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' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE FOR A PRELIMINARY INJUNCTION

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The central issue in this case is whether the union has provided a sufficient showing to justify its "reasonable rules" defense for a new union rule that admittedly restricts free speech by requiring that all campaign web sites be "password protected" so that only union members who identify themselves by name and membership number can enter. Defendants freely admit that the free speech provision of the Union Members Bill of Rights, section 101(a)(2) of the LMRDA, includes the right to speak to the public. But, they say, that right must yield here because of a union rule that is supposedly based on the danger of harm to legitimate union interests. In order to mount such a defense, however, the union must present **evidence** of the harm that it claims to fear from the public availability of campaign web sites. Moreover, the purported justifications for the rule must fit with the restrictive effect of the rule as well as with the exceptions that the union has made to make its rule appear less onerous.

The union argues, however, that it need not present any evidence that the rule is needed to prevent harm to legitimate union interests, and that it is enough to speculate about the harm that might be caused, based on vaguely recalled complaints made by a few members more than six years before the rule was adopted. Similarly, the union argues that an attack on the rule on the ground that it cannot achieve the rule's purposes, such as because the rule is severely underinclusive, must fail so long as the union speculates – again without presenting any evidence – that the problem identified as justifying the rule might not apply to the unaddressed area. If the union's burden were so limited, it would be able to adopt **any** restriction on free speech in its unquestioned discretion, and section 101(a)2) would be rendered unenforceable in the courts.

A. The Union's Reasonable Rules Defense Must Be Based on Evidence and Not Speculation.

In our opening brief, we cited several cases, culminating in *Steelworkers v. Sadlowski*, 457 U.S. 102 (1982), which consider first the impact of a rule on protected speech, and then whether the

rule in fact serves a legitimate purpose protected under the LMRDA. In both respects, the courts demand a showing based on evidence. Throughout the *Sadlowski* opinion, the court cited the evidence in the record supporting the various parts of its reasoning, 457 U.S. at 114 & nn.7 and 8, 115 & n.9, 118, 119 n.11, 120, noting that because of the summary judgment context the Court was assuming that the evidence from the respondents (against whom the Court ruled) was true, while considering the union's evidence only if it was uncontradicted. 457 U.S. at 114 n.7. Evidence was cited and treated as determinative in determining the outcome of the balancing test – both the impact on speech interests and the impact on the union's legitimate interests.

The union (Opp. Mem. 18-19 n.5) seeks to distinguish the court of appeals rulings in *Stachan v. Weber*, 535 F.2d 1202, 1203 (9th Cir. 1976) and *Keubler v. Cleveland Lithographers*, 473 F.2d 359, 363 (6th Cir. 1973), each of which overturned union discipline because of the union's failure to make a **showing** or carry its **burden** of proving that the prohibited activity was harmful to union interests. The union says that *Stachan* should not be considered because the reason for which the members were disciplined – refusing to salute the flag and recite the pledge of allegiance – had "no discernible nexus to traditional union interests." First of all, the *Stachan* court did not say that it was applying a "discernible nexus" test to decide whether the union rule was reasonable This is a test of the union's own invention. But even assuming that the maintenance of solidarity and patriotism, which was a very significant issue in the labor movement in the 1950's and 1960's in this writer's recollection, is deemed unrelated to traditional union interests, the same cannot be said of *Keubler*, which the union dismisses as being "to much the same effect at *Stachan.*" Union Mem. 19 n.5. In that case, members were disciplined for holding a rump meeting during a long strike, to express to each other their unhappiness about the union negotiating committee's failure to make progress

getting the membership back to work. This is the very sort of "divisiveness" that the union in this case insists might be communicated to the employers if they could see campaign web sites; it is scarcely lacking in nexus to traditional union interests.

B. The Union's Rules Will Severely Impair Protected Free Speech Rights.

Here, there can be no question that the union's rule will severely impair free speech rights that are protected by the LMRDA. The union concedes that the LMRDA protects the right to communicate about union affairs with the public, and indeed with employers. And the very purpose of the rule is to prevent communications about union elections to be delivered to the public. There is, therefore, no need to consider any further evidence to decide that the union's rule will prevent protected speech.

The union discounts this aspect of plaintiffs' claim on two grounds. First, it argues, based on a misstatement of the testimony of two of the plaintiffs at their depositions, that their election campaign web sites were directed solely at the union's own members, and **not** at the general public (defendants chose not to depose plaintiffs Gonter or Ward). But neither plaintiff so testified. Plaintiff Kohl was asked whether she had sent specific communications to the general public, and she said that she had not; she was asked whether she had spent money on campaign mailings beyond the districts in which she was running, and she said that she had not; and she was asked to agree that reaching the general public was not what she needed to do to win office in an election, and she agreed, "no, not to win an office." Union Br. at 7-8. The union concludes that these questions and answers show that **the** purpose of campaign web sites is to reach the electorate. *Id*. at 9. But none of this contradicts her statements in her affidavit that she affirmatively wanted her campaign web site to be read by members of other unions and by the general public, and indeed by employers,

because in her view that is part of her effort to hold the union and its officers accountable for their misdeeds. The union chose not to ask Kohl about these aspects of her affidavit, which remain uncontradicted in the record. Kohl has reaffirmed her intent to use her web site to reach out to the public as well. Second Kohl Affidavit ¶ 3.

In effect, Kohl's campaign web site had, and has, multiple purposes and multiple audiences. This is one of the things that makes the Internet distinctive: the simple equivalent of newsletters or leaflets. Web sites have multiple functions and multiple audiences: they are a caucus meeting, a press conference, a newsletter, personal conversation, poster, mailing, open forum, diary and other means of communication all rolled into one. One of the most chilling aspects of the union's rule is its attempt to deprive rank-and-file web sites of their multi-purpose and multi-audience character, insisting instead that they be confined to the one audience approved by the union.

Similarly, the union misrepresents its deposition questions to Quigley, which asked only whether certain statements on his campaign web site, such as leaflets soliciting attendance at campaign rallies, were directed at members. Quigley Dep. 55-56, 68. The union never asked him whether or not statements on his web sites were also aimed at the public. Quigley values the opportunity to look at the web sites of members of other unions, and does not want to have members of other unions shut off from learning about what is happening in his local so that they can learn from him as he has learned from them. *See* Quigley Aff. ¶ 24; Second Quigley Aff. ¶ 4.

The union also argues that its attack on free speech is less significant because it has not (yet) forbidden members from writing letters to the editor (which may or may not be printed), sending emails to particular individuals (if they know the right email address), or handing out leaflets at shopping centers (in order to reach hundreds rather than potentially thousands or millions of people

at a time). The problem here, of course, is that these methods are either more expensive, or more time consuming, or less effective – or all three of the above – than the creation of an Internet web site whose content is crawled by search engines and/or linked from other web sites, and thus can be found by the general public when the content of the web site matches something that the public is looking for online (or, indeed, finds through surfing). As the Supreme Court said in *Reno v ACLU*, the ability to post web sites can make any individual into the "town crier" or a "pamphleteer" with the ability to reach a vast audience. 521 U.S. 844, 853, 870 (1997). That the union is willing to allow these lesser alternatives – at least for now – is not much comfort.[1]

Although it is a sufficient objection to the rule that it improperly restricts speech to non-members of the union, the rule **also** limits speech to members. These restrictions are particularly problematic for candidates running against an incumbent business manager, because it is undisputed that Internet web sites provide a potential means for insurgent candidates to "level the playing field" by enabling them to bypass the official channels of communication within a local union which are

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[1]The union also argues that it "only" restricts election campaign web sites, "where the paramount interest of the union is in fostering the fullest possible discussion and debate among its members," while allowing other web sites that do not advocate the election of candidates. Wholly apart from the underinclusiveness issue that this raises, discussed in the next section of this brief, there is no evidence that a **mandatory** password protection rule is needed to foster intra-union debate. The union could make its password protection system available to those who want it in the event there is anyone who would feel less inhibited in campaign discussion if their site was password protected. There is, however, no evidence that such a person exists, and it is now conceded that nobody on the GEB even articulated this theory as a reason to adopt the rule.

Indeed, if the union's real interest were in fostering full discussion and debate among the union membership alone, it could provide server space and full technical support open to any candidates, make those membership only spaces, and offer this as an alternative to independently run and hosted web sites that are accessible to the general public. This approach, which would be akin to union magazine "battle pages" that some unions provide, would show whether members would really feel more comfortable speaking in a members-only environment, without in any way restricting the right to have publicly accessible web sites.

controlled by the incumbents. These facts distinguish the case from *Sadlowski*, where the plaintiffs made a similar argument but the union countered with **evidence** that an insurgent candidate had won without outside contributions, *id.* at 114, that staff in that union had the right not to participate in campaigns, *id*. at 114-115, and indeed that, as a consequence, union staff have also challenged incumbents and won election. *Id.* at 115. There is no such evidence here – quite to the contrary, it is admitted that IUOE union staff can be fired for refusing to support the business manager's re-election, and indeed that is what happened in Local 150 after plaintiff Ward announced his candidacy. Indeed, defendants' cross-examination of plaintiff Kohl drew out the fact that union staff are required, as a condition of employment, to contribute $100 per month to a political fund that is used at election time to finance the incumbents' re-election campaign. Kohl Dep. 24.

It is also undisputed that the union's password protection requirement makes it much less likely that newspapers will report on election campaign web sites, or that other web site operators will link to them, and that the loss of this publicity can reduce union member traffic. There is more controversy about whether the web site restriction rule will limit a web site's visibility on Google. The union has changed the rule to allow the home page of a web site to serve as a billboard so long as it simply announces a candidacy by giving names, positions sought and photos, but that only provides a means for members searching specifically for the campaign web site to find it. If a member searched, for example, for "Ray Connors 150", he would find links to the Team 150 web site because Local 150 retiree BA Ray Connors writes a column on that site; those links could not come up if the interior of the site were password protected. If the member searched for "Bill Dugan Democracy," he would reach various pages on Ward's web site where Ward attacks Dugan for suppressing union democracy. *See* attached Exh.1. But Ward is not permitted to say anything

negative about Dugan (his opponent) or Connors (a non-candidate supporter) on the "billboard" section of his web site and so he loses the chance at web traffic from members looking for information about those individuals.[2]

Another series of reasons why the password protection rule interferes with speech to members follows from the undisputed fact that password protection requires members who might otherwise enter a campaign web site to do more than they wold have to do in the absence of a password system. Plaintiffs are concerned because members have told them that they worry about being tracked online, because many members are resistant to logging into web sites for a variety of reasons; defendants counter these concerns with arguments of their own that are intended to suggest that many members will be able and willing to log in. The problem of members fear of the consequences of being identified, given the possibility of subtle retaliation at the union hiring hall, simply compounds the problem, and a paradoxical effect of the disclaimers of logging identifying information could be to make some members **worry** about being identified. These controversies are discussed at great length in Plaintiff's Statement of Material Facts ("PSMF), Defendant's Response to that Statement (DR - SMF), and in Plaintiffs' Reply to that Response ("P Reply SMF), ¶¶ 148 to

[2]Web site search engine rankings are also based on such factors as how often the content is updated (so that each new blog entry counts; but a billboard page is **designed** to be static), how many links there are to the website contents (people like to link directly to the relevant page, and are very unlikely to link to the home page of a site that is mostly password protected), the value of the links from the site to other sites (so that the links page should also be outside password protection); and the quantity and relevance of the site content. *See generally*, SEOmoz.org, *Search Engine Ranking Factors v2*, http://www.seomoz.org/article/search-ranking-factors; Wikipedia, *Link Popularity,* http://en.wikipedia.org/wiki/Link_popularity; SEO Tools, *Link Popularity*, http://www.seochat.com/seo-tools/link-popularity/. (all last viewed June 14, 2007)

161, and will not be repeated here.[3] In the end, plaintiffs recognize that members who really want to get into a given campaign web site will eventually be able to do so, even if they do not have their union cards with them at the time they are trying to get access, or even if the card wrongly omits or includes a middle initial. But the whole purpose of placing campaign messages on web sites is to make it **easy** for members to see them, even if they are only casually interested. The imposition of a password entry system is sure to discourage some members from entering insurgent web sites.[4]

Still another problem is the fact that the union's password protection system cannot be used on many of the newer web hosting technologies that make it increasingly easy to put content online without obtaining volunteer assistance from fellow members or sympathetic members of other unions with technological expertise. These hosting technologies range from blogs and MySpace pages to hosts for specialized content such as YouTube (videos) and Flickr (photographs), to pages that support "RSS feeds" that can tell interested web users when new content has been placed on a web host that the users are following. The union's response is that there are other web hosting

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[3]Defendants set great store on the written procedures governing the operation of union hiring halls as showing that members need have little fear that being on the wrong side of an election could hurt their livelihoods. Plaintiff Quigley, who worked as a business agent for many years,. explains in a supplemental affidavit that a business agent has many legitimate reasons to go out of order on the out-or-work list, and has access to information about when is a good time to **be** on the that list, that gives members a very strong incentive to be on good terms with the business agent. Second Quigley Aff. ¶¶ 2-3.

[4]The union points out that union members must write down their member numbers to be able to cast a mail ballot in both Local 18 and Local 150. But members have a period of weeks to find their card and send in the mail ballot. *See* Kohl Deposition, Exhibit 6, ¶ 23. The union's observation that members must (at least under the rules) show a union card to enter a union meeting means little if, as in most unions, IUOE local union meeting attendance is scanty, and besides, a member who is motivated to go to a union meeting will take the time to find the union card before he leaves home

platforms that allow content to be placed no the Internet without knowledge of web code.[5] The union also argues that there are ways to put videos online, as Quigley's IT volunteer has been able to do on Quigley's web site. These disputes are analyzed at length in PSMF, DR - SMF, and P Reply SMF, and space does not permit all of the permutations of this argument to be set forth here. It is clear at least that it is at least somewhat more difficult to put content online through a traditional web site than through the new technologies, Brenner Aff. ¶ 12, and significantly more difficult to set up the "extras" such as video hosting and podcasting. *Id.* ¶ 19. The password authentication system cuts off at least some of the easiest ways of posting content online. This is another form of limit on member speech that merits consideration in the *Sadlowski* balancing process.[6]

The union argues that because there is a small section on Kohl's web site that allows the posting of comments only by those who register and log in, and because the Association for Union Democracy has praised some rank-and-file web sites with restricted sections, there cannot be anything wrong with requiring password protection. There are three responses to this point. First,

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[5] Plaintiffs' expert witness Mark Brenner points out that when such sites are edited with the password protection code, the functionality is lost and any future editing must be done by hand. Brenner Aff. ¶ 12. In a supplemental affidavit, ¶ 11, Pineda complains that Brenner has made the mechanism for such editing sound more complicated than it really is. But the point remains – it is no longer simply a matter of typing in content and letting the web host's convenient technology do the rest. The union complains that Brenner's testimony was not based on "studies" and that he did not "conduct any experiments." Mem. 24. But expert testimony may be based either on "professional studies or personal experience." *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999). Indeed, the expert witnesses for both sides in his case have testified based on their professional experience rather than based on studies or experiments.

[6] As discussed during Brenner's deposition, at 150-152, there are now dozens of younger members of the Operating Engineers on MySpace. Unions have also begun to use Facebook for organizing purposes, http://openconcept.ca/union_facebook_organizing , and there is a Facebook network for Operating Engineers Funds, http://www.facebook.com/networks/networks.php?view=companies &browse&q=O, as well as for other unions.

the forums on each of these sites constitute a minuscule portion of a larger site, most of which is open to general public scrutiny. Second, there has apparently been very little participation in these forums, which tends to support plaintiffs' concern about the impact of password protection, rather than rebutting it. Third, and most important, plaintiffs have no objection to union members (or officers) who make a voluntary decision for their own reasons, good or bad, to maintain some or even all of their web sites under password protection. Plaintiffs would not object to the union creating a password protection system and urging candidates to participate, or even attempting to shame them by warning that employers could be watching unless they post only under password protection. But there is no basis for ordering those who want to maintain open web sites, or who do not post any truly secret information that the union is entitled to keep from employers, to impose password protection, thus restricting their right of free speech.

C. The Union's Limits on Free Speech Need Not Be Tolerated Given Defendants' Inability to Show That They Are Needed To Serve Legitimate Union Interests, or That They Will Serve Those Interests Effectively.

Given the rule's significant encroachment on protected speech, the Court should next consider whether the union has made an adequate "showing" of the harm that the rule is intended to prevent, and of the fit between this purported harm and the rule. The union fails miserably in both respects.

1. There Is No Showing That Public Campaign Web Sites Harm the Union's Institutional Interests.

First, it is undisputed that the union has presented **no** admissible evidence that any employer has ever gained **anything** by monitoring a union campaign web site, or that any truly confidential information has ever been posted on a campaign web site, not to speak of being posted to the union's

detriment. The union relies on statements that defendant Giblin averred he heard at a union hearing in December 2000, but in response to plaintiffs' objection that his testimony was hearsay, the union responds that it is not offering Giblin's testimony about the hearing to prove the truth of what he heard. DR - SMF ¶ 75. Nor was Giblin able to give even any details about what he heard, which is not surprising given how many years ago this was. The union has not even filed the transcript of the hearing, which would presumably provide those details, or responded to plaintiffs' request to examine the document. The union's refusal to provide the transcript itself creates an inference that the details that would be revealed would be adverse to the union's position. Similarly, the union relies on a 2005 incident in Local 66, when local union minutes were posted on a campaign web site, but also acknowledges that minutes may or may not reveal secrets, depending on what they say (and whether they reveal the details of member discussions, or simply report transactions at the meeting). Thus, Giblin's inability to recall what was in the minutes, coupled with the union's failure to introduce the minutes or Giblin's letters on this issue, or to provide the documents to plaintiffs, precludes the union's reliance on this incident as a justification for the rule's impact on free speech.

Instead of evidence, the union seeks to rely on vague hypotheticals about the advantages that employers might derive if they learned that members were divided about whether to go on strike, or that members thought that they should go on strike over a wage cut instead of over the firing of a union member, or that members were debating the desirability of various organizing techniques. But the union never quite argues that members who express these views publicly can be punished for revealing union secrets, or even that there is a great deal of discussion of such issues on campaign web sites. Absent such concrete examples, the union has simply failed to justify the speech repressive impact of its rule.

The union also makes much of plaintiffs' acknowledgment that there is such a thing as a union secret whose disclosure may properly be subject to union sanction. But the union substantially overstates the extent of plaintiffs' acceptance of the union's position. During their depositions, both Kohl and Quigley were presented with various hypothetical situations and asked either whether a union appointee who revealed inside information could be punished for revealing it; whether a union leader might be better able to disclose inside information if he were doing so on a password protected web site; and whether employers might derive some benefit from learning what members think about various issues. *E.g.*, Kohl Dep. 145, 163-164; Quigley Dep. 135-141, 151**.** But the union was careful never to ask plaintiffs whether they agreed that the union could block members from public expression of their opinions about such topics, on the theory that the members' own thoughts and opinions are a union secret. Both plaintiffs reaffirm in the attached affidavits that they do not share the union's view on this point. Quigley Second Affidavit ¶¶ 5-6; Kohl Second Affidavit ¶ 4.

The union also argues that, given its determination to prevent members from revealing "sensitive information" on publicly available campaign web sites, a prophylactic rule that simply requires password protection is better than a system under which the International scrutinizes web sites for punishable disclosures and opens itself up to charges of selective prosecution that discriminates based on political viewpoint. But that argument depends on an unarticulated and very controversial premise – there is a real problem that needs a solution, because campaign web contain a significant volume of disclosures that the union **could** punish without running afoul of the LMRDA. The union has not however, shown the existence of such disclosures. It has yet to identify a single disclosure on any campaign web site that it could lawfully punish.

Indeed, there are two reasons to believe that the union cannot identify examples of punishable disclosures on campaign web sites even apart from the fact that it has not done so. First, during his deposition defendant Giblin described many examples of supposedly "sensitive" information whose disclosure he said the union's rule was intended to prevent, that the union has no legitimate interest in regulating, such as the "secret" that the union's political strategy is to punish its enemies and reward its friends. Nine examples are set forth in paragraph 64 of Plaintiffs' Statement of Material Facts. Defendants' brief does not say anything about the list of nine examples in ¶ 64 of PSMF, but in DR-SMF, they complain that plaintiffs have "mischaracterized, taken out of context, and misquoted . . . Giblin's deposition testimony." It is not clear whether this argument is intended to suggest that Giblin does not really think that the enumerated web site statements are "sensitive," but in any even we stand by our quotations.[7]

The second reason why the Court should doubt defendants' implicit contention that there is a widespread problem of truly secret information being disclosed on campaign web sites is that they take the position that it would **not** violate any union rule to disclose the web sites' contents directly to employers. Surely, if these web sites contained union bottom lines in contract negotiations, or similar information whose disclosure would really threaten the union's interests, defendants would not have such a casual attitude toward the disclosure of such information by other means.

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[7]DR - SMF specifically addresses only one of the nine examples – the "three monkeys" leaflet in which the Team 150 web site says that the incumbent business manager is wrong to suggest that the questions that the Ward slate is raising about the union's negotiating inadequacies is risking the union's ability to get a good contract, because getting a good contract depends on such factors as the fraction of the market that is organized, and the state of the economy in the area. The union filed this document as DN 13-10, Exhibit 18 to the Quigley Deposition and Exhibit 9 to its filing. Because it provides an excellent example of how extreme are the union's claims of the need for secrecy, it is appended to this memorandum as Exhibit 2.

Given the flimsy evidentiary basis for the union's rule, this case thus presents the question whether such evidence is enough to justify a rule limiting free speech. If it is enough, then in the next case the union will have no difficulty justifying a rule that forbids rank and file members or groups from posting materials critical of the union's management of a joint union-employer pension fund on workplace bulletin boards, as in *Helton v. NLRB*, 656 F.2d 883, 895-96 (D.C. Cir. 1981), or from picketing in front of the union's offices to complain about hiring hall discrimination, as in *Black v. Ryder/P.I.E. Nationwide,* 970 F.2d 1461 (6th Cir. 1992), or engaging in the various other forms of public communication that was held protected in the cases cited in our opening memorandum at pages 28 to 29. It is convenient for defendants to say in this case that they respect the rulings in those cases, but if the arguments that they present here are accepted, it will be easy for defendants to find or predict harm from disclosures in letters to the editor or rank-and-file newspapers, and certainly the topics discussed by the members in *Helton* and *Black* are "sensitive" and potentially injurious to the union's institutional interest within the expansive construction of those terms set forth by Giblin during his deposition. Indeed, if unsupported conjecture were a sufficient basis for a union to limit its members' speech, its discretion would be essentially unlimited.

Accordingly, the union's claimed institutional interest does not justify the rule, and that rule should be declared contrary to Section 101(a)(2) of the LMRDA.

2. There Is No Showing That Password Protection of Campaign Web Sites Will Effectively Screen The "Sensitive Information" That The Union Claims to Be Trying to Protect From Being Seen by Employers.

Finally, even if there were some basis for defendants' contention that the password protection is needed to prevent employers from obtaining information whose disclosure the union is entitled

to punish, the rule is so full of loopholes that it cannot effectively serve that objective. The union's arguments to the contrary are not persuasive.

In our opening brief, we argued that the limitation of the rule to election campaign web sites, while allowing member web sites that are not about election campaigns from 2007 forward to be publicly available, makes the rule fatally underinclusive. In response, defendants argue that they focused on campaign web sites information received from members suggested that the problem of employer monitoring of web sites was confined to campaign web sites, and that, in any event, analysis of underinclusiveness runs counter to *Sadlowski*'s focus on reasonableness rather than narrow tailoring. Mem. 13-15. In fact, however, the plaintiffs in *Sadlowski* did make an underinclusiveness argument, that the union's rule regulated only international and not local elections. Far from rejecting the argument on the ground that underinclusiveness was irrelevant, the Supreme Court rejected it because the **evidence** established a good reason for the distinction – an "unrebutted affidavit" established that the union had a good reason for the distinction, because outsiders have little interest in influencing local union elections. 457 U.S. at 119 n.11.

Quite the opposite is true here. Defendants have introduced **no** evidence that non-election campaign web sites either do not contain "sensitive" information or are not monitored by employers or used by them to the union's disadvantage – defendants' affidavits do not address the issue, which is also ignored in the union's SMF. It is only the union's brief that addresses this distinction and claims that the same problem is not known to exist on non-election web sites. But say-so from the lawyers is no substitute for evidence. Nor is there any reason to believe that the members who spoke at the Local 30 hearing back in 2000 were distinguishing between election campaign web sites and any other form of intra-union campaign web site. Moreover, there is evidence that the kind of

information that Giblin defined as sensitive during his deposition **can** be found on non-password-protected member web sites. Exhibit 3 attached to this memorandum is the "forum" page from the Local 3 Democratic Union web site (an earlier printing was Exhibit 14 at the Giblin Deposition). There are many membership opinions posted there about contract negotiations, about mismanagement of the union's benefit funds, and other issues which, when discussed on campaign web sites, Giblin said were the sort of disclosures that the union's rule was trying to prevent. This fact simply reinforces the suspicion that the reason why the GEB, the vast majority of whose members are also incumbent local union business managers, are more worried about election web sites is that those are the sites that threaten their hold on local union office.

On the other hand, if the union's vague speculation about what "sensitive information" might be found on campaign web sites, and about what use employers might make of this information, and the union's contention that a handful of members complained several years ago about misuse of campaign web sites, are sufficient evidence to sustain the union's rule in this case, then if the union wins this case, it will have no difficulty coming up with enough "evidence" to justify a crackdown on member web sites that do not support or oppose candidates for union office.

Finally, the union's rule will not serve its purported objective because the union has made it too easy for employers to obtain the information on the password protected web sites. This is true, in part, because so many employers belong to the union. The union claims that any member who is a true employer would necessarily be excluded from union membership, or at least from the right to participate in the electoral process. But Quigley testified during his deposition that while he was a business agent he personally signed up "hundreds and hundreds" of owner operators, many of whom got to be bigger operators over time. Dep. 127. Although union counsel represented in the

course of questioning Quigley that the union has records suggesting that the number of contractors who began as owner operators is much smaller, *id.* 128, no such records have been put in evidence. Quigley further testified that there are Operating Engineers members who own multi-million dollar companies, *id.* 129, and identified by name three such members, who employ hundreds of IUOE members, but who nevertheless attended a recent meeting to elect the union's Election Committee; he said that other such contractors were in attendance but that he could not remember their names. *Id.* 131. Nor has the union said anything to rebut plaintiffs' evidence that, apart from members who are themselves contractors, there are many members who work as supervisory staff for contractors. Quigley Aff. ¶ 17. These employers and their supervisory staff would have direct access to the password protected campaign web sites because they could simply enter their own names and register numbers.

Even for employers who are not union members, password protection is so easily evaded that it cannot serve the union's purported purpose. The union makes no efforts to maintain the security of member names and password numbers. Giblin agreed that it would not violate any union rule for a member to publish his name and register number publicly for others to see. Giblin Dep. 133-134. Indeed, at her deposition Kohl testified that hundreds of non-members attend the semi-annual Local 18 state-wide union meeting, and any union member who speaks is required to preface her remarks with her name and union register number. Similarly, during the depositions in this very case, a member name and register number was read into the record, at the behest of the union's own counsel, yet the union has made no effort to ensure that the depositions were filed under seal. Any employer who wants to get access to statements on a campaign web site need only obtain a register number and log in, or importune one of the union's 396,000 members to log in and send it the

desired information.

The union's main response to this reason why password protection is ineffective is that it would be illegal for an employer to enter a campaign web site using a member's password. Mem. 19, citing the Electronic Communications Privacy Act, 18 U.S.C. § 2701(a). It must first be noted that it is not at all clear that obtaining such access would be illegal. In *Konop v Hawaiian Airlines*, 302 F.3d 868 (9th Cir. 2002), a dissident union member set up a password protected web site to which he allowed access by other union members but expressly forbade management to enter. An official of Hawaiian importuned two union members who were on the list of authorized users to allow him to use their log-in information, and was upset enough about the contents to contact the union to complain. Konop then sued Hawaiian, claiming that its access to the web site violated the ECPA. The Ninth Circuit held, however, that one of the exceptions to ECPA, 18 U.S.C. § 2701(c)(2), allows any user to authorize a third-party to access an otherwise forbidden web site. 302 F.3d at 880. Thus, all an employer would have to do to gain access to a campaign web site would be to ask any one of the 396,000 members of the IUOE to authorize it to enter his name and register number. This result is, indeed, quite consistent with the way employers have historically found out what is happening on the union side – by giving a "snitch" favorable treatment on the job in return for spying on the union and providing desired information.

Moreover, the deterrent effect of the ECPA even on an employer who cannot find a union member willing to be paid to give authorization would surely be lessened by the fact that there are 396,000 authorized users, and that the union's rules do not forbid members from printing out password protected web pages, or even downloading the entire web site and emailing the site to an employer. Giblin Dep. 134-136. Moreover, the union claims that it will not be tracking the IP

numbers of those who use the password protection authentication system. So, if an employer wants to use publicly the results of its having looked at a campaign web site, it can easily claim that it got access through legitimate means, and the union will have no recourse. In effect, this is an untraceable crime, and the deterrent effect of the statute is therefore minimal.[8]

Rather, the only lasting effect of password protection will be to discourage speech on the part of members who want to play by the rules, or who are worried about the severe disciplinary consequences of violating the rules. The IUOE's campaign web site resolution will not serve its stated purposes, and should be struck down as a plain violation of the LMRDA.

D. The Union's Rule Is Void for Vagueness.

The union argues that most of the situations that would be covered by the union's rule restricting "campaign web sites by candidates and their supporters" are clear, and that plaintiffs have not identified any actual, real-world member web sites that would present a close coverage question under the rules.

In fact, plaintiffs identified two such web sites. The Local 3 Democratic Union web site appears not to be a campaign web site, but as discussed at Giblin's deposition, Quigley has posted a campaign message on the forum section of that web site. Giblin was not allowed to say whether either Quigley or the site operator would be in violation of the campaign web site resolution by virtue of that message. This problem applies generally to other web sites that have forums, including not

[8]Moreover, because it is so hard for unions to prove violations and get relief against employers who violate the labor laws, employers frequently break the law in their fight against unions in organizing drives. Employers seem to have little compunction about firing workers for their union activity, threatening them with adverse consequences if they vote or campaign for the union, and engaging in other anti-union behavior. Would the IUOE similarly say that members should not worry about employer discrimination or retaliation because that would be illegal?

only Kohl's web site and the Local 37 Members Voice site, but the guestbook feature on the Woman Operator web site. http://books.dreambook.com/mariannerafferty/woman.html, as well as Yahoo! discussion groups within the Operating Engineers which require members to join but which do not demand any proof of union membership, http://finance.groups.yahoo.com/group/operatingengineers/; and http://finance. groups. yahoo. com/group/operatingengineersunion/.

Moreover, although plaintiff Kohl would prefer to believe that her web site is **not** a campaign site by virtue of a single line advocating the election of the Team150 slate, she is not certain, and does not want to risk a huge fine. Moreover, she is not certain how much more she can add about Team 150 or about other elections, particularly in her own local, without becoming liable for expulsion or a fine. Even with respect to the plaintiffs' own sites, or sites on which they have posted, there is considerable uncertainty about the reach of the resolution.

Moreover, because the rule is limited to "candidates or their supporters," plaintiffs are uncertain whether a "sucks" site that only attacks a candidate without supporting any candidates would be a campaign web site. Defendant Quigley, for example, has reserved series of "sucks" domain names, including mylocal150sucks.info (see attached Exhibit 4), for the purpose of publishing information in the future, and does not want to have to worry about whether that web site could be called a campaign web site if it attacks an individual who may be both a candidate for delegate and a candidate for International office. At his deposition, Giblin was unwilling to answer whether a "sucks" web site is a campaign site. If, as the union argues in its brief, all of these questions are so clearly resolved by reference to existing standards, it is hard to understand why Giblin did not just say so at his deposition.

Accordingly, the chilling effect of the union's vague rule is yet another reason why the rule

should be invalidated under Section 101(a)(2) of the LMRDA.[9]

CONCLUSION

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

Respectfully submitted,

/s/ Paul Alan Levy

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[9]The union again points to its "administrative procedure" for resolving questions about how the rule will be applied, but fails to respond to the argument in our opening brief that such administrative procedures are a remedy only for restrictions on commercial speech. Mem. at 41.

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' REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFFS' STATEMENT OF MATERIAL FACTS

Introduction

In Defendants' Response to a number of the paragraphs in Plaintiffs' Statement of Material Facts ("PSMF"), defendants have argued that the cited facts are not material, without citing any conflicting evidence. Plaintiffs respond here to many of those contentions of immateriality. Even though such facts may not become undisputed by operation of Local Rule 56.1, the evidence identified in Plaintiffs' Statement of Material Facts, and the further evidence cited in this reply, remains undisputed on the record in this case, and therefore support summary judgment for plaintiffs.

12. Defendants quarrel with the assertion that Local 150's members "work on construction sites." The Quigley Affidavit at ¶ 17 states that Local 150 is a construction local and thus that events described with respect to IUOE Local 30, even if true, would not occur in Local 150. The evidence is thus undisputed that Local 150 members work in construction; it follows that they work on construction sites.

18. The statements in this paragraph – that Ward's supporters on the Local 150 staff were fired last year once Ward's plan to run for Business Manager became known – is material because part of the reason why the union's rule is unreasonable is that candidates running against an

incumbent business manager suffer an imbalance of ability to communicate with the membership that Internet web sites are vital to counteract. Moreover, the cited statement in the Quigley Affidavit ¶ 18, that union staff member who supported Ward were fired remains undisputed in the record

19. Defendants quarrel with the assertion that Local 18's members "work on construction sites." The Kohl Affidavit repeatedly refers to members in Local 18 working in construction. It follows that they work on construction sites. In addition, during her deposition, Kohl testified about staff visits to and conversations among members at construction sites. Kohl Dep. 249-251.

21. Although defendants have cited some additional facts, they have not specifically denied the statement in this paragraph, which is therefore deemed admitted,

22. The fact stated in this paragraph is material because it is undisputed that Kohl intends to use the site to support candidates in her own and other locals, thus potentially bringing it within the scope of the union rule at issue here, and because the rule would forbid her from making the web site available to the public. Kohl did not say at the cited deposition transcript page that "campaign communications are not designed or intended for nonmembers," she simply said that campaign communications **are** directed at the voters. A campaign web site thus served two purposes simultaneously. The evidence remains undisputed in the record that Kohl wants the criticisms of the Local that she has placed on her web site to be read by the general public, for the reasons stated in her affidavit, at 16, 17, 24, including that public disapproval of wrongdoing by union officers is an important part of holding those officers accountable for their misdeeds.

23. Defendants' response misstates Kohl's deposition. At her deposition, she stated that union incumbents may have information that they should not share with employers. She did not say that rank and file members should be unable to share with the public, or even with employers, their

disagreements with officers' positions on such things as collective bargaining strategies. Accordingly, the first sentence of this paragraph remains undisputed. Although Quigley agreed that the existence of divisions within the membership over strike strategy can be sensitive information, he did not agree that a union ought to be able to prevent members from stating their doubts publicly (he was never asked such a question). Moreover, defendants have not disputed the second sentence in this paragraph – that Kohl believes that employers in her local have other ways of learning about internal union controversies. That sentence thus also remains undisputed.

25. Although defendants have cited some additional facts, they have not specifically denied the statement in this paragraph, which is therefore deemed admitted.

28-30. Plaintiffs acknowledge that because plaintiff Mueller was unable to come to Washington DC for a deposition on the required short timetable, and because defendants represented that they needed to depose Mueller in person, plaintiffs have agreed to strike these three paragraphs.

31. Although defendants have cited some additional facts, they have not specifically denied the statement in this paragraph, which is therefore deemed admitted.

33. Although defendants have characterized the facts slightly differently, they have not specifically denied the statement in this paragraph, which is therefore deemed admitted.

35. This paragraph is material because part of the reason why the union's rule is unreasonable is that Internet web sites provide a vital means for an insurgent candidate seeking to run against an incumbent business manager to "level the playing field" in light of the imbalance in the candidates' respective abilities to communicate with the membership. Defendants decline to admit that campaigning at a large number of small work sites is not cost-effective, but in light of the fact that many IUOE locals cover entire states, it is obvious that one candidate cannot effectively

campaign at work sites, each of which has a small number of voters. 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. Although defendants wish to dispute the following statement: "When leaflets are given out in the workplace, they are likely to fall into the hands of employers," they acknowledge that Giblin testified that there is a "very good chance they would." No conflicting evidence has been cited. *See also* Kohl Affidavit ¶ 5.

37. Although defendants offer a different way of saying this, because defendants do not dispute this fact it is admitted.

38. This paragraph is material because part of the reason why the union's rule is unreasonable is that Internet web sites provide a vital means for an insurgent candidate seeking to run against an incumbent business manager to "level the playing field" in light of the imbalance in the candidates' respective abilities to communicate with the membership. Because defendants do not cite any evidence disputing the evidence cited in this paragraph, the fact remains undisputed.

39. This paragraph is material because part of the reason why the union's rule is unreasonable is that Internet web sites provide a vital means for an insurgent candidate seeking to run against an incumbent business manager to "level the playing field" in light of the imbalance in the candidates' respective abilities to communicate with the membership. Moreover, the affidavits are not limited by their terms to the newspapers in Locals 18 and 150. Because defendants do not cite any evidence disputing the evidence cited in this paragraph, the fact remains undisputed.

40. This paragraph is material because part of the reason why the union's rule is

unreasonable is that Internet web sites provide a vital means for an insurgent candidate seeking to run against an incumbent business manager to "level the playing field" in light of the imbalance in the candidates' respective abilities to communicate with the membership. Plaintiffs do not imply that the newspapers' content has been manipulated in violation of 29 U.S.C. § 481(g). The control of the union newspaper that local union principal officers enjoy allows them to favor themselves without any violation of the law on the theory that what they do is newsworthy.

41. This paragraph is material because part of the reason why the union's rule is unreasonable is that Internet web sites provide a vital means for an insurgent candidate seeking to run against an incumbent business manager to "level the playing field" in light of the imbalance in the candidates' respective abilities to communicate with the membership. Plaintiffs do not imply that the local unions' web sites have been manipulated in violation of 29 U.S.C. § 481(g). The control of the union web sites that local union principal officers enjoy allows them to favor themselves without any violation of the law on the theory that what they do is newsworthy

42. This paragraph is material because part of the reason why the union's rule is unreasonable is that Internet web sites provide a vital means for an insurgent candidate seeking to run against an incumbent business manager to "level the playing field" in light of the imbalance in the candidates' respective abilities to communicate with the membership. Moreover, because defendants do not cite any evidence disputing the evidence cited in this paragraph, the fact remains undisputed.

43. This paragraph is material because part of the reason why the union's rule is unreasonable is that Internet web sites provide a vital means for an insurgent candidate seeking to run against an incumbent business manager to "level the playing field" in light of the imbalance in the candidates' respective ability to communicate with the membership. Nor is this an "overstated

assertion of law"; both Kohl and Quigley have been on staff under the control of Business Managers and hence are competent to say whether Business Managers can in effect demand campaign support. Indeed, Kohl's deposition testimony confirmed this fact, because she testified that union staff are "required to pay a hundred dollars a month" to the "CEO Fund, Committee to Elect Officers." Kohl Dep. 24. Moreover, because defendants do not cite any evidence disputing the evidence cited in this paragraph, the fact remains undisputed.

44. This paragraph is material because part of the reason why the union's rule is unreasonable is that Internet web sites provide a vital means for an insurgent candidate seeking to run against an incumbent business manager to "level the playing field" in light of the imbalance in the candidates' respective ability to communicate with the membership.

45. This paragraph is material because part of the reason why the union's rule is unreasonable is that Internet web sites provide a vital means for an insurgent candidate seeking to run against an incumbent business manager to "level the playing field" in light of the imbalance in the candidates' respective abilities to communicate with the membership. Moreover, both Kohl and Quigley have been on staff of supposedly independent entities and are thus competent to say whether staff at such entities are effectively under the control of Business Managers. Thus, the cited "evidence" does not put the paragraph in dispute.

46. This paragraph is material because part of the reason why the union's rule is unreasonable is that Internet web sites provide a vital means for an insurgent candidate seeking to run against an incumbent business manager to "level the playing field" in light of the imbalance in the candidates' respective abilities to communicate with the membership. Plaintiffs do not imply that there is any violation of 29 U.S.C. § 481(g). Union staff can campaign in the course of their

duties so long as the campaigning is "incidental to union business." 29 C.F.R. § 452.76. This well-known loophole is one of the very important reasons why the "playing field" is not level in union elections. It is particularly not level in a local union with dozens or even scores of union staff.

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48. This paragraph is material because part of the reason why the union's rule is unreasonable is that Internet web sites provide a vital means for an insurgent candidate seeking to run against an incumbent business manager to "level the playing field" in light of the imbalance in the candidates' respective abilities to communicate with the membership. In any event, defendants have admitted the fact.

49. This paragraph is material because part of the reason why the union's rule is unreasonable is that Internet web sites provide a vital means for an insurgent candidate seeking to run against an incumbent business manager to "level the playing field" in light of the imbalance in the candidates' respective abilities to communicate with the membership. Moreover, both Kohl and Quigley have been on staff of supposedly independent entities and are thus competent to say whether staff at such entities are effectively under the control of Business Managers. Thus, the cited

"evidence" does not put the paragraph in dispute. Plaintiffs do not imply that there is any violation of 29 U.S.C. § 481(g). Staff can campaign in the course of their duties so long as the campaigning is "incidental to union business." 29 C.F.R. § 452.76. This well-known loophole is one of the very important reasons why the "playing field" is not level in union elections. It is particularly not level in a local union with dozens or even scores of union staff.

50. This paragraph is material because part of the reason why the union's rule is unreasonable is that Internet web sites provide a vital means for an insurgent candidate seeking to run against an incumbent business manager to "level the playing field" in light of the imbalance in the candidates' respective abilities to communicate with the membership. Plaintiffs do not imply that there is any violation of 29 U.S.C. § 481(g). Union staff can campaign in the course of their duties so long as the campaigning is "incidental to union business." 29 C.F.R. § 452.76. This well-known loophole is one of the very important reasons why the "playing field" is not level in union elections. It is particularly not level is a local union with dozens or even scores of union staff.

52. The facts that the union has detailed procedures for the operation of the hiring hall, and that those procedures are legal enforceable by various means, prove neither that those rules are followed, nor that members need not fear the exercise of discretion by union officials in the application of those procedures. Quigley testified at his deposition that the Local 150 hiring hall generally did not follow the rules as set forth in the Local 150 hiring hall agreement, and that despite his years as a business agent he had never heard that the agreement contained language allowing arbitration of claimed hiring hall enforcement of rules against discrimination. Dep. 86-87. "This is a case of perception versus reality." *Id.* During his deposition, Quigley explained some of the ways in which a union business agent can advise the dispatcher go out of order in assigning work

opportunities, through the exercise of discretionary judgments about which union member has the right experience for the right job, based on having seen members working at job sites and knowing whether a member was suited for a particular machine. He said that he gave such advice many times, solicited or unsolicited, while he was working as a business agent. Quigley Dep. 15-16. Other examples are given in the attached affidavit. Quigley Second Aff.¶ 2-3. Plaintiffs acknowledge that neither Kohl nor Quigley have evidence of any individual examples of the discrimination based on a member's speech. Both aver in their affidavits, however, that there is fear among members about disagreeing with union officials because they are aware of the officials' power. Quigley Aff. ¶¶ 6-7; Kohl Aff. ¶ 10. No contrary evidence has been introduced.

55. Kohl's affidavit, averring at ¶ 8 that she made an unusually strong showing in her 2005 election campaign, is the record evidence on which plaintiffs rely. There is no contrary evidence, and the statements are therefore undisputed. Kohl Aff. ¶ 8.

58. Plaintiffs use the words "the purported" only because they do not concede that protection of sensitive information was the real purpose, not because they believe it is undisputed that other purposes exist. The evidence supporting the inference of other purposes is discussed in the briefs. For example, although defendants correctly quote the resolution as putting forward the "fullest expression of free speech" as a reason for the rule, the **evidence** shows that this could not have been the purpose because a voluntary password protection system would adequately serve that purpose, if in fact there were a significant number of union candidates who would feel reassured about speaking freely by the availability of such a system. Giving a false reason creates an inference that there are other motives. Similarly, the union's evident lack of interest in preventing disclosure of "sensitive information" by other means, such as by union member web sites that are not campaigning

to replace incumbent business managers, casts doubt on the genuineness of the claimed motivation.

59, 60 . Because these facts are admitted, we need not discuss the materiality of the facts here.

62. Giblin's deposition testimony was **both** that the deliberations of the meeting are secret, and that the words are, "[your] secrets [you] will keep." Giblin Dep. 18, 26.

64. The cited deposition testimony is highly material because the union's conception of what expressions of opinion are "sensitive" and thus must be concealed from the employer on pain of discipline show the lack of basis of the rule. The union gives only one example of alleged "mischaracterization, tak[ing] out of context, or misquot[ing] Giblin's deposition testimony – the reference in ¶ 64(h) to Giblin's testimony about Quigley Dep. Exh. 9 (also Exh. 15 in Giblin's deposition). The leaflet in question criticized the incumbent Business Manager for attempting to blame the Ward slate for making contract negotiations more difficult by raising unspecified issues about the leaders' approach.

67. Plaintiffs use the words "purportedly" only because they do not agree the rule has no impact on non-electioneering web sites, in light of the chilling effect discussed under plaintiffs'; vagueness claim, but plaintiffs recognize that defendants claim there is no impact on non-electioneering speech.

68. Although defendants in their response to this paragraph dispute that speaking about strategy, negotiating, or organizing necessarily, in Giblin's view, implicates "sensitive information" that reveals a union "secret" that needs to be concealed from employers, in the very next paragraph of their response to Plaintiffs' Statement of Material Facts, ¶ 69, defendants say "'strategies, negotiating, [or] organizing' are the issues that [Giblin] believes if disclosed would seriously impair

members in the collective bargaining process and also in the organizing process." Plaintiffs accept defendants' characterization of what constitutes a significant part of the sensitive information that the rule is supposedly intended to keep from employers.

69. Giblin's use of the phrase "the vast majority of other issues" shows that the disclosures that the union is trying to prevent are not limited to the three cites in ¶ 68, and the union acknowledged that he testified that the lines are not clear cut.

70. Plaintiffs agree that the union's prohibition is not limited to disclosures in the course of criticizing union leaders**,** but it **includes** disclosures in the course of such criticism.

71, 72. Defendants may not like the implication, but it remains undisputed that the alleged incidents in Local 30 and Local 66 are the **only** specific incidents that the union mentions in its papers as showing the need for the new web site rule.

75. Defendants implicitly admit that they have not submitted any evidence about the events in Local 30 that is admissible to prove that such events occurred**.** Their argument is that no evidence is required. That argument is addressed in the briefs.

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. Although defendants purport to dispute ¶ 77, they do not cite any conflicting evidence. Paragraph 77 states that Giblin could not recall the specifics of what was said on the web sites that employers were monitoring; defendants point to his statement recalling one detail about a campaign in which the unspecified statements were allegedly used against the union (allegedly because his statement is hearsay).

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, 80. Plaintiffs acknowledge that the newspaper article, like Giblin's testimony, provides inadmissible hearsay. Our point here is that given Giblin's inability to recall any specifics, and given a contemporary report showing (apart from the hearsay problem) that non-campaign web sites were under consideration, the Court should not accept Giblin's hearsay assertion that the web sites **were** campaign web sites.

80. Although defendants claim that they dispute this paragraph, their objection seems to be to having the facts cited without their explanation for Giblin's action. The facts themselves are undisputed.

81. Because the fact is admitted, defendants' request to "strike" the cited article is moot. A response to a statement of material fact is not a substitute for a motion to strike, even assuming that such a motion would be warranted.

83. Because the fact stated in this paragraph, defendants' expressed concern about the "implication" of the fact is not material to the purpose of a response to a statement of material fact.

85. Although defendants purport to dispute this paragraph, they cite no evidence that contradicts Giblin's admission of this fact during his deposition testimony. Defendants cite only two other paragraphs of defendants' response to the statement of material facts, but nothing in those paragraphs provides or cites any **evidence** contrary to the paragraph. The paragraph therefore stands admitted.

86. The fact is material to the pending motions, in light of Giblin's admission that the

contents of minutes need not always be kept secret, Giblin's inability to recall the specifics of what was in the minutes that were posted by the Local 66 members undercuts the union's claim that its rule is needed to prevent the disclosure of sensitive information. In fact, the union's acknowledgment that it has no **evidence** that sensitive information was disclosed on campaign web sites in Local 30, coupled with the fact that there is no **evidence** that sensitive information was disclosed in Local 66, shows that there is no **evidence** supporting the rule. That sets up the legal question, discussed in the briefs, whether a union rule restricting speech can be sustained without evidence to support its supposed purposes.

88. The fact is material because, if the union sends its magazine to public libraries, that would tend to undercut the claimed justification for the rule. Plaintiffs acknowledge that there is no evidence in the record showing one way of the other whether the union's magazine containing minutes goes to libraries. Because the union has the subscription list, but has not submitted it, the Court can infer that this evidence would be unfavorable to the union.

91. This fact has not been disputed, and thus stands admitted. Plaintiffs acknowledge that the union claims the encouragement of speech as one reason for the rule, but as discussed above in ¶ 58, the record evidence casts doubt on that claimed purpose.

92. To the extent that the union cites the web site of Kenneth Campbell to show that one of its Vice-Presidents has complied one month early, it is noted that not every page of the Campbell web site is password protected. *See* http://www.thecampbellteam.org/NewsArticleView.aspx?id=1 (copy attached).

93. This fact is material to the action because it shows that the union has no interest in "facilitating speech," only in interfering with access to the speech of those who do not want to

subject their web sites to password protection. In any event, the fact was admitted by Giblin at his deposition and remains undisputed.

96. This fact is material to the action because it tends to support plaintiffs' contention that the incumbent officers of local unions who constitute the vast majority of the IUOE GEB are not interested in restricting the distribution of sensitive information, but only in interfering with web sites that threaten to "level the playing field" and thus threaten their tenure in office. Giblin's citation of the desirability of local union's password protecting their own web sites shows his sensitivity to the disparity.

97. The characterization of the exposure of the union's secrets as being inadvertent is disputed because the union left the problem unresolved, despite its knowledge of the problem, until days after the problem was discussed at the Chism Deposition. Although the union cavils at the suggestion that the information available was "extremely sensitive," the deposition transcript, at 62-63, reflects that the available information in the "organizing" section included some special reports and an organizing database. We dare suggest that such information was far more deserving of protection against disclosure than the examples of "sensitive information" given by Giblin during his deposition. *See also* ¶ 98.

98. Although plaintiffs have no knowledge of when IUOE staff first learned of the problem, Kohl testified at her deposition that she saw the problem two months before her May 30 deposition. Kohl Dep. 256. At the very least, IUOE staff do not make the protection of sensitive information a priority.

99. The fact is material in that, in the months leading up to the original effective date, the union had undertaken none of its efforts to make it possible for candidates to operate password

protected web sites, and because the union's frequent changes in plans under the threat of litigation suggest that protecting the ability of candidates to enjoy the fullest freedom of speech was not actually one of the motives for the resolution. In any event, the fact stated in this paragraph remains undisputed

100. The fact is material in that, in the months leading up to the original effective date, the union had undertaken none of its efforts to make it possible for candidates to operate password protected web sites, and because the union's frequent changes in plans under the threat of litigation suggest that protecting the ability of candidates to enjoy the fullest freedom of speech was not actually one of the motives for the resolution. In any event, the fact stated in this paragraph remains undisputed.

104. Although the union prefers to present an explanation for this fact, it is undisputed.

105. To the extent that defendants appear to be suggesting that candidates and their supporters are free to use some other means than the union's remote authentication system to password protect their web sites, the union has not provided any other means for the operators of campaign web sites to comply with the resolution. It is undisputed that the membership list is not available to candidates and their supporters.

106-109. It appears that the union changed its approach after informing plaintiffs of its plans so that their briefs could be written on that assumption.

112. Defendants do not specifically dispute the facts stated in ¶ 112, although they add their own explanations. Those facts are therefore undisputed.

115. It is acknowledged that Giblin answered specifically with respect to more than one web site; however, he refused to answer most questions on this subject.

116. It is acknowledged that plaintiff's counsel was not able to finish his question about the existence of standards because defendants' counsel interrupted the question with a speech that included the following:

> you are not going to use this deposition as an opportunity for you to extract from him in the abstract without any context rulings on a whole variety of different kinds of web sites.

and that plaintiffs' counsel did not insist on an actual instruction from defendants; counsel not to answer the question on that ground. Giblin Dep. 100-101.

117. Defendants do not specifically dispute this fact, which is therefore admitted.

118. Defendants' response to this statement includes the following admission: "the resolution is in the process of evolution." Plaintiffs accept this rewording of the paragraph. Plaintiff note, however, that defendants' assertion, "the Resolution does not impose any limitation on "union member websites that are not password protected," is not correct. Under the Resolution, web sites that are not password protected may not be campaign web sites by candidates or their supporters.

119. Defendants do not specifically dispute this paragraph, but simply add their own characterization. The fact is therefore admitted.

122, 123. Although defendants are apparently defensive about the fact that at pages 45-46 and 73 on the one hand, and page 53 on the other, Giblin stated two different standards for what information could be on the "billboard," the cited pages plainly reveal that this is what happened. Giblin apparently entertained two different versions of his "opinion" within a few minutes of each other.

124. It is admitted that the draft provided on May 23, 2007, has been superseded by a new draft provided on June 9, 2007.

126-127. These are material because they tend to impeach the credibility of the union's expert witness, whose total compensation is contingent on the union's success. The fact that the funds go to Pineda's company instead of to Pineda as an individual does not change the fact that she has an interest in the outcome of the case.

129. The stated fact addresses the main ways that **users** locate web sites, not the various ways the web site operators promote their web sites. Moreover, the fact that there are other ways to promote web sites does not contradict the statement that searching is the main way for Internet users to locate web sites. Although the union purports to dispute the stated fact, it had not cited any contradictory evidence, and the fact is therefore not in genuine issue.

130. Although the union purports to dispute this fact on the ground that Pineda suggested some other means besides accessibility to search engines, those facts do not contradict the fact stated here, that 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. None of the example cited by defendants in ¶ 129 contradict this fact, which is therefore undisputed.

131. Although it is true that Pineda stated during her deposition that there are various ways to promote web sites, it is also true that she opined that promotion to search engines is not so important where the site owner knows how to reach the target audience directly. Pineda was apparently assuming that union candidates would have a mailing list for the entire IUOE, and also assuming that most union candidates can afford to finance multiple mailings to members of their own local unions to advertise the URL for their web site at the very outset of their campaigns. In fact, although the deposition testimony suggests that the Team150 slate is well-financed, Kohl's

deposition testimony makes clear that this was not true of her campaigns. Kohl Dep. 25, 77. To the extent that Pineda may have been assuming that candidates have email lists for the entire membership, that assumption would also have been mistaken.

133. This fact is material to the pending motions because even if the home page can be indexed by search engines, it may well be the content-rich interior pages that will attract more interest from readers. For example, a member searching for the terms "Bill Dugan democracy", or searching for the name "Ray Connors 150," will find interior pages in Quigley's web site where Ward attacks Dugan for suppressing union democracy, or where a Local 150 retiree named Ray Connors gives his opinions favorable to Ward and adverse to Dugan. *See* Exhibit 1. But Quigley is not permitted to say anything Dugan (his opponent) or Connors (a non-candidate supporter) on the "billboard" section of his web site and so he loses the chance to attract web traffic from members looking for information about those individuals. In any event, defendants have neither cited nor introduced any evidence contrary to the facts stated in this paragraph, which are, therefore, undisputed

134. This fact is material to the pending motions because accessibility to the press is an important way for members to publicize their web sites. Defendants mischaracterize the testimony cited in this paragraph. Although plaintiffs Kohl and Quigley did say during their depositions that their web sites were aimed at voters, they never said that the sites were **not** aimed as well at the general public. Neither deponent was specifically asked whether the web sites were aimed at the public **as well**. Moreover, in the Brenner, Kohl and Quigley affidavits cited in this paragraph and submitted with plaintiffs' motion for summary judgment, and in the Second Affidavits from Kohl and Quigley that accompany plaintiffs' reply brief, plaintiffs make clear that their campaign web

sites had a dual purpose, being aimed both at voters and at a wider audience. These facts remain undisputed.

135. This fact is material to the pending motions because accessibility to other web sites is an important way for members to publicize their web sites. Defendants mischaracterize the testimony cited in this paragraph. Although plaintiffs Kohl and Quigley did say during their depositions that their web sites were aimed at voters, they never said that the sites were **not** aimed as well at the general public. Neither deponent was specifically asked whether the web sites were aimed at the public **as well**. Moreover, in the Brenner, Kohl and Quigley affidavits cited in this paragraph and submitted with plaintiffs' motion for summary judgment, and in the Second Affidavits from Kohl and Quigley that accompany plaintiffs' reply brief, plaintiffs make clear that their campaign web sites had a dual purpose, being aimed both at voters and at a wider audience. These facts remain undisputed.

136. Although it is true that prominence on the home page is important, web site operators often want to get traffic directly to their interior pages, and in fact the Pineda testimony cited by defendants recognizes that it is not **only** the home page where placement of the relevant text is important. For example, it is often much more likely that other web sites will link to the content-rich interior pages of a web site, and it is generally accepted that link popularity is a very important consideration in the search and ranking algorithms at Google and similar search engines. *See, e.g.,*, http://en.wikipedia.org/wiki/Link_popularity; http://www.seochat.com/seo-tools/link-popularity/.

137, 138. Even if it were true that plaintiffs could not identify any IUOE campaign web sites, or intended campaign web sites, that use RSS feeds, the fact would be material because the union's rule prevents candidates and their supporters from using this popular technique to increase site

traffic. Moreover, by establishing a blog on Google's blogger, a site host automatically gets an RSS feed. *See* http://help.blogger.com/bin/answer.py?answer=41450&query=rss&topic=&type=f. *See also* Brenner Dep. 80. Therefore, plaintiff Mueller's blog is an example of an existing IUOE campaign web site that has an RSS feed.

139. Although there is a genuine issue about this fact because the parties respective experts' affidavits squarely conflict, Pineda's affidavit (stating that RSS feeds can be installed through technologically very difficult measures) supports plaintiffs' larger point, which is that the password protection rule interferes with member speech by making it harder for members to use the more user friendly hosting technologies that have evolved recently.

140. Although the union purports to dispute this fact, the assertion "many hosts do" is not logically inconsistent with the assertion "many hosts do not." This paragraph thus remains effectively undisputed.

141. Although defendants take issue with some of the specific points made in Brenner's affidavit, they do not dispute the more general statements in this paragraph. Even if **some** specific hosts support scripting, that fact is not contrary to the assertion that many hosts do not. Although defendants may dispute that they have younger members, a cursory review of the MySpace pages that come up when searching with the terms "iuoe" or "+operating +engineers" reveals that there are many such young, tech savvy Operating Engineers. Brenner Dep. 150-152. Defendants also take Brenner's deposition testimony about Flickr out of context. He testified that nothing in the wording of the Campaign Website Resolution necessarily bars use of Flickr. However, the posting of photographs of a campaign rally, or of a satirical photograph of a candidate for union office, could easily be deemed campaign related, thus implicating the password protection rule.

142. This statement is material to the outcome of the pending motions because, in light of the fact that the resolution cuts off access to many hosts that make it easy to post sites or content online without being technologically sophisticated (for example, posting videos on YouTube), the union's refusal to supply technical expertise to replace the "easy access" sites means that, for example, a member who wants to put a video on his campaign web site may be prevented from doing so. Moreover, the union cites no evidence contradicting this statement, which is therefore undisputed.

145. This statement is material to the pending motion because, even though some IUOE members will be able to get IT experts to help them with their web sites, and thus may be able to post videos to their web sites, many IUOE members may be unable to do so. Those members need access to the web hosts that simplify the posting of campaign content. Moreover, the fact that plaintiffs cannot specifically identify anybody who wants to use a particular campaign technique does not serve to justify a union rule that cuts off access to that technique. Finally, as noted above in ¶ 141, defendants take Brenner's deposition testimony about Flickr out of context. He testified that nothing in the wording of the Campaign Website Resolution necessarily bars use of Flickr. However, the posting of photographs of a campaign rally, or of a satirical photograph of a candidate for union office, could easily be deemed campaign related, thus implicating the password protection rule.

146. This fact is material because defendants selectively cite the evidence. Although Quigley or Kohl did not identify any IUOE members who have MySpace pages, Brenner testified that he had located many pages posted by IUOE members, using the search terms IUOE or "+operating +engineers." Brenner Dep. 150-152. Moreover, there is a network of Facebook pages for persons associated with Operating Engineers Funds. *See* http://www.facebook.com/networks/

networks.php?view=companies &browse&q=O.

147. Defendants selectively cite the evidence. Brenner's testimony was based on the fact that many campaigners and union activists, including intra-union campaigners, are turning to these newer forms of technology, *e.g.*, Brenner Affidavit ¶¶ 15, 16, and there is no reason to think that Operating Engineers are any different. Both Kohl and Quigley have stated that they want to use these newer forms of technology in the future. Quigley Affidavit ¶ 23; Kohl Affidavit ¶ 27; Kohl Second Affidavit ¶ 5, and plaintiff Mueller has already started doing so. *See* http://local39. blogspot.com/. For example, Brenner testified that he had located many MySpace pages posted by IUOE members, using the search terms IUOE or "+operating +engineers." Brenner Dep. 150-152. Moreover, there is a network of Facebook pages for persons associated with Operating Engineers Funds. *See* http://www.facebook.com/networks/networks.php?view= companies &browse&q=O. Brenner testified during his deposition, at 216-217, that a union activist has contacted him about podcasting, although the activist was not a candidate. And as noted above in ¶ 141, defendants take Brenner's deposition testimony about Flickr out of context. He testified that nothing in the wording of the Campaign Website Resolution necessarily bars use of Flickr. However, the posting of photographs of a campaign rally, or of a satirical photograph of a candidate for union office, could easily be deemed campaign related, thus implicating the password protection rule.

148. Plaintiffs Kohl and Quigley specifically stated in their affidavits that members are nervous about being tracked and do not like to login to web sites, Quigley Affidavit ¶¶ 6, 10; Kohl Affidavit ¶¶ 10, 11. With respect to the difference between registration and log-in, plaintiffs acknowledge that the two are not the same. However, the comparison was introduced by defendants' expert witness, in giving the example that three major newspapers require login to see some of their

online stories. She backed away from the analogy only when it turned out that the facts did not support her client's position even in the newspaper industry. For what it is worth, undersigned counsel will often turn away from a web site requiring log-in because it is just too much bother to log in. Finally, the fact that plaintiff Kohl's web site contains a forum that requires log-in does not show that requiring log-in will not deter viewing. As plaintiff Kohl shows in her Second Affidavit, ¶ 5, hardly anybody participates in the forum that requires log-in, even though she has had nearly 13,000 visitors to her web site. Local18MembersVoice.com (last visited June 14, 2007)

149. This fact is material because the contents of campaign web sites may well not be seen as valuable by many members who have to decide whether it is worth logging in.

150, 152, 153. The fact that the assurance of no-tracking may be reassuring to some or even many members does not contradict the fact that many members are concerned about being tracked. Indeed, the very presence of the assurance could be a reminder to members of the possibility of being tracked. This is especially true in light of Brenner deposition testimony that the prospect of not logging IP numbers is hard to credit, because without tracking IP numbers it would be difficult to identify and respond to denial of service attacks or other malicious attempts to hack the system. Brenner Dep. 275-277. Thus, the fact stated in this paragraph remains undisputed. Moreover, the fact that plaintiff Kohl's web site, or other web sites featured by the Association for Union Democracy ("AUD"), contain forum sections that require log-in does not show that requiring log-in will not deter viewing. As plaintiff Kohl shows in her Second Affidavit, ¶ 5, hardly anybody participates in the forum that requires log-in, even though she has nearly 13,000 visitors to her web site. Similarly, with respect to the web sites recognized by AUD, none of them required log-in to enter the bulk of the web site; rather, the discussion forums were discrete parts of the web site in

addition to many content pages that were freely accessible to all. *See generally* Kohl Dep. Exhibits 19-24. This is consistent with the experience in the newspaper industry, which generally allows the public to view many pages that advertise their content before the viewer reaches the password protection wall. *See* Pineda Dep. 36-64. Finally, as Kohl observed at her deposition, at 268-269, the figures in Kohl Dep. Exhibit 24, showing the number of "threads" and "posts" on that web site, suggest that it is only a very small number of members of the Allied Pilots Association who participate in the password protected forum on the APA-PDP web site. These figures thus vindicate plaintiffs' concern that requiring log-in may discourage participation.

154, 155, 156, 159, 161. The fact that the union may have arguments showing that there are other ways for IUOE members to obtain the needed log-in information does not make ¶ 154 not material. Moreover, the union's other arguments are not persuasive. For example, members have more than two weeks days to return their ballots in the mail, Kohl Deposition, Exhibit 6, ¶ 23, and thus they need not have their union cards accessible when the ballots first come in the mail. Moreover, members may regard casting a ballot as being worth more effort than simply accessing a web site that they have come across while surfing the Internet. And as for the fact that members are required by a union bylaw to have their union cards on the job does not mean that they always do so, as the Quigley Affidavit makes clear at ¶ 4. The facts that intra-union activists who are signing protest letters, coming to union meetings, or donating money to support a candidate may be motivated to find the necessary membership information does not alter the fact that members whose interest in the election is far more casual may not find it worth their while to telephone a help line, or go look for a union card someplace else in the house, when they come upon a web site that requires membership information for log-in. The point of having a web site is to make it as easy as

possible for members (and others) to see information, and the log-in requirement just creates obstacles that may discourage many people from getting access, especially if their interest in seeing a campaign web site is only casual in the first place. But a candidate and his supporters who run a web site want to get every possible vote, even from members whose interest is only casual.

164. Defendants have misstated what plaintiffs said during their depositions. They did not agree that rank-and-file expressions of opinion are "sensitive information" that members may be punished for revealing. *See* Plaintiffs' reply to ¶ 23, *supra.* Moreover, when plaintiffs said that employers have access to information about what is happening in the local, they did not qualify their affidavits by saying that it was only some kinds of information to which employers had access, and defendants chose not to ask during depositions whether employers had access to particular kinds of information. Thus, this fact remains undisputed.

165, 166, 167 Plaintiff Quigley specifically testified during his deposition that when he was a business agent, he signed up hundreds and hundreds of operators whose businesses grew into substantial operations over time, Dep. at 127. He identified several contractors who employ hundreds of IUOE members, run multi-million dollar businesses, and participate actively as union members and even attended a recent union meeting to vote for the election committee. *Id.* 130-133. Moreover, when plaintiffs said that employers have access to information about what is happening in the local, they did not qualify their affidavits by saying that it was only some kinds of information to which employers had access, and defendants chose not to ask during depositions whether employers had access to particular kinds of information. Thus, this fact remains undisputed.

171. Defendants miscite the testimony. Plaintiffs' counsel asked a series of questions about whether various union member conduct that would evade the password protection system would

violate "the rules" or "any of your rules." Giblin Dep. 133-135. Nor has the union identified any other rule that would be violated. The union has admitted that it does not have any general prohibition against disclosing union affairs to non-members. PSMF ¶¶ 59-61 and DR-SMF ¶¶ 59-61.

173. Defendants miscite the testimony. Plaintiffs' counsel asked a series of questions about whether various union member conduct that would evade the password protection system would violate "the rules" or "any of your rules." Giblin Dep. 133-135. Nor has the union identified any other rule that would be violated. Counsel never confined the question about downloading the electronic files of a web site and shipping it to a non-member. In fact, counsel did not ask the question about shipping the electronic files about "the rule" (singular), but about "the rules" (plural):

"Q. That doesn't violate the rules?

A. That's correct."

Nor has the union identified any other rule that would be violated. The union has admitted that it does not have any general prohibition against disclosing union affairs to non-members. PSMF ¶¶ 59-61 and DR-SMF ¶¶ 59-61.

175. This fact is material because is undercuts the effectiveness of the union's rule to serve its purported purposes. In any event, the evidence cited is undisputed in the record.

Respectfully submitted,

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