UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-7056

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

Plaintiffs-Appellants,

v.

VINCENT J. GIBLIN and INTERNATIONAL UNION OF OPERATING ENGINEERS,

Defendants-Appellees.

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

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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Summary of Argument

The central issue in this appeal is whether IUOE made a sufficient showing to justify its "reasonable rules" defense of a rule that admittedly restricts free speech by requiring that campaign websites be "password-protected," allowing only union members who identify themselves by name and membership number to enter. IUOE admits that LMRDA section 101(a)(2) protects the right to speak to the public. But, it says, that right must yield here because its rule is supposedly based on the danger of harm to legitimate union interests. To mount that defense, however, IUOE needs **evidence** of the harm that it claims to fear from the public availability of campaign websites. Moreover, the purported justifications for the restrictive effect of the rule must fit with the exceptions that IUOE has made to make its rule appear less onerous.

IUOE argues 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, it argues that attacks on a 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 it can speculate that the problem identified as justifying the rule might not apply to non-included websites. In effect, IUOE claims the right to apply an equal-protection-style

rational-basis test, that lets a government justify economic regulations by simply making reasons up out of whole cloth, even though this is a test for rules that restrict free speech. If unions' burden could be met by such speculation, unions could adopt **any** restriction on free speech in their unbridled discretion, and section 101(a)(2) would be rendered unenforceable in the courts.

Argument

A. "Reasonable Rules" Defenses Must Be Based on Evidence, Not Speculation.

Appellants' opening brief 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, despite its impact on speech, the rule in fact serves a legitimate purpose protected under the LMRDA. In both respects, the courts demand a showing based on evidence.

IUOE argues that *Sadlowski* allows the suppression of speech based entirely on union leaders' unsupported speculation because, at some junctures of the opinion, the Court referred to what the union "feared." 457 U.S. at 115, 118. What IUOE ignores is that, after recounting the union's position, the Court then cited the **evidence** in the record showing that the expressed fears were reasonable, while carefully 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. 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. Evidence was cited and treated as determinative in the balancing test – *i.e.*, in weighing both the impact on speech interests and the impact on IUOE's legitimate interests. IUOE notes that no evidence was cited on the specific point that recipients of outside contributions were corrupted by those donations, but they ignore the fact that, instead of such evidence, the Court relied on extensive legislative history showing that Congress wanted to minimize outsider influence in union elections. *Id.* at 116-118. Moreover, *Sadlowski* was decided against the backdrop of cases like *Buckley v. Valeo*, 424 U.S. 1 (1976), establishing, as a matter of law, the right of Congress to legislate limits to counter the corrosive influence of undue campaign contributions on candidates.

IUOE also seeks to distinguish *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. IUOE 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." Br. 43 n.18. 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 IUOE's own invention. But even assuming that overt patriotism and opposition to radicalism, which was a significant labor movement issue roughly through the mid-70's when the Vietnam War ended, is deemed unrelated to traditional union interests, the same cannot be said of *Keubler*, which IUOE dismisses as being "to much the same effect at *Stachan.*" *Id.* In that case, members were disciplined for holding a rump meeting during a long strike, to express their unhappiness about the union negotiating committee's failure to make progress getting members back to work. *Keubler* thus involved a core union concern and the very sort of "divisiveness" that IUOE here insists might be communicated to the employers if they could see campaign websites; *Keubler* scarcely lacked nexus to traditional union interests.

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

On the "impairment of rights" side of the balance, IUOE's rule will severely impair free speech rights that are protected by the LMRDA.

1. The Rule Impairs Speech Outside IUOE.

IUOE 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 from being delivered to the public. There is, therefore, no need to consider any further evidence to decide that IUOE's rule will prevent protected speech.

IUOE discounts this aspect of plaintiffs' claim on two grounds. First, it miscites the evidence, claiming that the two plaintiffs it chose to depose admitted that "the audience they were trying to reach through their campaign websites was IUOE's membership, not the general public." Br. 30-31. The cited evidence says no such thing. At the cited pages, 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." JA675. This testimony was not even **about** a campaign website, not to speak of showing that **the** purpose of campaign websites is to reach the electorate.

In effect, Kohl's campaign website had, and has, multiple purposes and

multiple audiences. This is one of the things that makes the Internet distinctive, not the simple equivalent of newsletters or leaflets. Websites have multiple functions and multiple audiences: They are a caucus meeting, press conference, newsletter, personal conversation, poster, mailing, open forum, diary, and other means of communication, all rolled into one. One of the most chilling aspects of IUOE's rule is its attempt to deprive rank-and-file websites of their multi-purpose and multi-audience character, insisting instead that they be confined to the one audience approved by IUOE. Our opening brief (at 49) cited plaintiffs' testimony specifically averring that their websites had dual purposes, to speak both inside and outside IUOE. IUOE simply ignores this argument and evidence (about which it chose not to question Kohl).

Similarly, IUOE misrepresents its deposition questions to Quigley, which asked only whether certain aspects of his campaign website, such as leaflets soliciting attendance at campaign rallies, were directed at members. JA 572-573. IUOE never asked him whether or not statements on his websites were also aimed at the public. Quigley values the opportunity to look at the websites 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* JA565,567.

IUOE also argues that its attack on free speech is less inconsequential 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 (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 Internet websites whose content is crawled by search engines and/or linked from other websites, and thus can be found by the general public when the content of the website matches something that the public is seeking online (or, indeed, finds through surfing). As the Supreme Court said in *Reno v. ACLU*, the ability to post websites 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 IUOE is willing to allow these lesser alternatives – at least until it decides to "fear" that speech too – is not much comfort.[1]

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[1] IUOE argues that the rule advances members' ability to speak freely during elections, but no evidence that a **mandatory** password protection rule is needed to foster intra-union debate. IUOE could make its password protection system available to those who want it in the event there are candidates who would feel less inhibited in campaign discussion if their sites were password-protected. There is, however, no evidence that such a person exists, and it is conceded that nobody on the GEB even articulated this theory as a reason to adopt the rule. Indeed, IUOE's discussion of the

2. The Rule Impairs Speech to Union Members.

Although it is a sufficient objection to the rule that it improperly restricts speech to non-members of IUOE (unless justified by countervailing union interests), 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 websites provide a potential means for insurgent candidates to "level the playing field" by enabling them to bypass the official channels of communication within incumbent-controlled local unions. 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 Steelworkers' staff had the right not to participate in campaigns, *id*. at 114-115, and, indeed, that, as a consequence, union staff had challenged incumbents and won election. *Id.* at 115. There is no such evidence here; 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 Ward announced his candidacy. Similarly, Kohl testified that, as a condition of employment, union

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supposed pro-speech impact of the rule, Br. 27-29, like its discussion of purported harm to the union's interests, is remarkably devoid of citation to **evidence.**

staff must contribute $100 per month to a political fund used at election-time to finance the incumbents' re-election. Kohl Dep. 24. And it was a website that contributed to the ouster of a GEB member just before the rule was adopted.

It is also undisputed that IUOE's password-protection requirement makes it much less likely that newspapers will report on election campaign websites, or that other website operators will link to them, and that the loss of this publicity can reduce union member traffic. Plaintiffs' Statement of Material Facts134-136 ("PlaintSMF1340-136"), JA60,112-114,143-144,450,455,562,567,633-634,641. (As in our opening brief, citations to PlaintSMF in the Joint Appendix are accompanied by responses to that Statement; where IUOE either objected to materiality or disputed all or part, we cite plaintiffs' Reply SMF and the supporting evidence). There is more controversy about whether the website restriction rule will limit a website's visibility on Google. IUOE changed the rule to allow a website's home page to serve as a billboard so long as it simply announces candidacies by giving names, positions and photos, but that only provides a means for members searching specifically for the campaign website to find it. If a member searched, for example, for "Ray Connors 150," he would find links to the Team 150 website because Local 150 retiree BA Ray Connors writes a

column there; 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 website where Ward attacks Dugan for suppressing union democracy. *JA783-786*. But Ward may not say anything negative about Dugan (his opponent) or Connors (a non-candidate supporter) on the "billboard" section of his website; thus 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 website to do more than they need to do absent a password system. Although IUOE argues that "no admissible evidence" supports the contention that login requirements necessarily reduce traffic to dissident campaign web sites, not only evidence but common

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[2]Search engine rankings also incorporate such factors as how often content is updated (hence each new blog entry counts; but billboard pages are static), the number of links to the website (people like to link directly to relevant pages, and are very unlikely to link to the home page of a site that is mostly password-protected), the value of 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's 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 March 12, 2009).

sense shows that having to take the extra step of logging-in will reduce traffic to any website.[3] Plaintiffs averred below that members worry about being tracked online, JA458-459,558,630-631, and IUOE's own witness admitted that members worry about this. JA156. Members' fear of the consequences of being identified, given the possibility of subtle retaliation at IUOE hiring halls, simply compounds the problem.[4]

IUOE counters with arguments suggesting that many members are able and willing to log-in. Plaintiffs recognize that members who really want to get into a campaign website will eventually be able to do so, even if they don't 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.

The whole purpose of placing campaign messages on websites is to make it **easy** for members to see them, even if they are only casually interested. The

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[3]For example, although IUOE takes pains to note that there is a section of Kohl's website that requires registration, Br. 37 n.14, it does not mention her testimony that hardly anybody participates in that part of her site, even though she has nearly 13,000 visitors to her website. JA642,682-683.

[4] Plaintiff Quigley, who worked as a business agent for many years, explained that a business agent has many legitimate reasons to go out of order on the out-of-work list, and has access to information about when is a good time to **be** on that list, that gives members a very strong incentive to be on good terms with the business agent. JA566-567.

imposition of a password entry system is sure to discourage some members from entering insurgent websites.[5]

Still another problem is the fact that IUOE'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. IUOE admits the problem but denigrates it on the theory that there are other web hosting platforms that allow content to be placed online without knowledge of web code, and that it is only "a few newer kinds of platforms" that are off-limits. As we explained in our opening brief, at 18-19, these newer platforms, such as YouTube, are increasingly central to modern electioneering. IUOE's only response is

[5]IUOE points out that union members must write down their member numbers to be able to vote. But members have a period of weeks to find their card and send in the mail ballot. *See* JA686, ¶ 23. IUOE'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.

another misleading citation to the record. They say that both of the plaintiffs whom they chose to depose "testified that they could not identify a single IUOE member who has even a personal page on any of the social networking sites," while noting that only Facebook members can visit Facebook pages. Br. 41. Apart from the fact that this is not what either witness was asked, this clever record miscitation ignores the testimony of Mark Brenner, JA467-469, that he had identified MySpace pages for dozens of younger members of the IUOE, and that, before the IUOE rule was adopted, IUOE candidates used YouTube videos to campaign. JA453. In fact, a You-Tube video from the IUOE Local 3 campaign was discussed at Giblin's deposition, JA351-353, 395-398, another point IUOE simply ignores.[6]

C. IUOE'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 IUOE has made an adequate "showing" of the harm that the rule is intended to prevent, and of the fit between this purported harm and

[6]Unions also use Facebook for organizing purposes, http://openconcept.ca/union_facebook_organizing. 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 rule. IUOE fails miserably in both respects.

1. There Is No Showing That Public Campaign Websites Harm IUOE Interests.

First, it is undisputed that IUOE has presented **no** admissible evidence that any employer has ever gained **anything** by monitoring a union campaign website, or that any truly confidential information has ever been posted on a campaign website, not to speak of being posted to IUOE's detriment. IUOE relies on statements that defendant Giblin averred he heard at a union hearing in December 2000, but not to prove the truth of what he heard, only to prove what he "feared." Similarly, IUOE relies on a 2005 incident in Local 66, when local union minutes were posted on a campaign website, 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). Morover, Giblin could recall neither the specifics of what he heard at the 2000 trusteeship hearing nor what was in the Local 66 minutes. Our opening brief (at 11-12) noted IUOE's admission that it had the contemporaneous documents (such as the 2000 transcript, Giblin's letters about Local 66, and the Local 66 minutes themselves); IUOE's failure to submit the documents creates a negative inference that the documents would not have supported IUOE's position. Certainly,

Giblin's inability to recall the specifics, coupled with IUOE's failure to introduce the contemporaneous documents or to provide the documents to plaintiffs, precludes IUOE's reliance on these incidents as a justification for the rule's impact on free speech.

Instead of evidence, IUOE 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 IUOE 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 websites. Absent concrete examples, IUOE has simply failed to justify the speech-repressive impact of its rule.

IUOE 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 IUOE substantially overstates the extent of plaintiffs' acceptance of IUOE'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 website; and whether employers might derive some benefit from learning what members think about various issues. *E.g.*, JA598-604,659,661-662. But IUOE was careful never to ask plaintiffs whether they agreed that IUOE 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. In fact, plaintiffs averred that they do not share IUOE's view on this point. JA567-568, 641-642.

IUOE also argues that, given its determination to prevent members from revealing "sensitive information" on publicly available campaign websites, a prophylactic rule that simply requires password protection is better than a system under which the International scrutinizes websites 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 unsupported premise – that there is a real problem that needs a solution, because campaign websites contain a significant volume of disclosures that IUOE **could** punish without running afoul of the LMRDA. IUOE has not shown the existence of such disclosures. It has yet to identify **a single disclosure** on **any** campaign website that it could lawfully punish.

An additional consequence of IUOE's inability to identify even a single item on the Ward website operated by Quigley is that, at the very least, the application of the rule to those two plaintiffs violated their free speech rights and hence should have been enjoined. In that regard, although IUOE repeatedly asserts that plaintiffs brought only a facial challenge to its rule, plaintiffs never limited themselves to a facial challenge, or waived their as-applied challenge to the rule.

Nor can IUOE excuse its inability to identify even a single punishable disclosure of genuine union secrets on the theory that its whole purpose is to avoid having to address disclosures on an item-by-item basis that might be seen as content-specific or candidate-specific censorship. Because the *Sadlowski* formula for assessing infringements of free speech rights under the LMRDA requires balancing the impact on speech interests against the impact on legitimate union interests, the union must come forward with a showing that the speech does, in fact, threaten legitimate union interests. Only once that showing is made can the benefits (and disadvantages) of a prophylactic rule become relevant. But IUEO has never made the required showing of adverse impact on union interests – its whole argument is that it should be allowed to suppress speech based on sheer speculation. A prophylactic rule cannot be justified based on mere "fears."

There are two reasons to believe that IUOE cannot identify examples of punishable disclosures on campaign websites. First, during his deposition, defendant Giblin described many examples of supposedly "sensitive" information whose disclosure, he said, IUOE's rule was intended to prevent; but IUOE has no legitimate interest in regulating those examples, such as the "secret" that IUOE'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, JA51-52. On appeal, IUOE does not defend **a single one** of these examples as a union secret that needs to be kept from employers.

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 websites is that they take the position that it would **not** violate any union rule to disclose the websites' contents directly to employers. Surely, if these websites contained union bottom lines in contract negotiations, or similar information whose disclosure would really threaten IUOE's interests, defendants would not have such a casual attitude toward the disclosure of such information by other means.

Given the flimsy evidentiary basis for IUOE's rule, this case thus presents the question whether IUOE's "fears" are enough to justify a rule limiting free

speech. If such fears are enough, then in the next case IUOE will have no difficulty justifying a rule that forbids rank and file members or groups from posting materials critical of IUOE'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 at IUOE 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 were held protected in the cases cited in our opening brief at pages 41-42. It is convenient for these defendants to say today that they respect the rulings in those cases, but if the arguments that they present here are accepted, it will be easy for defendants (or other unions) to say tomorrow how much they "believe" or "fear" harm from disclosures in letters to the editor or in rank-and-file newspapers, and certainly the topics discussed by the members in *Helton* and *Black* are "sensitive" and potentially injurious to union institutional interests 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, IUOE'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. IUOE Has Not Shown That Password Protection of Campaign Websites Will Effectively Screen The "Sensitive Information" That IUOE Claims to Be Trying to Protect From Being Seen by Employers.

Finally, even if there were some basis for defendants' contention that password protection is needed to prevent employers from obtaining information whose disclosure IUOE is entitled to punish, the rule is so full of loopholes that it cannot effectively serve that objective. IUOE's arguments to the contrary are not persuasive.

Our opening brief argued that the limitation of the rule to election campaign websites, while allowing member websites 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 websites because hearsay from members suggested that the problem of employer monitoring of websites was confined to campaign websites, and that, in any event, analysis of underinclusiveness runs counter to *Sadlowski*'s focus on reasonableness rather than narrow tailoring. Br. 45-46. In fact, however, the *Sadlowski* plaintiffs **did** make an underinclusiveness argument: that IUOE'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" proffered by the Steelworkers established that outsiders have little interest in influencing local union elections. 457 U.S. at 119 n.11.

Quite the opposite is true here. First of all, intra-union secrets on member websites – if indeed that really ever happens – is no less injurious to union interests because they can be found on a non-electoral web site than if they are found on campaign web sites. Thus, the distinction between the regulation of campaign and non-campaign websites is simply not a persuasive reason for a rule that requires password protection for the former and not for the latter. Nor is there any reason to believe that members who spoke at the Local 30 hearing back in 2000 were distinguishing between election campaign websites and any other form of intra-union campaign website. Moreover, the kind of information that Giblin defined as sensitive during his deposition **can** be found on non-password-protected member websites. JA787-806 is the "forum" page from the Local 3 Democratic Union website (an earlier printing Exhibit 14 at the Giblin Deposition). There are many membership opinions posted there about contract negotiations, about mismanagement of IUOE's benefit funds, and other issues which, when discussed on campaign websites, Giblin said were the sort of disclosures that IUOE's rule was trying to prevent. This fact simply reinforces the

suspicion that the reason why the GEB, whose members are also incumbent local union business managers, are more worried about election websites is that those are the sites that threaten their hold on office.

Here, IUOE offers only vague speculation about what "sensitive information" might be found on campaign websites, and about what use employers might make of this information, and offers vague and conclusory recollections about complaints from a handful of members several years ago about misuse of campaign websites. If that is sufficient evidence to sustain IUOE's rule in this case, it will have no difficulty coming up with enough "evidence" to justify a crackdown on member websites that do not support or oppose candidates for union office.

Finally, IUOE's rule will not serve its purported objective because IUOE has made it too easy for employers to obtain the information on the password-protected websites. This is true, in part, because so many employers belong to IUOE. IUOE 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, and asserts: "IUOE members who are employers . . . **[1]** are by and large small contractors, referred to as owner-operators, **[2]** whose economic interests are directly aligned with union's members." Br. 49, citing JA776-777

(numbers inserted to label clauses for discussion below). This is another misleading record citation. The cited paragraphs do support clause [2] of IUOE's quotation – the affiant's personal assessment of alignments of interest – but he never discusses clause [1] — the relative fractions of employers who fit one category or another. And 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 became bigger operators over time. JA592. Although union counsel represented in the course of questioning Quigley that IUOE has records suggesting that the number of contractors who began as owner-operators is much smaller, JA592a, no such records were put in evidence, raising yet another negative inference defeating IUOE's contentions on appeal.

Quigley further testified that there are IUOE members who own multi-million dollar companies, JA593, and identified by name three such members, who employ hundreds of IUOE members, but who nevertheless attended a recent meeting to elect IUOE's Election Committee; he said that other such contractors attended but that he could not remember their names. JA595. Nor has IUOE 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. JA561. These employers and their supervisory staff would have

direct access to password-protected campaign websites 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 IUOE's purported purpose. IUOE 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. JA365-366. 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. JA683-684. Similarly, during the depositions in this very case, when membership cards were placed in the record, social security numbers were redacted but member numbers were not, *e.g.,* JA165-170,579-580, yet IUOE 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 website need only obtain a register number and log in, or importune one of IUOE's 396,000 members to log in and send it the desired information.

IUOE's main response at this point is that it would be illegal for an employer to enter a campaign website using a member's password. Br. 47, citing

Electronic Communications Privacy Act, 18 U.S.C. § 2701(a). 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 website to which he allowed access by other union members but expressly forbade management to enter. A company official importuned two union members who were on the list of authorized users to allow him to use their log-in information, and complained to the union about site's contents. Konop sued claiming that the company's access to the website violated ECPA. The Ninth Circuit held, however, that an exception to ECPA, 18 U.S.C. § 2701(c)(2), allows any user to authorize a third-party to access an otherwise forbidden website. 302 F.3d at 880. Thus, all an employer would have to do to gain access to a campaign website would be to ask any one of the 396,000 IUOE members — some of whom are employers — to authorize it to enter the member's 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, ECPA's deterrent effect even on an employer who cannot find a snitch willing to be paid to give authorization would surely be lessened by the fact

that there are 396,000 authorized users, and that IUOE's rules do not forbid members from printing out password-protected web pages, or even downloading the entire website and emailing the site to an employer. JA366-368. Moreover, IUOE 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 website, it can easily claim that it got access through legitimate means, and IUOE will have no recourse. In effect, this is an untraceable crime, and the deterrent effect of the statute is therefore minimal.[7]

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 website resolution will not serve its stated purposes, and should be struck down because it violates the LMRDA.

D. IUOE's Rule Is Void for Vagueness.

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[7]Moreover, because it is so hard for unions to prove violations and get relief against employers who violate labor laws, employers frequently break the law in their fight against unions in organizing drives. Employers 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?

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

In fact, plaintiffs identified two such websites. The Local 3 Democratic Union website appears not to be a campaign website, but as discussed at Giblin's deposition, Quigley has posted a campaign message on the forum section of that website. Giblin was not allowed to say whether either Quigley or the site operator had violated the campaign website resolution by virtue of that message. This problem applies generally to other websites that have forums, including not only Kohl's website and the Local 37 Members Voice site, but the guestbook feature on the Woman Operator website. http://books.dreambook.com/mariannerafferty/woman .html, as well as Yahoo! discussion groups for Operating Engineers that require members to join but demand no proof of union membership, http://finance.groups.yahoo.com/group/ operatingengineers/; and http://finance. groups.yahoo. com/group/operatingengineers union/.

Moreover, although plaintiff Kohl would prefer to believe that her website is **not** a campaign site by virtue of a single line advocating the election of the

Team 150 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 to her website 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 critical "sucks" site that only attacks a candidate without supporting any candidates would be a campaign website. Defendant Quigley, for example, has reserved a series of "sucks" domain names, including mylocal150sucks.info (JA808-810), for the purpose of publishing information in the future, and does not want to have to worry about whether that website could be called a campaign website 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" website is a campaign site. If, as IUOE 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.

IUOE asserts that caselaw interpreting the term "campaign literature" under

Title IV of the LMRDA provides a "ready-made source of standards" for deciding when its rule applies. Br. 51. But not only is there no **evidence** in the record that IUOE has adopted that standard to guide its discretion, but the application of the rule suggests the extension of intense pro-incumbent bias to the website rule. Title IV allows a union publication (and hence the union's own website, which need not be password-protected under the rule) to praise incumbents to the skies, while ignoring members who happen to be running for office unless they do something worth criticizing, so long as the reports are "relevant" to union business, without being treated as campaign literature (especially if the puff and critical treatment remain consistent between elections). *See Camarata v. IBT*, 478 F.Supp. 321, 324-328 (D.D.C. 1979); *Murphy v. IUOE Local 18*, 99 LRRM 2075, 2122-2123 (N.D. Ohio 1978). Because incumbents can ordinarily plan for their re-election from the day they take office, while insurgents are likely to decide to run closer to the deadline for nominations, if the Title IV definition of "campaign literature" is imported to this context, incumbents can easily evade the rule by establishing self-adulatory websites as soon as they are first elected, and then just continuing in the same vein.

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

why the rule should be invalidated under Section 101(a)(2) of the LMRDA.[8]

CONCLUSION

The decision of the district court should be reversed, with instructions that plaintiffs' motion for summary judgment be granted.

Respectfully submitted,

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[8]In the court below, IUOE relied on its "administrative procedure" for resolving questions about how the rule will be applied, but now admits that the cases that uphold vague rules on that ground are limited to restrictions on commercial speech. Br. 55 n.24. When noncommercial speech is at stake, "a more stringent vagueness test should apply." *Village of Hoffman Estates v. Flipside* 455 U.S. 489, 499 (1982).