish a factual basis for its justifications of the rule. Moreover, at his deposition, Giblin was unable to provide the specifics of what had been said on those websites. He did not even know whether the statements appeared on the websites between elections, when the sites would be more comparable to a caucus website which the union's rule purports not to regulate. PlaintSMF77-78, JA53,96-97,136-137,320-321.

The second alleged incident involved a campaign website, www.votebeasleyhay.com, operated by Jay Hay and Joe Beasley, who ran against the incumbents in the 2005 election in IUOE Local 66. JA441. According to Giblin, Beasley and Hay posted some Board minutes on their website, and were "informed" by defendant Giblin that minutes are a union

secret and may not be revealed publicly. PlaintSMF80, JA54,97,137,280-281. In fact, Beasley and Hay were convicted by their local union and fined $5000. PlaintSMF81, JA54,97,639-640. At his deposition, Giblin acknowledged that not everything that happens at a union meeting is a secret, and that not all parts of union minutes must necessarily be kept secret; rather, the need for secrecy depends upon exactly what was said and exactly what the minutes reveal. Giblin was unable to recall the specifics of what was in the minutes posted by Beasley and Hay. PlaintSMF82-86, JA54,98,137-138,313-314,318. As with the Local 30 situation, IUOE has the relevant documents, JA318, but decided not to use them to establish the factual basis for the rule.

Indeed, at his deposition, Giblin acknowledged that the GEB's own minutes are published in the union magazine, and that he did not know whether the magazine goes to libraries or other public places; he also acknowledged that, until the Local 66 situation arose, GEB minutes were included in the pages of the magazine that were publicly posted on IUOE's own website. To this day, some IUOE locals post meeting minutes on their websites. PlaintSMF87-90,

JA54,98-99,138,315-316.[2]

On February 12, 2007, defendant Giblin announced the new website restriction rule in a letter to all Business Managers, which directed them to have their local election committees work with candidates in the locals to bring their websites into compliance by April 15. PlaintSMF94, JA55,99. After plaintiffs brought this challenge, the union agreed to postpone the implementation date to July 1, so that the case could litigated on a more orderly schedule, on cross-motions for summary judgment. In further response to the litigation, IUOE adopted "implementation guidelines" on May 11 (almost a month after the rule was originally scheduled to go into effect), which were first revealed publicly in summary judgment papers it filed on May 12, 2007. PlaintSMF101-103,

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[2]In the court below, IUOE initially argued that its rule **enables** candidates' use of the Internet, by giving them a means to make campaign statements online without being "inhibited" by concern that employers might take advantage of what they say about the union. But at his deposition, Giblin admitted that during the GEB discussion of the rule, nobody articulated this as a reason for adopting the rule. He also acknowledged that any candidates who **wanted** to password protect their own websites could readily do so without the rule, because the union could supply member register numbers and names to the candidates or their ISPs. PlaintSMF91-93, JA54-55,99,138-139,335-339,340-341,563. Thus, the theory of enhancing campaign speech does not support a rule that **requires** that website be restricted to union members.

JA56,101-102.

The union hired its expert witness in this case as a contractor to operate the password-protection system, and to require all campaign websites to incorporate a special piece of code, called a "script," that will direct the Internet browser of any person seeking to examine any page on the campaign site to a central database where the Internet user would have to "log in" by entering password information. The log-in screen tells members that although they are entering their names and register numbers to gain access, their identifying information will not be recorded. PlaintSMF104-109, JA56-57,102-103,140,153,190-191,434-435,446. Second, recognizing that entering these scripts into a website might be beyond the capabilities of some rank-and-file members who were not technically adept, the union retained a separate firm to help members enter the scripts. PlaintSMF110, JA57-103. Third, in an attempt to meet the vagueness problem created by some of the loose terms of the rule, the union decided that, instead of announcing standards to decide whether online speech will be free or restricted, members will have to ask Giblin for a ruling on the facts of their situation. At his deposition, Giblin repeatedly refused (with a couple of exceptions) to say whether particular websites were within the

requirements of the rule, or to articulate any standards by which the rule would be applied, insisting that he would address individual websites only on a case-by-case basis, with advice of counsel, eventually evolving common-law-like standards over a period of months to determine how the rule is to be applied. PlaintSMF11-114, 118-119, JA57-58,105-106,107-109,140,141,284-285,350-351,354-356,363-364. Indeed, defendants' counsel refused to allow Giblin to answer whether there were any standards governing determinations of the scope of the web site restriction rule, because that would be "abstract." PlaintSMF116. JA57=58,106-106,346-347.

Although the original rule applied the password-protection rule to the entire campaign website, PlaintSMF100, JA56,101,140,23, the union announced during depositions that website home pages would be a "billboard" showing the names of the candidates and the positions for which they were running, and would not be password-protected, but that all other parts of the website linked from the home page (and within the website beyond that) would be password-protected. During his deposition, Giblin gave contradictory answers about what could be on the "billboard." Several questions about the rule's application that arose during depositions were answered by letter on May 24, 2007. PlaintSMF

120-125, JA58-59,108-109,141,247,323-324,325a,334,434-435,446-448.

D. The Rule's Impact on Speech

Several undisputed facts show that the rule interferes with members' communications with other union members, not just with the media and the general public.

First, the accessibility of a website to the general public is a very significant part of the way in which Internet speakers reach out to specific audiences whom they want to reach. Although some of the details were disputed between the expert witnesses for the two sides, the evidence presented by plaintiffs and their expert witness Mark Brenner, and largely acknowledged by defendants' expert witness Joanna Pineda, showed that IUOE's password-protection requirement prevents website operators from using many of those mechanisms.

For example, the major way in which Internet users locate websites in which they may be interested, without knowing the precise Internet address ("URL") of such sites, is through the use of search engines such as Google. Pineda herself advises her audiences that they must be very visible on Google and similar search engines if they want to be seen online, although during her

deposition she downplayed that advice, saying that it doesn't apply in cases where the site owner knows how to reach the target audience directly. PlaintSMF129-131, JA59-60,110-112,142,239-241,244-245,260-261,274,455,644,648.[3] Pineda conceded, however, that search engines cannot index password-protected websites, PlaintSMF133, JA60,112, 143; indeed, her affidavit (JA193-194) gave invisibility to Google as one of the reasons **supporting** the rule, on the assumption that the site contained certain content that the site operator did not want exposed to permanent public view. Contrary to Pineda's assumption, intra-union website operators want their websites to be visible to the media and to authors of other websites that union members may see, both because coverage in those locations gives higher visibility and credibility to their campaigns in the eyes of union members, and because the newspaper or website may publish the URL of (or link to) a web page that its writer found interesting. That is much less likely to happen if all of the substantive content in the internal pages of a website remains inaccessible to

[3]Pineda admitted that she did not know whether candidates **do** have contact information for union members to convey the URL of their websites to members. PlaintSMF132, JA60,112.

outsiders (and hence to search engines). PlaintSMF134-136, JA60,112-113,143-144,450,455,562,633-634,637.

Internet users also use RSS feeds to keep track of new material being posted to websites in which they are interested; the RSS reader either delivers the new content so that the user can see it without bothering to go to the site itself, or the RSS message induces them to go back to the website so that they can see the news. According to plaintiffs' expert, RSS feeds and other similar services cannot be used for sites that are password-protected with IUOE's scripts. PlaintSMF137-139, JA60-61,114-115,144-145,245-246,452-453.[4]

Second, although there are a number of ISPs that can host a website and allow the insertion of scripting code, there are many site hosts that do **not** support scripting, as Brenner's affidavit explained and Pineda's deposition testimony conceded. Many hosts that do not support scripting are ones that allow posting of material on the Internet without any technical expertise, and they are often the more contemporary kinds of sites that are popular with tech-

[4]After her deposition, defendants' expert submitted an affidavit claiming that a website operator with "a high level of technological ability" could install an RSS feed onto a password-protected website. JA194b.

savvy and younger audiences. These services include social networking sites such as MySpace, blog hosts such as Blogspot, sites for the posting of videos or photographs such as YouTube and Flickr, and sites for downloading Podcasts. Modern campaigns, whether for President of the United States or for union office, use these sites both because target audiences can be reached there, and because they make it easy to post content and to embed or link back to that content on other sites. For example, YouTube played a major role in the Obama campaign, and networks used YouTube to ask questions in the debates; many even call it "The YouTube Election." http://www.newsweek.com/id/168269. The union's password-protection system, however, prevents union members from using these resources altogether. Although the parties' experts disputed some of the finer details about some of these user-friendly services, the undisputed facts in the record show that, in effect, the union's system largely confines member campaigning to old Internet technology, limiting use of the emerging technologies (popularly known at Web 2.0) that are making it easier and easier to place content online. PlaintSMF140-147, JA61-62,115-118,145-147,223-225,250-252,450-454,467-469,472-473,564,639,692.

Third, the record shows that there is widespread uneasiness on the part of

Internet users generally, and of union members specifically, about logging into websites and providing identifying information to do so. PlaintSMF148,152, JA62,118,119,147-149,45–454,458-459,555,558,630-632,642; JA499-505. Even the union's Information Technology director implicitly conceded the existence of this concern when he testified that the reason why IUOE's contracts would forbid provision of logged identifying data to the union is that members worry about such identification. JA156. The affidavits of the plaintiffs themselves confirm that members of their locals are worried about having their access to websites on the "wrong" side of union politics be tracked, PlaintSMF153, JA62,118-119,148-149,156,458-459,494-496,630-631,642,682-683,733-760, because their livelihood depends on union hiring-hall referrals and on the goodwill of union leaders. JA555-556,558,630-631.

IUOE expert witness Pineda downplayed the existence of any general reluctance on the part of Internet users to log-in to get information on an Internet website, but she based this opinion entirely on two practical examples, JA193, that she retracted at her deposition. (Properly so, according to Dr. Brenner. JA457-458.) First, she stated that three major newspapers (New York Times, Los Angeles Times, and Washington Post) require log-in to obtain access to

protected content on their websites. At her deposition, however, she acknowledged that each of those newspapers allows access to some information without log-in. Confronted with research reports and statements by newspaper professionals to the effect that it is only a minority of newspapers that require log-in, and that newspapers are retreating from mandatory log-in because they are worried about losing viewers who do not want to have to log-in, Pineda said first that she really does not know much about the practices of the newspaper industry, JA203-231, and second (after overt coaching from union counsel, JA206,211) that the example is inapposite, because newspapers require registration but the union's system requires only log-in using information that the union already has.

Her affidavit's second example was that "performance of e-commerce functions" requires log-in, but at her deposition she acknowledged that "some" e-commerce sites allow viewers to shop and require log-in only to make a purchase (that is, once the viewer has found something on the site that she really wants). JA232-235. Indeed, defendants have not identified a single e-commerce site where the customer must log-in before shopping. Pineda responded that the comparison was inapposite because the union requires only

log-in and not registration; but even assuming that registration is different from log-in, the newspaper and e-commerce examples were her own, and provided the **only** basis for her opinion that Internet viewers do not mind logging in. Indeed, she conceded that an Internet viewer's willingness to log-in may well depend on how important he feels it is to see the information behind the password-protected wall. JA197-198.

Fourth, although members know their own names, members are unlikely to have memorized their seven- or eight-digit member register numbers, and they do not necessarily carry their union cards with them at all times. PlaintSMF154-155, JA62,120-121,149-150,433,554,686. They may be unable to log in for that reason alone. Indeed, the authentication system requires entry of the member's precise name, and even the error of omitting the middle initial if that is what the union card provides, or including the middle initial if the union card does not provide it, or using a nickname that does not appear in the union record (or not using the nickname), is enough to cause the log-in to be denied. PlaintSMF156, JA63,121,149-150. To be sure, the union member can then go looking for his/her union card, or, during business hours can call the

local union (or an IUOE contractor) to ask for the proper log-in information.[5] SMF157-158, JA63,121.

But plaintiffs worry about whether every union member will be willing to persist beyond the first failed log-in, or indeed whether the member who is only casually willing to look at their campaign websites will bother going forward if reaching their website is not quick and easy. SMF161, JA63,122,149-150. As one blogger put it in explaining his reaction to newspaper registration and log-in pages, "I am at the point where I am not going to register to read any content unless it's the New York Times." JA218,273. A dissenting union member is scarcely the New York Times, and when union members are operating a campaign website, they want every viewing eye and every vote. A password-protection system that discourages even a small number of members from viewing a candidate's messages online obstructs protected speech, and the undisputed evidence here is that the rule is likely to interfere with member

[5]The password authentication system will set a "cookie" on users' browsers that will, if users accept cookies, allow users to continue looking at other pages on the website without re-entering the log-in information. But if users want to come back on a different occasion, users will have to enter the log-in information all over again. PlaintSMF162-163, JA63,122.

access to campaign messages.

E. The Rule's Inability to Serve Its Supposed Purpose

The undisputed facts also undercut the sole justification provided by the union for the password-protection rule – that it is needed to protect "sensitive information" from the eyes of employers who may use it to the union's detriment in contract negotiations or organizing campaigns. Even apart from the question whether the union vastly overestimates the extent to which certain information is properly deemed so sensitive that a union member's right to discuss it publicly is overridden by the union's interest in concealment – an issue addressed in the argument section of this brief (at 51-54) – the following facts show that the rule cannot effectively serve that objective.

First, many employers tend to know what is happening within the locals whose members they employ. This is partly true because the relationship between members and union officials on the one hand, and contractors and their supervisory personnel on the other hand, is not quite so adversarial as the Giblin affidavit makes them seem. As detailed in plaintiffs' affidavits, JA560-561,592-597,635, many contractors and many supervisors are themselves former rank-and-file employees, and they talk to each other about internal union events.

Contractors sit on joint boards with union leaders, and they tend to learn about all the major controversies within the local. *Id.* Indeed, many union members, who have membership cards and register numbers, are themselves employers, who can therefore use that information to log onto any password protected sites. *Id.* These members range from both small "owner-operators," who simply own a piece of heavy equipment and employ one or two fellow members, to the executives of major contractors who sit at the bargaining table on the employer side of contract negotiations, and include as well various supervisory personnel and foremen for such larger companies. Some of these employer personnel hold onto their membership status, for a variety of reasons, and hence will have direct access to campaign websites by using their register numbers. *Id.*

Second, the union's password-protection system does nothing to prevent campaign accusations from getting to employers through other methods, such as by publishing ads in newspapers, writing letters to the editors of print publications, and free coverage in the media, whether in response to press releases or otherwise. PlaintSMF36, 168, JA48,64,85-86,124,325. Indeed, because the GEB purported to act under its authority to provide for fair elections, the rule purports not to regulate on-going, non-election websites

created by intra-union caucuses, PlaintSMF67, JA52,94, or even an individual union member who has a beef but chooses not to run in an election or to expressly support a candidate for union office. Below, defendants touted this limit as a way of showing that they really aren't limiting much speech, DN13 at 7, but instead it shows only that the rule does little to accomplish its purported objective.

Third, the union does nothing to thwart the many ways in which its effort to restrict campaign website information to union members can be sidestepped. First of all, the union does not guard the secrecy of membership register numbers, which are kept in a variety of locations with little apparent security. SMF169, JA64,124.[6] Giblin acknowledged that if a member published his name and register number, that would not violate any union rule. PlaintSMF170, JA64,124. Nor would it violate any union rule for a member to print out the entire text of a website that he viewed online and ship that text directly to an employer. PlaintSMF171, JA65,124-125,150-151,365-367. Indeed, the union's expert witness acknowledged that any member who had entered his password

[6]IUOE did not request sealing when plaintiffs' union cards were put in evidence at a deposition. JA165-169,186-188.

data could then download the entire electronic file of a website and ship it to a non-member, because the union has no security features either to prevent that from happening or even to detect that it is happening. PlaintSMF172, JA65,125. The member's action also would not violate any union rules, PlaintSMF173, JA65,125,367, and if a **nonmember** published the website with the exact same information, the union would have no recourse because non-members cannot be disciplined by the union. PlaintSMF174, JA65,125. The union's expert witness also admitted during her deposition the phenomenon of Internet users creating "mirror" websites, which copy the entirety of another website that has been threatened with censorship, not out of agreement with the website's message but simply as an angry response to censorship. PlaintSMF175, JA65,125,253-254. Apparently, the union is willing to assume that information found on campaign websites is sensitive enough that unscrupulous employers are willing to read through pages of union member websites to find it, but that employers are not unscrupulous enough to ask their fellow employers with access to provide copies, or to look around for member names and register numbers that are easily retrievable.

F. Proceedings Below

After exhausting their intra-union remedies, plaintiffs sued in April 2007. To present the case to the district judge in time to secure a decision before the August 2007 round of local union elections (or the rule's July 1 effective date), the parties agreed to an expedited discovery and briefing schedule on cross-motions for summary judgment. Briefing was completed by June 15, 2007. On March 28, **2008**, under 28 U.S.C. § 476(a)(1), the district court entered an order denying plaintiffs' motion for summary judgment and preliminary injunction and granting defendants' motion for summary judgment, but purported to deny finality and hence appealability until an opinion was issued. Plaintiffs appealed, but this Court deferred briefing of the appeal and informed the district judge of the need for an opinion explaining his order.

On October 22, 2008, the district court issued its opinion. After reciting the parties' arguments, the Court addressed the reasonableness of the union's rule in a single paragraph. JA830-831. First, citing plaintiffs' depositions, the Court noted that the rule does not restrict all means of communications, but only communications on campaign websites where, the court believed, "the

paramount interest of the speaker is in reaching the union's electorate." Second, the court rejected plaintiffs' argument that the union had to show that the rule would avoid serious harms by analogy to the Supreme Court's decision in *Steelworkers v. Sadlowski*, 457 U.S. 102 (1982), where, the court thought, the union had not presented "formal proof" showing the harms against which the rule was directed. Instead, in *Sadlowski* it was enough that the "union merely feared" the harm, and that Congress had intended to protect against just that harm. The court opined that the union in *Sadlowski* had "expressed similar concerns as the Union here . . .; namely, . . . 'to ensure that nonmembers would not unduly influence union affairs and that the union leadership would remain responsive to the membership.'" *Id.* quoting *Sadlowski*.

In the final section of its opinion, the court rejected plaintiffs' vagueness argument because it deemed the language of the rule sufficiently clear to resolve the vast majority of controversies. JA831-833.

SUMMARY OF ARGUMENT

The union's threat to discipline any union member who runs for union office or supports a candidate for union office, and creates a campaign website but fails to use password-protection to limit access to that website to union

members, represents a direct attack on one of the core free speech provisions of the Union Members' Bill of Rights – the right to speak not just to union members but to other members of society about wrongdoing within their union and about efforts to hold their unions accountable. Both the language of the statute and the legislative history reveal that Congress considered the issue of speaking outside the union and deliberately decided to protect it, and case law going back to the 1960's shows that the courts have consistently protected that right. Moreover, the undisputed record evidence shows that the password-protection rule will also limit the ability of intra-union campaigners to bring their message to the other union members, by

— discouraging access by members who may not believe that an unseen website is worth the trouble of logging in, or the risk of revealing their interest in a website from the "wrong side";

— depriving campaign websites of the "credibility" and accessibility that comes from being linked from other websites and ranking high on search engines; and

— preventing members from using the new, user-friendly tools for constructing and publicizing websites such as blogs, social networks,

YouTube, and RSS feeds, which cannot incorporate the "scripting" technique needed to enable the union's password-protection mechanism.

The impact of the rule on protected speech is heightened because it applies specifically to member speech about **elections** – the very time when both members and non-members are most likely to pay attention to controversies within the union, and when members who believe that the incumbent leaders are running it badly have the best chance of focusing membership and public attention on their criticisms. Thus, the free speech guarantees are "particularly critical, and deserve vigorous protection, in the context of election campaigns." *Steelworkers v. Sadlowksi*, 457 U.S. 102, 112 (1982).

Under *Sadlowksi*, the reasonableness of a union rule restricting free speech depends on a balancing of the impact of the rule on protected speech against the extent to which the rule serves a legitimate union purpose. In that regard, the courts should consider the parties' arguments – as the Supreme Court did in *Sadlowski* – in light of the **evidence** submitted by the parties to establish both the impact on speech and the relationship of the rule to a legitimate purpose. Here, however, although the alleged union purpose – preventing employers from obtaining secret internal union information by scrutinizing campaign

websites – has some theoretical appeal, IUOE refused to provide **any** admissible evidence that information that a union is entitled to compel members to keep secret has **ever** appeared on a campaign website.

Plaintiffs recognize that there are some true union secrets, such as the exact time when the union plans to walk off the job, or the planned fall-back position in contract negotiations if the union's opening offer is not accepted, or the names of the inside organizers at a particular place of employment. But there is no showing that any such information ever appeared on a campaign website, or indeed is more likely to appear on websites than in other forms of communication. Instead, the "secrets" that the union's President claimed it needed to protect from disclosure included such facts as that a local union follows the policy of "reward our friends and punish our enemies" – hardly a secret, but a mainstay of the labor movement since the days of Samuel Gompers. But Giblin specifically identified discussion of such matters as "sensitive issues that belong behind a wall of a password-protected site." JA328-330.

Like the district court, IUOE drew an analogy to *Sadlowski*, which upheld a union rule forbidding candidates from accepting financial contributions from non-members to support their election efforts, but this case has nothing to do

with outsider involvement in elections. Indeed, IUOE already has a rule forbidding outsider contributions to campaigns. Rather, the question is whether union members can, at the same time that they are telling union members why they should vote their leaders out of office, also tell the public why they believe the union leaders are running the union badly.

Second, undisputed facts cast substantial doubt on whether the union's rule will actually do much to serve the purpose of keeping campaign websites from the purview of employers who are determined to see what is there. Many employers actually retain their memberships in this union, and hence can use their own register numbers to look at every campaign website across the country, and then share what they find with other employers. Nor are member register numbers treated by the union as secret information, and an employer need only identify a single member's number to compromise the protection of every campaign website. Indeed, a single unhappy member could subvert the entire rule by the simple device of posting his name and number online, not to speak of printing a website or downloading the HTML code or other files from a website and forwarding them to a non-member to display without password protection. Because the rule limiting speech is so easily evaded, its substantial

adverse impact on speech by members who want only to play by the rules is simply not worth tolerating.

Finally, the terms "campaign website" and "supporters" of a candidate are so vague that members will often be unsure whether their speech is outside the rule, and hence protected, or forbidden by the rule, and hence subject to discipline. Instead of setting standards to interpret vague terms, the union has put forward an "administrative procedure" whereby members of the union may send their proposed speech to defendant Giblin for a ruling. The existence of an administrative pre-screening device is unsuited to avoiding a vagueness challenge when core political speech is at issue.

In the final analysis, the rule that the union has adopted simply makes no sense unless the reason for the rule is to chill free speech. If the union's only interest were protecting against disclosure of genuinely secret information, it could adopt a rule against distributing that information. It could even offer a voluntary password-protection system to candidates as a safe harbor, allowing them to password-protect if they share the union's concern about disclosure. Moreover, there is no obvious connection between secret or even merely "sensitive" information and websites used for **election campaigns.** That the

union has chosen to limit its rule to campaign websites strongly implies a different motive – the incumbent local union officers who comprise the GEB are trying to protect themselves against another defeat, like the one in Local 3 the year before the rule was adopted.

Defendants have tried to downplay the rule's significance by contending that they seek to restrict speech only on websites and only during elections, but the Court should make no mistake about what is at stake in this case. If defendants can succeed in taking away the right to speak publicly during elections – the time when the right of free speech is at its apogee, and when the need to receive the speech is at its apogee – or if they can succeed in restricting online speech on the ground that it is **too** effective a way for union members to communicate with other union members and with the public, this case will just represent the camel's nose in the tent. If defendants win here, other unions whose leaders feel threatened by the ease with which union members can criticize them online will be quick to follow IUOE's lead, and indeed expand the prohibited list of forums in which members may speak, lest their speech fall into the hands of the employers.

STANDARD OF REVIEW

Rulings on cross-motions for summary judgment are reviewed de novo.

ARGUMENT

I. THE UNION'S RULE INFRINGES PLAINTIFFS' RIGHT TO COMMUNICATE WITH BOTH NON-MEMBERS AND WITH MEMBERS ABOUT UNION AFFAIRS.

A. The Rule Impairs the Right to Communicate with Non-Members.

This action seeks to enforce the right of free speech afforded by the Bill of Rights for Members of Labor Organizations in Title I of the LMRDA (also known by its House sponsors as the Landrum-Griffin Act), 29 U.S.C. §§ 411 *et seq*. (The text of section 101(a)(2) appears *supra* at 2.)

Plaintiffs' claim must be considered in the context of the events and concerns that led to the enactment of Title I of the LMRDA. The LMRDA, and particularly Title I, was the product of hearings conducted in the late 1950's by the Senate Select Committee on Improper Activities in the Labor-Management Field, chaired by Senator McClellan. S. Rep. No. 187, 86th Cong., 1st Sess. 2 (1959), *reprinted in* I NLRB, *Legislative History of the LMRDA* 398 (1959) ("*Legis. Hist.*"). The McClellan Committee investigations revealed many

different ways in which corrupt union leaders had dominated unions and remained unaccountable to their members.

Congress found that union officials did not always subscribe to democratic views of what is in the best interest of their members. According to one view, widely-held in the labor movement,

> labor unions should be regarded as military organizations, for their function is to wage economic warfare with employers . . .. As a wartime army can neither brook divided leadership nor tolerate active dissidents, so must a union punish the trouble-makers in order to close ranks against employers and rival organizations.
>
> Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 Mich. L. Rev. 819, 829 (1960).

But when it enacted the LMRDA, Congress rejected that view, concluding that the needs of workers would be better served by truly democratic unions in which policies were formulated and adopted after open discussion, debate, and criticism. *Id.*

As initially reported by the Senate Committee, the LMRDA neither protected union members' right to speak, nor gave members any right to sue. Indeed, the Senate Committee consciously decided not to legislate on that topic lest it interfere with unions' internal affairs. I *Legis. Hist.* 403. The Senate

Committee thereby rejected Senator McClellan's proposed Bill of Rights of Union Members. However, the full Senate repudiated the Committee's attempt to minimize intrusion into union affairs when it adopted Senator McClellan's Bill of Rights as a floor amendment. These amendments were modified by a set of clarifying amendments offered by Senator Kuchel, and the House confirmed the Senate's action by adopting the Landrum-Griffin substitute for the House Committee's bill. See Levy, *Legal Responses to Rank-and-File Dissent*, 30 Buff. L. Rev. 663, 681 n.22, 684 n.118 (1981).

As one court has put it, "the balance was struck in favor of union democracy." *Navarro v. Gannon*, 385 F.2d 512, 518 (2d Cir. 1967), *see also Salzhandler v. Caputo*, 316 F.2d 445, 451 (2d Cir. 1963). Congress applied free speech principles drawn from the Bill of Rights to the activities of the participants in union government. II *Legis. Hist*. 1103, 1104 (Senator McClellan), 1104 (Rep. Landrum). In light of this background, although the First Amendment and section 101(a)(2) are not co-extensive, courts frequently look to First Amendment principles to guide the interpretation of the LMRDA by analogy. For example, in *Steelworkers v. Sadlowski*, 457 U.S. 102 (1982), the Supreme Court ruled that "First Amendment principles may be helpful,

although they are not controlling," *id.* at 111, and it looked to First Amendment precedents for guidance, although it found them distinguishable in that case. Similarly, in *Reed v. UTU*, 488 U.S. 319, 325-327 (1989), the Court looked to First Amendment principles for analogies to decide which statute of limitations to borrow for section 101(a)(2) cases. And in *Black v. Ryder/PIE Nationwide*, 970 F.2d 1461, 1467 (6th Cir. 1992), the court looked to a First Amendment case by analogy in formulating jury instructions for a case involving retaliation based on free speech activity in violation of section 101(a)(2).

Section 101(a)(2) contains three rights, each set apart from the others by semi-colons. Plaintiffs rely on the second of these rights: "and to express any views, arguments, or opinions." In the original McClellan Amendments, separate provisions guaranteed the right to speak freely and the right to assemble freely. Under his Bill of Rights, "no longer will a man have to cringe in terror because he may have spoken a word that offended a petty tyrant." II *Legis. Hist.* 1098. As Senator McClellan explained, his proposed amendment

> gives union members the right to assemble in groups, if they like, and to **visit their neighbors and to discuss union affairs**, and to say what they think, or perhaps discuss what should be done to straighten out union affairs, or perhaps discuss the promotion of a union movement, or perhaps a policy in which they believe . . ..

Senator Kuchel's substitute Bill of Rights amendment, as originally introduced, combined Senator McClellan's rights of speech and assembly into a single provision, which set forth the same three rights as does the statute as passed, but separated by commas. Senators were concerned that this language was ambiguous about whether speech was protected only at union meetings, or whether union member speech in public was encompassed by the protection of the bill of rights. Senator McClellan proposed the addition of the semicolons for clarity. *Id.* at 1230, 1234. Senator Cooper then stated that it was "wise to make some legislative history on the point," and that he assumed "the purpose of placing a semi-colon at that point, is to assure, if there is any question about it, that the constitutional safeguards of free speech shall be preserved outside the union hall." *Id.* at 1230. Senator McClellan responded: "The purpose is to make certain that union members shall have freedom of speech not only in a union hall but outside." *Id.* Other senators subsequently agreed and the amendment was accepted. *Id.* Courts have agreed that the text and legislative history definitively show that Congress intended the statute to protect speech to non-members. *Deacon v. Operating Engineers Local 12*, 273 F.Supp. 169, 173 (C.D.Cal. 1967); *see also Farnum v. Kurtz*, 2 Cal.App. 3d Supp. 1 (Cal.Super.

1969) ("it has been established by prior decisions . . . [that] freedom of speech is protected outside of the union halls as well as within.").

Indeed, federal courts consistently recognize that section 101(a)(2) protects the right to speak to non-members as well as members, or to speak to members in forums that are open to view by non-members. *Helton v. NLRB*, 656 F.2d 883, 895-96 (D.C.Cir. 1981) (member's rights violated when union removed article posted on open-use bulletin board at place of employment because article described union corruption); *Keeffe Bros. v. Teamsters Local 992*, 562 F.2d 298, 301 (4th Cir. 1977) (member protected for statement "in a public place"); *Giordani v. Upholsterers*, 403 F.2d 85, 86 (2d Cir. 1968) (protecting member who wrote letter to public officials charging union with misappropriating welfare and pension funds); *Bishop v. Iron Workers*, 310 F. Supp.2d 33 (D.D.C. 2004) (striking several provisions in union's constitution under section 101(a)(2), including one forbidding members to "reveal any private business or proceedings of this [union]"); *Deacon*, *supra*, 273 F.Supp. at 172 (newspaper article written by a member protected); *Caldwell v. ILA Local 1694*, 696 F.Supp. 132, 134 (D.Del. 1988) (members protected for letter to local newspaper critical of union and leadership); *Pearl v. Tarantola*, 361 F.Supp.

288, 294 (S.D.N.Y. 1973) (protecting statements published in newspaper attacking union as colluding with employer); *Leonard v. M.I.T. Employee's Union*, 225 F.Supp. 937, 939-40 (D.Mass. 1964) (protecting member who distributed and publicly posted leaflets harshly criticizing union leadership even though union claimed it had the effect of "weakening the union in a critical moment of its negotiations with the employer"); *Graham v. Soloner*, 220 F.Supp. 711, 713 (E.D.Pa. 1963) (protecting public picketing outside union's offices by union members carrying signs addressed to public officials); *Gartner v. Soloner*, 220 F.Supp. 115, 117 (E.D.Pa. 1963) (protecting public picketing of union by member holding signs with disparaging comments about union officials).

In fact, speech critical of the union made by a union member directly to an employer has been equally protected under the LMRDA. *Maxwell v. UAW Local 1306*, 489 F.Supp. 745 (C.D.Ill. 1980) (protecting members for letter to employer criticizing the union for not enforcing contract provisions); *Farnum v. Kurtz*, 2 Cal.App.3d Supp. 1, 81 Cal.Rptr. 924 (1969) (protecting letter very critical of union, sent to both employer and press); *Boilermakers v. Rafferty*, 348 F.2d 307 (9th Cir. 1965) (upholding compensatory damages for members

punished for distributing handbill critical of union to members, members of other unions, supervisors and employers).

This Court has agreed that the right of free speech under the LMRDA includes speech to non-members, or at least speech in forums where non-members can see it. In *Helton v. NLRB*, 656 F.2d 883 (D.C. Cir. 1981), the issue was whether a union had violated members' rights under the National Labor Relations Act by removing a leaflet from a bulletin board maintained by the union on the employer's premises. In the course of the decision, this Court discussed whether the union's action violated any of the core policies of the labor laws, and held that section 101(a)(2) protected the right of members of an intra-union caucus to promote their views by posting on the work-place bulletin board. *Id.* at 895-96. It is, therefore, well-established in this Court that members' speech in forums open to non-members is fully protected by the LMRDA.

B. IOUE's Rule Also Interferes with Effective Use of the Internet to Communicate Campaign Messages to Members.

In addition to improperly restricting union members' right to communicate to non-members, the website restriction rule also interferes with members' right

to use the Internet to communicate with members of IUOE whose support – and votes – they seek to enlist.

In this regard, although incumbents as well as insurgents use campaign websites, such websites provide an especially important resource to a challenger, given the many ways in which incumbent union officers control the official and unofficial channels of communication within the union. As in many unions, an IUOE Business Manager controls the union newspaper, the union website, and the union staff. The staff is constantly talking to members and **must** support the Business Manager's reelection or lose their jobs. PlaintSMF38-50, PlaintSMF 38-52, JA 48-50,86-90,129-134,555-556,561-562,666-567,570a-570b,588-589,629-630,643a. The en banc Fourth Circuit recognized the importance of such factors in deciding how to construe the LMRDA's protections of the right to campaign for union office:

> "[T]he . . . unquestioned purpose of Congress was to ensure fair and democratic elections. Congress recognized that one of the major obstacles to meaningful elections was the inherent advantage of incumbents and it sought to curb the advantage." Summers, *Democracy In A One-Party State: Perspectives From Landrum-Griffin*, 43 Md.L.Rev. 93, 117-118 (1984). When the union bureaucracy has exclusive control of the union membership lists, with addresses, as in this case, and that bureaucracy has continuous contact with the union membership . . . the advantages

> of incumbency over any attempt of an insurgent to promote his candidacy . . . are obvious.
>
> *Brown v. Lowen*, 857 F.2d 216, 218 (4th Cir. 1988), *opinion adopted en banc*, 889 F.2d 58 (1989), *aff'd*, 498 U.S. 466 (1991).

The union's restrictions are thus subject to especially exacting scrutiny.

The undisputed facts, as set forth above in the Statement of Facts, Part D, at 16-20, show that the password-protection rule interferes with communication to members in a variety of ways:

— First, simply by limiting speech directed to the general public, the union's rule interferes indirectly with member access to the website operator's speech, such as by suppressing access through search engines, by making newspaper reports or Internet commentary about the election and the campaign website less likely, and by preventing use of RSS feeds and similar techniques that allows Internet users to keep up with new developments on websites of interest.

— Second, despite the union's efforts to reform its rule to address the issues raised by plaintiffs in this case, members' need to log-in may deter access to insurgent campaign websites either because access involves extra steps, including searching for the needed log-in

information, or because of a natural reluctance to self-identify online. That reluctance is heightened by members' fears about the impact on their livelihood, earned through hiring-hall referrals, of being identified as reading the "wrong side's" propaganda. To be sure, the union member who is committed to getting onto a campaign website may ultimately find a way to do so, but plaintiffs worry about losing readership by the union member whose interest in reading campaign speech is only casual. After all, every vote counts!

— Third, the technique adopted by the union for password protection – "scripts" must be placed on each web page inside the site so that anyone trying to view those pages will be referred to a website attached to the union's centralized password-protection database – effectively prevents members from placing their campaign content on a variety of user-friendly sites that allow the placement of campaign material without having any technical skill at website creation.

Because the union's rule interferes with the right of plaintiffs and other union members who start campaign websites to communicate online with members, and not just with the general public, the rule should be struck down

as a violation of section 101(a)(2).

C. Limits on the Password-Protection Rule Do Not Sufficiently Lessen Its Impact on Protected Speech to Save the Rule.

The district court endorsed IUOE's argument minimizing the rule's impact on the right to speak outside the union because the rule does not prevent members from using "other channels of communication, including, but not limited to, email, postal mail, telephonic communications, correspondence sent to editors of newspapers, or leaflets," and applies only to elections when the paramount interest of members is (supposedly) in reaching out to union members who can vote. Opin19. This argument runs counter to the Supreme Court's reasoning in *Reno v. ACLU*, *supra* at 6, which celebrated the power of the Internet as enabling the ordinary citizen to become a "pamphleteer" or "town crier" whose message reaches further than it ever could by simple leafleting or speaking from a soapbox. For example, the cost of a general mailing to the entire population of Ohio, or of hiring telemarketers to deliver annoying robocalls, or of buying newspaper or television advertisements (or the difficulty and possible illegality of trying to send a spam email to all citizens of Ohio) puts those methods beyond the reach of an ordinary union member like plaintiff

Kohl.

To be sure, plaintiffs testified during their depositions that, when they were faced with the expense of non-Internet communications in previous elections, they chose to write only to the members who could vote – that expense was high enough. But the pervasiveness of the Internet allows union members to communicate with the public as well as the members for the same virtually non-existent price. It is, indeed, the very effectiveness of Internet communications – which allowed the insurgents in IUOE's largest local to bring down an incumbent GEB member in 2006, allowed plaintiff Kohl to get elected in Local 18 in 2005, and allowed insurgents in Local 150 to mount an effective challenge to the third most senior GEB member – that impelled IUOE to strike at this new effective means for ordinary members to bring their criticisms to the attention of members and non-members alike.

Moreover, although it is certainly true that in an intra-union election the most important audience is the members themselves, that is not the only reason why plaintiffs created their campaign websites. It is during an election season that members are likely to work hardest on formulating and expressing their critiques of how their union is being run, but it is for that very reason that they

may desire – as plaintiffs have said here – to bring their criticisms to the broader public. In that way, they can better bring the force of public opinion to bear on the union and the leaders to make them change, even if the personalities in office remain the same. And, just as the members' attention to criticisms of the leadership reaches its height as the election approaches, public attention to disagreements within the union are likely to be heightened by the existence of a competitive election.

That is why plaintiffs testified that their websites had two important purposes – both to win the election and to reach out for broader public support. JA558-559,562-565,567,637-638,641. In this sense, just as freedom of speech within the union "is particularly critical, and deserves vigorous protection, in the context of election campaigns," *Teamsters Local 82 v. Crowley*, 467 U.S. 526, 537 (1984), quoting *Sadlowski*, 457 U.S. at 112, freedom to speak outside the union is particularly critical at the same time.

Defendants' expert witness acknowledged during her deposition that websites have multiple audiences. JA196. The district court was wrong to discount the impact of defendants' rule forbidding members from making their critical websites available to the media and to the general public just because the

rule is in effect only during union election campaigns.

D. The Rule's Impact on Protected Speech Rights Is Not Justified by Its Supposed Service to a Legitimate Union Purpose.

Although IUOE argues that its rule is needed to protect "sensitive information" from being revealed to employers, no evidence supported that contention. To sustain its burden under the proviso, defendants must make a "showing that the union as an institution would be seriously harmed," *Stachan v. Weber*, 535 F.2d 1202, 1203 (9th Cir. 1976), and must introduce "proof" of such harms. *Keubler v. Clevland Lithographers*, 473 F.2d 359, 363 (6th Cir. 1973); *see also Sadlowski*, 457 U.S. at 118 (discussing evidence showing that, in the election immediately preceding the adoption of the "no outside funding" rule, candidate Sadlowski had received massive support from outside contributors, thus providing good reason for concern about outside influence). But defendants carefully – and necessarily – phrased their Material Facts below to say only what defendants "stated" or "concluded"; they have not introduced **evidence** of serious harms. JA34-36. At most, they recited some hearsay evidence about events several years earlier in IUOE Local 30, and cited cases holding that **unions** may not be **compelled** to disclose certain "highly sensitive

and confidential" information to members or to employers (or, irrelevantly, that similar records are exempt from **governmental** disclosure under FOIA). DN 7, 17-20.

Plaintiffs agree that members may properly be forbidden from disclosing true union secrets, such as the union's fall-back position in collective bargaining ("we'll open by asking for a ten-cents-an-hour raise but if they offer five cents, we'll take it"). However, defendants produced no evidence suggesting that such information has appeared on any campaign websites. To the contrary, the record makes clear that the sort of "sensitive information" that defendants seek to protect sweeps far more broadly, and includes **anything** that members may say that relates in any way to three "critical issues" – contract negotiations and bargaining, organizing, and union strategies – and several other unspecified topics.

For example, at his deposition, defendant Giblin said that a statement that, in dealing with politicians, a local union follows the policy of "reward our friends and punish our enemies" is the sort of secret that the rule is intended to keep from employers. PlaintSMF64(a), JA51,93,135,328-330,387-388. Puffery by incumbents, bragging that pensions had quadrupled over the past few years,

or that they had negotiated "the best agreement any member of the local has ever worked under," or criticisms by insurgents, complaining that employees in a large bargaining unit had decertified the union because the incumbent did not provide good representation, or merely using the words "worried about contract negotiations" followed by "read on," all represent the type of information that the union's rule is trying to protect from being disclosed to employers. *See* PlaintSMF64, JA51-52,93,135,326-328,333,342-343,369,371-372,375-376,387-394,416-421.

Given that the union sees its power to prevent public criticism as extending so broadly, it is not surprising that the union asserts a prophylactic rule that protects it from having to say exactly what public speech ought to be prohibited. Had defendants sought to punish candidates for speaking these words publicly, their actions would not survive LMRDA claims under section 101(a)(2).

Despite the extensive scrutiny that plaintiffs' own websites received during discovery, the one example that the union cited in its briefs below pertaining to any of the five plaintiffs further illustrates the unsupportable breadth of the union's attempt to censor speech. The union cited a leaflet

provided on the Ward/Quigley website containing opinions about upcoming contract negotiations. DN7, 18-19. The Court is urged to look at the document, JA416, which apparently responded to statements by the Dugan slate suggesting that Ward's election challenge threatens Dugan's ability to negotiate a good agreement. The leaflet argues that a union's ability to get a good contract rests on the extent of its organization and other factors, and that the union is so strong that "even a monkey could negotiate a good contract." Does IUOE contend that it could punish a member for distributing such a leaflet outside the plant or in front of the union hall because this is a "union secret"? It is hard to understand what insights about the union's strategy defendants think an employer could derive from such general bombast, or why employers would not figure out such considerations on their own.

Ultimately, IUOE's argument is not so much that specific information on the web site reveals union secrets, but that, merely by revealing to employers that the membership is divided and debating the best course to follow, campaigns show weaknesses that the employer may exploit through aggressive bargaining. That is the same argument that unions made in opposing the LMRDA back in 1959, and, as Professor Cox said in his seminal article on the

LMRDA, quoted above at page 37, Congress rejected that view in favor of union democracy.

Defendants also suggest that their rule is needed to preserve the sanctity of secret union meetings, because some campaign websites have included minutes of union meetings. However, defendant Giblin conceded at his deposition that not everything that is said at union meetings needs to be kept secret, and that not every portion of union minutes needs to be kept secret. PlaintSMF82-85, JA54,98,137-138,313-314,318. Indeed, at his deposition Giblin undercut the broad claims in his affidavit that IUOE jealously guards the secrecy of minutes of GEB meetings, PlaintSMF87-89, JA54,98-99,138,315-316, and some locals **still** post their minutes on their websites. PlaintSMF90, JA54,99. If there is a problem with respect to the posting of minutes on websites, the problem can be addressed specifically, not by a prophylactic rule forbidding any public speech on campaign websites.[7]

Defendants also draw an analogy between union meetings and campaign

[7] IUOE cited below a campaign website in IUOE Local 66 two years ago, on which members posted union minutes. DN7, at 6-7. At his deposition, however, Giblin could not say anything specific about what was in the minutes – namely, whether they revealed any secrets. PlaintSMF86, JA54,98.

websites, suggesting that websites represent a form of conversation among members and that password protection is needed to protect the privacy of such conversations, just as union meetings are not open to non-members. However, the fact that a **union** may exclude non-members from **its own** meetings, out of a desire to foster membership debate there, does not mean that the union is entitled to tell its members who operate their own caucuses (or campaigns) whom they may invite to their own meetings, or whether those meetings may be held in a forum open to public view. *Ostrowski v. Utility Workers Local 1-2*, 530 F.Supp. 208, 218-219 (S.D.N.Y. 1980). After all, the purpose of the LMRDA's Bill of Rights was to give members rights distinct from the union, similarly to how the Constitution's Bill of Rights gave members of the polity rights distinct from the government.

In addition, every one of the reasons that the union gives for its rule would apply just as well to other forms of speech in which union members speak in forums open to public (and employer) scrutiny. To be sure, the union goes out of its way to emphasize that, in limiting speech on websites, it is not limiting the right of union members to issue press releases, send letters to the editor, take out newspaper advertisements, distribute leaflets at the workplace, or indeed, direct

their communications about the union's supposed secrets directly to an employer. But this argument, made to show alternate means of communication, seriously undermines the union's position. Each of these means of communication is more or less likely to come to the attention of employers, and it is only as a matter of grace that the union has chosen to limit its rule to "campaign websites." If the union prevails in this case, on the ground that it need not present any evidence to support its claims about the harms that the rule is intended to avoid, then any form of communication outside the union that proves successful in bringing public opinion to bear on the union will also be forbidden by a rule addressed to that form of communication — strictly as a prophylactic matter, of course. Any of the many unions headquartered in Washington, DC, will be able to take advantage of that precedent.

Indeed, little more than ten years ago a candidate for union office was kicked out of the Operating Engineers for telling a newspaper reporter that the union was not running a fair election, JA422-431. Here, the union confines itself to website speech, and says it doesn't restrict any other, but in past cases the forum du jour to be restricted was a bulletin board, *e.g., Helton, supra*, or picketing the union hall. *E.g.*, *Graham v. Soloner*, *supra.* But if the decision

below stands, because it is enough for a union to present self-serving affidavits showing only that the defendants "thought" or "concluded" that a harm would result, it will not be difficult to justify a rule forbidding talking to the press or giving out newspapers on the job, because employers might see that, too.

Defendants argued below that their prophylactic rule was a preferable alternative to a censorship-based system requiring national union officers to monitor campaign websites and intervene with threats of discipline whenever they found union secrets. Had defendants made a showing that it was common for campaign websites to include truly secret information – the sort of information for whose disclosure members may lawfully be punished – this argument might have had greater force. But because defendants stoutly refused to introduce any evidence supporting the claim that there is **ever** any really secret information, whose disclosure might properly be the basis for discipline, on campaign websites, the threat to turn to censorship rings more than a little hollow.

Defendant also tried to draw an analogy to the Supreme Court's ruling in *Sadlowski*, but although the case sets forth the general standards for application of section 101(a)(2), the facts of that case render it irrelevant here. In

Sadlowski, the question was whether a union can forbid candidates in a union election to accept campaign contributions from non-members, against the backdrop of legislative history suggesting that Congress wanted to keep unions free of improper control by certain outsiders (not to speak of federal election law barring donations by foreigners). No outsider involvement issue is present here, however. The question here is, rather, whether members are forbidden to allow access to campaign websites to non-members, not because they seek assistance in the election, but because they want non-members to read their criticisms of the union (or do not care whether that happens), and the relevant text and legislative history, *supra* at 39-40, makes clear that Congress wanted to **protect** the right to communicate with non-members about union issues.

Another important distinction between this case and *Sadlowski* is that the rule at issue there was adopted by the democratically elected delegates to a union convention. 457 U.S. at 115 n.9. Here, by contrast, IUOE's rule was adopted by an executive board comprised almost entirely of Vice-Presidents who simultaneously serve as Business Managers of local unions, PlaintSMF6, JA45,80, and have a self-interest in thwarting use of the Internet to foster more

effective electoral challenges.[8]

The union's "reasonable rule" defense should also be rejected because the rule is so unlikely to accomplish the supposed purpose of preventing the union's supposed secrets from being seen by employers. First, in this union, many members **are** employers, ranging from small contractors who own one or two pieces of heavy equipment and employ other IUOE members, to the heads of large contracting companies, and every level of employer supervisor in between. Such employers and employer representatives frequently talk with rank-and-file members and learn about intra-union controversies that way. JA560-561,592-97,635. Second, IUOE does not bar members from publishing the very same "secrets" in leaflets given out at work, where they are likely to fall into the employer's hands, or in newspaper ads, letters to the editor, or other kinds of public communication – or even sending them to employers directly.

Third, the union does not make a secret of the passwords – member names

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[8] The GEB's authority to adopt the new rule was found in the IUOE Constitution's provision allowing it to adopt procedures to ensure fair local union elections. PlaintSMF65-66, JA52,94. However, the rule has nothing to do with the fairness of union elections, because members have been perfectly capable of erecting campaign websites without the benefit of this rule.

and register numbers. A single member could publish his name and password online, or send that information to an employer, and that information would be enough to allow any employer in the country to access any IUOE campaign website. PlaintSMF169-170, JA64,124. Is the union so confident that employers have no access whatsoever to member register numbers? Employers surely know the members' names. One peek at a single union membership card gives them the information they need to gain access to any campaign website in the country.

Nor, indeed, does the union's rule (or its password-protection system) prevent a member either from printing out the website and sending it to an employer, or from downloading the website files in electronic form and sending them to a non-member to republish them with immunity from the union's disciplinary power. Indeed, the union's own expert acknowledged that Internet users who oppose censorship will often create "mirror" sites, not because they agree with the site owner's opinion, but simply out of outrage against censorship. PlaintSMF175, JA65,125,253-259.[9]

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[9]Below, the union's only response to these possibilities was that if a **candidate** sent his website to an employer, he could be held politically

Yet another reason why the union's rule cannot accomplish its purported purpose is that it is applied only to **election** campaign websites, but does not bar members from placing the same criticisms – and the same supposed secrets – on intra-union websites that do not promote candidacy for union office. Indeed, in the one specific case that the union cites as showing the need for the rule – certain websites in IUOE Local 30 that were allegedly monitored by employers and whose contents were allegedly cited back at the union in contract negotiations and in organizing campaigns – it is not at all clear that the websites involved **election** campaigns, as opposed to intra-union caucuses that were attacking a previously elected incumbent. The union's only evidence on this incident is the affidavit of defendant Giblin about what he remembers about hearsay statements at an intra-union hearing in the year 2000, and at his deposition it became quite apparent that his recollections were exceedingly vague. Indeed, a contemporaneous press account strongly suggests that websites in Local 30 continued past the election. JA434,444-445. Yet, if it was

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accountable for doing so. DN7, 23-24. But because any of the nearly 400,000 members of IUOE could do the same thing, there would be no such accountability.

a "caucus" website rather than an election campaign website, then even if the union's rule had been in effect in 2000, it would not have prevented the harm that the union says it is trying to prevent here.

But the union's invocation of the events in Local 30 casts doubt on its asserted reason for the rule. These events – the only **specific** example cited by the union when statements on a campaign website supposedly revealed sensitive information to the union's disadvantage – occurred more than six years before the rule was adopted. Much closer in time to the rule's adoption was the effective use of a website in defeating an incumbent GEB member in his August 2006 local union election, JA419-421, not to speak of Ward and Quigley's contemporaneous use of a website as part of their campaign to unseat the third most senior member of the GEB, William Dugan. The members of the GEB evidently feel threatened by campaign websites, and they have responded with a rule that is **limited** to websites of the kind attacking their own incumbency. Because that rule infringes members' right to communicate publicly, and does not effectuate any legitimate union purpose, the rule should be struck down even without regard to the ways it chills members' ability to use websites to

communicate with members and non-members alike.[10]

II. THE VAGUE TERMS OF THE UNION'S RULE WILL CHILL FREE SPEECH.

As under the First Amendment, union rules may be struck down under section 101(a)(2) of the LMRDA if they are vague or overbroad. *Mallick v. IBEW*, 644 F.2d 228, 235-236 (3d Cir. 1981); *Semancik v. UMW District 1*, 466 F.2d 144, 153 (3d Cir. 1972). Here, although the term "candidate" is relatively clear, the terms "campaign web site" and "supporters" are less clear, especially because IUOE defends its rule on the ground that it does not limit the right of members to have websites that are **not** election-related. *Cf. Sadlowski*, 457 U.S. at 115 (outsider rule has less impact on free speech because not applicable to member speech on issues not directed to elections).

For example, plaintiff Kohl operates a website that pertains mostly to her

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[10] Another reason for skepticism about the union's professed concern about disclosure of "sensitive information" is its apparent lack of interest in avoiding the disclosure of information on union websites. In announcing the rule to local union business managers, Giblin stated that local union websites and IUOE's own site should be reviewed to be sure that sensitive information is password protected. Not only are defendants taking no steps to do that, but they left highly confidential information on their own website open to public scrutiny. PlaintSMF95-98, JA55,99-100,139-140,256.

2005 election campaign, and, as such, is outside the scope of the rule, which applies only to elections beginning in 2007. JA377-379. But Kohl wanted to express views on her website about current elections. For example, scrolling text on her website supported the candidacy of plaintiff Ward and his slate. Was that enough to bring her website within the password-protection requirement? And if not, how much more could she say without having to institute password-protection? *Id.* Similarly, a noncampaign website created by a member of IUOE Local 3 only addressed issues within the local; however, plaintiff Quigley sent the site operator a message commending Local 3 for "turning the bums out," recounting the efforts of members of Local 150 to do the same, and identifying some of the Team 150 platform. JA400,787-806. Did Quigley violate the password-protection rule by placing electioneering comments on an otherwise non-campaign site, and did the host of that site risk being fined thousands of dollars for allowing the comments to be posted?

Or, what about a "sucks" site, *e.g.,* DuganSucks.org, which denounces a person who is running for office and urges members to reject him, but does not support any specific candidate? JA358-359. What about a site that denounces one of the elected GEB members for voting for the website rule, but does not

engage in "express advocacy" about whether he (or an opponent) should be elected in the future? Indeed, even the term "website" may be vague because, when shown a MySpace page, and a YouTube video that the "Gold Ticket" slate used in the 2006 Local 3 election, defendant Giblin expressed uncertainty about whether it was a "website." JA357, 395-397. At his deposition, Giblin not only refused to answer questions about how the rule would apply to such cases, but his lawyers refused to allow him to be asked about the "standards" he would apply in deciding how to construe the rule. JA346-347. These examples reflect not merely peripheral issues about the construction of the rule, but go to the heart of the limitation on members' free speech. The vagueness of the terms will have a chilling effect on member speech, and that alone is sufficient reason to invalidate the rule.

The court below invoked *Hill v. Colorado*, 530 U.S. 703, 733 (2000), and *Grayned v. Rockford*, 408 U.S. 104, 110 (1972), to support its conclusion on vagueness, but in each of those cases the statutes had been limited in ways not present here. In *Hill*, the Court relied heavily on the inclusion of a scienter requirement to defeat the vagueness challenge, and in *Grayned* the Court acknowledged concern about vague language but relied on a ruling of the

Illinois Supreme Court that had imposed a requirement of "imminent" interference with the protectible interest. Here, by contrast, there is no limiting language in the password-protection rule, and defendants' counsel refused repeated requests at the deposition of IUOE's president for limiting principles and standards, insisting instead on case-by-case common-law development to establish the meaning of the rule, which would chill speech at least during the course of its development. The rule should be stricken as vague.

CONCLUSION

The order granting summary judgment to defendants should be reversed, and the case remanded with instructions to enter summary judgment for plaintiffs.

Respectfully submitted,

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January 29, 2009

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief was prepared in 15 point type using WordPerfect X3, which counted 13,652 words in the brief.

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January 29, 2009

CERTIFICATE OF SERVICE

I hereby certify that, on this date, I caused two copies of the foregoing Initial Brief for Plaintiffs-Appellants to be served on counsel for defendants-appellees as follows:

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