UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Michael Quigley, *et al.*	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 07-600 (RBW)
	)	
Vincent J. Giblin, *et al.*,	)	
	)	
Defendants.	)	

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE, FOR A PRELIMINARY INJUNCTION

Pursuant to Rules 56 and 65 of the Federal Rules of Civil Procedure, plaintiffs move the Court to grant summary judgment in their favor on the ground that there are no genuine issues about any of the material facts that support issuance of judgment in their favor invalidating defendants' "Campaign Web Site Resolution," or, in the alternative, to grant a preliminary injunction barring implementation of that Campaign Web Site Resolution insofar as that Resolution requires members of defendant International Union of Operating Engineers to maintain any campaign web site under password protection limiting access to members of the IUOE. The motion is based on the accompanying affidavits and exhibits (including deposition transcripts and exhibits attached thereto), and is supported by the accompanying memorandum of law. The motion for summary judgment is further supported by the accompanying Statement of Material Facts About Which There Is No Genuine Issue. The accompanying memorandum opposes defendants' motion for summary judgment, as well as supporting plaintiffs' motion, and hence is also accompanied by a Response to Defendants' Statement of Material Facts. Alternative proposed orders, one granting summary judgment and one granting a preliminary injunction, are attached.

Respectfully submitted,

/s/ Paul Alan Levy

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May 28, 2007

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MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE FOR A PRELIMINARY INJUNCTION, AND IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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MISCELLANEOUS

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* Authorities on which plaintiffs principally rely are marked with an asterisk.

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. The Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA") guarantees members' right to speak both to each other and to the public. The LMRDA was enacted to enable union members to hold their unions accountable, both within the union and in the arena of public opinion, through the exercise of the right to criticize leaders and through free and fair elections. Congress specifically considered members' need to communicate with non-members, and included separate language intended to guarantee that right.

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 such problems. In an effort to assert control over members' use of the Internet, defendants adopted a rule that forbids members from placing communications about union elections on the Internet unless the web sites 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 ask the Court to enjoin enforcement of the rule. Because the new rule will take effect on July 1, and members who do not comply by that date will be subject to discipline, plaintiffs ask the court to issue a preliminary injunction or, in the alternative, to grant summary judgment striking down the rule.[1]

FACTS

A. The Parties.

The plaintiffs in this case are members of three local unions of defendant International Union

[1] Count Two of the complaint challenged a union rule under which union members are fined for suing the union without exhausting intra-union remedies. In response to this suit, defendants acknowledged that the provision is legally unenforceable under federal law, and committed to begin steps to remove the offending provision from their constitution. Accordingly, the parties will ask the Court to defer ruling on Count Two for the time being.

of Operating Engineers ("IUOE"), a union with nearly 400,000 members that mostly represents operating engineers, who work on construction sites, and stationary engineers, who work in building and industrial complexes and in service industries. Like most unions, the IUOE elects international officers every five years, the maximum term of office permitted by the LMRDA, and its local unions hold their elections every three years, 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. The next IUOE Convention will be held in the spring of 2008. In between Conventions, the IUOE is governed by a General Executive Board ("GEB"), which is headed by the General President of the IUOE, defendant Vincent J Giblin. Plaintiffs' Statement of Material Facts ¶¶ 1-11 ("SMF").

Plaintiffs Michael J. Quigley and Joseph Ward are members of IUOE Local 150, a local with 22,000 members who work on construction sites located in Illinois, Indiana, and Iowa. The next election in Local 150 will be held in August 2007. Quigley is the webmaster of the web site for a slate of candidates called Team 150; the web site is located at www.150election.com. This web site sets forth the Team 150 program, as well as containing harsh attacks on the incumbent leadership. Ward is running on the Team 150 Slate for the office of Business Manager, which, as in every other IUOE Local, is the principal officer of the Local. Ward is currently the elected Treasurer of Local 150, and in that capacity has been employed by Local 150. However, because the staff of a local union serve at the pleasure of the principal officer (unless themselves represented by a union and protected by a union contract), Ward's supporters on the Local 150 staff were fired last year once Ward's plan to run for Business Manager became known. SMF 12-18.

Plaintiffs Patricia Kohl and Paul Gonter are members of IUOE Local 18, a local with 15,000 members who work on construction sites located in most parts of Ohio as well as several counties

in Northern Kentucky. Kohl and Gonter ran together on a slate of candidates in the last Local 18 election, in 2005. During the 2005 election, Kohl operated a web site at www.local18members voice.org, which presented statements by herself and Gonter about their reasons for running for office as well as other information about Local 18 and criticisms of the incumbents. After the election, Kohl decided to keep the web site in operation to serve as a platform for continued commentary on union affairs. Kohl wants her criticisms of the Local to be to be read not only by members of the union, but also by the general public, because she believes that public disapproval of wrongdoing by union officers is an important part of holding those officers accountable for their misdeeds. Kohl also intends to use the Members Voice web site to support candidates in the next Local 18 election in August, 2008, when Gonter plans to run again. SMF 19-24.[2]

Plaintiff Paul Mueller is a member of IUOE Local 39, a local union representing 17,000 stationary engineers employed in Northern California and Nevada. Mueller attempted to run for office in Local 39's last election, in 2004, but was unable to gather enough signatures on a nominating petition. Other candidates had campaign web sites but Mueller did not. In fact, Mueller had never operated a web site and is very unsure of his ability to create one. He plans to attempt a candidacy again in 2007 and has opened a blog for that purpose. SMF 25-31. His blog could not be password protected pursuant to the system that the union has adopted. SMF 144.

B. The 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 other, and with the public, about their concerns. Web

[2] Kohl has retired, making her ineligible to run for office. However, IUOE retirees can pay dues and thus remain active members. Thus, both she and Quigley, who is also retired, have full rights to speak and vote in the union, and are protected by the Union Members' Bill of Rights.

sites play an increasing role both in union elections and members' efforts to reach out to the broader public to talk about problems in unions, in the 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. SMF 32. 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, SMF 33-34, but in a local with between 17,000 and 22,000 members, a single mailing can cost $10,000 or more (assuming $.39 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, each of which has 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 web sites, but more contemporary developments such as YouTube, MySpace and blogs – provide a crucial alternative to these means of communicating campaign messages. SMF 35-37.

Although web sites 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. Brenner Aff. ¶ 7; Kohl. Aff. ¶ 7; Quigley Aff. ¶ 18. 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 web site, 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. SMF 38-52. 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 web site, in part, for the unusually strong showing in the Local 18 election in 2005. SMF 55. The web site at

http://goldticket.deltaspark.net/index.html, operated by the Gold Ticket, an insurgent slate in the 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 (Giblin Dep., Exh. 18).

C. The Union's Adoption and Revisions of Its New Rule.

In January 2007, the IUOE's GEB adopted a new rule restricting "campaign websites" operated by "candidates and their supporters." SMF 56. The GEB is comprised of the 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, SMF 6, 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, as of April 15, such web sites would have to be "password protected," so that only union members, using their names and membership numbers as passwords, could view the web sites. The purported purpose for this rule is to ensure that "sensitive information" about the union does not get into the hands of employers. SMF 56-57. However, unlike some other unions, the IUOE does not have any general prohibition against disclosing "union affairs" to non-members (such provisions are not lawful). Instead of a constitutional provision, the IUOE has a meeting ritual, whereby at the end of each meeting, members chant together a statement that includes "our secrets we will keep." SMF 58-63. The GEB relied on its constitutional authority to adopt regulations providing for the fairness of union elections. Article XXIV, § 1(e). SMF 65-66. Thus, although the "guard our secrets" rationale would extend to any web site, regardless of whether it pertains to a union election, the GEB purported to limit its prohibition to "campaign web sites" that relate to union elections. SMF 67.

According to Giblin, anything that a union member says about the union's organizing, negotiating, or strategies, as well as about undefined other topics, necessarily implicates "sensitive information" that reveals a union "secret."[3] Accordingly, Giblin believes, the union has the power to prohibit a member from criticizing the union publicly on these issues, and to insist that such criticisms be set forward only in places to which only union members have access.

As justification for its extraordinary new rule, the union has pointed to two specific incidents, one in Local 30 seven years ago, and one in Local 66 two years ago. The alleged events in Local 30 emerged at a hearing attended in the year 2000 by defendant Giblin, who was at the time a Vice-President of the IUOE, to decide whether to place IUOE Local 30 in trusteeship. During the hearing, Giblin avers that some members complained that employers had been reading the internal union web sites, and had quoted statements on those web sites to the union's disadvantage in both organizing campaigns and contract negotiations. Thus, according to Giblin, the new web site resolution was required to protect union "secrets" from employers who could misuse them to the union's disadvantage. At his deposition, however, Giblin was unable to provide the specifics of what had been said on those web sites. He could not even say for certain whether the statements had appeared on the web sites during **election** campaigns (which would make them comparable to the web sites regulated under the union's rule), or between elections, when the sites would be more comparable to a caucus web site which the union's rule purports not to regulate. SMF 77-78.[4]

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[3]For example, at his deposition, Giblin claimed that a statement by a union leader 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 web site. SMF 64(a). This dictum, a watchword of the labor movement since the days of Samuel Gompers, http://www.epicweb.org/epic/info.htm, is now claimed to be a union "secret" whose disclosure threatens the interests of the union.

[4]The union has the transcript of that hearing but has decided not use the document to establish a factual basis for its justifications of the rule.

The second incident involved a campaign web site, www.votebeasleyhay.com, operated by Jay Hay and Joe Beasley, who were running against the incumbents in the 2005 election in IUOE Local 66. Levy Aff. Exh. C. According to Giblin, Beasley and Hay posted some minutes of the Executive Board on their web site, and were "informed" by defendant Giblin that minutes are a union secret and may not be revealed publicly. SMF 80. In fact, Beasley and Hay were convicted by their local union and fined $5000. SMF 81; Kohl Affidavit ¶ 28. At his deposition, however, 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. SMF 82-86.[5]

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 the IUOE's own web site. To this day, some IUOE locals post meeting minutes on their web sites. SMF 87-90.

To justify the GEB's invocation of its power to guarantee "fair elections," the union makes the remarkable argument 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 web sites could readily

[5]As with the Local 30, the IUOE has the relevant documents, Giblin Dep. 36, but has decided not to use them to establish the factual basis for the rule.

do so without the rule, because the union could supply member register numbers and names to the candidates or their Internet Service Providers. SMF 91-93. Thus, the theory of enhancing campaign speech does not support a rule that **requires** that web site be restricted to union members.

On February 12, defendant Giblin announced the new web site 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 web sites into compliance with the rule by April 15. SMF 94. Originally, the union planned to provide the necessary data to each candidate's ISP. SMF 99. But 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. At the same time, the union undertook substantial refinements to the way the rule would apply, in an apparent effort to make the rule more defensible. Several "implementation guidelines" were adopted by the GEB on May 11 (almost a month after the rule was originally scheduled to go into effect), announced to all IUOE local union Business Managers in a letter of that date, and revealed to plaintiffs in the summary judgment papers filed on May 12, 2007. SMF 101-103.[6]

Under the new version of the rule, instead of allowing each web site operator to construct his own password system, with access to union membership data, the union decided to hire its own contractor to operate the password protection system, and to require all campaign web sites 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

[6]Plaintiffs were advised that the union would be refining the rule, and defendants proposed a litigation schedule under which they would file the first motion for summary judgment, at which time they would present the newly revised rule. The parties agreed to try to resolve the case by cross-motions for summary judgment, leaving for later discussion whether the implementation date would be further deferred pending the Court's ruling.

user would have to "log in" by entering password information. The log-in screen will tell members that although they are entering their names and register numbers to gain access, their identifying information will not be recorded. As drafted, the page makes no reference to the involvement of any independent contractor, but implies that the IUOE is directly involved. SMF 104-109. Second, recognizing that entering these scripts into a web site might be beyond the capabilities of some rank-and-file members who were not technically adept, the union planned to retain a separate technology firm to help members enter the scripts. SMF 110. 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 web sites were within the requirements of the rule, or to articulate any standards by which the rule would be applied, insisting that he would only address individual web site 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. SMF 111-119.

The rule continued to evolve even after the union filed its summary judgment papers. Originally, the plan was for the password protection rule to apply to the entire campaign web site, SMF 100, but during the deposition of the union's expert witness on May 18 (who was also retained to create and maintain the password protection system, at least assuming that it survives this case), it became apparent that the union was considering a change whereby the home page of the campaign web site could be accessed without a password, and only the internal pages of the web site would have to be password-protected. At the deposition of defendant Giblin on May 22, the union announced that campaign web site home pages could only be a "billboard" showing the names of

the candidates and the positions for which they are running, and would not be password protected, but that all the links to other parts of the web site from the home page (and within the web site beyond that) would be password protected. During his deposition, Giblin gave contradictory answers about what could be on the billboard. Several of the other questions about the application of the rule that arose at the May 18 depositions were answered by letter on May 24, 2007. SMF 120-125.

D. The Rule's Impact on Speech – and Its Inability to Serve Its Supposed Purpose.

Although the principal legal objections posed by plaintiffs in this case are that the rule improperly bars members from communicating about their intra-union concerns with the general public, and that the objectives that the rule is said to advance will not, in fact, be served, there are several undisputed facts that show that the rule will also interfere with members' communications with other union members.

First, the accessibility of a web site 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, and as shown by plaintiffs' expert witness Mark Brenner, and largely acknowledged by the union's expert witness Joanna Pineda, the union's password protection requirement prevents web site operators from using those mechanisms. For example, the major way in which Internet users locate web sites in which they may be interested, without knowing the precise Internet address (the "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. SMF 129-131.[7] Pineda conceded, however,

[7]Pineda admitted that she did not know whether candidates **do** have contact information for union members to convey the URL of their web sites to members. SMF 132.

that search engines cannot index password protected web sites, SMF 133; indeed, her affidavit (¶ 15) 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 web site operators want their web sites to be visible to the media and to authors of other web sites 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 web site 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 of the web site remains inaccessible to outsiders. SMF 134-136. Internet users also use RSS feeds to keep track of new material being posted to web sites 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 web site so that they can see the news. But RSS feeds and other similar services cannot be used for password protected web sites. SMF 137-139.

Second, although there are a number of Internet Service Providers that can host a web site and allow the insertion of scripting code, there are many site hosts that do **not** support scripting, as Brenner explains and Pineda conceded in her deposition. 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-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 link back to that content from other sites. The union's password protection system, however, prevents union members from using these resources altogether. In effect, the union's system confines member campaigning to old Internet technology, cutting off use of the emerging technologies that are making it easier and easier to place content online. SMF 140-147.

Third, the affidavit of plaintiffs' expert witness, Mark Brenner, shows that there is widespread uneasiness on the part of Internet users generally, and of union members specifically, about logging into web sites and providing identifying information to do so. SMF 148, 152. Even the union's Information Technology director implicitly conceded the existence of this concern when he testified that the reason why the union was entering contracts that would forbid logging of identifying data, and at the same time forbid provision of logged identifying data to the union, is that members worry about such identification. SMF 150-151. The affidavits of the plaintiffs themselves confirm that members of their locals are worried about having their access to web sites on the "wrong" side of union politics be tracked. SMF 153.[8]

The union's expert witness, Joanna Pineda, downplayed the existence of any general reluctance on the part of Internet users to log in to get valued information on an Internet web site, but she based this opinion entirely on two practical examples that she retracted at her deposition. Pineda Aff. ¶ 14. (And properly so, according to the Brenner Affidavit, ¶¶ 25-26). First, she stated that three major newspapers – the New York Times, Los Angeles Times, and Washington Post, all require log-in to obtain access to protected content on their web sites. At her deposition, however, she acknowledged that each of those newspapers allows access to some information without log-in, and when she was shown research reports and statements by newspaper professionals to the effect

[8] Although the log-in page will contain an assurance of confidentiality, that assurance might simply remind members of the technical possibility of being tracked by the union itself.

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, she said first that she really does not know much about the practices of the newspaper industry, Pineda Dep. 36-64, and second (after overt coaching from union counsel, at 39, 44) that the example is inapposite, because newspapers require registration but the union's system only requires log-in using information that the union already has. Her affidavit's second example was that "performance of e-commerce functions" require log-in, but at her deposition she acknowledged that "some" e-commerce sites allow viewers to shop and only require log-in to make a purchase (that is, once the viewer has found something on the site that she really wants), *id.* 66-69, and again made the point that the comparison was inapposite because the union requires only log-in and not registration. Pineda seems not to have noticed that even assuming that registration is different from log-in, the newspaper and e-commerce examples were her own, and indeed provided the **only** basis for her opinion that Internet viewers do not mind logging in.

Fourth, although members will certainly 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. SMF 154-155. 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. SMF 156. To be sure, the union member can then go looking for the union card, or, during business hours can call

the local union (or the International) to ask for the proper log-in information.[9] The draft log-in page offers the telephone number of the IUOE's Records Department as the way to obtain the proper information for log-in if entering information from the union card does not work. SMF 157-158. 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 come look at their campaign web sites will bother going forward if reaching their web site is not quick and easy. SMF 161. 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." Pineda Dep. 51 and Exh. 8. A dissenting union member is scarcely the New York Times, and when union members are operating a campaign web site, they want every vote. A password protection system that discourages even a small number of members from viewing a candidate's messages on line is of concern, and the undisputed evidence here is that the rule is likely to interfere with member access to campaign messages.

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 s overridden by the union's interest in concealment – an issue addressed in the argument section of

[9]The password authentication system will set a "cookie" on the user's browser which will, if the user accepts cookies, allow the user to continue looking at other pages on the web site without re-entering the log-in information, but if the user wants to come back on a different occasion, the user will have to enter the log-in information all over again. Moreover, because some Internet users refused to accept cookies as a privacy matter, those users will have to log-in every time they wish to follow a link within the same campaign web site. SMF 162-163.

this brief (at 31-33) – 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 on contractors and their supervisory personnel on the other hand, is not quite so adversarial as the Giblin affidavit makes them seem. 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. 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. These members range from both small "owner-operators," who simply own a piece of heavy equipment and employ one of 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 web sites by using their register numbers. SMF 164-167.

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, free coverage in the media whether in response to press releases or otherwise. SMF 36, 168. Indeed, because the GEB purported to act under its authority to provide for fair elections, the rule purports not to regulate continuing web sites created by intra-union caucuses, SMF 67, 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. In its brief, the

union touts this limit as a way of showing that it really is not limiting much speech, but instead it shows only that the union's 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 web site information only 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. SMF 169. Giblin acknowledged that if a member published his name and register number, that would not violate any union rule. SMF 170. Nor would it violate any union rule for a member to print out the entire text of a web site that he viewed online and ship that text directly to an employer. SMF 171. Indeed, the union's expert witness acknowledged that any member who had entered his password data could then download the entire electronic file of a web site 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. SMF 172. The member's action would also not violate any union rules, SMF 173, and if a **nonmember** published the web site with the exact same information, the union would have no recourse because non-members cannot be disciplined by the union. SMF 174. The union's expert witness also admitted during her deposition the phenomenon of Internet users creating "mirror" web sites, which copy the entirety of another web site that has been threatened with censorship, not out of agreement with the web site's message but simply as an angry response to censorship. SMF 175. Apparently, the union is willing to assume that information found on campaign web site is sensitive enough that unscrupulous employers are willing to read through pages of union member web sites in order to find these gems, but that they are not unscrupulous enough to ask their fellow employers with access to provide copies, ot to look around for member names and register numbers that may be easily retrievable.

PROCEEDINGS TO DATE

Plaintiffs filed their complaint on April 18, 2006. Even before this date, the parties conferred and agreed on a litigation schedule whereby defendants would refine their rule and file a motion for summary judgment no later than May 11, 2007; then plaintiffs would depose defendants' witnesses and cross-move for summary judgment no later than May 28, 2007. Defendants are to depose plaintiffs' witnesses and oppose plaintiffs' motion no later than June 8, 2007; and plaintiffs are to file their final reply brief no later than June 15, 2007. In this way, the parties agreed that they would present the case to the Court for final disposition in advance of the July 1 date when the rule is to be implemented.

The parties have discussed the question whether the rule's implementation might be postponed further in the event the Court cannot rule by July 1, but defendants were unwilling to make any commitments in that regard until they saw plaintiffs' papers. Plaintiffs still hope that they can address the timing issue with defendants on a consensual basis, as they have been able to do with respect to other procedural aspects of the case. However, in the event defendants do not agree to any further stay of the implementation date, plaintiffs have made this motion one for summary judgment or, in the alternative, for a preliminary injunction.

SUMMARY OF ARGUMENT

The union's threat to impose internal union discipline on any union member who runs for union office or supports a candidate for union office, and creates a campaign web site but fails to limit access to that web site 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 outside speech as well as inside speech, and case law going back to the 1960's shows that the courts have consistently protected that right.

The union's argument is based in part on a series of false analogies and comparisons. Despite the union's heavy reliance on the Supreme Court's ruling in *Steelworkers v. Sadlowski,* 457 U.S. 102 (1984), which upheld a union rule forbidding candidates from accepting financial contributions to non-members to support their election efforts, this case has nothing to do with outsider involvement in elections – 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. The union also relies on an analogy to the closure of the union's own meetings to outsiders, because union members need to be able to discuss some issues privately. To be sure, when the union calls a meeting, it is entitled to decide who can attend, and who must be excluded; but when union members call a meeting, they too have the right to decide who can attend and who is to be excluded. Other members (or union officers) who do not want to participate in an open meeting are free not to attend (or the dissenters may choose to exclude them, for that matter); the right to caucus under terms of members' own choosing has also been long recognized by the courts. Similarly, if union members decide that they want to discuss their election-related concerns in a public online form, members who do not want to be in a discussion on those terms may choose not to participate, but they may not prohibit such public discussions.

Plaintiffs fully 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. The union may properly punish members who disclose such secrets. But the right to criticize the decisions, actions, or failures of union officers may not be restricted simply because the criticism relates in some way to collective bargaining or organizing. In that regard, the union's assertion that its adoption of a prophylactic rule forbidding all public campaign speech should be tolerated because it is too difficult to monitor campaign speech to decide which speech discloses secret information, and to impose punishment appropriately, fails because it is apparent that the union vastly overestimates the scope of the speech that it is entitled to prohibit.

Even apart from plaintiffs' basic argument, that the rule violates the LMRDA because its prohibition of public speech is a fundamental attack on one of the LMRDA's core protections, the rule should be invalidated for three additional reasons. First, the undisputed facts show that in addition to preventing members from communicating with the public, the rule creates several obstacles to communications with members. The log-in procedure is likely to discourage member viewing by making entry into the web sites more difficult and threatening to privacy; password protection prevents campaigners from using public sources such as the media, other web sites, RSS readers and search engines as intermediaries to more effectively bring their criticisms to the attention of members; and the particular technical means chosen by the union for its password authentication process preclude the use of several important means of Internet communication beyond the creation of a traditional web site, such as blogs, social networking sites, and video and picture sharing sites, which can easily be used by union members with a minium of technical expertise

Second, the undisputed facts cast substantial doubt on whether the union's rule will actually

do much to serve the purpose of keeping campaign web sites from the purview of employers who are determined to see what is there. Many employers actually retain membership in this union, and hence can use their own register numbers to look at every campaign web site 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 un order to compromise the protection of every campaign web site. 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 web site or downloading the HTML code or other files from a web site 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 web site" 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. Indeed, discipline imposed by this union can be quite heavy, including expulsion from the union as well as fines of $5000 and higher. Although 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 remedy is better suited to avoiding a vagueness challenge to regulations that limit commercial speech, than it is when core political speech is at issue. Moreover, it became apparent at Giblin's deposition that he is unwilling to articulate **any** standards that will be applied to such requests for clarification. Instead, he intends to apply qadi justice, taking each case on its own facts and consulting with his attorney, with the promise only that justice will be swift and that, after several months of living

under the system, speakers may eventually be able to discern the pattern of his rulings and judge their own situations accordingly. When the speech at issue is core political speech about union affairs, particularly during election periods when free speech protections are at their apogee, that system would not be an adequate response to a vagueness challenge under the First Amendment, and should not be accepted under the LMRDA.

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 web sites used for **election campaigns.** The fact that the union has chosen to limit its rule to campaign web sites strongly implies a different motive – the incumbent local union officers who comprise the GEB are trying to protect themselves against further examples of what happened in Local 3 last year.

Moreover, defendants have tried to downplay the significance of their rule by contending that they seek to restrict speech only on web sites 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 during elections – the time when the right of free speech is at its apogee, and when the need to speak 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 this case, other unions whose leaders feel threatened by the ease with which union members are able to criticize

them online will be quick to follow this union's lead, and indeed to expand the prohibited list of forums in which members may speak, lest their speech fall into the hands of the employers.

ARGUMENT

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

A. The LMRDA Guarantees Members' 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*. Section 101(a)(2) of the Act provides:

> 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).

Section 102 of the LMRDA, 29 U.S.C. § 412, specifically authorizes injunctions to enforce this statute:

> Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate.

Plaintiffs' claim must be considered in the context of the events and concerns which 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.

Unfortunately, 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 on Labor and Public Welfare, the LMRDA neither protected union members' rights to speak about candidates or to deliberate on union business, nor gave members a right to sue when union leaders retaliated against them for exercising those rights. Indeed, the Senate Committee consciously decided not to legislate on that topic lest it interfere with unions' internal affairs. I Legis. Hist. 403. In so doing, the Senate Committee 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 the Bill

of Rights offered by Senator McClellan 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 NLRB, *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. Similarly, in *Reed v. UTU*, 488 U.S. 319, 325-327 (1989), the Court looked to First Amendment principles for analogies in order 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 (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).

The specific language in section 101(a)(2) on which plaintiffs rely is the second of three rights, each of which is set apart from the other by semi-colons: "and to express any views, arguments, or opinions." In the original set of 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. at 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 right of speech and right of assembly into a single provision, which set forth the same three rights as does the statute as passed, but separated the rights 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 this legislative history definitively shows 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) (citing inter alia *Deacon*, 273 F. Supp. at 172-73, for the proposition that "it has been established by prior decisions . . . [that] freedom of speech is protected outside of the union halls as well as within.").

Consistent with these early cases, federal courts have consistently recognized 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) (finding member's rights violated when the union removed an article posted on an open-use bulletin board at the place of employment because the article described corruption in the union); *Keeffe Brothers v. Teamsters Local Union No. 992*, 562 F.2d 298, 301 (4th Cir. 1977) (finding the member protected for making a statement "in a public place" that the union official had embezzled money); *Giordani v. Upholsterers*, 403 F.2d 85, 86 (2d Cir. 1968) (protecting a member who wrote a letter to public officials, including elected representatives at all levels, charging a union with misappropriating welfare and pension funds); *Deacon*, 273 F. Supp. at 172 (finding a publicly published newspaper article written by a member protected); *Caldwell v. ILA Local 1694*, 696 F. Supp. 132, 134 (D. Del. 1988) (protecting members' right to write a letter published in a local newspaper critical of the union and union leadership); *Pearl v. Tarantola*, 361 F. Supp. 288, 294 (S.D.N.Y. 1973) (protecting statements published in a 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 the 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 who issued a letter addressed to the employer expressing criticism of the union for not enforcing certain contract provisions); *Farnum v. Kurtz*, 2 Cal.App.3d Supp. 1, 81 Cal.Rptr. 924 (Cal. App. Dep't Super. Ct. 1969) (protecting a letter that was very critical of the union sent to both the employer and to the press); *Boilermakers v. Rafferty*, 348 F.2d 307 (9th Cir. 1965) (upholding a compensatory damage award for members punished for distributing a handbill critical of the union to other members, members of other unions, supervisors and employers).

Both this Court and the D.C. Circuit have been fully committed to the proposition 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 them. In *Bishop v. Iron Workers*, 310 F. Supp.2d 33 (D.D.C. 2004), the court struck down several provisions in the union's constitution as a violation of section 101(a)(2), including one forbidding members to "reveal any private business or proceedings of this Local Union or of the International Association." Similarly, 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, the court of appeals discussed whether the union's action violated any of the core policies of the labor laws, and held that section 101(a)(2) extended to protect the rights of the members of an intra-union caucus to promote its views by posting on the work-place bulletin board. *Id.* at 895-96. It is, therefore, well-established precedent in this Court that members' speech in forums open to non-members is fully protected by the LMRDA.

B. The Web Site Restriction Rule Cannot Past Muster as a "Reasonable Rule" Governing the Member's Responsibility Toward the Union as an Institution.

Although ignoring the portion of section 101(a)(2) that its rule violates, defendants place the entire weight of their defense of their rule on the proviso that allows a union to adopt "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." In this regard, the union cites *Steelworkers v. Sadlowski*, 457 U.S. 102 (1984), and argues that the rule is needed to protect "sensitive information" from being revealed to employers.

Before explaining why the rule does not serve this interest, it is important to lay to rest another purported purpose that the union's brief and Statement of Material Facts falsely invoke. Defendants' papers contain fine words about the union's respect for the right of free speech, about the importance of the Internet as a means of campaigning and about the union's supposed desire to foster such speech. Indeed, the union professes concern about whether, absent password protection, some candidates for union office or other members might feel inhibited about speaking candidly, for fear that their words would be taken out of context and cited against the union in some future bargaining or organizing context. However, the union's rule is **not** needed to enable members to create web sites to discuss union affairs. It is undisputed in the record that IUOE members and candidates have been creating and using web sites addressed to union affairs since the end of the 20th Century, and **there is no evidence in the record that a single member has felt the slightest inhibition** about saying what he wanted to say on a web site based on the concern that defendants' counsel put forward.

Moreover, at his deposition, defendant Giblin admitted that, in the course of the discussions leading to the adoption of the rule, not a single member of the GEB said anything about the possibility the some members might feel inhibited about what they put on web sites in the absence of password protection, or stated that a purpose of the rule would be to remove such inhibitions. SMF 91-93. Indeed, two members of the current GEB, William Dugan and Russell Burns, **currently**

have campaign web sites online, each of which discusses subjects that defendants say they want to protect from employer scrutiny, and includes information that Giblin regards as "sensitive" material that the rule is intended to keep to members only. It appears that neither member has the slightest concern of the sort that the union's papers assume that any union member might have. The theory that the rule is needed to promote speech is just an argument by the lawyers that finds no basis in either the realities of union politics, or in the evidence in the record.

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 web sites, 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 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 web sites." If the union prevails in this case, however, that grace will quickly be abandoned, by these defendants and by other unions. 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, Giblin Dep., Exh. 20, and in the experience of undersigned counsel, other unions have brought charges about going to the press or handing out caucus newspapers that the employer might see. Here, the union confines itself to web site speech, and says it doesn't restrict any other, but in past cases the speech du jour that had to be restricted was in a newspaper, or picketing the union hall.

The purpose that the union does assert in this case is the need to protect union secrets from

being revealed to employers. In order 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* (discussing evidence showing harm to union). But defendants carefully phrase their Material Facts to say only what defendants "thought" or "concluded"; they have not introduced **evidence** of serious harms. At most, they recite some hearsay evidence about events several years ago in IUOE Local 30, and cite cases holding that unions may not be **compelled** to disclose certain "highly sensitive and confidential" information to members or to employers (or that similar records are exempt from disclosure under the FOIA). Def. Mem. 17-20. Plaintiffs agree that there are, in fact, some union secrets that a member could properly be forbidden to disclose, such as the union's fall-back position in collective bargaining ("we'll open by asking for an increase of ten cents a hour but if they offer five cents, we'll take it"). But 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 indeed several other unspecific 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. SMF ¶ 64(a). Statements 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 the employees in a large bargaining unit had decertified the union because

they 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* SMF ¶ 64. Given that the union sees its power to prevent public criticism as extending so broadly, it is not surprising that the union claims that it wants a prophylactic rule that protects it from having to say exactly what public speech ought to be prohibited. Had the union sought to punish candidates for speaking these words publicly, not a single such case would survive an LMRDA claim under section 101(a)(2).

The one example that the union cites pertaining to any of the five plaintiffs further illustrates the unsupportable breadth of the union's attempt to censor speech. The union cites a leaflet provided on the Ward/Quigley web site containing opinions about upcoming contract negotiations. Def. Mem. 18-19. The court is urged to look at the document, which apparently responds 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." It is hard to understand what insights about the union's strategy defendants think an employer could derive from such talk, that the employer would not have thought for itself.

Defendants also suggest that their rule is needed to preserve the sanctity of secret union meetings, in light of the fact that some campaign web sites 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. SMF 82-85. Indeed, at his deposition Giblin undercut the broad claims in his affidavit that the IUOE jealously guards the secrecy of minutes of GEB meetings, SMF 87-89, and some locals **still** post

their minutes on their web sites. SMF 90. If there is a problem with respect to the posting of minutes on web sites, the problem can be addressed specifically, not by a prophylactic rule forbidding any public speech on campaign web sites.[10]

Defendants also draw an analogy between union meetings and campaign web sites, suggesting that web sites 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 union 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).

Defendant also cite the Supreme Court's ruling in *Sadlowski*, but apart from setting forth general standards for application of section 101(a)(2), that case has no relevance to the rule at issue here. In *Sadlowski*, the question was whether a union can forbid candidates in a union election to accept campaign contributions from non-members of the union, against the backdrop of legislative history suggesting that Congress wanted to keep union's free of improper control by certain outsiders. There is no issue of outsider involvement in the union here, however. The question here is whether members are forbidden to allow access to campaign web sites 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 legislative history

[10] The union cites a campaign web site in IUOE Local 66 two years ago, on which members posted union minutes. Def. Mem.6-7. At his deposition, however, Giblin could not say anything specific about what was in the minutes – namely whether they revealed any secrets. SMF 86.

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. The IUOE's rule was adopted by an executive board comprised almost entirely of Vice-Presidents who simultaneously serve as Business Managers of local unions, and who have an intense interest in protecting themselves from the use of the Internet to foster more effective electoral challenges.[11]

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, this is a union in which 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, and in which these employers and employer representatives frequently talk with rank-and-file members and learn about intra-union controversies that way. SMF 164-167. Second, the union does not bar members from publishing the very same "secrets" in leaflets given out at the work place, 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 and register numbers. Indeed, a single member could either 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

[11] To justify the GEB's authority to adopt the new rule, Giblin explained that it had been enacted under the IUOE Constitution's provision allowing the GEB to adopt procedures to ensure fair local union elections as the sole legal authority for the rule. SMF 65-66. However, the rule has nothing to do with the fairness of union elections, given the fact that members have been perfectly capable of erecting campaign web sites without the benefit of this rule.

web site. SMF 169-170. Is the union so confident that employers have no access whatsoever to member register numbers? They 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 web site in the country. Nor, indeed, does the union's rule (or its password protection system) prevent a member from either printing out the web site and sending it to an employer, or from downloading the web site 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 "mirror" sites, not because they agree with the site owner's opinion, but simply out of outrage against censorship. SMF 175.[12]

Yet another reason why the union's rule cannot accomplish its purported purpose is that it is applied only to **election** campaign web sites, but does not bar members from placing the sane criticisms – and the same supposed secrets – on intra-union web sites 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 web sites 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 web sites involved **election** campaigns, as opposed to intra-union caucuses that were attacking a previous 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 unspecific. Indeed, a contemporaneous press account strongly

[12]The union's only response to these possibilities is to suggest that if a **candidate** sent his web site to an employer, he could be held politically accountable for doing so. Def Mem. 23-24. But because any one of the nearly 400,000 members of the IUOE could do the same thing, there would be no such accountability.

suggests that web sites in Local 30 continued past the election. SMF 79. Yet, if it was a "caucus" web site rather than an election campaign web site, 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.

But the union's invocation of the events in Local 30 casts doubt on the real reason for the rule. These events – the only **specific** example cited by the union when statements on a campaign web site 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 web site in defeating an incumbent GEB member in his August 2006 local union election, Giblin Dep. Exh. 18, not to speak of Ward and Quigley's contemporaneous use of a web site 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 web sites, and they have responded with a rule that is **limited** to election related web sites. 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 limits members' ability to use web sites to communicate with members, as discussed in the next section of this memorandum.[13]

II. THE UNION'S RULE ALSO INTERFERES WITH EFFECTIVE USE OF THE INTERNET TO COMMUNICATE CAMPAIGN MESSAGES TO MEMBERS.

In addition to improperly restricting members' right to communicate to non-members, the web site restriction rule also interferes with union members' right to use the Internet to communicate

[13] Another reason to be skeptical of the union's profession of concern about disclosure of "sensitive information" is its apparent lack of interest in avoiding the disclosure of information on union web sites. In announcing the rule to local union business managers, Giblin stated that local union web sites and the 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 web site open to public scrutiny. SMF 95-98.

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

In this regard, although incumbents as well as insurgents use campaign web sites, web sites 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. In the IUOE, as in many unions, the Business Manager controls the union newspaper, the union web site, and the union staff, which is constantly talking to members, and which can be ordered to support the Business Manager's reelection or lose their jobs. SMF 38-50. 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 F2d 216, 218 (1988), *opinion adopted en banc*, 889 F.2d 58 (4th Cir. 1989), *aff'd*, 498 U.S. 466 (1991).

Moreover, the union's rule is directed at limiting speech in union elections, the time when "this freedom is particularly critical, and deserves vigorous protection, in the context of election campaigns. For it is in elections that members can wield their power, and directly express their approval or disapproval of the union leadership." *Teamsters Local 82 v. Crowley*, 467 U.S. 526, 537 (1984), *quoting Sadlowski*. The union's restrictions are thus subject to especially exacting scrutiny.

The undisputed facts, set forth both in plaintiffs' own affidavits and the affidavit of their expert witness Mark Brenner, and largely conceded by the union's affiants during their depositions,

show that the password protection rule threatens to interfere with communication to members in a variety of ways. First, by limiting speech directed to the general public, the union's rule interferes indirectly with member access to the web site operator's speech. For example, the principal way that members of the public, including members, find web pages that contain information in which they may be interested is by using search engines, but a password protected web page cannot be indexed by search engines, and hence will not be returned as a search result.[14] Candidates often seek press coverage and links on web sites that members may read both to reach out to members and to lend their campaigns greater legitimacy; but the press is not likely to link to a web site that the reporter cannot read. Internet users also employ RSS readers and other similar techniques to follow new developments on web pages in which they may be interested, but these techniques cannot be used for password protected sites. SMF 129-139.

Next is the problem of whether all members whom plaintiffs want to reach will bother to log in when they are confronted with a log-in page. One of the main advantages of communicating over the Internet is ease of use, and when web pages or web sites require log-in, the natural result is that those who are not highly motivated to view the underlying information may decide to go elsewhere. SMF 149, 161. This phenomenon is encountered by other web site operators, such as newspapers, some of which require log-in but many of which avoid such requirements because they worry about losing web site traffic. Brenner Aff. ¶ 25-26; Pineda Dep. 32-66. But the problem is compounded

[14]In an apparent effort to address this problem, defendants announced during their depositions that they were changing the rule to provide that the campaign web site's home page would not be password protected, but would be limited to a "billboard" stating the name of the candidate, office sought, and picture. In the same deposition, defendant gave inconsistent answers about what could be on the "billboard." SMF 121-123. In any event, as shown by the Brenner Affidavit, a billboard page of the sort described by defendants severely limits the ability to attract Internet traffic through search engines. SMF 136.

in the case of union members surfing online, partly because they may worry about being "tracked" by the union and found to be looking at political propaganda from the "wrong side," SMF 150-153, but also because of the quite practical problem that members rarely memorize their member register number, SMF 154-155, and if they do not have their union card handy they will be unable to enter the proper log-in information. SMF 156-158. To be sure, the union member who is committed to getting onto a campaign web site may ultimately find a way to do so – he can call the union to get the log-in information, he can come back when he finds his union card, and the like – 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 undisputed facts show that the technique adopted by the union for password protection – which requires members to enter certain code called "scripts" into each of their web pages so that anyone trying to view those pages will be referred to a web site 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 web site creation. Modern campaigns, in unions and elsewhere, typically use social networking sites such as MySpace, blogging sites such as Blogspot, facilities for placing photos, videos, or audio files such as YouTube and Flickr, and similar facilities, but scripts cannot be placed on any of those web sites. SMF 140-147. For example, plaintiff Mueller recently created a campaign blog, SMF 31, but if the union's rule is upheld he will have to shut it down. Indeed, the union's rule forces members to adopt an increasingly outmoded form of Internet site, assuming the existence of a "home page" located at a domain name registered by the candidate, with several other pages branching out from that page.

Because the union's rule interferes with the right of plaintiffs and other union member who start campaign web sites 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).

III. 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). In this case, although the term "candidate" is relatively clear, the terms "campaign web site" and "supporters" are less clear, especially in light of the fact that the union defends its rule on the ground that it does not limit the right of members to have web sites that are **not** election sites. *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 web site that pertains mostly to her 2005 election campaign, and as such is outside the scope of the rule which applies only to elections beginning in 2007. Giblin Dep. 151-152. But Kohl wants to express views on her web site about current elections. For example, there is scrolling text on her web site supporting the candidacy of plaintiff Ward and his slate, Team 150. Is that enough to bring her web site within the password protection requirement? And if not, how much more could she say without having to institute password protection. *Id.* Similarly, there is currently a noncampaign web site created by a member of IUOE Local 3 that simply addresses 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. Giblin Dep.

Exh. 13, 14. Does Quigley violate the password protection rule by placing electioneering comments on an otherwise non-campaign site, and does the host of that site risk being fined thousands of dollars for allowing the comments to be posted? Or, what about a "sucks" site, which denounces a person who is running for office, and urges members to reject him, but does not support any specific candidate? Giblin Dep. 120-121. What about a site that denounces defendant Giblin for his support for the web site rule, but does not engage in "express advocacy" about whether he (or an opponent) should be elected at the IUOE's next convention? Indeed, even the term "web site" 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 "web site." Dep. 118. 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. SMF 116-117. The vagueness of these terms will have a chilling effect on member speech.

In response plaintiffs' vagueness claim, defendants offer the availability of an "administrative procedure" whereby members of the union can ask defendant Giblin for an interpretation of the rule as it applies to their particular facts. Def. Mem. 28, *citing Trans Union Corp. v. FTC*, 245 F.3d 809 (D.C. Cir. 2001), and *Village of Hoffman Estates v. Flipside, Hoffman Estates,* 455 U.S. 489 (1982).

The union's system of administrative interpretation does not save its rule. First of all, *Trans Union* and *Hoffman Estates* both involved challenges to "classic economic regulation" – in *Trans Union* the sale of lists of debtors to marketing companies, and in *Hoffman Estates* the sale of drug paraphernalia. In both cases, the courts were at pains to distinguish the cases before them from non-commercial speech. 455 U.S. at 496, 498; 245 F.3d at 817. When noncommercial speech is at stake,

"a more stringent vagueness test should apply." 455 U.S. 699. Moreover, in both cases a neutral administrative agency would be issuing determinations, not a highly political union president.

Moreover, this is not a situation in which there is already a body of interpretation to which members can look to understand how the rule will apply to them. Giblin claimed during his deposition that he would consider each case individually, in a strictly case-by case-basis, and he agreed only that, by looking to see if they could find a pattern in his decisions, members would hopefully be able to predict how their speech might be treated. SMF 113, 119.

Such a regime is quite troubling as applied to core political speech, especially when the practicalities are considered. Member X is thinking about putting a message on a non-campaign web site that is not password protected. But before he does so, he has to write a letter to Giblin asking whether, as written, the message would provoke application of the rule. Perhaps the member would be wise to send Giblin a range of possible comments, with greater or lesser detail, and with more or less explicit reference to an election or to voting, asking which of the alternatives is too much to avoid coverage by the rule. And the web site host who is thinking about whether to include a comment - or deciding what to put on the next web page that he is writing – and must write to defendant Giblin to ask whether this or that detail may be included without running afoul of the password protection requirement. Nor is it clear exactly what a member must submit to get a ruling. Giblin testified that sometime it will be necessary to examine the entire web site to make a decision, and sometimes only part of the site will have to be reviewed. SMF 112. This is precisely the sort of content-specific review of core political speech that most offends the First Amendment, and it should similarly be forbidden under section 101(a)(2).

Indeed, the union's invocation of an "administrative review process" should not be permitted

to obscure the fact that it is not just rule interpretations that are being promised – the rule itself keeps changing. In January 2007, the union first adopted its web site password protection requirement, but it is apparent that the union had not carefully considered the free speech and practical ramifications of its rule, because almost every time the union says something about the rule, it is apparent that the rule has changed. In the course of explaining why the union was unwilling to give firm answers to issues of interpretation and application during the Giblin deposition, the union gave the game away – the rule "is in the process of evolution," Dep. at 113, or "a work in progress." *Id.* 152. Implicitly, the administrative review process will continue the process of evolution. In the end, the union has put forward not a rule but a generalized desire to limit "campaign speech," whatever that might mean in the context of an individual case. The vague and ephemeral nature of the restriction simply enhances its chilling effect, and the "rule" should be struck down for vagueness.

IV. THE COURT SHOULD EITHER GRANT SUMMARY JUDGMENT OR ISSUE A PRELIMINARY INJUNCTION BARRING ENFORCEMENT OF THE RULE.

Plaintiffs have argued above that, based on the undisputed facts, they are entitled to summary judgment invalidating the union's rule forbidding members from operating campaign web sites without adopting the union's password protection system. In the event, however, that the union introduces evidence creating any genuine issues with respect to the material facts, plaintiffs ask in the alternative that the Court issue a preliminary injunction barring enforcement of the rule pending the resolution of such factual conflicts.

> When deciding whether to grant a preliminary injunction, the district court must examine whether "(1) there is a substantial likelihood plaintiff will succeed on the merits; (2) plaintiff will be irreparably injured if an injunction is not granted; (3) an injunction will substantially injure the other party; and (4) the public interest will be furthered by the injunction." Id. at 1317-18 A court must balance these factors, and "[i]f the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas are rather weak."

Ellipso, Inc. v. Mann, 480 F.3d 1153, 1157 (DC Cir. 2007),.quoting *Wash. Metro. Area Transit Comm'n v. Holiday Tours*, 559 F.2d 841, 843 (D.C.Cir.1977).

Plaintiffs have shown above that they are highly likely to succeed on the merits of their claim, on at least one of three independent grounds – violation of their right to speak publicly, violation of their right to speak to members, and the vagueness of the union's rule. Moreover, plaintiffs will be severely and irreparably injured if they are denied the right to speak to their fellow union members to solicit their support in the upcoming elections. First, as the Supreme Court has held, deprivations of rights of free speech are presumed to cause severe, irreparable injury sufficient to warrant the grant of preliminary relief, *Elrod v. Burns*, 427 U.S. 347, 373 (1976), and this principle has been held applicable to deprivation of union members' rights under the LMRDA. *Hummel v. Brennan*, 469 F. Supp. 1180, 1187 (E.D. Pa. 1979); *Ostrowski v. Utility Workers Local 1-2*, 530 F. Supp. 208, 215 (S.D.N.Y. 1980). Indeed, in urging his colleagues to provide a civil action instead of criminal sanctions as a means of enforcing the LMRDA, Senator Javits reassured his colleagues that "a court will act, and act in time." II *Legis. Hist.* 1240, 1241.

There is no reason to believe that the union will suffer appreciable injury should the motion be granted. The union claims that it has been suffering these same problems of employer scrutiny of member web sites since the turn of the century, although it has introduced **no** evidence of real harm to its interests over the several years that campaign web sites have been in existence in various locals, and any such web sites as now exist have been in existence for years. Under the current schedule, the union will not be implementing its rule until July 1, just one month before end of the IUOE election season in August. Although there is no doubt that the union would prefer to be able to begin applying its rule this year, the addition of that one month without password protection will scarcely cause substantial injury to the union's legitimate interests. Moreover, even if summary

judgment cannot be granted at this time, the parties should be able to conclude litigation of this case by the end of the year, in time for the rule to be either implemented, or not, during the election season next year.

Finally, the public interest supports the granting of the preliminary injunction. "The public has an interest in assuring that unions, which have taken on a fiduciary duty with respect to workers in the United States, and in which those workers have reposed their trust, do not abuse their power." *Patrick v. McCarthy*, 743 F. Supp. 894, 901 (D.D.C. 1990). Moreover, the public interest is served by the issuance of a preliminary injunction "where, as here, there has been a violation of the LMRDA's bill of rights." *Bauman v. Presser*, 117 LRRM 2393, 2401 (D.D.C. 1984). *Accord, Lorangeteli v. Critelli*, 853 F.2d 186, 196 (3d Cir. 1988) (public interest lies in vindicating the principles of union democracy).

CONCLUSION

Plaintiffs' motion for summary judgment, or for a preliminary injunction, should be granted.

Respectfully submitted,

/s/ Paul Alan Levy

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May 28, 2007

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Michael Quigley, *et al.*	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 07-600 (RBW)
	)	
Vincent J. Giblin, *et al.*,	)	
	)	
Defendants.	)	

PLAINTIFFS' STATEMENT OF MATERIAL FACTS ABOUT WHICH THERE IS NO GENUINE ISSUE

1. Defendant IUOE is an international labor organization with approximately 396,000 members. Defendants' Statement of Material Facts ("Def. SMF") ¶ 1.

2. The IUOE has 138 chartered and autonomous local unions across the United States and Canada. It primarily represents operating engineers, who work as heavy equipment operators, mechanics, and surveyors in the construction industry, and stationary engineers, who work in operations and maintenance in building and industrial complexes, and in the service industries. The IUOE also represents approximately 3,600 registered nurses and other medical personnel. *Id.* ¶¶ 2-3.

3. Defendant Vincent J. Giblin is the General President of defendant IUOE, and as such is both the IUOE's principal executive officer, and a member of the General Executive Board of the IUOE ("GEB"). Before he held that office, he was General Secretary-Treasurer of the IUOE (the second highest ranking officer of the IUOE), until March 2005, when he succeeded Frank Hanley as General President. Before becoming General Secretary-Treasurer in December 2002, Giblin served as a Vice-President of the IUOE beginning in 1989. In his capacity as General Secretary Treasurer and Vice-President, Giblin was a member of the GEB. Def. SMF ¶¶ 5-7; Giblin Aff. ¶¶ 3-4; Giblin Dep. 7-9.

4. About 40 years ago, Giblin became a member, officer and business representative of IUOE Local 68, where his father was Business Manager. The Business Manager is the principal officer of an IUOE Local Union. In 1975, he succeeded his father as Business Manager, and continued to hold that office until 2004. Giblin Aff. ¶ 5; Giblin Dep. 7-9.

5. Giblin was succeeded in the office of General Secretary-Treasurer by Christopher Hanley, the son of Frank Hanley. Christopher Hanley became an IUOE member in 1988, and joined the staff of the IUOE where he worked until he became General Secretary-Treasurer. Giblin Dep. 9-10.

6. The remaining members of the GEB are the fourteen Vice-Presidents, each of whom serves at the same time as the Business Manager of his respective IUOE Local. Giblin Dep. 11.

7. The IUOE elects its international officers every five years, the maximum term of office permitted by the LMRDA. Complaint ¶ 6, admitted in Answer. 29 U.S.C. § 481

8. IUOE local unions elect their officers every three years, the maximum term permitted by the LMRDA. Complaint ¶ 6, admitted in Answer. 29 U.S.C. § 481

9. In IUOE locals, elections are held in August, preceded by a nominating period that begins as early as May. Giblin Aff. ¶ 10.

10. The next IUOE Convention will be held in the spring of 2008. Giblin Aff. ¶ 9.

11. In between Conventions, the IUOE is governed by the GEB. *Id.*

12. Plaintiffs Michael J. Quigley and Joseph Ward are members of IUOE Local 150, a local with 22,000 members who work on construction sites located in northern Illinois, northwest Indiana, and southeastern Iowa. Answer ¶ 7.

13. The next election in Local 150 will be held in August 2007. Answer ¶ 22.

14. Quigley is the webmaster of the web site for a slate of candidates called Team 150; the

web site is located at www.150election.com. Quigley Aff ¶ 3; *see generally* www.150election.com.

15. Ward is running on the Team 150 Slate for the office of Business Manager. Quigley Aff. ¶ 3.

16. Ward is currently the elected Treasurer of Local 150, and in that capacity has been employed by Local 150. Answer ¶ 22.

17. The staff of a local union serve at the pleasure of the principal officer (unless themselves represented by a union and protected by a union contract). Quigley Aff. ¶ 18; Giblin Dep. 145-146.

18. Ward's supporters on the Local 150 staff were fired last year once Ward's plan to run for Business Manager became known. Quigley Aff. ¶ 18.

19. Plaintiffs Patricia Kohl and Paul Gonter are members of IUOE Local 18, a local with 15,000 members who work on construction sites located in most parts of Ohio as well as in northern Kentucky. Answer ¶ 18.

20. A slate of candidates, including Kohl and Gonter, ran in the last Local 18 election, in 2005. Koll Aff. ¶ 3.

21. During the 2005 election, Kohl operated a web site, located at www.local18members voice.org, which presented statements by herself and Gonter about their reasons for running for office as well as various information about Local 18 and criticisms of the incumbents. Kohl Aff. ¶ 8; *see* http://www.local18membersvoice.com/candidates.htm.

21. After the election ended, Kohl decided to keep the web site in operation, to serve as a platform for continued commentary on union affairs. Kohl Aff. ¶ 9.

22. Kohl wants her criticisms of the Local to be to be read not only by members of the union, but also by the general public, because she believes that public disapproval of wrongdoing by union

officers is an important part of holding those officers accountable for their misdeeds. *Id.* ¶¶ 16, 17, 24.

23. Kohl is not worried about employers seeing her criticism of the officers of her union, because she believes that it is helpful for them to know what kind of people they are dealing with. She also believes that employers in her local have other ways of learning about internal union controversies. *Id.* ¶¶ 19, 25-26.

24. Kohl also intends to use the Members Voice web site to support candidates in the next Local 18 election in August, 2008, when Gonter plans to run again. *Id.* ¶ 27.

25. Kohl currently uses the Members Voice web site to support candidates in the Local 150 election. Giblin Dep. 151 and www.local18membersvoice.com.

26. Plaintiff Paul Mueller is a member of IUOE Local 39, a local union representing 17,000 stationary engineers employed in northern California and northern Nevada. Answer ¶ 7.

27. Mueller attempted to run for office in Local 39's last election, in 2004, but was unable to gather enough signatures on a nominating petition. Answer ¶ 24; Mueller Aff. ¶ 2.

28. Other candidates in Local had campaign web sites but Mueller did not. *Id.*

29. In fact, Mueller had never operated a web site and at the time he signed his affidavit was very unsure of his ability to create one. *Id.* ¶ *3.*

30. Mueller hopes to attempt a candidacy again in 2007 and to open a web site for that purpose. *Id.* ¶ *2.*

31. Mueller has started a personal blog, where he discusses the upcoming election in Local 39 and his own candidacy, at http://www.local39.blogspot.com/.

32. The Internet has the potential to transform union politics by providing a cheap, yet

effective, means of spreading campaign messages. Brenner Aff. ¶¶ 7-8; Giblin Aff. ¶ 13.

33. Unions have mailing lists but individual members cannot get copies of that list. Brenner ¶ 7; Answer ¶ 13.

34. Candidates for union office have a statutory right to send campaign mailings, at their own expense. 29 U.S.C. § 481(c).

35. In union elections, members can also campaign at the workplace but, particularly in a construction union, there are a large number of work sites each of which has a small number of members of any given construction union, reducing the cost-effectiveness of such campaigning. Kohl Aff. ¶ 5.

36. When leaflets are given out in the workplace, they are likely to fall into the hands of employers. Giblin Dep. 52.

37. The various tools for online communication – not just traditional web sites, but more contemporary developments such as YouTube, MySpace and blogs – provide a crucial alternative to these means of communicating campaign messages. Kohl Aff. ¶¶ 5, 6, 8; Brenner Aff. ¶¶ 7-10.

38. Incumbent elected officers preside at all meetings and decide what will be on the agenda. Quigley Aff. ¶ 18; Kohl Aff. ¶ 7.

39. In local unions that have newspapers, there is only one union newspaper, which is mailed to every union member. Quigley Aff. ¶ 18; Kohl Aff. ¶ 7.

40. The union newspaper is under the control of the principal officer of the local, and typically features the pictures and activities of the incumbent officers. Quigley Aff. ¶ 18; Kohl Aff. ¶ 7.

41. In local unions that have web sites, the site's contents are under the control of the union's

principal officer. Kohl Aff. ¶ 7

42. A Business Manager is allowed to hire and fire the staff for taking the wrong stance with respect to an election. Giblin Dep. 146.

43. The Business Manager can, in effect, direct all staff to support him in an election at the risk of their jobs. Quigley Aff. ¶ 18; Kohl Aff. ¶ 7.

44. In Local 18, the Business Manager has the services of approximately 50 staff members at his disposal. Kohl Aff. ¶ 7.

45. In Local 150, the Business Manager has the services of approximately 200 staff members at his disposal. Quigley Aff. ¶ 18.

46. The staff of the union are continually in touch with the membership in the course of their official duties. Quigley Aff. ¶ 18; Kohl Aff. ¶ 7.

47. Some of the staff of the union travel to work sites at union expense, where they speak to members. Quigley Aff. ¶ 18; Kohl Aff. ¶ 7.

48. In the course of their official duties, staff of the union receive many calls from union members looking for help on workplace problems. Quigley Aff. ¶ 18; Kohl Aff. ¶ 7.

49. The Business Manager also controls the staff at affiliated apprenticeship funds and other funds jointly managed with employer representatives which are, as a practical matter, under the union's leadership. Quigley Aff. ¶ 18; Kohl Aff. ¶ 7.

50. Union staff and the staff at affiliated funds can and do talk about union politics in the course of their official contacts with union members. Quigley Aff. ¶ 18; Kohl Aff. ¶ 7.

51. In a construction local, members depend for work referrals on the union hiring hall (run by appointed staff). Quigley Aff. ¶ 6.

52. The union's control over employment opportunities gives the Business Manager and his staff extra informal authority vis a vis members. Quigley Aff. ¶¶ 6-7; Kohl Aff. ¶ 10.

53. The IUOE Constitution requires that any member of the union can be punished for failure to follow any "orders [or] directions" of an officer whom the constitution empowers to give such orders or directions. IUOE Constitution, Article XXIV, § 3.

54. The union encourages members to read the Constitution so that they will know, among other things, what their duties are. Giblin Dep. 20.

55. Kohl credits her campaign web site, in part, for her unusually strong showing in the Local 18 election in 2005. Kohl Aff. ¶ 8.

56. In January 2007, the GEB adopted a new rule governing "campaign websites" set up by "candidates and their supporters." Def. SMF ¶ 17; Giblin Dep. Exh. 3, page 1.

57. The resolution provided that such web sites would have to be "password protected," so that only union members, using their names and membership numbers as a password, could view the web site. *Id.*

58. The purported purpose for this rule is to ensure that "sensitive information" about the union does not get into the hands of employers. Def. SMF ¶ 22.

59. Some unions, including at least one IUOE local, have or have had general rules forbidding members from disclosing "union affairs" to non-members. Giblin Dep., Exh. 20; *Bishop v. Iron Workers*, 310 F. Supp.2d 33 (D.D.C. 2004).

60. This Court has struck down such a rule. *Bishop v. Iron Workers*, 310 F. Supp.2d 33 (D.D.C. 2004).

61. The IUOE Constitution would not allow discipline for such a broadly worded offense

that extended to discussing anything about the union with any outsider. Giblin Dep. 160.

62. At the end of every meeting, members chant in unison a statement that includes the words, "our secrets we will keep." Giblin Dep. 26.

63. The prohibition against revealing "our secrets" restricts disclosure of a narrower category of information than a general rule against revealing union affairs to non-members. Giblin Dep. 160.

64. At his deposition, Giblin gave the following examples of the sort of "sensitive information" that the new web site rule was intended to protect from viewing by employers:

(a) The statement that the union has "rewarded our friends and punished our enemies" in the political arena. *Id.* 58-59 and Exh. 5.

(b) The caption, "worried about contract negotiations read on." *Id.* 139-140 and Exh. 16.

(c) The statement, "the best agreements any member of this local has ever worked under, bar none." *Id.* 56-57 and Exh. 5.

(d) A report by a former US Attorney concluding that Union officials departed from the regular bidding process to favor a particular employer at the union's training site. *Id.* 65 and Exh. 6.

(e) Statements that employees in a certain workplace decertified the union as their representative because they were dissatisfied with the union's representation. *Id.* 86-87 and Exh. 8.

(f) A statement that a local union has quadrupled its members' pension benefits in the past twenty years. *Id.* 56 and Exh. 5.

(g) A promise to hire more union staff to provide better service to the members. *Id.*

59 and Exh. 5.

(h) A statement in a leaflet referring generally to "contract negotiations." *Id.* 137 and Exh. 15.

(i) A statement, in an article about how the union's new web site rule sets a dangerous precedent, containing the words "massive losses in pension funds but no accountability." *Id.* 147-148 and Exh. 18.

65. The GEB has authority under the IUOE Constitution to adopt rules and regulations providing adequate safeguards to insure fair local union elections. Article XXIV, Subdivision 1, Section (e).

66. The GEB predicated its authority to adopt the new web site rule on its authority under Article XXIV, Subdivision 1, Section (e). Giblin Dep. Exh. 3, p. 1.

67. The new web site resolution purportedly does not limit the web sites of union members or groups that are not electioneering. Giblin Dep. 125-126.

68. According to Giblin, anything that a union member says about the union's strategy, negotiating, or organizing, implicates "sensitive information" that reveals a union "secret" that needs to be concealed from employers. *Id.* 23.

69. According to Giblin, there are certain other categories of information than can constitute "sensitive information" that a union member may be punished for revealing. *Id.* 24 (these three "are the most critical"), 28 ("the vast majority of other issued can be achieved [sic] in other forums").

70. Giblin believes that the union has the power to prohibit a member to reveal such "sensitive information" to non-members, including in the course of criticism of union leaders for their positions in these areas, and to insist that such criticisms be set forward only in places to which

only union members have access. *Id.*

71. The union has pointed to two specific incidents in Local 30 and in Local 66 as showing the need for the new web site rule. Giblin Aff. ¶¶ 17-20, 22.

72. The incidents identified in ¶ 71 above are the **only** specific incidents that the union mentions in its papers as showing the need for the new web site rule *See generally* Giblin Affidavit; Defendants' Memorandum of Law; Def. SMF.

73. The alleged events in Local 30 emerged at a hearing attended in the year 2000 by defendant Giblin, who was at the time an Vice-President of the IUOE. Giblin Aff. ¶ 18.

74. The purpose of the hearing was to decide whether to place IUOE Local 30 under "International Supervision," a form of trusteeship. *Id.*

75. Defendants have not submitted any evidence about the events in Local 30 that is admissible to prove that such events occurred**.** *See generally* Giblin Affidavit; Defendants' Memorandum of Law; Def. SMF.

76. Giblin avers that, during the hearing, some members complained that employers had been reading the internal union web sites, and had quoted statements on those web sites to the union's disadvantage in both organizing campaigns and contract negotiations. Giblin Aff ¶ 19

77. At his deposition, however, Giblin was unable to remember the specifics of what had been said on those web sites, except the general topics to which they pertained. Giblin Dep. 40.

78. Giblin could not say for certain whether the statements that employers had used had appeared on the web sites during **election** campaigns or between elections, when the sites would be more comparable to a caucus web site which the union's rule purports not to regulate. *Id.* 41.

79. A contemporaneous press account suggests that the web sites continued after the election

in Local 30 and attacked the incumbent. Levy Aff. ¶ 6 and Exh. D.

80. The events in Local 66 involved members who posted some minutes of the local's Executive Board on their campaign web site, and were "informed" by defendant Giblin that minutes are a union secret and may not be revealed publicly. Giblin Aff. ¶ 20.

81. In fact, these members were convicted by their local union and fined $5000. Levy Aff. ¶ 5 and Exh. C; Kohl Aff. ¶ 28.

82. Not everything that happens at a union meeting is a secret. Giblin Dep. 20-24.

83. Not all parts of union minutes must necessarily be kept secret. *Id.* 28, 29.

84. Some union minutes provide more detail about statements and discussions at the meeting than do other minutes. *Id.* 105-106.

85. The need for secrecy depends upon exactly what was said and exactly what the minutes reveal. *Id.* 28.

86. Giblin was unable to recall the specifics of what was in the minutes that were posted by the Local 66 members. *Id.* 36.

87. The GEB's own minutes are published in the union magazine. *Id.* 33.

88. Giblin does not know whether or not the magazine goes to libraries or other public places. *Id.* 33-34.

89. Until about the time of the Local 66 incident, the GEB included the pages in its magazine that contained the GEB minutes on the public part of the IUOE web site. *Id.* 35-36; Kohl Aff. ¶ 29.

90. To this day, some IUOE locals post meeting minutes on their web sites. Kohl Affdavit, ¶ 28; http://www.iuoelocal 317.org/meeting_minutes.htm; http://iuoelocal25.org/minutes.html.

91. During the GEB's discussion of the new web site rule, nobody articulated the idea that

the resolution **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, as a reason for adopting the rule. Giblin Dep. 78-79, 80-81.

92. Nothing would prevent candidates who want to password protect their own web sites from doing so today, on a voluntary basis. Quigley Aff. ¶ 20; Giblin Dep. 74.

93. The union has never considered running a password protection system on a voluntary basis. Giblin Dep. 83-84.

94. On February 12, defendant Giblin announced the new web site 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 web sites into compliance with the rule by April 15. Giblin Dep. Exh. 3.

95. The same letter stated that both local unions and the International should review their web sites to ensure that "sensitive information" is password-protected. *Id.*

96. Giblin is unaware of any efforts being undertaken by the IUOE to ensure that locals conceal sensitive information behind password protection. Giblin Dep. 44.

97. Extremely sensitive information, including an organizing database, strategies for organizing, and the like, were openly available on the IUOE's web site at the time this action was filed. Kohl Aff. ¶ 11; Chism Dep. 60-67.

98. IUOE staff were aware of the problem, allegedly for only two or three weeks, but did not password protect that information until shortly after the problem was discussed at a deposition in this case. *Id.* 64-66.

99. Originally, the union planned to provide the necessary data to each candidate's ISP, or

to the candidates themselves, subject to a promise of confidentiality. Levy Aff. ¶ 4 and Exh. B.

100. Originally, the union intended the entire the web site would have to be password protected. Answer ¶ 29.

101. After this case began, the union changed the web site rule in several respects. *Infra.*

102. Several "implementation guidelines" were adopted by the GEB on May 11, and announced to all IUOE local union business managers in a letter bearing that date. Giblin Aff. ¶ 31 and Exh. 5.

103. The guidelines were revealed to plaintiffs in the union's summary judgment papers filed on May 12, 2007. Docket Entry No. 7.

104. The union decided to hire its own contractor to operate the password protection system centrally. Chism Aff. ¶ 4.

105. Under the procedure developed by the union's contractor, all campaign web sites will be required 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 server containing a central database. Pineda Aff. ¶ 11.

106. At the screen displayed on the user's browser when the member reaches the server through which the database is accessed, the Internet user would have to "log in" by entering password information. *Id.* ¶ 9.

107. The separate screen will reassure members that although they are entering their names and register numbers, as shown on their membership card, to gain access, their identifying information will not be recorded. Levy Aff. ¶ 7 and Exh. E.

108. The separate screen will make no reference to the involvement of any independent

contractor. *Id.*

109. The separate screen will tell members that if they do not have access to their membership record card, or if they cannot gain access after entering information appearing on the membership card, they can call the IUOE's Membership Records Department for assistance. *Id.*

110. The union will retain a separate technology firm to provide assistance to members who are not sufficiently technically adept to enter the scripts on their web site pages on their own. Pineda Aff. ¶ 12.

111. Members who are not sure whether the web site rule governs their web sites will be able to ask defendant Giblin for a ruling on the facts of their situation. Giblin Aff. ¶ 31(iv).

112. In some cases, the person who wants a ruling will have to submit the entire web site for Giblin's examination. Giblin does not know whether the entire web site will always have to be submitted for him to examine. Giblin Dep. 114, 128-129.

113. All of Giblin's rulings will be on a case-by-case basis, with the advice of counsel. *Id.* 100, 123.

114. At his deposition, Giblin stated that one hypothetical web site, on which a candidate included Word and PDF documents for distribution and urged members to invite him to fax those documents for distribution at work sites, would be a campaign web site within the meaning of the new rule. *Id.* 108-109.

115. Apart from this one example, Giblin repeatedly refused to say whether any particular web site was subject to the requirements of the rule. *See generally* Giblin Deposition.

116. Defendants' counsel refused to allow plaintiffs to ask Giblin whether there are any standards governing determinations of the scope of the web site restriction rule, because that would

be "abstract." *Id.* 100-101.

117. At his deposition, Giblin did not articulate any standards by which the rule would be applied. *See generally* Giblin Deposition.

118. The union's rule limiting speech on union member web sites that are not password protected "is in the process of evolution." *Id.* 113.

119. Giblin expects that eventually a pattern of rulings will emerge that can guide other members who are trying to decide how the rule will be applied. *Id.* 116.

120. The new rule continued to change even after the union filed its summary judgment papers. *Infra.*

121. During the deposition of the union's expert witness on May 18, it was revealed that the union was considering a change in the rule, whereby the home page of the campaign web site could be accessed without a password, and it would be only the internal pages of the web site that would have to be password-protected. Pineda Dep. 90.

122. At the deposition of defendant Giblin on May 22, the union announced that campaign web site home pages could only be a "billboard" that states the names of the candidates and the positions for which they are running, and would not be password protected, but that all the links into the web site from the home page (and within the web site beyond that) would have to be password protected. *Id.* 45-46, 73.

123. On another occasion, however, Giblin contradicted the rule as set forth in ¶ 122, stating that the "billboard" could include a short biography of the candidate or candidates. *Id.* 53.

124. On the evening of May 23, 2007, the union decided what to put on the screen that will be shown to members seeking access through the password protection system. Levy Aff. ¶ 7 and

Exh. E.

125. By letter dated May 24, the union answered several additional questions raised during the depositions about its implementation plans, confirming decisions that had been conveyed orally the previous day. Levy Aff. ¶ 8 and Exh. F.

126. The union's expert witness will also administer the password protection database and the operation of the server to which the "scripts" will direct the browsers of Internet users who are seeking access to password protected campaign web sites. Chism Dep. 20-22.

127. The union's expert witness will make more money for providing services to design and run the password protection system than she will have received for being the expert witness. Her compensation from the administration (between $3000 and $5000 up front, plus between $200 and $500 per month for an indefinite period) would be higher than the direct compensation for her affidavit and deposition (10 to 14 hours at $250 per hour). Pineda Dep. 10, 12.

128. The union does not know whether it will operate the password protection system if, as a result of this case, it cannot make password protection mandatory. Giblin Dep. 83-84.

129. The main way for Internet users to locate web sites in which they may be interested, unless they already know the precise Internet address (the "URL") of such sites, is through the use of search engines such as Google or Yahoo!. Brenner Aff.¶ 20. *See also* Pineda Dep. 76-77, and Exh. 4, 10.

130. When speaking and writing to general audiences who were not paying for partisan opinions, union expert Joanna Pineda cites accessibility to Google and other search engines as one of the most important considerations in bringing a new web site to the attention of general target audiences. Pineda Dep. 76-77, and Exh. 4, 10**.** *See also* Pineda Dep. 82.

131. During her deposition, however, she downplayed that advice, saying that it doesn't apply in cases where the site owner knows how to reach the target audience directly. *Id.* 75.

132. Pineda acknowledged that she did not know whether candidates for office in the IUOE know how to reach all members of the union in order to tell them where their web sites are located. *Id.*

133. Search engines cannot index password protected web pages. Indeed, Pineda's affidavit gave invisibility to Google as one of the reasons **supporting** the rule. Pineda Aff.¶ 15.

134. Intra-union web site operators want their web sites to be visible to media outlets that union members may see, because coverage there both gives higher visibility and credibility to their campaigns in the eyes of union members, and because the media report may publish the URL of (or, in its online report, link to) a web page that its reporter found interesting. Brenner Aff. ¶ 8; Kohl Aff. ¶¶ 16, 23; Quigley Aff. ¶ 19.

135. Intra-union web site operators want their web sites to be visible to other web sites that union members may see, because coverage there both gives higher visibility and credibility to their campaigns in the eyes of union members, and because the web site may link to a web page that its writer found interesting. *Id.*

136. A rule allowing only a home page in the nature of a "billboard" to be free of password protection will limit the ability of web site operators to make their sites accessible through searches on Google and other search engines. Brenner Aff. ¶ 21.

137. Internet users also use RSS feeds to keep track of new material being posted to web sites in which they are interested. Brenner Aff. ¶ 14.

138. An 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 web site so that they can see the news. *Id.*; Pineda Dep. 82-83.

139. RSS feeds and other similar services cannot be used for password protected web sites. Brenner Aff. ¶ 14.

140. Many hosts of web sites and other forms of Internet content do **not** support scripting (that is, scripts cannot be entered on them). *Infra.*

141. Many of the hosts that do not support scripting are ones that allow the 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-savvy and younger Internet users. Brenner Aff. ¶ 16.

142. The union's technology assistance firm will not help the operators of campaign web sites with creating their web sites, installing content on those sites, or putting the content on servers. Chism Dep. 56-58.

143. Services that do not support scripting include the social networking sites such as MySpace. Pineda Dep. 108-109; Brenner Aff. ¶ 16.

144. Services that do not support scripting include blog hosts such as Blogspot. Brenner Aff. ¶ 13.

145. Services that do not support scripting include sites for the posting of videos or photographs such as YouTube and Flickr, and sites for downloading Podcasts. Brenner Aff. ¶¶ 15, 16; Pineda Dep. 110.

146. 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 link back to that content from other web sites. Brenner Aff. ¶¶ 10, 16.

147. The union's system effectively confines member campaigning to old Internet technology, cutting off use of the emerging technologies that are making it easier and easier to place content online. Brenner Aff. ¶¶ 9-18.

148. Some members of the public will resist entry of identifying information to gain access to a web site or web page. Brenner Aff. ¶¶ 22-28.

149. The willingness of Internet users to login depends in part on how valuable the users think the information that could be accessed will be. Pineda Dep. 30-36, 48-49, 51.

150. Some IUOE members are concerned about entering identifying information to gain access to a web site or web page, because they worry about being tracked. Chism Dep. 25; Quigley Aff. ¶ 10; Brenner Aff. ¶¶ 27, 28.

151. The reason why the IUOE plans to provide assurances that identifying information will not be logged, and if logged will not be provided to the union, is to meet the concern of members about entering identifying information to gain access to a web site or web page. Chism Dep. 25.

152. There is widespread uneasiness on the part of Internet users generally, and of union members specifically, about logging into web sites and providing identifying information to do so. Brenner Aff. ¶¶ 27, 28; Chism Dep. 25.

153. Members have stated that they are worried about having their access to web sites on the "wrong" side of union politics be tracked. Kohl Aff. ¶ 10.

154. IUOE members are unlikely to have memorized their seven or eight digit member register numbers. Quigley Aff. ¶ 4.

155. IUOE members do not do not necessarily carry their union cards with them at all times. Quigley Aff. ¶ 4; Mueller Aff. ¶ 4.

156. The union's authentication system will require 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. Chism Dep. 42-50; Brenner Aff. ¶ 22; Levy Aff. ¶ 8 and Exh. F.

157. IUOE members may be seeking to log on at a time when the union's office is not open to take questions about their register number. Chism Dep. 50.

158. The screen that members will see when trying to log in will offer the telephone number of the IUOE's Records Department as the way to obtain the proper information for log-in if entering information from the union card does not work. Levy Aff. ¶ 7 and Exh E.

159. Some union members who might be willing to **try** to log-on may not be willing to persist beyond the first failed log-in. Brenner Aff. ¶¶ 23-24.

160. The IUOE's database may not contain a member's register number for several months after the member joins the union. Quigley Aff. ¶ 5.

161. Members who are only casually willing to look at campaign web sites may not go forward if reaching such web sites is not quick and easy. Brenner Aff. ¶¶ 23-24.

162. The union's password authentication system will set a "cookie" on the user's browser which will, if the user accepts cookies, allow the user to continue looking at other pages on the web site without re-entering the log-in information, but if the user wants to come back on a different occasion, the user will have to enter the log-in information all over again. Chism Dep. 33-37; Pineda Dep. 96-97; Levy Aff. ¶ 8 and Exh. F.

163. Because some Internet users refused to accept cookies as a privacy matter, those users will have to log-in every time they wish to follow a link within the same campaign web site. Pineda Dep. 96-97.

164. Many employers tend to know what is happening within the locals whose members they employ. Quigley Aff. ¶ 17; Kohl Aff. ¶ 18.

165. Many contractors and many supervisors are themselves former rank and file employees, and they talk to each other about internal union events. Quigley Aff. ¶ 17; Kohl Aff. ¶ 18.

166. Contractors sit on joint boards with union leaders, and they tend to learn about all the major controversies within the local. Quigley Aff. ¶ 17; Kohl Aff. ¶ 18.

167. 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. These members range from both small "owner-operators," who simply own a piece of heavy equipment and employ one of 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. Quigley Aff. ¶ 17; Kohl Aff. ¶ 18.

168. The union's password protection system does nothing to prevent campaign statements from getting to employers through other methods, such as by distributing papers at the workplace, publishing ads in newspapers, writing letters to the editors of print publications, or free coverage in the media, whether in response to press releases or otherwise. Levy Aff. ¶ 3and Exh. A.

169. The union does not guard the secrecy of membership register numbers, which are kept in a variety of locations with little apparent security. Quigley Aff. ¶ 15.

170. A member could publish his name and register number without violating any union

rule. Giblin Dep 134.

171. It would not violate any union rule for a member to print out the entire text of a web site that he viewed online and ship that text directly to a non-member. *Id.* 134-135.

172. Any member who had entered his password data could then download the entire electronic file of a web site 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 was happening. Chism Dep. 37-38; Pineda Dep. 112-113.

173. A member who downloaded the entire electronic file of a web site, and shipped it to a non-member, would not violate any union rules. Giblin Dep. 135.

174. If a nonmember published the web site with the exact same information, the union would have no recourse because non-members cannot be disciplined by the union. *Id.* 136.

175. Internet users who oppose censorship sometimes create "mirror" web sites, which copy the entirety of another web site that has been threatened with censorship, not out of agreement with the web site's message but simply as an angry response to censorship. Pineda Dep. 111-112.

Respectfully submitted,

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