



## **AGENDA OF THE ETHICS BOARD**

**WEDNESDAY, OCTOBER 7, 2020, 5:00 PM**

**Virtual Meeting. Public may attend via Zoom.**

**A. Zoom Meeting Information.**

- I. This item contains documents which provide call in information and instructions for the Zoom Meeting.

**B. Roll Call.**

- I. William Vande Castle, Chair; Alder Bill Galvin; Branka Bakovic; Chari Graham; Cheryl Renier-Wigg; Aaron Weinschenk

**C. Approval of the Agenda.**

- I. Approval of the Agenda for Wednesday, October 7, 2020.

**D. Approval of Minutes.**

- I. Approval of the Minutes from the September 1, 2020 Ethics Board Meeting.

**E. Regular Business.**

- I. Hearing on the following Motions filed in the matter of the Ethics Complaint against Alder John Vander Leest, filed by Mr. Tarl Knight, under the City of Green Bay Code of Conduct for Elected Officials:
  - Motion to Specify Plaintiff's Claim with Particularity and Clarity filed by Alder Vander Leest on August 31, 2020
  - Motion to Suppress filed by Mr. Knight on September 18, 2020
  - Motion to Dismiss filed by Alder Vander Leest on September 18, 2020
  - Motion to Suppress filed by Mr. Knight on October 2, 2020

2. Deliberations and action on the Motions filed in the matter of the Ethics Complaint against Alder John Vander Leest, filed by Mr. Tarl Knight, under the City of Green Bay Code of Conduct for Elected Officials.

The Board may convene in closed session pursuant to Sections 19.85(1)(a), Wis. Stats., for purposes of deliberating concerning a case which was the subject of any judicial or quasi-judicial trial or hearing before that governing body. The Board will thereafter reconvene in open session pursuant to Section 19.85(2), Wis. Stats., to take action on items discussed in closed session, if appropriate, and to consider the remainder of the agenda.

## **F. Adjournment.**

- 1) THIS MEETING IS RECORDED: THE VIDEO OF THIS MEETING AND MINUTES ARE AVAILABLE ONLINE AT [www.greenbaywi.gov](http://www.greenbaywi.gov)
- 2) ACCESSIBILITY: Any person wishing to attend who requires special accommodation because of a disability, should contact the City Safety Manager at 920-448-3125 at least 48 hours before the scheduled meeting time so that arrangements can be made.
- 3) QUORUM: Please take notice that a majority or quorum of the Common Council will attend this Ethics Board meeting and will constitute a meeting of the Common Council for purposes of discussion and information gathering relative to this agenda.
- 4) REPRESENTATION: The party requesting the communication, or their representative, should be present at this meeting.

# Virtual Meeting Instructions

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Ethics Board 10-7-20

## Zoom Meeting Information

### Join Zoom Meeting

<https://us02web.zoom.us/j/86379879818?pwd=S1VUY2ljQzItaDRtSDFnMkM3UE5Mz09>

**Meeting ID: 863 7987 9818**

**Passcode: 963728**

### One tap mobile

+13126266799,,86379879818#,,,,,0#,,963728# US (Chicago)

+19292056099,,86379879818#,,,,,0#,,963728# US (New York)

### Dial by your location

+1 312 626 6799 US (Chicago)

+1 929 205 6099 US (New York)

+1 301 715 8592 US (Germantown)

+1 346 248 7799 US (Houston)

+1 669 900 6833 US (San Jose)

+1 253 215 8782 US (Tacoma)

Meeting ID: 863 7987 9818

Passcode: 963728

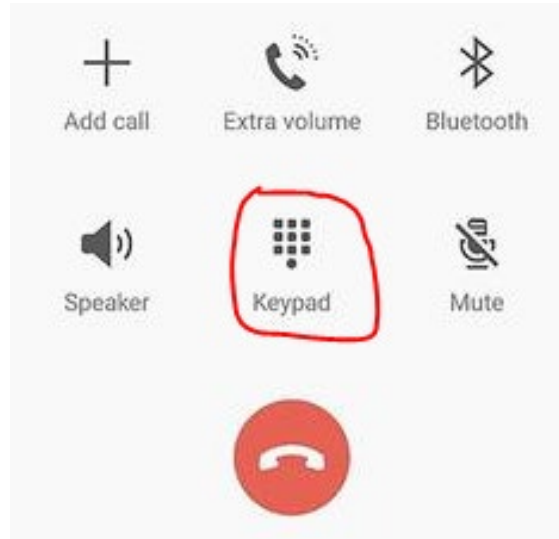
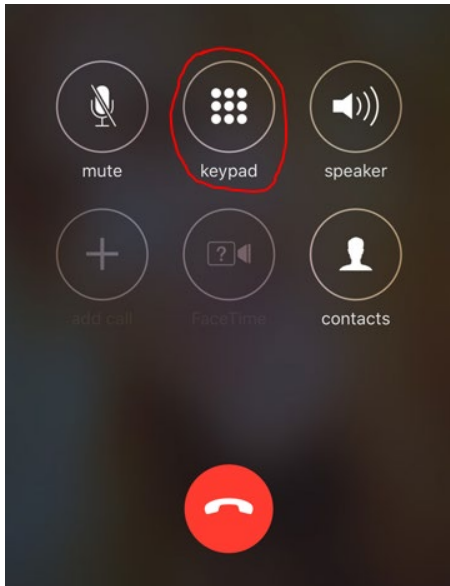
Find your local number: <https://us02web.zoom.us/j/86379879818?pwd=S1VUY2ljQzItaDRtSDFnMkM3UE5Mz09>

## Additional Information

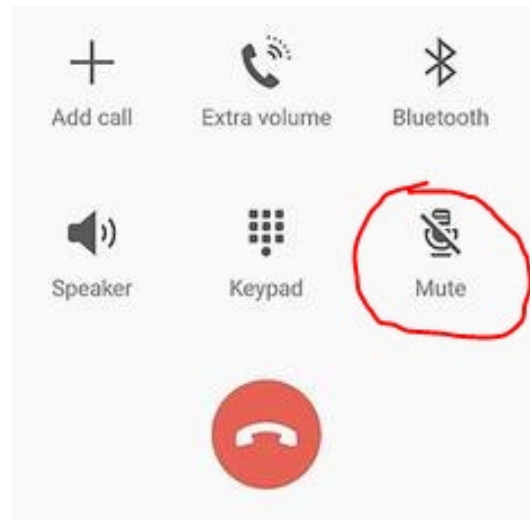
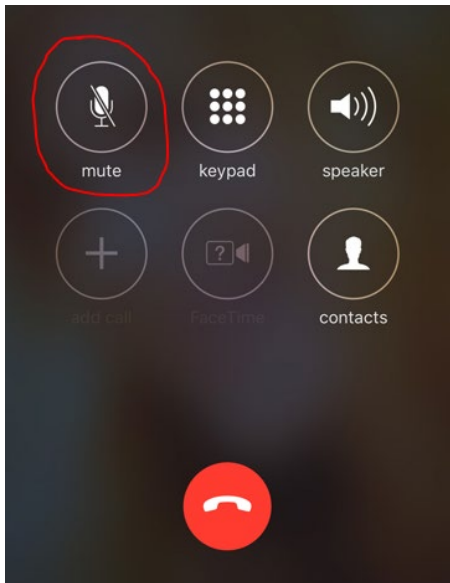
1. Wisconsin Open Meetings Law still applies
  - a. Persons interested in speaking to an item must give their name and address
  - b. Committee/Commission/Board members will still follow *Roberts Rules of Order*
2. All zoom meetings will have a password in the instructions. Please enter when prompted.
3. Please log into the Zoom meeting 10 minutes before the meeting starts to ensure proper technology is working.
  - a. If you are a Board Member, please log into [CivicClerk](#) with a computer, laptop, or tablet device.
4. Once you are in the meeting please mute yourselves.
  - a. You may unmute yourself when you are called upon to speak.
5. Waiting room
  - a. When you call in, all callers/participants will be placed in a “waiting room.”
  - b. Persons on the agenda will be admitted to the meeting, and then once the item is concluded, the host will permanently mute you from the meeting (you can still hear the meeting).
6. Using Zoom with a tablet or computer
  - a. Tablet—you will be asked to sign in. Download the app either with the Apple Store or the Play Store
  - b. Computer—you will be asked to sign in. You may download the app or click on the link to open Zoom in your browser.
7. Registering
  - a. The host may ask you to register for the meeting. A registration link will be sent to you along with the invite. You’ll receive another email confirming that you’re registered for the meeting.
  - b. If you’re using a phone, your registration will still be tied to an email.
8. Raising your hand
  - a. Committee members—you can either use CivicClerk and request to speak or you can “raise your hand” in the zoom meeting (you’d need to use a computer or tablet) to let the host know you’d like to speak. You can also un-mute yourselves and start speaking.
  - b. Persons on the agenda—you can “raise your hand” but you’d need to use a computer. You will be allowed to speak, per Wisconsin Open Meetings Rules, once the committee has “opened the floor for interested parties to speak.” Once the committee is finished with your agenda item, the host will mute you permanently, unless the committee opens the floor again.
9. What devices should I use?
  - a. Smart phone (please see more detailed instructions on page 3)
  - b. Land line
  - c. Tablet—well in advance of the meeting, please download the Zoom Meeting app before you join a meeting by using either the Apple Store or the Play Store. You will be asked to input your name, thus identifying you for the meeting. You’ll also be asked to verify your email.
  - d. Computer—well in advance of the meeting, please download the Zoom Meeting app, but you can also click on a link to open the Zoom Meeting in your browser. You will be asked to input your name, thus identifying you for the meeting.
  - e. For tablet and computer users—if you download the app you will be asked to verify your email.
10. Zoom etiquette
  - a. Muting yourselves when you’re not talking will prevent your background noise from interfering with others’ ability to listen to and participate in the meeting.
  - b. If you’re using a telephone, please identify yourself with your phone number and name before you speak. Zoom meeting hosts can see only your telephone number and will ask you to identify yourselves.
11. Closed session
  - a. Persons in the Zoom meeting will be put into a waiting room while the committee meets in Closed Session. Participants will be admitted back into the Zoom meeting once the committee reconvenes in Open Session.
  - b. Persons watching live on YouTube will see a gray screen with the City logo during closed session.
12. Persons interested in attending anonymously or listening to the meeting may call in by dialing \*67 followed by the phone number above.

## Calling into the Zoom meeting using a smartphone

1. Dial the phone number listed at the beginning of this document.
2. When prompted, enter the Meeting ID number followed by #
  - a. If you're using a smartphone, you can access the keypad by clicking "Keypad" on your screen



3. Once you are in the meeting, notify the meeting host that you are in and state your name.
4. If you do not need to talk, please make sure your phone is on **Mute**
  - a. If you're using a smartphone, look at your screen and click the Mute button



- b. If you're using a computer, you should see a Mute button in the Zoom application





Report to the  
Ethics Board  
of the City of Green Bay

**MEETING DATE**

October 7, 2020

**PREPARED BY**

**AGENDA ITEM # C.I**

Approval of the Agenda for Wednesday, October 7, 2020.

**BACKGROUND**

**RECOMMENDATION**

**FISCAL IMPACT**

**ATTACHMENTS**

None



Report to the  
Ethics Board  
of the City of Green Bay

**MEETING DATE**

October 7, 2020

**PREPARED BY**

**AGENDA ITEM # D.I**

Approval of the Minutes from the September 1, 2020 Ethics Board Meeting.

**BACKGROUND**

**RECOMMENDATION**

**FISCAL IMPACT**

**ATTACHMENTS**

None



Report to the  
Ethics Board  
of the City of Green Bay

## MEETING DATE

October 7, 2020

## PREPARED BY

## AGENDA ITEM # E.1

Hearing on the following Motions filed in the matter of the Ethics Complaint against Alder John Vander Leest, filed by Mr. Tarl Knight, under the City of Green Bay Code of Conduct for Elected Officials:

- Motion to Specify Plaintiff's Claim with Particularity and Clarity filed by Alder Vander Leest on August 31, 2020
- Motion to Suppress filed by Mr. Knight on September 18, 2020
- Motion to Dismiss filed by Alder Vander Leest on September 18, 2020
- Motion to Suppress filed by Mr. Knight on October 2, 2020

## BACKGROUND

## RECOMMENDATION

## FISCAL IMPACT

## ATTACHMENTS

1. Scheduling Order 9-4-20
2. VANDERLEEST - Witness and Exhibit List
3. VANDERLEEST - DDDDfacebook- Vanderleest exhibit (14277060)
4. VANDERLEEST - vandmots I I X X copy copy
5. VANDERLEEST - VANBFWWWW QQQ
6. VANDERLEEST - rhon
7. VANDERLEEST - vandspecificityNNNNNN
8. KNIGHT - Knight vs. Vanderleest Argument Brief
9. KNIGHT - List of Witnesses and Diagrams
10. KNIGHT - List of Witnesses to Subpoena
11. KNIGHT - Motion to Suppress
12. KNIGHT - Motion to Suppress Motion to Dismiss
13. VANDERLEEST - VANDSTATEMENT
14. VANDERLEEST - weryimage0TTTTTTTQQQQ
15. VANDERLEEST - WISCONSIN ETHICS COMMISSION AA
16. KNIGHT - Knight vs. Vanderleest Argument Brief
17. VANDERLEEST - Davison case is not binding precedent here
18. VANDERLEEST - SEC230
19. VANDERLEEST - Vanderbrief I I I X X

20. VANDERLEEST - legal argumentX R
21. VANDERLEEST - motionsvanderleest####^^^
22. KNIGHT - ethics-evidence-blocked
23. KNIGHT - ethics-evidence-blocked2
24. KNIGHT - ethics-evidence-campaign-page
25. Tarl Knight v. John VanderLeest - Complaint

BEFORE THE CITY OF GREEN BAY  
ETHICS BOARD

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In the Matter of the Complaint Against Alder VanderLeest

Respondent

By Tarl Knight

Complainant

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SCHEDULING ORDER

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1. At a duly scheduled and properly noticed public meeting, on Tuesday, September 1, 2020 at 5:00 pm this matter came before the City of Green Bay Ethics Board (Board) for a scheduling conference.
2. Complainant was present at the meeting as was Respondent and his counsel Robert Miller. A quorum of the Board was present, represented by James Kalny.
3. After consideration, and discussion with the parties, upon motion duly made and seconded the Board directed counsel to issue a scheduling order under the signature of the Board Chair, directing the following:
  - a. On or before September 11, 2020 the parties shall exchange:
    - i. a list of all witnesses they intend to call at the hearing of this matter
    - ii. copies of all documents that are intended to be introduced in the hearing of this matter.
    - iii. Mr. Kalny shall contact the parties to coordinate this exchange.
  - b. On or before close of business on September 18 any procedural/evidentiary motion shall be filed with the City Clerk. Any amendment to the complaint will also be due at that time.
  - c. Responses to such motions shall be filed with the City Clerk on or before close of business September 25, 2020.
  - d. Also before close of business on September 25, , all subpoena's required by the parties shall be requested in writing filed with the City Clerk. The clerk shall forward the requests to the Board Chair who draft and execute subpoenas for the requesting party. The Party will be responsible for the service of the subpoenas.
  - e. The Board will notice a meeting and convene the hearing of this matter for the purpose of hearing any motions on October 7, 2020 at 5:00 pm.

- f. The evidentiary hearing of this matter shall be held on October 28, 2020 at 5:00 pm.

DATED in Green Bay, Wisconsin, this 4<sup>th</sup> day of September, 2020.

GREEN BAY ETHICS BOARD

By:

  
\_\_\_\_\_  
William VandeCastle, Chair

09/10/20

John Vanderleest  
Witness and Trial List

By: Atty. Rob Miller

Witnesses

John Vanderleest

Exhibits

Everything previously  
filed

Chris Wery Affidavit

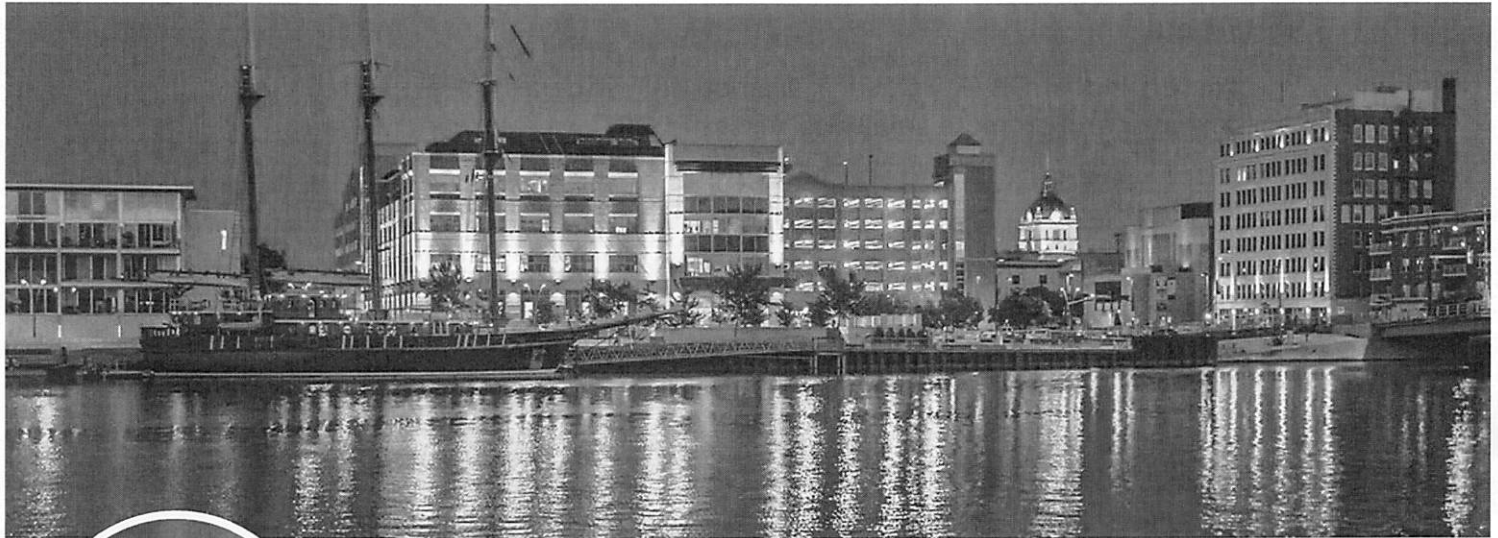
Georgetown Law Center  
article

Statement from GB  
School Bd member on  
death threats and  
social media training

to be  
obtained



20+



# Green Bay City Council - John S. Vander Leest

@JohnVanderleestGbcitycouncil · Politician

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## GENERAL

293 people like this including 1 of your friends



342 people follow this

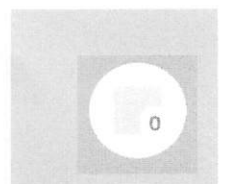
Politician

## ADDITIONAL CONTACT INFO

(920) 499-0996

johnvanderleest@yahoo.com

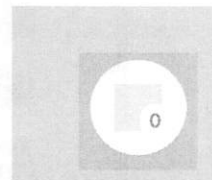
Send Message





**About**

I'm running for GB City Council, District 11. I will be a strong friend to the taxpayer and promote small businesses in GB. I want to work for you.



Before the City of Green Bay  
Ethics Board

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Tarl Knight, Complainant

vs.

John S. Vanderleest, City Council Member, Respondent

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The respondent, by his counsel, Robert J. Miller moves for a dismissal of the charges based upon the following individual bases :

1. The charges regarding the social media section of the Ethics Code should be dismissed because there is no applicable cases barring the respondent from deleting or restricting access to his website. He has complied with all applicable requirements. Further, the Ethics code does not appear to cover the use of social media.

2. The charge regarding violation of the public meeting section (section 4 of the Code of Ethics should be dismissed because the operation of a website or facebook page is not a public meeting. "Public meeting" has clear definitions in routine parlance, in legal terms, and in the the Wisconsin statutes.

Moreover, the Ethics Board by applying the public meeting standard would essentially be re-writing the ordinance well beyond the plain meaning of its terms. The Ethics board has not been delegated the power to enact new ethics rules.

3. Section 230 of the Communication Decency (previously cited in documents) preempts any action by state and local government against the sponsor/manager of a web site. The actions of policing a website's content fall within this area. The action should be dismissed on this basis.

4. Vanderleest arguably followed the current advice of the Wisconsin Ethics Board. This board ostensibly grants Wisconsin officials the right to manage facebook posts. He should not be be punished while in compliance with the guidance of the Wisconsin Ethics Board.

5. Vanderleest and his colleagues were given no instruction on the use of social media. The Ethics Board moves to impose guidelines retroactively and recast ethics guidelines (public meeting definitions) after the fact. This is a separate basis for dismissal.

6. The City of Green Bay Personnel Policy cited in the complaint would not be applicable to an Alderman. In any event, the policy outlines that each City of Green Bay site is solely owned by the City. The section requiring compliance with all applicable social media rules ( 24.3) has no applicability to a personal/campaign website produced by a city council member.

7. The legislative action creating the Ethics Board neither adopted nor promulgated procedural and evidentiary rules for its proceedings. Therefore, the proceedings have no constitutional validity and are violative of basic due process ( Wisconsin and U.S. Constitutions).

8. The application of these rules in the midst of a political campaign creates one set of rules for the incumbent and another for the challenger. The action should be dismissed because of its violation of the constitutional requirements for equal protection of the laws ( Wisconsin and U.S. Constitutions).

Dated this 18th of September 2020

*Robert J. Miller*

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Robert J. Miller  
Attorney for Alderman Vanderleest  
227 S. Van Buren St.  
Green Bay, WI 54301

Tarl Knight, Complainant

vs.

John S. Vanderleest, Respondent

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BRIEF SUPPORTING MOTIONS TO DISMISS

**I. The charge regarding violation of the public meeting (section 4 of the code of ethics) should be dismissed because the operation of a website or Facebook page is not a “public meeting” in the context of the Code of Ethics. It has a clear definition in routine parlance, in legal terms, in the Wisconsin statutes, and in the city of Green Bay ordinances**

*A. We have a specific definition of public meeting in Wisconsin via the open meetings law: It is the convening of members of a governmental body for the purpose of exercising responsibilities authority power or duties delegated to or vested in the body. Section 19.82 (2) Wisconsin Statutes.*

The caselaw further illuminates the statute by stating that a meeting contemplates at least two members per the statute, *Plourde vs. Horner*, et.al, Court of Appeals, 2006 WI App 147 at paragraph 14:

In other words, we require the public to be granted access to discussions among governmental body members so that the public can be informed of the debate and decision-making process that occurs between the body’s membership. But it would be absurd, if not impossible, to require an open meeting notice whenever a body of one would set out to contemplate a pending issue. We do not believe the legislature intended to require public soliloquies by single-member governmental bodies.

If the term “public meeting” is not limited to its definition and clear meaning, then what limits a complainant from including anything as a “public meeting?” A chance meeting on the street, or in a store, or at a place of worship suddenly becomes a public meeting where the official is subject to the rules of the ethics code. At that point, what portion of a public official’s life is not subject to the code?

*B. The plain meaning of “ public meeting” does not include Facebook exchanges.*

Wisconsin courts have held that the statutory interpretation “begins with the language of the statute. If the language is plain we ordinarily stop the

inquiry," **Bruno vs. Milwaukee County** 2003 WI 28 at paragraph 8.

There is no ambiguity in the common understanding of public meetings. We have definitions in the Wisconsin statutes and in Green Bay's ordinances.

Importantly, the understanding of a statute or ordinance does not involve a search for ambiguity where there is none: "This is not to say that interpretation will always be straightforward and easy --just that we should not make it gratuitously roundabout and complex," Antonin Scalia and Bryan Garner, **Reading Law: The Interpretation of Legal Texts** (2012) at p. 70.

C. *The rule of lenity in the interpretation of ordinances/statutes works against the expansion of the meaning of "public meeting to include facebook exchanges.*

The rule of lenity has been defined as follow: "Ambiguity in a statute defining a crime or imposing a penalty should be resolve in the defendant's favor," Antonin Scalia and Bryan Garner, **Reading Law: The Interpretation of Legal Texts** (2012) at p. 296.

The rationale for this rule is that it is the legislature, not the judiciary that shall impose the penalty:

The rule that penal laws are to be construed strictly is founded on the tenderness of the law for the rights of individuals and on the plain principle that the power of punishment is vested in the legislative not the judicial department. It is the legislature not the court which is to find a crime and ordain it's punishment, **United States vs. Wiltberger**, 18 U.S. (5 Wheat) 76 at p. 95 (1820)

This rationale argues for the standard meaning of "public meeting." A punitive ordinance, once drafted, does not grow to encapsulate new conduct. Rather, it is strictly construed per its meaning to protect the rights of the defendant.

As the Supreme Court stated in **United State vs. CIO**, 335 U.S. 106 at 142 (1948) ,when the state seeks to punish, it must do so with a clarion prior warning and clarity:

The conduct proscribed must be defined specifically so that the person or persons affected remain secure and unrestrained in the rights to engage in activities not encompassed by the legislation. Blurred signposts to criminality will not suffice to create it.

In this instance, the council members have been not offered training in appropriate internet conduct ( see affidavit of Council Member Chris Wery). The Council is considering mandatory internet social media training months after Vanderleest has been charged with an ethics violation ( see communication of Alderperson Dorff, appended). It is as if the city withholds guidance on social media use until a council member is ensnared by a potential ethical trap.

D. *The action of the City of Green Bay via a constituent body (the Ethics Board) declaring that internet and facebook exchanges are “public meetings” will subject the city to thousands of open meetings law violations.*

If the city now believes its internet and facebook exchanges are “public meetings.” There are presumably thousands of open meetings violations as the city failed to properly notice those meetings.

The potential financial ramification of this transmutation of “public meeting” could be enormous.

## **II. The Ethics board is not empowered to legislate by re-writing city ordinances.**

The complaint references a city personnel policy on the subject of social media, etc. If the Council wished to expand that policy to the City Council it would have been a very easy step to do so. It chose not to include social media conduct.

The legislative power of the City of Green Bay is vested in its City Council. It is not vested in a an unelected regulatory board—the Ethics Board. The City Council did not delegate to the Ethics Board the right to legislate. The arrogation of this power by the Board to itself is, at a minimum, objectionable.

It is situation directly out of Alice in Wonderland for the Ethics Board to re-write, re-cast, and transmute an ordinance, and then find a member in violation of the newly-minted ordinance and/or interpretation.

## **III. Section e3 of the Communications Decency Act pre-empts any state or local action which is contrary to the act. The act is appended.**

The relevant section is this:

### *3)State law*

*Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.*

The act of evading the statute’s mandates is not achieved by calling objectionable conduct by another name. Punishing people for responsible policing of internet sites is banned by the act.

#### **IV. There is no violation of any controlling rule of law**

The action of policing website or facebook content does not violate any case which is controlling precedent in the Eastern District of Wisconsin.

Ironically, real public meetings have the restriction of content and access that the complainant condemns when exhibited on the internet. Section 2.06 (11) of the city's ordinances provides as follows:

*Rights of others to address the council: No person other than a member of the council shall address the council unless the rules are suspended, except under the order of business for that purpose.*

A member of the public does not have a blanket right to address the council or its committees. His time may be limited or eliminated entirely. This is not viewed as violation of the ethics code.

Moreover, the public does not have a constitutional right to have a public official listen to them, *Morgan vs. Bevin*, 298 F. Supp 3d 1003 (E.D. Ky. 2018) at 1011.

There is "no constitutional right as members of the public to a government audience for their policy views." *Minn. State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271, 286 (1984). Governor Bevin is under no obligation to listen to Plaintiffs, and Plaintiffs have no Constitutional right to be heard in this precise manner. "Nothing in the First Amendment or in this Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues." *Id.* at 285. Governor Bevin has chosen to effectively, "ignore" those on Facebook he deems are not following the line of conversations he has decided to start on Facebook. *Smith v. Ark. State Highway Emp., Local 1315*, 441 U.S. 463, 466 (1979) (holding, in part, "the First Amendment does not impose any affirmative obligation on the government to listen [or] to respond.") Governor Bevin's Twitter and Facebook accounts

It would be farfetched to sanction a public official for refusing to take a phone call, failing to open and read a letter, or refusing to meet with a member of the public. However, that is the direction that this enforcement action leads.

Quite the opposite is true regarding policing an internet/facebook site. The Wisconsin Ethics Board appears to approve of state officials managing facebook pages. In addition, the court in *Morgan vs. Bevin* approved conduct similar to that of Mr. Vanderleest.

#### **V. Complainants motion to suppress has no application to this proceeding.**

A motion to suppress is classically filed to suppress evidence in a criminal proceeding where the government has violated the defendant's rights.

It underlines the lack of rules in this proceeding. There appear to be virtually no procedural or evidentiary rules. At the very least, there are no written rules that were given to the litigants at the outset of this proceeding.

If Mr. Knight seeks to police and edit the evidence that the Ethics board hears, then it is manifest that the same control needs to be present in the management of website and facebook content.

## **VI. Conclusion**

A public official should not have to engage in a scavenger hunt to determine the applicable ethical guidelines and when they apply. The official, when subject to an ethics proceeding, should not have to guess at the procedural rules and evidentiary standards.

Both situations are present in this proceeding. No one would reasonably believe that the operation of a facebook site is a "public meeting" accordingly to the terms of the ethics code

To change the meaning of terms after the fact and conclude that conduct is objectionable is as lawless as it is astonishing.

Brown County has already dismissed a complaint by Mr. Knight. The City of Green Bay should do likewise.

Respectfully submitted by:

*s/ R. Miller*

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Attorney R. J. Miller  
Attorney for Council Member John Vanderleests  
September 25, 2020

# 7 U.S. Code § 230 - Protection for private blocking and screening of offensive material

U.S. Code

(a) Findings—The Congress finds the following:

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) Policy—It is the policy of the United States—

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

(c) Protection for "Good Samaritan" blocking and screening of offensive material

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1). [1]

(d) Obligations of interactive computer service

A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

(e) Effect on other laws

(1) No effect on criminal law

Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, or any other Federal criminal statute.

(2) No effect on intellectual property law

Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) State law

Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

(4) No effect on communications privacy law

Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(5) No effect on sex trafficking law—Nothing in this section (other than subsection (c)(2)(A)) shall be construed to impair or limit—

(A) any claim in a civil action brought under section 1595 of title 18, if the conduct underlying the claim constitutes a violation of section 1591 of that title;

(B) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 1591 of title 18; or

(C) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 2421A of title 18, and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted.

(f) Definitions—As used in this section:

(1) Internet

The term "Internet" means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) Interactive computer service

The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(3) Information content provider

The term "information content provider" means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

(4) Access software provider—The term "access software provider" means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

(A) filter, screen, allow, or disallow content;

(B) pick, choose, analyze, or digest content; or

(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

(June 19, 1934, ch. 652, title II, § 230, as added Pub. L. 104–104, title V, § 509, Feb. 8, 1996, 110 Stat. 137; amended Pub. L. 105–277, div. C, title XIV, § 1404(a), Oct. 21, 1998, 112 Stat. 2681–739; Pub. L. 115–164, § 4(a), Apr. 11, 2018, 132 Stat. 1254.)

Late Communication 9-15-2020

To the mayor's office:

Due to concerns from citizens regarding recent social media comments made and actions taken, by city elected officials, and my belief that members of city council may not be well informed as to current best practice regarding social media, I am requesting a mandatory training for all alders and other elected officials, possibly held during a city council meeting, clearly delineating what is and is not appropriate use of social media by an elected official.

Alder Dorff District 1

Council Meeting 9-15-20

Ethics Board of Green Bay

-----  
Tarl Knight, complainant

vs.

John S. Vanderleest, respondent  
-----

AFFIDAVIT  
-----

Rhonda Sitnakau, being first duly sworn states as follows:

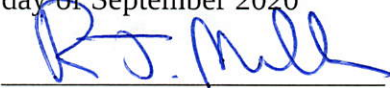
1. She takes no position about the pending matter and is merely supplying information.
2. She is a current member of the Green Bay Area School Board.
3. As a school board member, she has received death threats and other threats from telephone messages and facebook posts.
4. She currently has an harassment injunction against an individual who lodged threats against her.

Dated this 13<sup>th</sup> of September 2020

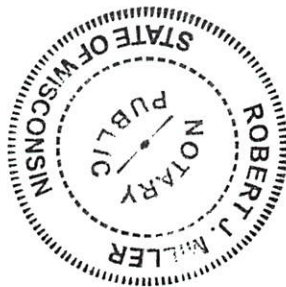


Rhonda Sitnakau

Subscribed and sworn before this 13<sup>th</sup>  
day of September 2020



R. J. Miller  
Notary Public, Brown County, WI  
My commission is permanent



Before the Ethics Board  
of the City of Green Bay

---

Tarl Knight, Complainant

vs.

John S. Vanderleest  
Respondent

---

MOTION TO SPECIFY PLAINTIFF'S CLAIM WITH PARTICULARITY AND CLARITY

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The respondent, by his attorney, Robert J. Miller moves as follows:

1. That the plaintiff be required to state, in writing, with particularity and clarity how **Davison vs. Randall** (17-2002), a 4<sup>th</sup> Circuit Court of Appeals case, binds and requires an alderman in Green Bay, Wisconsin to conform with its dictates. More simply stated, the plaintiff should explain why and how the **Davison** case applies to Green Bay, Wisconsin and the City Council's Code of Ethics.

Dated this 31<sup>st</sup> day of August 2020

*Robert J. Miller*

---

Robert J. Miller  
Attorney for Alderman J. Vanderleest  
227 S. Van Buren St.  
Green Bay, WI 54301  
920 853 6455

**TARL KNIGHT**  
**Complainant**

vs.

**JOHN S. VANDERLEEST**  
**Respondent**

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### **ARGUMENT**

The formal complaint which I, the Complainant, filed against the Respondent accuses the Respondent of having continuously blocked well-meaning constituents' and taxpayers' social media accounts, as well as deleting relevant posts and comments posted by them to their local representative's official government social media account, which has been declared a "public forum" by several prominent federal First Amendment cases. Such material as has been blocked and/or deleted by the Respondent was concerning serious, community-related issues (such as opinions and suggestions relating to proposed taxes, proposed construction projects, and proposed alternative parking methods), and had not contained any amount of profanity or insulting material, all of which the aggrieved parties will corroborate and a particular instance of which has already been submitted.

Regarding the issue of standing, Section 8 of the City of Green Bay Code of Conduct clearly states "any person" may file a formal complaint provided they satisfy the listed conditions:

Any person who believes a [sic] Elected official, in his/her official capacity, has violated a requirement, prohibition, or guideline set out herein may file a sworn complaint with the City Clerk identifying (1) the complainant's name, address and contact information; (2) the name and position of the City official who is the subject of the complaint; (3) the nature of the alleged violation, including the specific provision of the Code allegedly violated, and (4) a statement of facts constituting the alleged violation and the dates on which, or period of time during which, the alleged violation occurred.

The formal complaint concerns the Complainant as well as any taxpaying members of the community. The material at issue will be further specified by the aggrieved parties if afforded the opportunity. Until the respective parties are permitted to testify further as to the content of the deleted posts and comments, the Respondent's strawman argument of the material at issue

containing illicit or injurious statements, and so permitting deletion, are yet completely invalidated.

The conduct at issue, blocking and/or deleting citizens' well-meaning, relevant posts and comments regarding city issues, clearly violates the basic standards set by the City of Green Bay's Code of Conduct for public officials and their government social media accounts, which have been declared to be public forums by multiple federal First Amendment cases, such as *Knight First Amendment Institute vs. Trump* (2019) and *Davison vs. Randall* (2019).

Only last year, federal courts affirmed public officials' social media accounts to indeed constitute public forums, citing *Davison vs. Randall* (2019):

“Public officials may not retaliate against speech they dislike by suppressing expression on social media... The suppression of critical commentary regarding elected officials is the quintessential form of viewpoint discrimination against which the First Amendment guards.”

Further, citing *Knight First Amendment Institute vs. Trump* (2019):

“[T]he First Amendment does not permit a public official who utilizes a social media account for all manner of official purposes to exclude persons from an otherwise open online dialogue because they expressed views with which the official disagrees.”

Section 1 of the City of Green Bay Code of Conduct states:

[M]embers of the Common Council and Mayor shall maintain the utmost standards of personal integrity, trustfulness, honesty, and fairness in carrying out their public duties, avoid any improprieties in their roles as public servants, comply with all applicable laws, and never use their City position or authority improperly or for personal gain.

Section 4 of the City of Green Bay Code of Conduct states:

No signs of partiality, prejudice, or disrespect should be evident on the part of individual Council members toward an individual participating in a public forum. Every effort should be made to be fair and impartial in listening to public testimony. The Council members are expected to demonstrate, both publicly and privately, their honesty and integrity, and to be an example of appropriate and ethical conduct. All Council members should convey to the public their respect and appreciation for the public's participation, input, and opinions.

The Complainant maintains the actions of the Respondent have constituted habitually suppressive behaviour, which automatically and categorically violates the City of Green Bay's Code of Conduct, and similar actions by public officials violating the First Amendment have been criticised by multiple federal authorities throughout the years. The formal complaint filed against the Respondent holds merit, and the Complainant urges for any aggrieved parties outlined by the formal complaint to have the opportunity to testify as proof.

Thank you,

A handwritten signature in black ink, appearing to read "Tarl Knight". The signature is fluid and cursive, with a long, sweeping underline that extends to the right.

Tarl Knight

**TARL KNIGHT**  
**Complainant**

vs.

**JOHN S. VANDERLEEST**  
**Respondent**

---

**LIST OF WITNESSES**

Mark Zahn, 1100 Chantel Street, Green Bay, WI 54304, was blocked August of 2017.

Abbey Vizelka, 1009 Chantel Street, Green Bay, WI 54304, was blocked April of 2020.

Bethe Lane, 1841 7th Street, Green Bay, WI 54304, had numerous posts and comments deleted between 2016-2020.

Jon Schultz, 1755 Chateau Drive, Green Bay, WI 54304, had numerous posts and comments deleted between 2016-2020 and was blocked April of 2020.

Jennifer Jacobson Carew, 1696 Forest Glen Drive, Green Bay, WI 54304, was blocked June of 2017.

Wendy Coriell, currently of 407 Arbutus Avenue #307, Oconto, WI 54153, was blocked April of 2020.

John A. Vanderleest, 1616 9th Street, Green Bay, WI 54304, has been alleged to have managed and curated the “Green Bay City Council – John S. Vander Leest” social media account as a proxy for Alderman John S. Vanderleest.

Sincerely,



Tarl Knight

(Attachments)



Conversation between Jon Schultz and the “Green Bay City Council – John S. Vander Leest” social media account about numerous deleted comments/posts, dated 10 April 2020. Note how the account has been labelled by Facebook as an official “Politician” account, not a “Political Campaign” account.

Posts

**Green Bay City Council - John S. Vander Leest** 2 hrs · 🌐

Friends and Constituents,

I've been asked how to call into the City Council meeting to give public comments about the voting failures at the spring election in Green Bay. The meeting starts at 6 Pm tonight.

Attached is the Zoom information on how to log in. You can call in with a regular phone or with a smartphone you can watch the video on Zoom.

There will be an election report by the City Clerk at the beginning of the meeting and the floor will be suspended to allow the public to speak. This is on the agenda -

K. Report on April 7, 2020 Election

To enter the zoom meeting call 312 626 6799, enter meeting ID: 929 7972 2711 and Password: 029320

I've attached the GB City Council agenda below too.

Let me know if you have any questions. Good government is one that is involved and holds its government accountable.

<https://greenbaywi.civicclerk.com/Web/GenFile.aspx?ad=9838>

<https://greenbaywi.civicclerk.com/Web/Player.aspx...>

GREENBAYWI.CIVICCLERK.COM  
**greenbaywi.civicclerk.com**

Vanya Koepke 1 Comment 6 Shares

Like Comment Share

Write a comment...

**Wendy J. Coriell** I find it rather cute how you pretend to care about the constituency and all the people of Green Bay instead of your career and power hold, and now how all of a sudden you're pretending to be tech support for Zoom and pretend to be in favor of government transparency. What a joke. You don't even come close to standing for transparency, honesty, or the will of the constituency.

"I'm not a savvy computer person," said Vander Leest, who had the county route his emails to his personal account in 2016. "I check my email three or four times a week to stay involved with city and county business, and to respond to constituents."

"But the use of commercial email services by some is isn't the only thing some supervisors do to create risks, spur ethics questions and raise concerns among open government advocates, fellow supervisors and the county's chief technology officer."

17:07

LTE

**Wendy J. Coriell** Greater Green Bay Society of the Llama 9 mins · 🌐

Sigh. Of course Vander Leest deleted my comment. Of course he did. Haven't others had issues with censorship on his page as well? Some even blocked?

Posts

**Green Bay City Council - John S. Vander Leest** 2 hrs · 🌐

Friends and Constituents,

I've been asked how to call into the City Council meeting to give public comments about the voting failures at the spring election in Green Bay. The meeting starts at 6 Pm tonight.

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GREENBAYWI.CIVICCLERK.COM  
**greenbaywi.civicclerk.com**

Vanya Koepke 1 Comment 6 Shares

Like Comment Share

Write a comment...

Comment/post by Wendy Coriell, posted to the "Green Bay City Council – John S. Vander Leest" social media account, and statement about deletion of said comment/post made by Wendy Coriell, 21 April 2020.

## ALDERMAN VANDER LEEST BLOCKS MARK ZAHN (AUG '17)

**Green Bay City Council - John S. Vander Leest**  
August 16, 2017

Green Bay is one of the highest taxed communities in NE Wisconsin. We spend over \$100 million dollars in our City budget. I'm working on the property tax issue through a Budget task force to hold property taxes down for the City of Green Bay.

We need to prioritize our current spending to devote more resources to road construction and maintenance. We don't need a wheel tax to tax you further.

The wheel tax is a bad idea and would have started at \$20 and continued to climb to +\$50 plus or more to solve the City's spending problems. That's what government does with a new tax, it would start small then grow larger over time.

I voted NO. We must do better for taxpayers. **What do you think?**

<http://www.greenbaypressgazette.com/v.../proposed-g...7070166001/>

Proposed Green Bay wheel tax runs out of gas

Proposed Green Bay wheel tax

2 Comments 1 Share

Share Buffer

Most Relevant

In August of 2017, Alderman Vander Leest posted a link to an article about the "wheel tax" that the city was debating at the time. He offered his stance on the matter and then concluded by asking "What do you think?" This is clearly an elected official seeking public comment on a city issue. I offered my input on the matter as a vocal supporter of the wheel tax. I have known people who have been devastated by special assessments of tens of thousands of dollars. Even though I knew he wouldn't agree with my stance, I expected him to at least consider my opinion.

**Mark David Zahn** I strongly disagree with your vote on this issue. I would have happily paid \$20-50 per year rather than an unexpected several thousand dollars in one go. The whole "holding the line on property taxes" thing is bluster and farce. The city fire department uses my street as a shortcut route and the constant back and forth of those huge trucks badly beats up on our street and it takes forever for it to get patched up. I was really hoping this would have passed, but I already knew I couldn't count on your vote on this.

Like · Reply · 2y

**Green Bay City Council - John S. Vander Leest** The city would jack up the \$20 wheel tax to cover more spending and waste. I believe it would be \$40 per vehicle or more in a few years. That's what government does.

Like · Reply · 2y

Shortly after his rebuttal, and before I had a chance to continue the debate, Alderman Vander Leest blocked me from participating in his Facebook page with no explanation or warning whatsoever - a ban that continued well into 2020. This prevented me from posting, commenting and "liking" his posts, and also prevented me from seeing his content in my regular news feed.

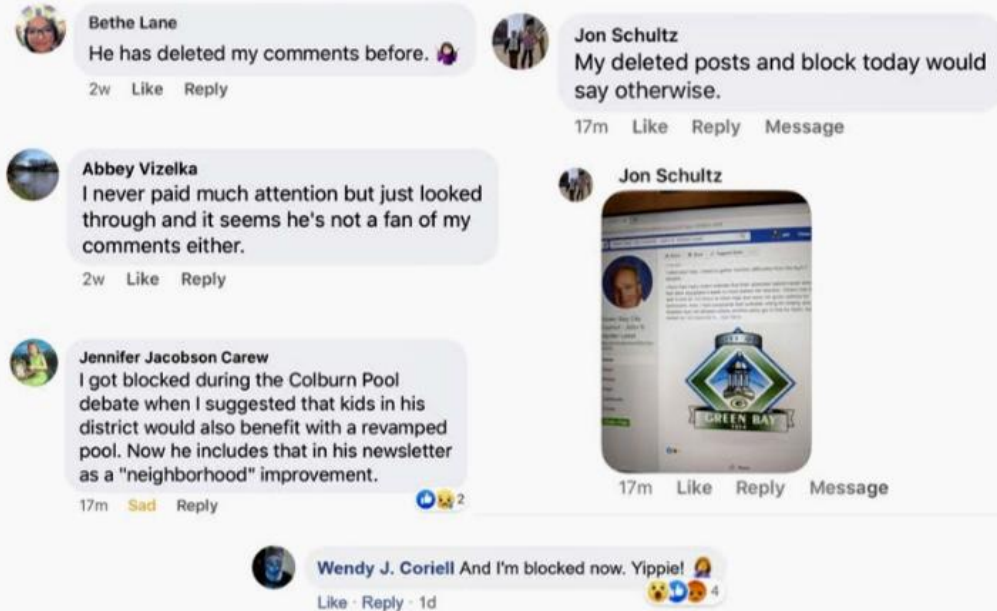
I strongly believe this act prevented me from exercising my First Amendment rights to participate in the exchange of ideas in this public forum, and also my right to petition my elected official on matters that affected me as a taxpayer in the City of Green Bay. While there are certainly other ways for one to contact their alderperson, the fact that Mr. Vander Leest solicits input from constituents and excludes those who have views that differ from his own inaccurately paints a picture of support, slanted to his own political preference. This act of ill-will from one's own elected representative puts a chilling effect on speech and effectively closes the lines of communication. I have no trust that if I would make a phone call to Mr. Vander Leest about a simple issue like a pothole that he would even work on my behalf.

Mr. Vander Leest has said in the past, "I'm here to represent all the people of the district." In a March 2020 newspaper profile, he stated, "I listen to residents of my area and know what is important to them." I believe his actions clearly show he has no intention of "making the public feel welcome" or conveying to the public his "respect and appreciation for the public's participation, input, and opinions" as the city's own Code of Conduct for Elected Officials mandates. His conduct during his time in office demonstrates anything but fairness, openness and willingness to work for all he represents. I have no ill-will towards Mr. Vander Leest. On the contrary, I want nothing more than to have a fruitful relationship with my public officials and have the ability to have my viewpoints not only heard but genuinely considered. This has nothing to do with an election and I'm not looking to run him out of office. But I do expect more of my elected officials and I wish for him to take responsibility in this matter and commit to respecting *all* his constituents' Constitutional rights.

— Mark Zahn, 4/23/20

Comment/post by Mark Zahn, posted to the "Green Bay City Council – John S. Vander Leest" social media account, and statement about deletion of said comment/post made by Mark Zahn, dated 16 August 2017.

## CITIZENS BLOCKED OR DELETED BY MR. VANDER LEEST



## HOW TO TELL IF YOU HAVE BEEN BLOCKED ON FACEBOOK

Facebook offers a "Town Hall" feature that shows you your elected officials based on your street address. You then have the ability to follow those officials' pages and get their mailing address, email and phone #.

When blocked by Alderman Vander Leest (shown at left), no option to follow the page exists, preventing you from getting new content from the alderman in your news feed, and barring you from interacting with the conversation that happens there.

On the page, no "like" button will be present to follow the page, and no "like" or "comment" buttons will be available, cutting off all interaction with the page.

Statements about deletion of comments/posts and about having been blocked, made by (clockwise) Beth Lane, Jon Schultz, Wendy Coriell, Jennifer Jacobson Carew, and Abbey Vizelka, respectively, 23 April 2020.

Diagram showing the difference between available features while having been blocked by the "Green Bay City Council – John S. Vander Leest" social media account and while not having been blocked, 23 April 2020.

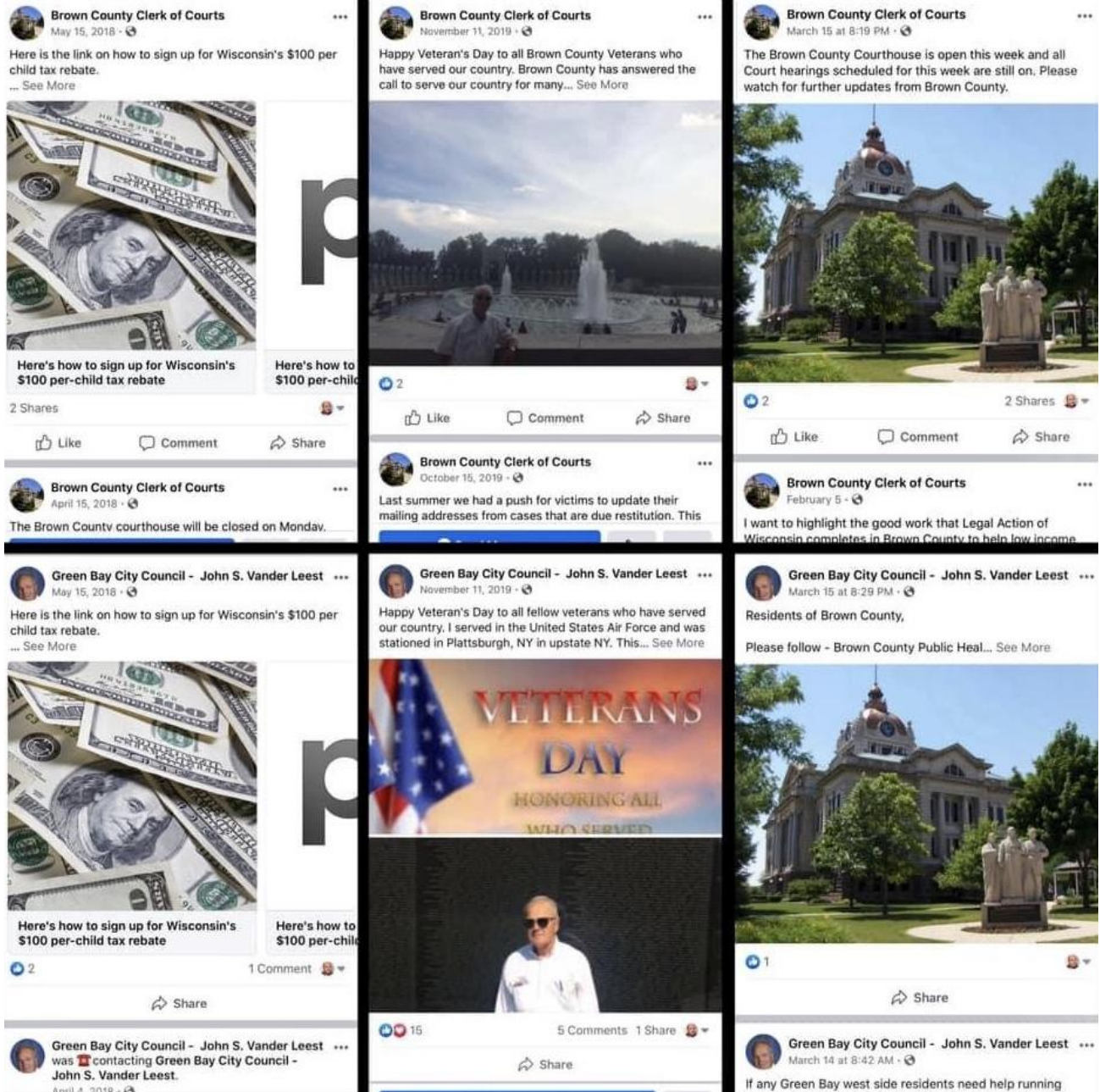


Diagram showing clear similarities between numerous postings made by John A. Vanderleest’s “Brown County Clerk of Courts” social media account and John S. Vanderleest’s “Green Bay City Council – John S. Vander Leest” social media account, May 2018-March 2020.

**TARL KNIGHT**  
**Complainant**

vs.

**JOHN S. VANDERLEEST**  
**Respondent**

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**LIST OF WITNESSES TO BE SUBPOENAED**

Mark Zahn  
Abbey Vizelka  
Bethe Lane  
Jon Schultz  
Jennifer Jacobson Carew  
John A. Vanderleest

Sincerely,



Tarl Knight

**TARL KNIGHT**  
**Complainant**

vs.

**JOHN S. VANDERLEEST**  
**Respondent**

---

**MOTION TO SUPPRESS**

I, the Complainant, am requesting a motion to strike the affidavit signed by Green Bay Area School Board member Rhonda Sitnikau and submitted by the Respondent 13 September 2020. Ms. Sitnikau has not been listed as a potential witness by the Respondent, nor as an aggrieved party by the Complainant. Although I am familiar with Ms. Sitnikau and am particularly sensitive to Ms. Sitnikau's situation, its relevance to the material at issue is unclear and completely unrelated to the original formal complaint and its claims against the Respondent.

Further, I have since corresponded with Ms. Sitnikau, who was clearly unfamiliar with the case and how the Respondent plans to connect the affidavit to the material at issue.

Thank you,



Tarl Knight

**TARL KNIGHT**  
**Complainant**

vs.

**JOHN S. VANDERLEEST**  
**Respondent**

---

**MOTION TO SUPPRESS**

I, the Complainant, am requesting a motion to strike the Respondent's motion to dismiss, signed and filed 18 September 2020. The Respondent's motion is not pertinent to the sections of the City of Green Bay's own Code of Conduct which were cited by the original formal complaint. Its sections regarding the City of Green Bay's Personnel Policy, social media instruction for public officials, and the remainder of its content are still not pertinent to the City of Green Bay's Code of Conduct which was cited by the original formal complaint.

Thank you,

A handwritten signature in black ink, appearing to read "Tarl", written in a cursive style.

Tarl Knight

My name is John S. Vander Leest. I ran for Green Bay City Council in 2014 and created a Facebook election page in Fall 2013. I was not elected in Spring 2014 but continued to use the Facebook election page in 2016 when I ran again for Green Bay City Council. I was elected to the Green Bay City Council in April 2016. I regularly used the John S. Vander Leest for City Council Facebook page to communicate with supporters who liked my election page.

I used the Facebook election page for my election updates, updating my supporters on items that concerned me, personal/family updates and other local interest items that my supporters cared about.

The Facebook page was operated as a campaign page. At no time did I operate it as an official City page. No city taxpayer dollars were used to maintain the John Vander Leest for City Council Facebook site.

If parties attacked me in posts, name called other parties, made comments that were off topic, I would remove these related Facebook comments. For example, I deleted posts similar to the following:

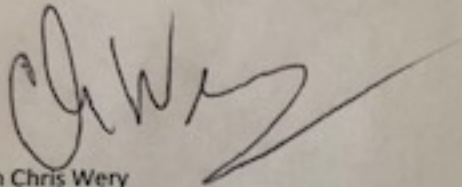
- 1 Off topic comments on a post related to the Spring 2020 election problems
- 2 Name calling. Referred to as a schmuck. Also, derogatory terms used toward other parties posting.
- 3 Negative remarks about my business interests

In mid-April 2020, Attorney Chavez indicated that Facebook comments on my election page should not be removed nor should anyone be blocked/restricted from the Facebook page. Since that recommendation was made, I have completely complied with Chavez's recommendation. I have not blocked/restricted any individuals or removed any comments from any social media.

Before from Attorney Chavez's advice in April 2020, I had never received any communication from the City attorney's office, other city staff or any other related provider on rules or guidelines regarding social media use by public officials.

Alderman John S. Vander Leest

My name is Chris Wery. I served on the Green Bay City Council from 2002-2012 and again from 2014 to present. During that entire time period the City Attorney's office, other city staff or any other provider has not provided any training or communication on social media usage or rules to follow for city Facebook pages or campaign Facebook pages. Again, I have never received any communication from the City attorney's office, other city staff or any other related provider on rules or guidelines to follow on social media for public or campaign sites.

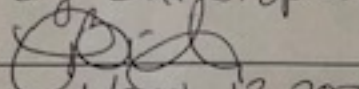


Alderman Chris Wery

This document was signed before me on Aug 13, 2020 date by Chris Wery.

Signed by Christopher A Wery

Notary signature



Notary expiration date

March 13, 2024

Notary seal



WISCONSIN ETHICS COMMISSION ADVICE:

First Document: Explaining purpose and advice to local governments ( from their web site)

Second Document: Table indicating that legislator and staff can “manage” facebook posts

Third Document: Complete document containing advice on social media use

Fourth Document: Additional advice on social media use

We find almost no restrictions on public officials use of social media except insofar as it restricts the use of public money for some activities.

e of Wisconsin  
Ethics Commission

# Requests for Advice

## Requesting advice from the Wisconsin Ethics Commission

Any individual, either personally or on behalf of an organization or governmental body, may request of the Ethics Commission an advisory opinion regarding the propriety under the ethics, lobbying, or campaign finance laws of any matter to which the person is or may become a party. Any appointing officer, with the consent of a prospective appointee, may request of the Ethics Commission an advisory opinion regarding the propriety of any matter to which the prospective appointee is or may become a party.

## Confidentiality

Written requests for advice and the Commission's replies are confidential unless made public by the requestor. No member or employee of the Ethics Commission may make public the identity of anyone requesting an advisory opinion or of persons mentioned in an opinion. Periodically, the Commission publishes summaries of its opinions after making sufficient alterations to prevent the identification of the requestor and persons mentioned in the opinions.

## How to request an advisory opinion

A request for an advisory opinion of the Commission may be made in writing or electronically. The request should state each question upon which an opinion is desired, present all relevant facts, be as specific as possible, identify the names of all parties that are pertinent to the question, and include references to pertinent law known to the requestor. Requests should be submitted to the Commission Administrator or addressed generally to the Commission. Please see the [Contact Us \(/Pages/AboutUs/ContactUs.aspx\)](/Pages/AboutUs/ContactUs.aspx) page for current contact information.

A request posed by an attorney-at-law on a client's behalf should also set forth: a tentative conclusion upon each question presented, the reasoning upon which that conclusion is based, and all relevant statutory provisions, case law, opinions of the Attorney General, prior opinions of the Ethics Commission, and other authorities, whether or not they support the tentative conclusion concerning the questions presented.

A request requiring the resolution of questions of fact should not be submitted because the Ethics Commission cannot resolve factual issues in an opinion. A local public official may request an advisory opinion relating to the code of ethics for local government officials, Wis. Stat. § 19.59, from the attorney for the official's local unit of government. A local government attorney may seek advice from the Ethics Commission.

## Requesting opinions - County, municipal and other local government attorneys

Pursuant to Wis. Stat. § 19.59(6), a county corporation counsel, an attorney for a local governmental unit, or a state-wide association of local governmental units may ask the Wisconsin Ethics Commission to issue an opinion concerning the interpretation of Wis. Stat. § 19.59, the Code of Ethics for local government officials, employees and candidates. Written requests for advice are confidential. No member or employee of the Ethics Commission may make public the identity of anyone requesting an advisory opinion or of persons mentioned in an opinion. Periodically, the Commission publishes summaries of its opinions after making sufficient alterations to prevent the identification of the requestor and persons mentioned in the opinions. The Statutes do not authorize the Commission to issue an opinion to an official or representative of a local government other than the local government's legal counsel.

A request from a county corporation counsel, an attorney for a local governmental unit, or a state-wide association of local governmental units should:

- State on whose behalf the opinion is requested.
- State each question upon which an opinion is desired.
- State all of the facts giving rise to each question presented.
- Set forth a tentative conclusion upon each question presented and the reasoning upon which that conclusion is based.
- Set forth and analyze all relevant statutory provisions, case law, prior opinions of the Ethics Commission, and the authorities whether or not they support the tentative conclusion concerning the questions presented.


A request requiring the resolution of questions of fact should not be submitted because the Ethics Commission has no authority to decide questions of fact. The Ethics Commission does not issue opinions on whether past conduct has violated the law. Although the foregoing criteria are subject to exception when the circumstances warrant, a request which does not meet these criteria may be returned and the requestor asked to resubmit the request in an appropriate form.

## Advisory Opinion Request Process

Upon receipt of a valid opinion request, staff will confirm receipt with the person making the advisory opinion request. Staff will then prepare an analysis of the request and document relevant statutes, case law and constitutional law. For formal opinion requests, staff will also confirm with the requestor whether or not they wish to request a public hearing on the matter. Upon completion of the analysis of the request, staff will contact the Commission to schedule the opinion request for the next available Commission meeting. At the Commission's discretion, a special Commission meeting may be schedule to

address the request if the requestor can demonstrate the need for such urgency. Requestors may also wish to consider an informal advisory opinion for urgent matters. Please see the section below for additional information about informal advisory opinion requests.

## Informal Advisory Opinions

At its March 7, 2017 meeting the Ethics Commission delegated the authority to issue informal advisory opinions. A copy of the adopted policy and the delegation of authority is available here:  [Ethics Commission Policy - Delegation of Authority for Informal Advisory Opinions.pdf](#) (</Resources/EthicsCommissionPolicy-DelegationOfAuthorityForInformalAdvisoryOpinions.pdf>). As required by Wisconsin Statutes, the Commission shall review each informal advisory opinion at its next scheduled meeting.

## Evidence of intent to comply with law

It is prima facie evidence of intent to comply with the Ethics Code for State Public Officials (subch. III, ch. 19, Wisconsin Statutes) and the lobbying law (subch. III, ch. 13, Wisconsin Statutes) when a person refers a matter to the Ethics Commission and abides by the Commission's advisory opinion, if the material facts are as stated in the opinion request. Wis. Stat. § 19.46(2).

[Wisconsin.gov](https://www.wisconsin.gov) (<https://www.wisconsin.gov>).

[Campaign Finance Information System \(CFIS\)](https://cfis.wi.gov) (<https://cfis.wi.gov>).

[Eye on Lobbying](https://lobbying.wi.gov) (<https://lobbying.wi.gov>). [Financial Disclosure](https://sei.wi.gov/) (<https://sei.wi.gov/>).

[Contact Us](/Pages/AboutUs/ContactUs.aspx) (</Pages/AboutUs/ContactUs.aspx>).



[\(https://twitter.com/](https://twitter.com/)

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# TABLE AT PAGE 8

3. A legislator should **not use state resources**, such as a state computer, to post non-legislative content to a website, Facebook page, or other social media other than purely personal (not campaign or business) content.
4. **Legislative staff may post legislative content** to a mixed-use website, Facebook page, or other social media at any time, even if using state resources, but not to a campaign website, campaign Facebook page, or other forms of campaign social media. However, legislative staff should do this only with respect to materials that are distributed more broadly to the press and public.
5. **Legislative staff may post personal, business, or campaign content** to a mixed-use website, Facebook page, or other social media **only** on personal time and without using state resources.
6. Although a mixed-use website may contain a link to the legislator's official state webpage, a state webpage should not be linked to a mixed-use website, Facebook page, or other social media.

See the below table that was included in the GAB letter to illustrate permissible and impermissible activities:

Type of website	Legislative		Personal		Campaign		Business	
Example	WI State Rep John Doe (Facebook)		John Doe (Facebook)		Doe for Assembly (Facebook)		Doe Consulting, LLC (Facebook)	
Type of Person	Legislator	Staff	Legislator	Staff	Legislator	Staff	Legislator	Staff
Using State Resources	I Some P No C No B	I Some P No C No B	I Some P No C No B	I Some P No C No B	X	X	X	X
On State Time	I Some P No C No B	I Some P No C No B	Any	I Some P No C No B	Any	X	Any	X
Off State Time/Resources	I Some P No C No B	I Some P No C No B	M	M	Any	Any	Any	Any
Link of the Wisconsin Legislature's Website	No	No	No	No	No	No	No	No
Publishing content from others	No	No	NA	NA	NA	NA	NA	NA
Notes	This is essentially a legislative resource.							

**Key**  
 I = Legislative post      M = Mixed Content  
 P = Personal post      X = Not Allowed  
 C = Campaign post      NA = Not applicable  
 B = Business post

It is the understanding of this Commission that paragraphs 1-5 of the above GAB advice was further adopted by the Chief Clerks and incorporated into their respective chambers' policy manuals for legislative staff. On June 21, 2018, the Ethics Commission re-iterated this advice in a letter to the Chief Clerks of the Legislature with the clarification that paragraph 2 only applied to posts to mixed-use websites/accounts and that official legislative social media accounts should only be used for official governmental purposes. A legislator's use of an official legislative social media account for campaign or business purposes, even when not using a state computer or on state time, could be a violation of Wis. STAT. § 19.45 (2) and (5).

Consistent with that prior advice, the Commission again advises that legislative staff may only post and manage legislative content on a mixed-use website or social media account while on state

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## 2020 ETH 01

### CAMPAIGN FINANCE & ETHICS – 50-PIECE RULE AND MIXED-USE SOCIAL MEDIA ACCOUNTS

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You are a legislative staff person. You have asked for an advisory opinion regarding the use of official legislative social media accounts and legislative office budgets for various types of communications when under the restrictions of [Wis. STAT. § 11.1205](#) (“the 50-piece rule”).

#### Summary:

It is the opinion of the Commission that legislators and legislative staff may use official legislative social media accounts and legislative office budgets as described below.

#### Analysis:

##### A. Wisconsin’s 50-Piece Rule

The questions in this section primarily require the application of [Wis. STAT. § 11.1205](#):

#### **11.1205 Use of government materials by candidates.**

##### **(1)**

**(a)** Except as provided in sub. **(2)**, no person elected to state or local office who becomes a candidate for national, state, or local office may use public funds for the cost of materials or distribution for 50 or more pieces of substantially identical material distributed after:

- 1.** In the case of a candidate who is nominated by nomination papers, the first day authorized by law for circulation of nomination papers as a candidate.
- 2.** In the case of a candidate who is nominated at a primary election by write-in votes, the day the board of canvassers issues its determination that the person is nominated.
- 3.** In the case of a candidate who is nominated at a caucus, the date of the caucus.
- 4.** In the case of any other candidate who is nominated solely by filing a declaration of candidacy, the first day of the month preceding the month which includes the last day for filing the declaration.

**(b)** This subsection applies until after the date of the election or after the date of the primary election if the person appears as a candidate on a primary election ballot and is not nominated at the primary election.

**(2)** This section does not apply to use of public funds for the costs of the following:

- (a)** Answers to communications of constituents.
- (b)** Actions taken by a state or local government administrative officer pursuant to a specific law, ordinance or resolution which authorizes or directs the actions to be taken.
- (c)** Communications between members of the legislature regarding the legislative or deliberative process while the legislature is in session.
- (d)** Communications not exceeding 500 pieces by members of the legislature relating solely to the subject matter of a special session or extraordinary session, made during the period between the date that the session is called or scheduled and 14 days after adjournment of the session.

1. Does one Facebook/Twitter post count as sending out one item regardless of how many individuals view or share it?

Wisconsin law prohibits individuals elected to state or local office who become candidates for national, state, or local office from using public funds for the cost of materials or distribution of 50 or more pieces of substantially identical material distributed during a campaign period (“the 50-piece rule”), except as specifically permitted. [WIS. STAT. § 11.1205](#).

Over the course of 2018 and 2019, the Commission has taken several steps to clarify the appropriate uses of social media by public officials and explain the application of the 50-piece rule to social media communications. See [2018 ETH 03](#), Guidelines [ETH-1251](#) and [ETH-1253](#). In [2018 ETH 03](#), the Commission formally analyzed [WIS. STAT. § 11.1205](#) and considered how to count instances of electronic communication under the 50-piece rule. In that opinion, the Commission held that electronic communications where the sender actively selects recipients would be counted as a single “piece” per recipient (e.g., emails, text messages, or direct messages); however, electronic communications that were published in a singular form, but could be read by multiple individuals (e.g., a website page, Facebook post, or tweet) would only be counted as a single piece. [2018 ETH 03](#). This remains true regardless of the number of times the page, post, or tweet is viewed.

However, [2018 ETH 03](#) is silent as to the question of how a recipient’s share of a communication with others should be counted under the 50-piece rule. The statute is similarly silent. See [WIS. STAT. § 11.1205](#). For example, if a legislator who is up for election uses a state computer system during the campaign period to send a single individual an email and that person independently decides to forward that email to 50-plus others, would that be a violation of the 50-piece rule? What if the sender asks the original recipient to forward it and the recipient sends it to 50 plus others, would that be a violation of the 50-piece rule? The answer to these questions require an interpretation the language of [WIS. STAT. § 11.1205](#).

The purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect. *State ex rel. Kalal v. Circuit Court for Dane Cty.*, [2004 WI 58](#), ¶44. Statutory interpretation begins with the language of the statute. *Id.* at ¶45. Statutory language is given its common, ordinary, and accepted meaning. *Id.* Statutory language should also be interpreted in the context in which it is used; not in isolation, but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results. *Id.* at ¶46. If the meaning of the statute is plain, the inquiry ordinarily ends there. *Id.* at ¶45. However, a literal reading of a statute may be rejected if it would lead to an absurd or unreasonable result that does not reflect the legislature’s intent. *State v. Jennings*, [2003 WI 10](#), ¶11. Additionally, statutory interpretations that render provisions meaningless should be avoided. *Belding v. Demoulin*, [2014 WI 8](#), ¶17.

While the 50-piece rule is codified in Chapter 11, the campaign finance laws, the 50-piece rule is more akin to the prohibitions of subchapter III of Chapter 13 or Chapter 19 in that it regulates conduct by current officeholders and seeks to prohibit abuses of office. In these contexts, there are long-standing interpretations that an official cannot do indirectly what he or she is prohibited from

doing directly, even where the statute is silent as to indirect applications. *See e.g.*, [2003 Eth Bd 11](#), ¶3; [2001 Wis Eth Bd 02](#), ¶7. As these other prohibitions are similar in nature to the prohibition of the 50-piece rule, the Commission believes a similarly inclusive interpretation would be appropriate when interpreting the prohibition here. However, reading [WIS. STAT. § 11.1205](#) to include every email forward, Facebook share or Twitter retweet of an original communication would likely produce an absurd result where the sender has no knowledge or control over the republication including how many times the message is shared subsequent to the initial communication.

To avoid counting every instance of an initial recipient subsequently sharing a communication while still prohibiting circumvention of the restrictions of the 50-piece rule by employing another, the Commission again will look to the original sender's intentions and adopt an objective test where only the republications intended by the original sender will be counted. Accordingly, where the sender requests or intends for an initial recipient(s) to share the original communication with others, the Commission would then count the republications by the initial recipient(s) done at the request of the original sender as if they were done by the original sender.

2. Can elected officials use office funds to take out a legislative ad in a local newspaper while under the "50-piece rule"?

For each of the remaining 50-piece rule questions, it is important to note that the Ethics Commission can only speak to the laws it administers (Chapter 11, subchapter III of Chapter 13, and subchapter III of Chapter 19). The Commission generally has no authority over the use of legislative office funds. It is the understanding of the Commission that questions regarding the distribution of materials by legislators at government expense should be directed to either the Senate or Assembly Chief Clerk as appropriate. However, as you have asked specifically if these uses of funds would be permitted under the 50-piece rule, the Commission will answer your questions with caveat that when contemplating a use of legislative office funds, you should first seek an answer from the Chief Clerk's Office as to whether a specific expenditure is an appropriate use of state resources and consistent with the policies of the Legislature.

As explained in response to the first question, the 50-piece rule prohibits the use of public funds for the cost of materials or distribution for 50 or more pieces of substantially identical material during a campaign period. [WIS. STAT. § 11.1205](#). This is true regardless of whether the sender is communicating a legislative or campaign message. *See* [WIS. STAT. § 11.1205](#), [2018 ETH 03](#). Additionally, the selection of recipients is only a factor in counting the number of pieces for electronic communications. [2018 ETH 03](#). In this situation, while the elected official may only be sending one piece (i.e., the proposed ad) to the newspaper, it is clear that by paying the newspaper to publish the advertisement, the elected official would be using public funds to pay for the newspaper's subsequent production and distribution of the ad in each newspaper that is to be printed. Assuming the newspaper prints 50 or more copies, this practice would likely run afoul of the 50-piece rule when done during the campaign period. This conclusion is consistent with an informal opinion of the Elections Board in 1996, which held that "because public money would be used to purchase the distribution of more than 49 pieces of identical material (the ad in the newspaper), and because publication is deemed to fall within the statutory language, 'the cost of materials or distribution,' the post-June 1 publication would be proscribed by s. 11.33, Stats."

3. Can elected officials use office funds to place a legislative radio ad while under the “50-piece rule?”
  - a) Are members restricted to 49 spots per ad?

The 50-piece rule only applies to the cost of materials or distribution for 50 or more pieces of substantially identical material. [WIS. STAT. § 11.1205](#). A radio ad is a single audio recording broadcast on a specific radio frequency that can be received by any listener with a radio tuned to that frequency within range of the transmitter.<sup>1</sup> This singularity of material makes radio broadcasts more akin to a bulletin board or billboard, which are similarly platforms for a single message to be received by a large number of individuals. As such, the Commission believes that the 50-piece rule would not prohibit elected officials from using office funds to place legislative radio ads during a campaign period. However, to address the follow-up question, if subject to the 50-piece rule, an elected official is still limited to no more than 49 pieces of substantially identical material, so any single radio ad could not be played more than 49 times during the campaign period without running afoul of the statute.

4. Can an elected official use office funds to mail a legislative newsletter to a Postal patron route or “Every Door Direct Mail” list while under the “50-piece rule”? (see USPS postal patron map attached)

Similar to the response to Question #2, it is important to note that the 50-piece rule prohibits a candidate from using public funds for the cost of materials or distribution for 50 or more pieces of substantially identical material during a campaign period. [WIS. STAT. § 11.1205](#). A USPS Postal Patron mailing, also known as Every Door Direct Mail, delivers a copy of the submitted piece to every mailbox within a certain area or route. Again, the selection of recipients is only a factor in counting the number of pieces for *electronic communications* per [2018 ETH 03](#). In this situation the elected official is still using public funds for the cost of materials or distribution for 50 or more pieces of substantially identical material (i.e., each piece of direct mail). The fact that the sender is not selecting the recipients is not a consideration in physical communications like legislative newsletters. As such, the Commission believes such a use of office funds would be prohibited under [WIS. STAT. § 11.1205](#) if done by a covered official during the campaign period.

Additionally, the Commission would note an opinion issued by the Elections Board, [1976 Wis El Bd 16](#) (withdrawn December 6, 2016) that spoke to the practice of sending out legislative newsletters during the campaign period. While this opinion has been withdrawn by the Commission due to its references to laws that have since been repealed and recreated, this opinion considered the use of legislative office accounts to send out legislative newsletters under the prior iteration of the 50-piece rule and while it was not the central holding of the opinion, the Board did state that since distribution of 100 or more newsletters during the campaign period would be prohibited, distribution prior to the campaign period would presumably be allowed. While the language of the 50-piece rule has changed between 1976 and 2019 (notably moving the maximum number of pieces allowed from 99 to 49), the Commission believes this opinion demonstrates that the prior practice was for legislative offices to be restricted from such expenditures during the

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<sup>1</sup> Many radio stations simulcast their broadcasts to the Internet. Consistent with [2018 ETH 03](#) we believe the simulcast, if known to and intended by the sender, would count as one additional piece.

campaign period and we see no evidence that in the various changes to the 50-piece rule over years the Legislature intended any different conclusion.

5. Can elected officials use office funds to promote their account, boost a post or take out legislative ads on social media platforms including Facebook, Twitter, and Youtube while under the “50-piece rule”?
  - a) If so, how targeted can these be?
    - 1) Can you target an ad to individuals only within your Legislative District?
    - 2) Can you target an ad to individuals based on other criteria? (Individuals within a certain radius of an event? Individuals who follow other social media pages? Individuals that meet certain demographic criteria? ... see attached photos *FBad1* and *FBad2* for example of potential targeting)
  
6. Example #1:
  - a) We hold regular monthly listening sessions around the district throughout the year
  - b) For each listening session, we send out a news release, post the event on our website and create a Facebook event.
    - 1) Once under the 50-piece rule, we send press releases to fewer than 50 email addresses.
  - c) If we are allowed to continue promoting these events on Facebook using office funds, those posts can reach hundreds or thousands of local residents.
    - 1) For example, one Facebook ad for a local listening session during the budget process, using \$250 from our office account, reached 8,996 residents in the [legislative district] and resulted in 170 rsvp’s for that listening session.
    - 2) See attached *FBlisteningssession* and *FBlisteningssession2* graphics for an example of what those ads generally look like.
  - d) Can we continue to use office funds to promote these listening sessions?
  
7. Example #2:
  - a) We generally research policies and draft legislation in the summer and fall months of even numbered years.
  - b) We will be rolling out a list of legislative priorities later this year and asking the public to weigh in on the list of policies that they’d like the legislature to focus on and prepare for.
  - c) Can we promote a post soliciting feedback from the public on legislative priorities?
    - 1) i.e. “I’m working to ensure every family has access to quality health care, strong schools, safe roads and clean drinking water. Let me know what issues you’d like the state legislature to focus on.”
  - d) Can we promote a post that provides information to residents on relevant and timely legislative issue?
    - 1) i.e. “As children head back to school, many communities are struggling with teacher shortages, outdated facilities and a lack of state funding.

Visit *[legislative website link]* to learn more about what's being done to address these issues."

In order to answer these questions, a brief review of how the Commission understands these social media platforms to work at present is necessary as technology is constantly evolving. Facebook, Twitter, and YouTube each have "feeds" which show content to the user. A feed is created by the platform via an algorithm and largely consists of content that the user has either indicated they wish to see by liking, following, or subscribing to the content producer or by the platform placing the content in the user's feed due to other factors (e.g., demographics of the user, similarity to other content the user has viewed, etc.) It is important to note that a user does not see every piece of content from every content producer they like, follow, or subscribe to unless the user goes to that specific content producer's page on the platform. A content producer who wishes to expand the number of users who see the producer's content in their user "feed" can choose to pay the platform to place their content in more users' feeds.

There are multiple ways a content producer can expand their reach on social media platforms. On Facebook in particular, a content producer can choose to "boost" a post. A boost is essentially an advertisement consisting of the chosen post. After selecting a post to boost, the content producer can choose their audience through the following options (see FBad1):

- People you choose through targeting
  - Targeting options are extensive and include criteria like location, age, education, financial status, interests, behaviors, political affiliation, etc.
- People who like your Page
- People who like your Page and their friends
- People in your local area

After defining the intended audience, the content producer is then asked to set a duration for the ad and the total budget (see FBad2). Depending on the budget, Facebook estimates the number of users who will be reached per day and attempts to divide the total budget evenly across the entire duration of the ad. Facebook also permits content producers to create custom audiences from custom lists of phone numbers, email addresses, website cookies, etc.; although it is the understanding of the Commission that Facebook will not allow either targeting options or custom audiences that would narrow the potential audience for an ad to less than 50.

If the content producer would like to get more users to like their page (and thereby gain more viewers of their content via posts, instead of via paid advertising), another option is to "promote" the content producer's page. Promoting is essentially creating an advertisement for the content producer's page as a whole instead of just a particular post. These ads can then be tailored to a particular audience similar to selecting the audience for a boosted post and have similar duration and budget options.

The final option on Facebook is to simply place a traditional paid advertisement. These ads are not placed in the user's feed between posts, but instead are located in a static position elsewhere on the screen. Traditional ads have the same options for audience selection, duration, and budget.

You ask if elected officials can use their office accounts for these types of advertising (boosted posts, promoted pages, and traditional paid advertisements) on social media when under the 50-piece rule. Again, by its terms, the 50-piece rule prohibits officials from using public funds for the cost of materials or distribution of 50 or more pieces of substantially identical material during a campaign period. [WIS. STAT. § 11.1205](#). Consistent with the Commission’s prior advice in [2018 ETH 03](#), the Commission believes an official could continue to include a notice of a listening session on their legislative website, create a Facebook event, create a Facebook post about the session, and send a news release regarding the event out to up to 49 recipients when under the restrictions of the 50-piece rule. However, using legislative office funds to further promote those sessions via paid advertisement (boosted post, promoted page, or traditional paid advertisement) on social media during the campaign period, would be limited by the 50-piece rule as the official is paying to distribute substantially identical material multiple times. As such, a covered official may be able to boost a post or promote a page during the campaign period, but only to no more than 49 people, which may not be technically possible on the social media platforms described.<sup>2</sup>

## B. Mixed Use Accounts

1. Can legislative staff manage and post content on “mixed use” social media accounts used by elected officials?

In 2012, the Government Accountability Board (“GAB”) issued an informal advisory opinion on the use of social media by legislators and described its recommendations for best practices to avoid potential campaign finance and ethics violations. This letter was approved by the Government Accountability Board at its March 20, 2012 meeting. In this letter, the GAB advised that because state resources would be used to create and maintain official legislator social media pages, those pages may not be used for campaign or personal purposes.

Later in 2012, the Chief Clerks of the Legislature followed up their initial request with further questions on the permissible uses of social media by legislators and their staff. On October 11, 2012, the Director and General Counsel of the GAB issued a letter which reiterated the earlier guidance approved by the GAB and expanded into the topic of “mixed-use” sites such as a legislator’s personal or campaign social media sites. The relevant advice is excerpted below:

*With respect to the use of state staff and resources to create and post materials to the web or other social media pages that contain a mix of legislative and personal materials, including business and campaign materials, our advice is:*

1. *State resources should not be used to **create** a website or Facebook page that will be used for mixed purposes.*
2. *Subject to paragraph 3, **a legislator** may post any type of content at any time to a website, Facebook page or other social media.*

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<sup>2</sup> If the social media ad is substantially identical to either the notice on the legislative website, Facebook post, Facebook event, or news release, those instances of substantially identical communication are combined with the instances of the social media ad when tallying the 49 pieces allowable under the rule.

3. A legislator should **not use state resources**, such as a state computer, to post non-legislative content to a website, Facebook page, or other social media other than purely personal (not campaign or business) content.
4. **Legislative staff** may post **legislative content** to a mixed-use website, Facebook page, or other social media at any time, even if using state resources, but not to a campaign website, campaign Facebook page, or other forms of campaign social media. However, legislative staff should do this only with respect to materials that are distributed more broadly to the press and public.
5. **Legislative staff** may post personal, business, or campaign content to a mixed-use website, Facebook page, or other social media **only** on personal time and without using state resources,
6. Although a mixed-use website may contain a link to the legislator's official state webpage, a state webpage should not be linked to a mixed-use website, Facebook page, or other social media.

See the below table that was included in the GAB letter to illustrate permissible and impermissible activities:

Type of website	Legislative		Personal		Campaign		Business	
Example	WI State Rep John Doe (Facebook)		John Doe (Facebook)		Doe for Assembly (Facebook)		Doe Consulting, LLC (Facebook)	
Type of Person	Legislator	Staff	Legislator	Staff	Legislator	Staff	Legislator	Staff
Using State Resources	L Some P No C No B	L Some P No C No B	L Some P No C No B	L Some P No C No B	X	X	X	X
On State Time	L Some P No C No B	L Some P No C No B	Any	L Some P No C No B	Any	X	Any	X
Off State Time/Resources	L Some P No C No B	L Some P No C No B	M	M	Any	Any	Any	Any
Link of the Wisconsin Legislature's Website	Yes		No		No		No	
Policing content from others	Yes		NA		NA		NA	
Notes	This is essentially a legislative resource.							

**Key**

L = Legislative post      M = Mixed Content  
P = Personal post      X = Not Allowed  
C = Campaign post      NA = Not applicable  
B = Business post

It is the understanding of this Commission that paragraphs 1-5 of the above GAB advice was further adopted by the Chief Clerks and incorporated into their respective chambers' policy manuals for legislative staff. On June 21, 2018, the Ethics Commission re-iterated this advice in a letter to the Chief Clerks of the Legislature with the clarification that paragraph 2 only applied to posts to mixed-use websites/accounts and that official legislative social media accounts should only be used for official governmental purposes. A legislator's use of an official legislative social media account for campaign or business purposes, even when not using a state computer or on state time, could be a violation of WIS. STAT. § [19.45 \(2\)](#) and [\(5\)](#).

Consistent with that prior advice, the Commission again advises that legislative staff may only post and manage legislative content on a mixed-use website or social media account while on state

time and may only post such materials to a mixed-use website or account that are distributed more broadly to the press and public. Legislative staff may only post personal, business, or campaign content to a mixed-use website or social media account on personal time and without the use of state resources.

2. Can elected officials with a “mixed use” social media account promote their account, boost a post or take out ads on Facebook/Twitter using office funds?

Reviewing the above table summarizing the advice provided by the Government Accountability Board and reaffirmed and further clarified by the Commission, it is clear that no person is authorized to use state resources to post campaign or business material. This is consistent with the general public purpose doctrine established by the courts in *State ex rel. Thompson v. Giessel*, 265 Wis. 207 (1953). This doctrine holds that expenditures of public money have to be made for a public purpose. However, the Commission does not make the determination of whether a given expenditure is for a public purpose. The proper way for such an issue to be decided is by way of a taxpayer civil action against the spending authority, which the courts would adjudicate, not this Commission.

It would logically follow that if legislative staff on state time can use state resources to post legislative content to a mixed-use social media account, state resources could also be used to boost or take out ads for such legislative posts on the mixed-use social media account. However, as legislative staff are only permitted to post such legislative content to a mixed-use social media account when the content is more broadly distributed to the media and the public, paying to boost or take out an ad for a post on a mixed-use social media account would not appear to be consistent with the original advice as it appears to contemplate that the post to the mixed-use account would be secondary to the original broader communication to the public and the media. Furthermore, as a general question as to the proper use of legislative resources, this is also a question that cannot be answered by the Ethics Commission alone and should also be directed to the Chief Clerk’s Office.

Finally, because paid promotion of a mixed-use account as a whole could potentially benefit the official, their immediate family, or organizations with which the official is associated via the other content contained within and disseminated by that mixed-use social media account (i.e., business, campaign, etc.), the Commission advises against officials using state resources to promote mixed-use social media accounts as it could be a potential violation of [Wis. Stat. § 19.45\(2\)](#). This issue is further complicated by the potential for an official to later take a mixed-use account with them when they leave their public position, potentially retaining an asset of substantial value that was maintained or potentially even enhanced in value through the use of public resources.

**From:** [REDACTED]  
**To:** [Carlton, Daniel - ETHICS](#)  
**Subject:** RE: Social Media Guidance  
**Date:** Wednesday, September 18, 2019 10:20:20 AM  
**Attachments:** [image001.png](#)  
[image002.png](#)  
[image003.png](#)  
[FBad1.png](#)  
[FBad2.png](#)  
[USPSpostalpatron.png](#)

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Hi Dan,

Thanks for sitting down last week to talk more about our request. At this time, I'd like to clarify that our request is for an informal opinion. Below are a list of questions that we would like guidance on:

### **50 piece rule questions**

Does one Facebook/Twitter post count as sending out one item regardless of how many individuals view or share it?

Can elected officials use office funds to take out a legislative ad in a local newspaper while under the "50 piece rule?"

Can elected officials use office funds to place a legislative radio ad while under the "50 piece rule?"

- Are members restricted to 49 spots per ad?

Can an elected official use office funds to mail a legislative newsletter to a Postal patron route or "Every Door Direct Mail" list while under the "50 piece rule?"

- (*see USPS postal patron map attached*)

Can elected officials use office funds to promote their account, boost a post or take out legislative ads on social media platforms including Facebook, Twitter, and Youtube while under the "50 piece rule?"

- If so, how targeted can these be?
  - Can you target an ad to individuals only within your Legislative District?
  - Can you target an ad to individuals based on other criteria? (Individuals within a certain radius of an event? Individuals who follow other social media pages? Individuals that meet certain demographic criteria? ... see attached photos *FBad1* and *FBad2* for example of potential targeting)

### **Example #1:**

- We hold regular monthly listening sessions around the district throughout the year

- For each listening session, we send out a news release, post the event on our website and create a Facebook event.
  - Once under the 50 piece rule, we send press releases to fewer than 50 email addresses.
- If we are allowed to continue promoting these events on Facebook using office funds, those posts can reach hundreds or thousands of local residents.
  - For example, one Facebook ad for a local listening session during the budget process, using \$250 from our office account, reached 8,996 residents in the [REDACTED] District and resulted in 170 rsvp's for that listening session.
  - See attached *FBlisteningession* and *FBlisteningession2* graphics for an example of what those ads generally look like.
- Can we continue to use office funds to promote these listening sessions?

Example #2:

- We generally research policies and draft legislation in the summer and fall months of even numbered years.
- We will be rolling out a list of legislative priorities later this year and asking the public to weigh in on the list of policies that they'd like the legislature to focus on and prepare for.
- Can we promote a post soliciting feedback from the public on legislative priorities?
  - i.e. "I'm working to ensure every family has access to quality health care, strong schools, safe roads and clean drinking water. Let me know what issues you'd like the state legislature to focus on."
- Can we promote a post that provides information to residents on relevant and timely legislative issue?
  - i.e. "As children head back to school, many communities are struggling with teacher shortages, outdated facilities and a lack of state funding. Visit [REDACTED] to learn more about what's being done to address these issues."

**"Mixed Use" accounts (social media accounts containing a mix of legislative and campaign content)**

- Can legislative staff manage and post legislative content on "mixed use" social media accounts used by elected officials?
- Can elected officials with a "mixed use" social media account promote their account,

boost a post or take out ads on Facebook/Twitter using office funds?

Again, happy to chat more or clarify any of these requests if you or your staff have questions.

Thanks,

[REDACTED]

[REDACTED]  
**Office of** [REDACTED]  
[REDACTED]



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**From:** Carlton, Daniel - ETHICS <Daniel.Carlton@wisconsin.gov>

**Sent:** Tuesday, August 20, 2019 12:32 PM

**To:** [REDACTED]

**Subject:** RE: Social Media Guidance

When I ask whether you want it to be public, I need to clarify something...the requestor's identity is always redacted. I'll talk to you a little more about it after the meeting today. May not be able to follow up with you until tomorrow morning, though.

Dan

---

**From:** [REDACTED]

**Sent:** Tuesday, August 20, 2019 11:53 AM

**To:** Carlton, Daniel - ETHICS <[Daniel.Carlton@wisconsin.gov](mailto:Daniel.Carlton@wisconsin.gov)>

**Subject:** RE: Social Media Guidance

Thanks Dan,

I did have one other follow-up question for you... Would this opinion be made public by the commission, or would it only be provided to our office?

Thanks,

[REDACTED]

[REDACTED]  
**Office of** [REDACTED]  
[REDACTED]



**From:** Carlton, Daniel - ETHICS <[Daniel.Carlton@wisconsin.gov](mailto:Daniel.Carlton@wisconsin.gov)>  
**Sent:** Friday, August 16, 2019 12:16 PM  
**To:** [REDACTED]; ETH Ethics <[ethics@wisconsin.gov](mailto:ethics@wisconsin.gov)>  
**Cc:** [REDACTED]  
**Subject:** RE: Social Media Guidance

Good afternoon,

This email is to acknowledge receipt of your opinion request. As you are probably aware, the Commission is meeting on Tuesday, August 20, 2019. As we are within a few business days, we will not be able to prepare the opinion you requested in time for this meeting. The next regularly scheduled meeting of the Wisconsin Ethics Commission is December 3, 2019. A formal opinion can definitely be prepared and deliberated by the Commission at that meeting.

After the Commission's meeting on Tuesday, we will begin working on this request. I anticipate that we will be requesting some additional information from you at that point. Until then, should you have any questions or need anything further, please don't hesitate to contact me.

Sincerely,

Dan

**Daniel A. Carlton, Jr.**  
Administrator

Wisconsin Ethics Commission  
Campaign Finance | Lobbying | Ethics  
<https://ethics.wi.gov> | (608) 266-8123 | Twitter: [@EthicsWi](https://twitter.com/EthicsWi)

*This email may contain information that is privileged, confidential and/or exempt from disclosure under applicable law. If you received this transmission in error, please immediately contact the sender and destroy the material in its entirety, whether in electronic or hard copy format.*

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**From:** [REDACTED]  
**Sent:** Friday, August 16, 2019 12:01 PM  
**To:** ETH Ethics <[ethics@wisconsin.gov](mailto:ethics@wisconsin.gov)>  
**Cc:** Carlton, Daniel - ETHICS <[Daniel.Carlton@wisconsin.gov](mailto:Daniel.Carlton@wisconsin.gov)>; [REDACTED]  
**Subject:** Social Media Guidance

Hello,

I would like to request a formal opinion from the ethics commission regarding the use of

social media accounts by legislative offices. In particular, I would like official guidance from the commission on the following matters:

- **Wisconsin’s “50 piece rule”**
  - Does one Facebook/Twitter post count as sending out one item regardless of how many individuals view or share it?
  - Can elected officials use office funds to promote their account, boost a post or take out legislative ads on Facebook/Twitter while under the “50 piece rule?”
  - Do legislative social media accounts not associated with a specific official fall under any “50 piece rule” restrictions? (i.e. “Senate Republicans” [@WIGOPSenate](#) or “WI JFC Democrats” [@JFCDemocrats](#))
  
- **“Mixed Use” accounts**
  - Can legislative staff manage and post content on “mixed use” social media accounts used by elected officials?
  - Can elected officials with a “mixed use” social media account promote their account, boost a post or take out ads on Facebook/Twitter using office funds?
  
- **Blocking/banning users and deleting/hiding content**
  - Can legislators block/ban individuals who use profane or threatening language from following their official social media accounts?
  - Can legislators block/ban members of the public from viewing or following “mixed use” social media accounts?
  - Can legislators delete or hide public comments on their official social media account if they are deemed to be profane, threatening, or campaign related?

I appreciate your consideration of these issues and would be happy to answer any questions or provide additional clarification of these requests if needed.

Thank you,

- [REDACTED]

[REDACTED]  
**Office of** [REDACTED]  
[REDACTED]



## AUDIENCE

People you choose through targeting

Edit

Location - Living In United States: [REDACTED]  
(DMA)

Age 18 - 65+

People Who Match Interests: Knights of Columbus or The Wall Street Journal, Behaviors: Anniversary (within 61-90 days) or Likely engagement with US political content (moderate), Job title: Football Coach

Less ▲

People who like your Page

People who like your Page and their friends

People in your local area

Create New Audience

### Automatic Placements (Recommended)


ON

Use automatic placements to maximize your budget and help show your ads to more people. Facebook's delivery system will allocate your ad set's budget across multiple placements based on where they're likely to perform best. [Learn more.](#)

## DURATION AND BUDGET

Duration ⓘ

Days   

End date  Sep 27, 2019

Total budget ⓘ



Estimated People Reached ⓘ

5,000 - 15,000 people per day

of 43,000

Refine your audience or add budget to reach more of the people that matter to you.

You will spend **\$100.00** per day. This ad will run for **10** days, ending on Sep 27, 2019.



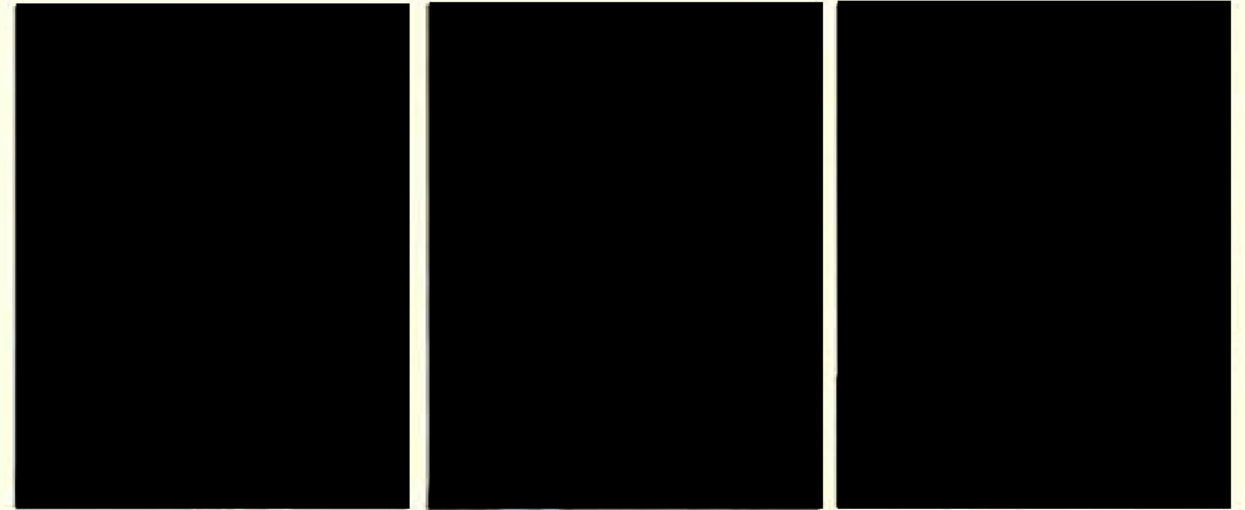
# BUDGET LISTENING SESSION

with Senator [REDACTED],  
Senator [REDACTED]  
& Representative [REDACTED]

[REDACTED], 2019

5:30 pm - 7:00 pm

[REDACTED] LIBRARY  
[REDACTED]  
[REDACTED]



Sen. [REDACTED]  
[REDACTED] Senate District

Sen. [REDACTED]  
[REDACTED] Senate District

Rep. [REDACTED]  
[REDACTED] Assembly District

FOR MORE INFORMATION, PLEASE CONTACT:

[REDACTED]  
[REDACTED]  
[REDACTED]



Join Sen. [REDACTED]  
and Rep. [REDACTED]

# BUDGET LISTENING SESSION


[REDACTED], 2019  
5:30 PM - 6:30 pm

[REDACTED]  
Community Room



[REDACTED]

*This event is free and open to the public.*



# Every Door Direct Mail®

Select Routes

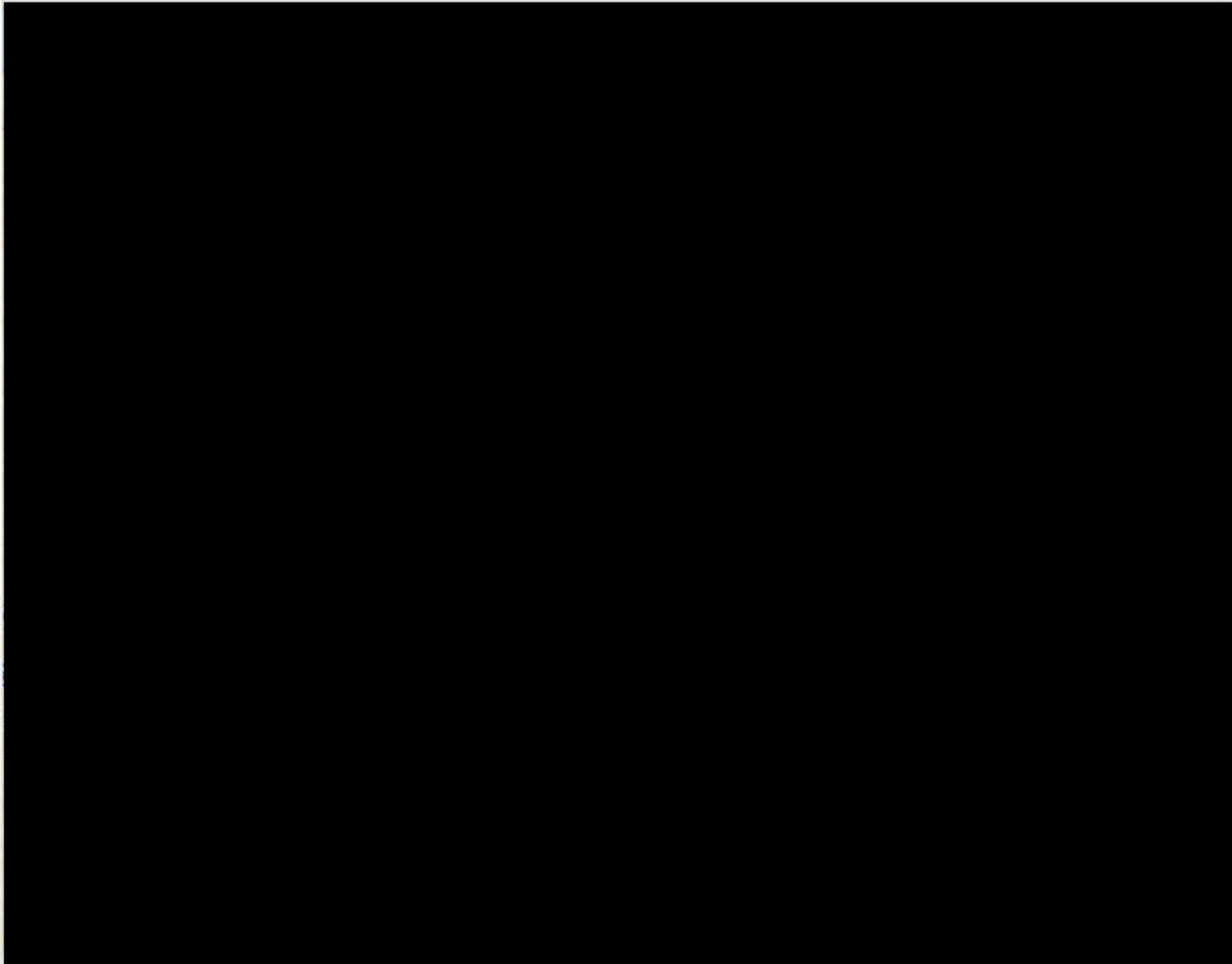
Find a Printer

Using EDDM®

Mailpiece Size Checker > 

✕ 🔍 📍

ROUTE	RESIDENTIAL	BUSINESS	TOTAL	AGE 25-44	SIZE	INCOME	COST
<input type="text" value=""/>	707	15	722	28%	2.46 PPL	\$50.82K	\$135.01



## Order Summary

Individual Routes Selected  
**6**

Post Office™ Drop-Offs >  
**1**

Total Delivery Addresses [Clear](#)  
**3872**

Approximate Cost [i](#)  
**\$724.06**

[Continue](#)

[Save](#)

# Wisconsin Ethics Commission

For persons elected to state or local office who become a candidate for national, state, or local office

## Social Media Use by Officials

### GENERAL GUIDANCE

The Code of Ethics for State Public Officials prohibits the use of an official's public position for private benefit. [WIS. STAT. § 19.45\(2\)](#). As such, it is important for an official to be able to distinguish between a public purpose and a private purpose when considering the use of public resources. To avoid the appearance of misuse of public resources a public official should include some indication of whether a social media account is for their official position or is a campaign, business, or personal account in the profile, summary, or other description of the account.

### Best Practices for Official Social Media Accounts

Official social media accounts are the most restricted. Officials should limit use of their official social media accounts to information related to an official's position, duties, and issues with a public purpose.

Examples of acceptable communications from an official social media account:

- Posts discussing how the state could address an issue through state laws or actions;
- General legislative activity like information about bills that the official has sponsored or co-sponsored;
- State budget information;
- Sharing newsletters from the official's office;
- Publicizing public events;
- Public service announcements and;
- Endorsements and messages of support when justified by having a state purpose. For example: "I support [candidate or organization] and their work to address [state policy issue] in Wisconsin."

Examples of communications that should NOT come from an official social media account:

- Solicitation of campaign contributions;
- Promotion of campaign-related events;
- Photos of campaign-related branding and events such as T-shirts, signs, or banners; and
- Any content that is strictly personal or commercial such as promoting the official's personally owned business or a business with which the official is associated.

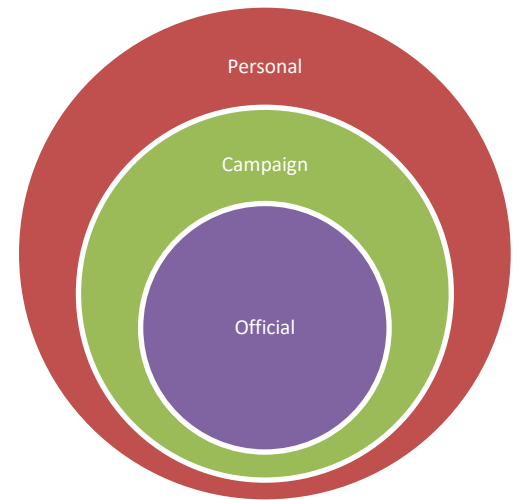
See WIS. STAT. §§ [11.1208\(2\)\(a\)](#), [19.42\(2\)](#), [19.45\(2\)](#).

## Best Practices for Campaign and Personal Social Media Accounts

A campaign may use a campaign social media account for all communications allowable for an official account, in addition to campaign-related activities including solicitation of contributions. Campaign social media accounts should not be used for strictly personal or commercial purposes. *See* WIS. STAT. § [11.1208\(2\)\(a\)](#).

A personal account may contain both official and campaign-related information.

Please see the diagram to the right for an illustration of acceptable uses by type of account.



### **USE OF SOCIAL MEDIA ON “STATE TIME”**

Elected officials will often switch between official and campaign activities throughout the day because an elected official is simultaneously an official and a candidate. [WIS. STAT. § 11.0101\(1\)](#). However, to avoid the appearance of misuse of public resources an elected official is advised not to create campaign-related social media communications or content while performing their official duties (i.e., while participating in an event in their official capacity – e.g., an event listed on their official calendar, a floor session, or committee hearing). [WIS. STAT. § 19.45\(2\)](#). Also, no person may enter or remain in any state building, office, or room for the purpose of requesting or collecting a contribution; therefore, elected officials should take special care as to the content of their social media communications while in a state building. [WIS. STAT. § 11.1207\(4\)](#).

An elected official is also advised to not use campaign committee resources for strictly personal benefit, or for commercial purposes. WIS. STAT. §§ [11.1208\(2\)\(a\)](#), [19.45\(2\)](#), [19.42\(2\)](#). For example, the candidate should not use a campaign social media account or campaign website to advertise for a personal business.

### **50-PIECE RULE APPLICATION TO SOCIAL MEDIA**

The “50-Piece Rule” prohibits the use of public funds for the distribution of 50 or more pieces of substantially identical material by a covered person during a specified time period. [WIS. STAT. § 11.1205](#). The language of the “50-Piece Rule” does not distinguish between electronic pieces and printed pieces. Electronic communications almost always result in multiple copies being created even when sent to a single recipient. This is due to the nature of the technical systems that enable electronic communications. When calculating the number of pieces distributed under the “50-Piece Rule” the Commission will only count those instances of electronic communication intended by the sender. *See* [2018 ETH 03](#).

If a message is actively communicated to individually addressed recipients (e.g., via email, instant messages, or direct messages), each individual recipient is considered a single piece under the “50-Piece Rule.” However, a passive message such as a website, Facebook post, or tweet, where the sender has no direct control over the audience of his or her message, is only counted as a single piece under the “50-Piece Rule.”

**TARL KNIGHT**  
**Complainant**

vs.

**JOHN S. VANDERLEEST**  
**Respondent**

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### **ARGUMENT**

The formal complaint which I, the Complainant, filed against the Respondent accuses the Respondent of having continuously blocked well-meaning constituents' and taxpayers' social media accounts, as well as deleting relevant posts and comments posted by them to their local representative's official government social media account, which has been declared a "public forum" by several prominent federal First Amendment cases. Such material as has been blocked and/or deleted by the Respondent was concerning serious, community-related issues (such as opinions and suggestions relating to proposed taxes, proposed construction projects, and proposed alternative parking methods), and had not contained any amount of profanity or insulting material, all of which the aggrieved parties will corroborate and a particular instance of which has already been submitted.

Regarding the issue of standing, Section 8 of the City of Green Bay Code of Conduct clearly states "any person" may file a formal complaint provided they satisfy the listed conditions:

Any person who believes a [sic] Elected official, in his/her official capacity, has violated a requirement, prohibition, or guideline set out herein may file a sworn complaint with the City Clerk identifying (1) the complainant's name, address and contact information; (2) the name and position of the City official who is the subject of the complaint; (3) the nature of the alleged violation, including the specific provision of the Code allegedly violated, and (4) a statement of facts constituting the alleged violation and the dates on which, or period of time during which, the alleged violation occurred.

The formal complaint concerns the Complainant as well as any taxpaying members of the community. The material at issue will be further specified by the aggrieved parties if afforded the opportunity. Until the respective parties are permitted to testify further as to the content of the deleted posts and comments, the Respondent's strawman argument of the material at issue

containing illicit or injurious statements, and so permitting deletion, are yet completely invalidated.

The conduct at issue, blocking and/or deleting citizens' well-meaning, relevant posts and comments regarding city issues, clearly violates the basic standards set by the City of Green Bay's Code of Conduct for public officials and their government social media accounts, which have been declared to be public forums by multiple federal First Amendment cases, such as *Knight First Amendment Institute vs. Trump* (2019) and *Davison vs. Randall* (2019).

Only last year, federal courts affirmed public officials' social media accounts to indeed constitute public forums, citing *Davison vs. Randall* (2019):

“Public officials may not retaliate against speech they dislike by suppressing expression on social media... The suppression of critical commentary regarding elected officials is the quintessential form of viewpoint discrimination against which the First Amendment guards.”

Further, citing *Knight First Amendment Institute vs. Trump* (2019):

“[T]he First Amendment does not permit a public official who utilizes a social media account for all manner of official purposes to exclude persons from an otherwise open online dialogue because they expressed views with which the official disagrees.”

Section 1 of the City of Green Bay Code of Conduct states:

[M]embers of the Common Council and Mayor shall maintain the utmost standards of personal integrity, trustfulness, honesty, and fairness in carrying out their public duties, avoid any improprieties in their roles as public servants, comply with all applicable laws, and never use their City position or authority improperly or for personal gain.

Section 4 of the City of Green Bay Code of Conduct states:

No signs of partiality, prejudice, or disrespect should be evident on the part of individual Council members toward an individual participating in a public forum. Every effort should be made to be fair and impartial in listening to public testimony. The Council members are expected to demonstrate, both publicly and privately, their honesty and integrity, and to be an example of appropriate and ethical conduct. All Council members should convey to the public their respect and appreciation for the public's participation, input, and opinions.

The Complainant maintains the actions of the Respondent have constituted habitually suppressive behaviour, which automatically and categorically violates the City of Green Bay's Code of Conduct, and similar actions by public officials violating the First Amendment have been criticised by multiple federal authorities throughout the years. The formal complaint filed against the Respondent holds merit, and the Complainant urges for any aggrieved parties outlined by the formal complaint to have the opportunity to testify as proof.

Thank you,

A handwritten signature in black ink, appearing to read "Tarl Knight". The signature is fluid and cursive, with a long horizontal stroke at the end.

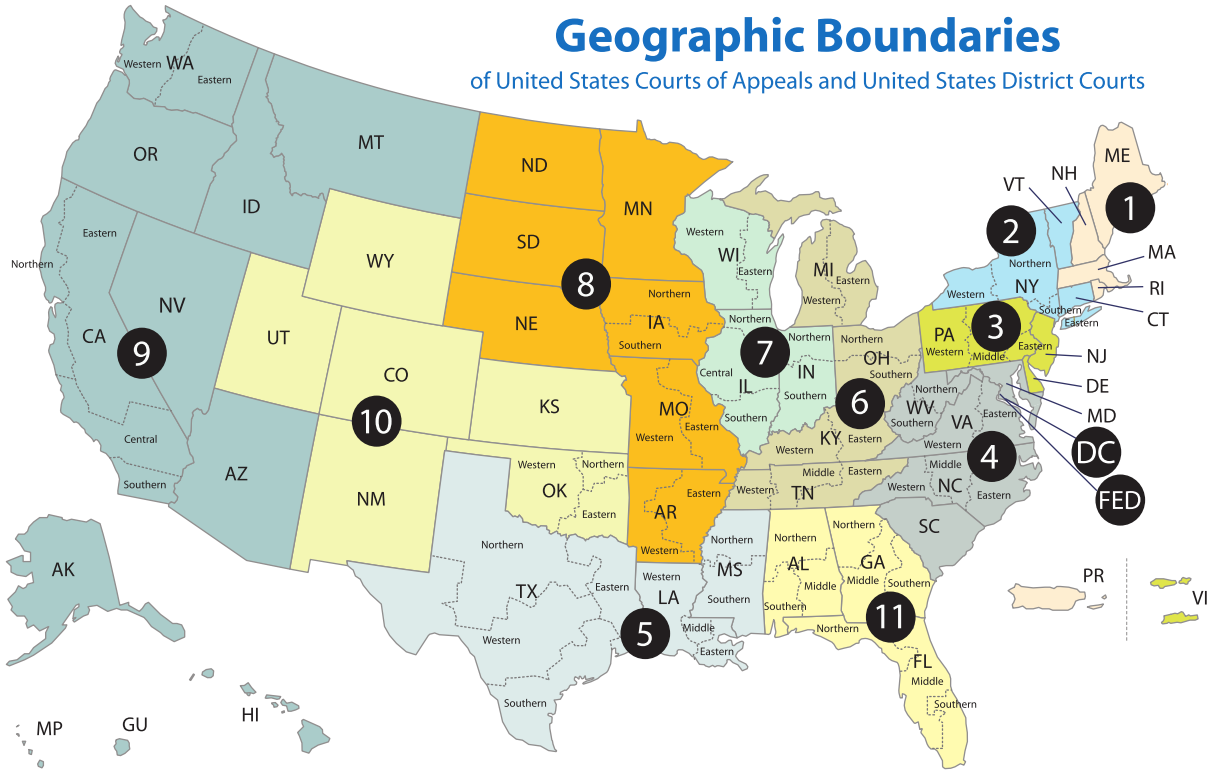
Tarl Knight

**DAVISON VS. RANDALL** , NO. 17-2002 (4TH CIRCUIT COURT OF APPEALS), is not binding precedent in the Eastern District of Wisconsin

Davison was issued on 1/19/2019 in final form.

# Geographic Boundaries

of United States Courts of Appeals and United States District Courts



**PUBLISHED**

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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**No. 17-2002**

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BRIAN DAVISON,

Plaintiff - Appellee,

v.

PHYLLIS RANDALL, In her official and individual capacity,

Defendant - Appellant,

and

LOUDOUN COUNTY BOARD OF SUPERVISORS, In their official and individual capacities; LEO ROGERS, In his official capacity; TONY BUFFINGTON, In his official capacity; RON MEYER, In his official capacity; GEARY HIGGINS, In his official capacity,

Defendants.

-----  
LOCAL GOVERNMENT ATTORNEYS OF VIRGINIA, INC.;  
INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION; VIRGINIA  
ASSOCIATION OF COUNTIES; VIRGINIA MUNICIPAL LEAGUE,

Amici Supporting Appellant,

AMERICAN CIVIL LIBERTIES UNION; ACLU OF VIRGINIA; ACLU OF  
MARYLAND; ACLU OF NORTH CAROLINA; ACLU OF SOUTH  
CAROLINA; ACLU OF WEST VIRGINIA,

Amici Supporting Appellee.

---

**No. 17-2003**

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BRIAN C. DAVISON,

Plaintiff - Appellant,

v.

PHYLLIS RANDALL, In her official and individual capacity; LOUDOUN COUNTY BOARD OF SUPERVISORS, In their official and individual capacities,

Defendants - Appellees,

and

LEO ROGERS, In his official capacity; TONY BUFFINGTON, In his official capacity; RON MEYER, In his official capacity; GEARY HIGGINS, In his official capacity,

Defendants.

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Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. James C. Cacheris, Senior District Judge. (1:16-cv-00932-JCC-IDD)

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Argued: September 26, 2018

Decided: January 7, 2019

Amended: January 9, 2019

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Before KEENAN, WYNN, and HARRIS, Circuit Judges.

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Affirmed by published opinion. Judge Wynn wrote the opinion, in which Judge Keenan and Judge Harris concurred. Judge Keenan wrote a separate concurring opinion.

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**ARGUED:** Scott E. Gant, BOIES SCHILLER FLEXNER, LLP, Washington, D.C.; Leo P. Rogers, LOUDON COUNTY ATTORNEY, Leesburg, Virginia, for Appellant/Cross-



## WHICH COURT IS BINDING?<sup>1</sup> Binding vs. Persuasive Cases

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You have found the perfect case: the facts are similar to yours and the law is on point. But does the court before which you are practicing (or, in law school, the jurisdiction to which you have been assigned) have to follow the case? *Stare decisis* is the common law principle that requires courts to follow precedents set by other courts. Under *stare decisis*, courts are obliged to follow some precedents, but not others. Because of the many layers of our federal system, it can be difficult to figure out which decisions bind a given court. This handout is designed to help you determine which decisions are mandatory and which are persuasive on the court before which you are practicing.



<b>Binding versus Persuasive Authority: What's the Difference?</b>
<ul style="list-style-type: none"> <li>• <i>Binding authority</i>, also referred to as mandatory authority, refers to cases, statutes, or regulations that a court <b>must</b> follow because they bind the court.</li> <li>• <i>Persuasive authority</i> refers to cases, statutes, or regulations that the court <b>may</b> follow but does not have to follow.</li> </ul>

### To get started, ask yourself two questions:

- 1) Are the legal issues in your case governed by state or federal law? and
- 2) Which court are you in?

Once you know the answers to these questions, you are well on your way to determining whether a decision is mandatory or persuasive.

### *Step 1: Are the Legal Issues in Your Case Governed by Federal or State Law?*

First, a lawyer needs to know the facts and issues of the case. Facts such as where the events took place, where the home(s) of the parties are, and where the parties conduct most of their business frame the legal issues. In other words, identifying key facts will help you to determine what law governs the legal issues in your case.

The hypothetical case below illustrates how you might analyze a particular set of facts to identify whether the legal issues are governed by state or federal law. The first step is to identify the facts and brainstorm all the possible legal issues raised by those facts.

<sup>1</sup> By Robyn Painter and Kate Mayer. Revised in 2017 by Kate Mathews.

Hypothetical Case: Pick-Pocketing in Virginia

<b>Facts</b>	<b>Possible Legal Issues</b>
<ul style="list-style-type: none"><li>• You are shopping in a grocery store in Virginia when a little old woman in line at the checkout starts screaming that she's been pick-pocketed.</li><li>• The police arrive on the scene, and the woman identifies you as someone who suspiciously brushed against her.</li><li>• The police arrest you and throw you in jail.</li><li>• Later, the police interrogate you without first informing you of your right to have a lawyer present.</li></ul>	<ul style="list-style-type: none"><li>• Is pick-pocketing a crime in Virginia? If so, under what law?</li><li>• Did the police have probable cause to arrest you based on the identification of the old woman?</li><li>• How reliable was the old lady's identification?</li><li>• How long can the police hold you?</li><li>• Were any of your Constitutional rights violated during the police's arrest and interrogation of you?</li><li>• If you are found guilty, can the little old lady also sue you in civil court for infliction of emotional distress or another tort?</li></ul>

After you have brainstormed all the possible legal issues the facts raise, determine whether the legal issues are governed by federal or state law. In any given case, there may be both federal and state issues. America operates on a system of dual sovereignty: the fifty states and the federal government all retain their own sovereignty. Because each state is a sovereign, each state sets its own laws and has its own Constitution. In addition, the United States federal government makes laws and has a Constitution.

When determining whether a legal issue is governed by federal or state law, keep in mind that some areas of the law, such as criminal and environmental law, are governed by both state and federal laws. Generally, the principle of **preemption** means that a legitimate federal action supersedes a state law in certain cases. Although a full discussion of preemption is beyond the scope of this handout, you should be aware of some basic principles. Federal law preempts state law when the two laws conflict, when Congress expressly or implicitly says so, or when federal laws are so pervasive that they occupy the entire field of law.

Hypothetical Case: Pick-Pocketing in Virginia

*There is no preemption issue in your case because there is no conflict between state and federal law such that federal law would override Virginia state law. Specifically, there is no federal law prohibition against pick-pocketing that could conflict with Virginia's local pick-pocketing law. So, two sets of laws potentially govern.*

<i><b>Federal Issues</b></i>	<i><b>State Issues</b></i>
<ul style="list-style-type: none"> <li>• <i>Your Fourth, Fifth, and Sixth Amendment rights were triggered once you were arrested—these rights are governed by federal law, i.e., the U.S. Constitution.<sup>2</sup></i></li> </ul>	<ul style="list-style-type: none"> <li>• <i>Virginia’s or the town’s local pick- pocketing statute will lay out the elements of and punishment for the offense; the court’s decision in your case will also be informed by state cases about pick-pocketing.</i></li> <li>• <i>Your arrest might also implicate Virginia’s state Constitution—state Constitutions must provide at least as many rights as the Federal Constitution, but can also entitle you to broader protections.</i></li> </ul>

*In sum, your case involves legal issues governed by both state and federal law.*

### **Step 2: Which Court Are You In?**

Next, determine which court you are in, which is a two-part inquiry.

**(1)** First, ask yourself whether you are in federal or state court.

Dual sovereignty means that each sovereign has its own court system: the states each have courts and the United States has courts, which are called federal courts. Federal courts are located throughout the United States.

**(2)** Second, ask yourself whether you are in a trial court, an intermediate appellate court, or a supreme court.

Most American court systems—whether they are federal or state—have a similar structure, consisting of trial courts, intermediate appellate courts, and the highest court in the jurisdiction, usually supreme courts. In the federal court system, the trial courts are called United States District Courts. There are twelve federal courts of appeals that each cover a geographical region called a circuit and are, accordingly, called the United States Court of Appeals for the [insert number] Circuit or Circuit Courts.<sup>3</sup> States vary in the names they give to their courts, but regardless of the nomenclature, the structure is the same.<sup>4</sup>

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<sup>2</sup> Usually, there are state cases adopting Federal Courts’ interpretation of the Constitution. If this is so, you should cite your state case. Be careful, though, to check and see if there are any new federal decisions governing basic Constitutional rights surrounding your case.

<sup>3</sup> Additionally, there is a thirteenth federal appellate court called the Court of Appeals for the Federal Circuit, which unlike the regional Circuit Courts of Appeal, has nationwide jurisdiction to hear appeals in only certain types of cases including cases involving patent laws and cases appealed from the U.S. Court of Federal Claims and the U.S. Court of International Trade.

<sup>4</sup> In some states, such as New York and Maryland, the highest court in the state is actually called the Court of Appeals.

### Hypothetical Case: Pick-Pocketing in Virginia

*In your case, the local police arrested you. These police were acting under the authority of the Virginia state or local statute against pick-pocketing. Thus, at this point, you are in a Virginia state trial court. Realize, though, that even though you are in a state court, the federal Constitutional issues you identified in **step 1** can still be heard by that court.*

*If you lose at trial and need to appeal, that appeal will go to Virginia's intermediate appellate court, and then to Virginia's highest court, the Virginia Supreme Court. Only if you lose at the state's highest court and believe that the state law violates the U.S. Constitution can you appeal to the U.S. Supreme Court.*

*If you had been arrested by the FBI or for a federal offense, then you could be tried in federal district court, perhaps in the U.S. District Court for the Eastern District of Virginia. If the case were appealed, it would go to the U.S. Court of Appeals for the Fourth Circuit, then to the U.S. Supreme Court.*

*In sum, at this point, your case is in a state trial court for the purpose of determining whether a particular case is binding or persuasive.*

### ***NOW YOU ARE READY! Is the case you have found binding or persuasive?***

Now that you have found a case on point, some general principles will help you to figure out whether a law is binding or persuasive. Use your answers to the above questions to apply these principles to your case.

First, **higher courts bind lower courts** within their particular state or circuit. With the exception of the U.S. Supreme Court, courts of appeals and state courts do not bind courts outside the state or circuit in which they are located. That is, a federal Supreme Court decision is binding on all lower federal courts, both circuit courts of appeals and district courts. A federal circuit decision is binding on all federal district courts within its circuit, but not federal courts in other circuits. For example, a decision of the U.S. Court of Appeals for the Ninth Circuit binds the U.S. district courts within the Ninth Circuit, but not federal courts in any other circuit. However, a district court or trial court decision would not bind higher courts. A decision by a state's highest court is binding on all appeals courts and trial courts in that state, but not on state courts in other states, and usually, a state court of appeals' decision binds state trial courts in that state.<sup>5</sup>

Second, with the exception of the U.S. Supreme Court, **federal courts bind only other federal courts, not state courts**. Thus, a decision by the U.S. Court of Appeals for the Ninth Circuit, a federal court, is binding on federal district courts within the boundaries of the Ninth

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<sup>5</sup> Although some states have appellate courts that bind all lower courts in the state, others have regional districts or circuits and a state appellate court may bind only lower courts within its geographic district or circuit. Therefore, be sure to research the structure of the courts in your particular state. <http://www.law.georgetown.edu/w-p-content/upload/2018/07/Matthew-Schaffer-FederalLawFederalCourtsandBindingandPersuasiveAuthority.pdf>

Circuit. It is not binding on California state courts, even though California is geographically within the Ninth Circuit. Similarly, **state courts bind only other state courts within the state.** A decision of the California Supreme Court would thus bind other California state courts, not state courts in any other state. However, sometimes a federal court must apply a state’s law. In that case, the state’s interpretation of that law is binding on the federal court. Therefore, a California Supreme Court decision on a matter of California law would bind federal courts on that state law issue. Similarly, state courts must sometimes decide issues of federal law, but they are not bound by federal courts except the U.S. Supreme Court. A decision of the U.S. Supreme Court, a federal court, is binding on state courts when it decides an issue of federal law, such as Constitutional interpretation.

Hypothetical Case: Pick-Pocketing in Virginia

<i>Federal Issues</i>	<i>State Issues</i>
<ul style="list-style-type: none"> <li>• <i>The Constitutional issues are federal. The state trial court is thus bound by the U.S. Supreme Court’s decisions about the Constitutional issues in your case.</i></li> <li>• <i>Any decisions from other federal courts other than the U.S. Supreme Court are persuasive authority on the federal law issues.</i></li> <li>• <i>Note that if you had been accused of a federal offense, you probably would have appeared in a federal district court, which would have been bound by the court of appeals for your circuit (i.e., the Fourth Circuit), and the U.S. Supreme Court on all federal issues.</i></li> </ul>	<ul style="list-style-type: none"> <li>• <i>The Virginia state trial court in which your case will be heard is bound by Virginia courts of appeal and by the Virginia Supreme Court on all state issues. Because the pick-pocketing law is a state law issue, the state’s courts of appeals and state supreme court decisions will bind the state trial court you are in.</i></li> <li>• <i>All other court decisions are persuasive authority on the state law issue—that is, decisions from all federal courts, other states’ state courts, and other state trial courts in the same state.</i></li> </ul>

Applying this analysis from the outset will help you to be a smarter, faster researcher and to narrow down the body of case law at which you are looking. Knowing what the court is bound to follow will help you to write more effective memos, motions, and briefs.

For a more detailed discussion of binding and persuasive authority at the federal level, see the Writing Center’s handout, “Federal Law, Federal Courts, and Binding and Persuasive Authority.” Also, for a discussion about using persuasive authority in your legal writing, see the following handout: “When and How to use Secondary Sources and Persuasive Authority to Research and Write Legal Documents.”

The table below displays the above principles in another form. Use your answers from **Steps 1 and 2**—whether the issue is state or federal and which court you are in—to find the box in the

left hand column that applies to your case. Then, read across that row to find out which courts bind you and which courts are only persuasive to you.

1) State or Federal Issue? 2) Which court are you in?	Binding Authority	Persuasive Authority
State issue in state trial court	That state's state appeals court That state's highest court	All federal courts Other states' state courts Other state trial courts in the same state
State issue in state appeals court	That state's highest court	All federal courts Other states' state courts State trial courts in the same state Other state courts of appeals in the same state
State issue in state's highest court	N/A	That state's highest court* State trial courts in the same state State courts of appeals in the same state Other states' state courts All federal courts
State issue in federal district court	Interpretations from the state's highest court	All federal courts Other state courts
State issue in federal circuit court	Interpretations from the state's highest court	All federal courts Other state courts
State issue in U.S. Supreme Court	Interpretations from the state's highest court	All federal courts Other state courts
Federal issue in state trial court	U.S. Supreme Court That state's court of appeals That state's highest court	All federal district courts All federal circuit courts State courts
Federal issue in state appeals court	U.S. Supreme Court That state's highest court	All federal district courts All federal circuit courts State courts
Federal issue in state's highest court	U.S. Supreme Court	All federal district courts All federal circuit courts State courts
Federal issue in federal district court	U.S. Supreme Court Federal circuit court in the circuit where the district court is	Other federal circuit courts Federal district courts All state courts
Federal issue in federal circuit court	U.S. Supreme Court	That federal circuit court* Other federal circuit courts Other federal district courts All state courts
Federal issue in U.S. Supreme Court	N/A	U.S. Supreme Court* All federal circuit courts All federal district courts All state courts

\* Technically, courts of the same level do not bind each other. Thus, the U.S. Supreme Court may overturn its prior decisions, though it has adopted different practices of *stare decisis* for its constitutional precedents and its precedents interpreting federal statutes. For a discussion of *stare decisis* practices of the U.S. Supreme Court, see Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 2 (2005). Further, although federal circuit courts technically do not bind themselves, nearly every circuit court has adopted a strong rule of *stare decisis*, or "law of the circuit" rule, under which the holding of a published decision by a three-judge panel of the circuit binds subsequent panels. Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L. J. 787, 794–95 (2012). Therefore, in practice, a published circuit court opinion is generally binding on that court. *Id.* However, "law of the circuit" rules vary slightly by circuit. *Id.* at 797.

# 7 U.S. Code § 230 - Protection for private blocking and screening of offensive material

U.S. Code

(a) Findings—The Congress finds the following:

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) Policy—It is the policy of the United States—

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

(c) Protection for "Good Samaritan" blocking and screening of offensive material

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).<sup>[1]</sup>

(d) Obligations of interactive computer service

A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

(e) Effect on other laws

(1) No effect on criminal law

Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, or any other Federal criminal statute.

(2) No effect on intellectual property law

Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) State law

Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

(4) No effect on communications privacy law

Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(5) No effect on sex trafficking law—Nothing in this section (other than subsection (c)(2)(A)) shall be construed to impair or limit—

(A) any claim in a civil action brought under section 1595 of title 18, if the conduct underlying the claim constitutes a violation of section 1591 of that title;

(B) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 1591 of title 18; or

(C) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 2421A of title 18, and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted.

(f) Definitions—As used in this section:

(1) Internet

The term “Internet” means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) Interactive computer service

The term “interactive computer service” means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(3) Information content provider

The term “information content provider” means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

(4) Access software provider—The term “access software provider” means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

(A) filter, screen, allow, or disallow content;

(B) pick, choose, analyze, or digest content; or

(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

(June 19, 1934, ch. 652, title II, § 230, as added Pub. L. 104–104, title V, § 509, Feb. 8, 1996, 110 Stat. 137; amended Pub. L. 105–277, div. C, title XIV, § 1404(a), Oct. 21, 1998, 112 Stat. 2681–739; Pub. L. 115–164, § 4(a), Apr. 11, 2018, 132 Stat. 1254.)

U.S. Code Toolbox



**Before the Ethics Board of the City of Green Bay**

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**TARL KNIGHT,**

**Complainant,**

**vs.**

**JOHN S. VANDERLEEST,**

**Respondent.**

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**ARGUMENT**

The Ethics Complaint lodged by the Complainant, a former candidate for City Council, against the Respondent accuses the Respondent of having blocked social media posts made by other individuals on a social media account used by the Respondent for governmental purposes. Such material as has been blocked was on the ground that the posts contained offensive and insulting material. None of the material at issue directly concerned the Complainant.

The Respondent submits that his actions constitute neither misconduct nor unethical behavior, as similar actions by public officials have been upheld by multiple courts. The Respondent exercised his discretion as a public official in good faith and in a manner that was objectively reasonable. The Ethics Complaint filed against him has no merit.

Section 1 of the City of Green Bay Code of Conduct states, in part, that

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Robert J. Miller, Atty.  
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[M]embers of the Common Council and Mayor shall maintain the utmost standards of personal integrity, trustfulness, honesty, and fairness in carrying out their public duties, avoid any improprieties in their roles as public servants, comply with all applicable laws, and never use their City position or authority improperly or for personal gain.

City of Green Bay, Wisconsin Code of Conduct § 1.

The conduct at issue here, blocking or deleting offensive and insulting posts on a social media account used for a governmental purpose, does not violate any of the above-mentioned general standards. The only specific category in the Code of Conduct that conceivably could apply here is Section 4, on elected officials' conduct toward the public. Nothing in that section, which primarily deals with public meetings, applies to the use of social media.

Nor is the conduct in question in violation of the requirement in the City's social media policy that use of social media adhere to applicable federal, state, and local laws.

The federal Communications Decency Act provides, in pertinent part, as follows:

No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected[.]

47 U.S.C. § 230(c)(2).

There is an abundance of case law in which courts have upheld similar actions by public officials and/or have declined to impose liability on the officials.

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In *Morgan v. Bevin*, 298 F. Supp. 3d 1003 (E.D. Ky. 2018), a civil rights action for the alleged violation of the First Amendment, citizens whose accounts were blocked by the Governor of Kentucky on social media websites failed to show that the public interest would be served by issuing an injunction. Thus, a preliminary injunction preventing the Governor from blocking anyone in the future and restoring the citizens' accounts and accounts of other similarly situated individuals was not warranted. In addition, the Governor's use of privately owned social media websites was personal speech because he was speaking on his own behalf. The First Amendment did not apply, and the Governor's accounts were privately owned channels of communication that were not converted to public property by their use by a public official. *Id.* at 1010-11.

In *McKercher v. Morrison*, No. 18CV1054 JM(BLM), 2019 WL 1098935 (S.D. Cal. Mar. 8, 2019), the court dismissed an action alleging that a mayor blocked the plaintiff from accessing the mayor's personal Facebook website in retaliation for, among other things, criticizing him as an elected official. The mayor had qualified immunity from such a lawsuit. Significantly, such immunity applies to officials who have a reasonable, *even if mistaken*, belief about the facts or about what the law requires in any given situation. *Id.* at \*3.

In *Price v. City of New York*, No. 15 CIV. 5871 (KPF), 2018 WL 3117507 (S.D.N.Y. June 25, 2018), the court granted qualified immunity to city officials in an action brought by a citizen whose posts on social media had been blocked. *Accord*

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*Tanner v. Ziegenhorn*, No. 4:17-CV-780-DPM, 2019 WL 2344094, at \*1 (E.D. Ark. May 31, 2019) ("The Court assumes, for purposes of Kennedy and Chapman's motion to dismiss, that these deletions [from the State Police Facebook account] infringed Tanner's free speech rights. The guiding law, though, wasn't clear enough then to subject Kennedy and Chapman to suit. State actors are entitled to qualified immunity unless they violate clearly established law."); *Davison v. Rose*, No. 1:16CV0540 (AJT/IDD), 2017 WL 3251293, at \*10 (E.D. Va. July 28, 2017) ("Here, the law is less than settled as to whether the Plaintiff had a right to post on a Facebook page maintained by a public official and that this right was violated when those postings were removed or when Plaintiff was prevented from posting his comments. . . . It is not clear as a legal matter whether the Facebook pages at issue in this litigation can be said to constitute either type of public forum. In any event, it cannot be said that such a First Amendment right was a 'clearly established' right, 'of which a reasonable person would have known.' These Individual Defendants are therefore entitled to qualified immunity for the actions they took against Plaintiff with respect to their Facebook pages."); *Davison v. Plowman*, 247 F. Supp. 3d 767, headnote 12 (E.D. Va. 2017) ("It would not have been apparent to a reasonable government official that excluding county resident from limited public forum, a county commonwealth's attorney's social media page, after resident repeatedly disregarded the forum's rules, would violate the First Amendment, and thus county commonwealth's attorney was entitled to qualified immunity from resident's § 1983 action with respect to

attorney's decision to block resident from further posting on the county commonwealth's attorney's social media page[.]"), *aff'd*, 715 F. App'x 298 (4th Cir. 2018) (unpublished opinion); *Hunt v. Bd. of Regents Univ. of N.M.*, 338 F. Supp. 3d 1251 (D.N.M. 2018) (even assuming that university official violated medical student's First Amendment right to post on social networking website by subjecting him to corrective action after his inflammatory post was found to constitute unprofessional conduct in violation of university's social media policy, student's right was not "clearly established" when the discipline was imposed, and so chair was entitled to qualified immunity), *aff'd*, 792 F. App'x 595 (10th Cir. 2019) (unpublished opinion); *Wagschal v. Skoufis*, No. 19 CIV. 2393 (CM), 2020 WL 1033873 (S.D.N.Y. Mar. 3, 2020) (state legislator was entitled to qualified immunity from liability in private citizen's § 1983 action alleging that legislator violated his First Amendment rights by blocking him from social media pages); *Novak v. City of Parma*, 932 F.3d 421 (6th Cir. 2019) (police officers were entitled to qualified immunity from liability in action alleging that officers violated social media page creator's First Amendment rights by seeking to have social media platform remove comments).

The Respondent does not dispute that there are some reported cases in which public officials have been found to have violated the First Amendment rights of persons or groups by blocking access to social media, but he submits that such cases differ significantly from this case. For example, in *One Wisconsin Now v. Kremer*, 354 F. Supp.

3d 940 (W.D. Wis. 2019), state legislators violated the First Amendment by blocking a liberal advocacy group from the legislators' respective accounts on an online social media platform where, as is not the case here, the legislators blocked only a select number of accounts and articulated no specific reason for blocking the group. Unlike anything in the instant case, the defendants in *Kremer* blocked the plaintiff because of its prior speech or identity and even indicated, either directly or indirectly, that they did not approve of the plaintiff's political perspective. *Id.* at 956.

There is a well-established presumption in the law that public officers, in performing their official duties, have complied with all statutory requirements, and such presumption applies to acts of official boards and legislative bodies as well as to the acts of individual officers. *Bohn v. Sauk Cty.*, 268 Wis. 213, 67 N.W.2d 288 (1954); *State ex rel. Richey v. Neenah Police & Fire Comm'n*, 48 Wis. 2d 575, 180 N.W.2d 743 (1970).

Members of a city's governing council, in particular, are presumed to have acted regularly and lawfully. *Town of Medary v. City of La Crosse*, 88 Wis. 2d 101, 277 N.W.2d 310 (Ct. App. 1979). The actions of the Respondent, as alleged in the Ethics Complaint, were entirely reasonable and lawful. At the very least, such actions are far short of what is required to overcome the presumption of good faith and legality.

August 3, 2020  
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Respectfully submitted,

*Robert J. Miller*

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Attorney for Respondent John S. Vanderleest

Before the Ethics Board  
of the City of Green Bay

---

Tarl Knight, Complainant

vs.

John S. Vanderleest  
Respondent

---

ARGUMENT

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**I. The grant of right to counsel in section 8 (d) (3) connotes the rights for effective counsel.**

The grant of a right to counsel is illusory unless counsel has a right to adequately prepare the defense. We have not allowed “trial by ambush” in the American courts for over 100 years.

The respondent is requesting a suspension of the proceedings so that he can depose the complainants. This is especially necessary as the complaint as presently constituted has nothing from the actual parties.

In **Goldberg vs. Kelly**, 397 U.S. 254 1970 at paragraph 17, the U.S. Supreme Court addressed this issue:

Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment \* \* \*.

This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, \* \* \* but also in all types of cases where administrative \* \* \* actions were under scrutiny.'

## **II. The right to call witnesses and cross-examine witnesses is meaningless without the right to compel the witnesses to appear.**

A. Part of the effectiveness of the right to counsel is the presentation of testimony. This right is an empty one if an individual with valuable testimony cannot be compelled to appear. Again, this issue was discussed in the **Goldberg** case, at paragraph 19.

'The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.' *Powell v. Alabama*, [287 U.S. 45](#), 68—69, 53 S.Ct. 55, 64, 77 L.Ed. 158 (1932). We do not say that counsel must be provided at the pre-termination hearing, but only that the recipient must be allowed to retain an attorney if he so desires. Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient.

B. The Wisconsin Municipal Administrative Procedure Act ( Chapter 68 of the Wisconsin Statutes) may have applicability here. At the very least, section 68.11 of the Wisconsin Statutes accords counsel the right to subpoena witnesses/records in a proceeding under the section.

## **III. The Communications Decency Action (appended) permits the deletion of objectionable content and the federal government has pre-empted the area.**

A. 47 U.S.Code 230 (c) (2) permits the removal of objectionable content. Among the elevated political discourse which is sought to be preserved by the petitioner is the following:

1. I reliably informed that one post called the respondent a “schmuck.”  
This is Yiddish for penis.
2. Another post according to my information, denigrated my client’s business and his integrity.
3. Yet another post called my client a criminal.

B. 47 U.S. Code 230 (e)(3) highlighted in purple) indicates that any state or local action contrary to this is prohibited. The federal government has pre-empted the area.

**IV. Considerations for Ethics Board-- The action of policing content is a legal thicket surrounded by constitutional quicksand.**

Second-guessing the deletion of posts, etc on the web could mushroom into a full-time occupation for this board.

Ultimately, limiting council members abilities to superintend their sites will have them appear to ratify, endorse, and sponsor the reprehensible content. It will have the government compelling speech, which is, in itself a constitutional violation. Moreover, the adoption and support of this repulsive content is an ethics violation.

Thus council members, such as my client, are damned to ethics code violations if they delete the content and damned to ethics violations if they do not.

Respectfully submitted by:

*Robert J. Miller*

---

Robert J. Miller  
Attorney for the Respondent—John Vanderleest  
227 S. Van Buren St.  
Green Bay, WI 54301  
SB NO. 1018487

# 47 U.S. Code § 230 - Protection for private blocking and screening of offensive material

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**(a) FINDINGS** The Congress finds the following:

- (1) The rapidly developing array of [Internet](#) and other [interactive computer services](#) available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.
- (2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.
- (3) The [Internet](#) and other [interactive computer services](#) offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.
- (4) The [Internet](#) and other [interactive computer services](#) have flourished, to the benefit of all Americans, with a minimum of government regulation.
- (5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

**(b) Policy** It is the policy of the [United States](#)—

- (1) to promote the continued development of the [Internet](#) and other [interactive computer services](#) and other interactive media;
- (2) to preserve the vibrant and competitive free market that presently exists for the [Internet](#) and other [interactive computer services](#), unfettered by Federal or [State](#) regulation;
- (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the [Internet](#) and other [interactive computer services](#);
- (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and
- (5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

**(c) PROTECTION FOR "GOOD SAMARITAN" BLOCKING AND SCREENING OF OFFENSIVE MATERIAL**

**(1) TREATMENT OF PUBLISHER OR SPEAKER**

No provider or user of an [interactive computer service](#) shall be treated as the publisher or speaker of any information provided by another [information content provider](#).

**(2) CIVIL LIABILITY** No provider or user of an [interactive computer service](#) shall be held liable on account of—

- (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
- (B) any action taken to enable or make available to [information content providers](#) or others the technical means to restrict access to material described in paragraph (1).<sup>[1]</sup>

**(d) OBLIGATIONS OF INTERACTIVE COMPUTER SERVICE**

A provider of [interactive computer service](#) shall, at the time of entering an agreement with a customer for the provision of [interactive computer service](#) and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

**(e) EFFECT ON OTHER LAWS**

**(1) NO EFFECT ON CRIMINAL LAW**

Nothing in this section shall be construed to impair the enforcement of section [223](#) or [231](#) of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, or any other Federal criminal statute.

**(2) NO EFFECT ON INTELLECTUAL PROPERTY LAW**

Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

**(3) STATE LAW**

Nothing in this section shall be construed to prevent any [State](#) from enforcing any [State law](#) that is consistent with this section. No cause of action may be brought and no liability may be imposed under any [State](#) or local law that is inconsistent with this section.

**(4) NO EFFECT ON COMMUNICATIONS PRIVACY LAW**

Nothing in this section shall be construed to limit the application of the [Electronic Communications Privacy Act of 1986](#) or any of the amendments made by such Act, or any similar [State law](#).

**(5) NO EFFECT ON SEX TRAFFICKING LAW** Nothing in this section (other than subsection (c)(2)(A)) shall be construed to impair or limit—

- (A) any claim in a civil action brought under [section 1595 of title 18](#), if the conduct underlying the claim constitutes a violation of section 1591 of that title;
- (B) any charge in a criminal prosecution brought under [State law](#) if the conduct underlying the charge would constitute a violation of [section 1591 of title 18](#); or
- (C) any charge in a criminal prosecution brought under [State law](#) if the conduct underlying the charge would constitute a violation of [section 2421A of title 18](#), and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted.

**(f) DEFINITIONS** As used in this section:

**(1) INTERNET**

The term "[Internet](#)" means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

**(2) INTERACTIVE COMPUTER SERVICE**

The term "[interactive computer service](#)" means any [information service](#), system, or [access software provider](#) that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the [Internet](#) and such systems operated or services offered by libraries or educational institutions.

**(3) INFORMATION CONTENT PROVIDER**

The term "[information content provider](#)" means any [person](#) or entity that is responsible, in whole or in part, for the creation or development of information provided through the [Internet](#) or any other [interactive computer service](#).

**(4) ACCESS SOFTWARE PROVIDER** The term "[access software provider](#)" means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

- (A) filter, screen, allow, or disallow content;
- (B) pick, choose, analyze, or digest content; or
- (C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

(June 19, 1934, ch. 652, title II, §230, as added [Pub. L. 104-104, title V, §509](#), Feb. 8, 1996, [110 Stat. 137](#); amended [Pub. L. 105-277, div. C, title XIV, §1404\(a\)](#), Oct. 21, 1998, [112 Stat. 2681-739](#); [Pub. L. 115-164, §4\(a\)](#), Apr. 11, 2018, [132 Stat. 1254](#).)

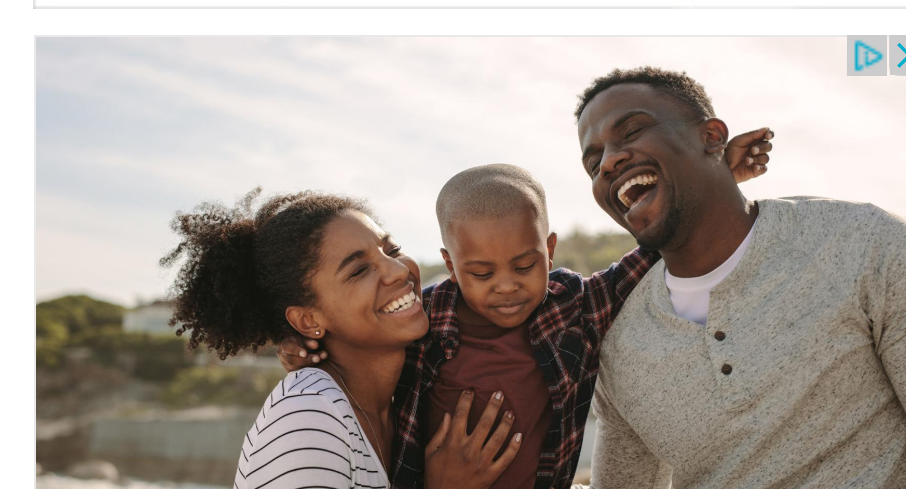
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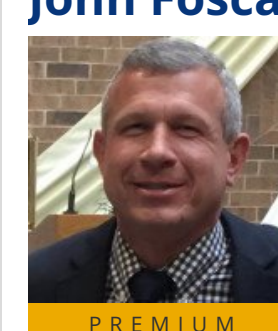
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Police say everyone should carry this new safety device that protects against attackers.

OPEN

Before the Ethics Board  
of the City of Green Bay

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Tarl Knight, Complainant

vs.

John S. Vanderleest  
Respondent

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MOTION FOR POSTPONEMENT OF PROCEEDINGS

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The respondent, by his counsel, Robert J. Miller, moves for an order granting a postponement of the hearing as he has been in the case for approximately 3 business days. This is an inadequate time to prepare for the hearing.

Dated this 20<sup>th</sup> day of July 2020

*Robert J. Miller*

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Robert J. Miller  
Attorney for the Respondent  
227 S. Van Buren St.  
Green Bay, WI 54301  
SB No 1018487  
Phone 920 432 1900

Before the Ethics Board  
of the City of Green Bay

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Tarl Knight, Complainant

vs.

John S. Vanderleest  
Respondent

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MOTION FOR COMPLAINTS FROM THE ALLEGED AGGRIEVED PARTIES

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The respondent, by his attorney, Robert J. Miller, states as follows

1. Upon information and belief, no posts of Mr. Knight have been blocked or deleted by the respondent.
2. Mr. Knight may not have standing to complain and may not have any personal (first-hand) knowledge of the facts.
3. The respondent is entitled to a complete outline of the complainants allegations before proceeding.
4. Mr. Knight suggests that “several are available to provide proof of having been blocked” He attached a list of parties.
5. Respondent’s counsel is unclear whether he has the right to subpoena their testimony at a deposition or even at a hearing.
6. Respondent’s counsel is unable to cross-examine pieces of paper or even compel testimony from the actual aggrieved parties.

Dated this 20<sup>th</sup> day of July 2020

*Robert J. Miller*

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Robert J. Miller  
Attorney for the Respondent  
227 S. Van Buren St.  
Green Bay, WI 54301  
SB No 1018487  
Phone 920 432 1900





# CITIZENS BLOCKED OR DELETED BY MR. VANDER LEEST

**Bethe Lane**  
He has deleted my comments before.   
2w Like Reply

**Jon Schultz**  
My deleted posts and block today would say otherwise.  
17m Like Reply Message

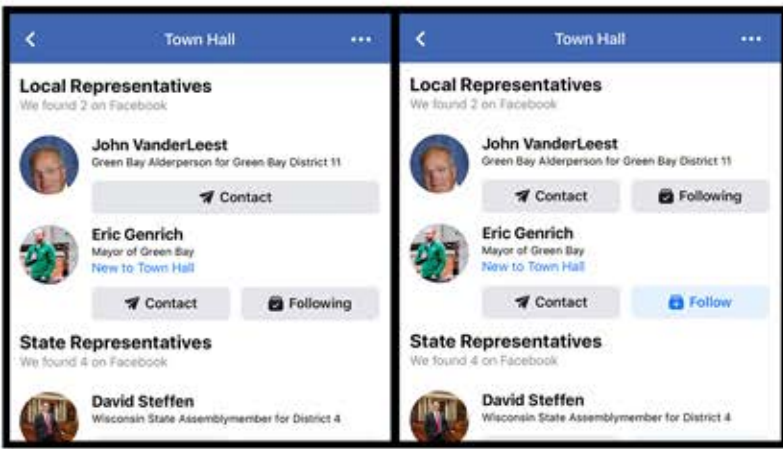
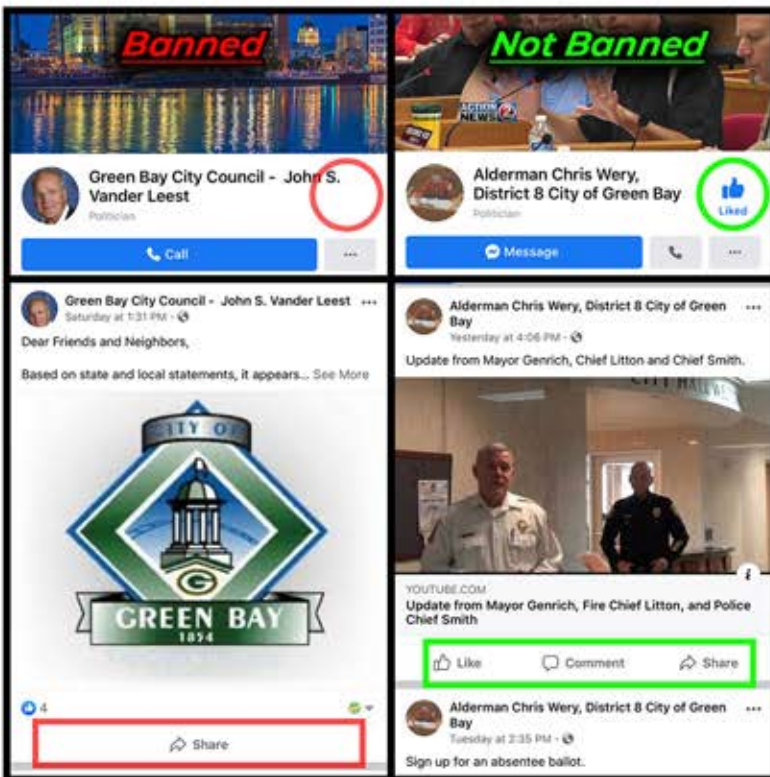
**Abbey Vizelka**  
I never paid much attention but just looked through and it seems he's not a fan of my comments either.  
2w Like Reply



**Jennifer Jacobson Carew**  
I got blocked during the Colburn Pool debate when I suggested that kids in his district would also benefit with a revamped pool. Now he includes that in his newsletter as a "neighborhood" improvement.  
17m **Sad** Reply   2

**Wendy J. Coriell** And I'm blocked now. Yippie!    
Like · Reply · 1d   4

# HOW TO TELL IF YOU HAVE BEEN BLOCKED ON FACEBOOK



Facebook offers a "Town Hall" feature that shows you your elected officials based on your street address. You then have the ability to follow those officials' pages and get their mailing address, email and phone #.

When blocked by Alderman Vander Leest (shown at left), no option to follow the page exists, preventing you from getting new content from the alderman in your news feed, and barring you from interacting with the conversation that happens there.

On the page, no "like" button will be present to follow the page, and no "like" or "comment" buttons will be available, cutting off all interaction with the page.

# ALDERMAN VANDER LEEST BLOCKS MARK ZAHN (AUG '17)

Green Bay City Council - John S. Vander Leest  
August 16, 2017 · 🌐


Green Bay is one of the highest taxed communities in NE Wisconsin. We spend over \$100 million dollars in our City budget. I'm working on the property tax issue through a Budget task force to hold property taxes down for the City of Green Bay.

We need to prioritize our current spending to devote more resources to road construction and maintenance. We don't need a wheel tax to tax you further.

The wheel tax is a bad idea and would have started at \$20 and continued to climb to +\$50 plus or more to solve the City's spending problems. That's what government does with a new tax, it would start small then grow larger over time.

I voted NO. We must do better for taxpayers. What do you think?

<http://www.greenbaypressgazette.com/.../proposed-g.../57016601/>



Proposed Green Bay wheel tax runs out of gas

Proposed Green Bay wheel tax

2 Comments 1 Share

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In August of 2017, Alderman Vander Leest posted a link to an article about the “wheel tax” that the city was debating at the time. He offered his stance on the matter and then concluded by asking “What do you think?” This is clearly an elected official seeking public comment on a city issue. I offered my input on the matter as a vocal supporter of the wheel tax. I have known people who have been devastated by special assessments of tens of thousands of dollars. Even though I knew he wouldn’t agree with my stance, I expected him to at least consider my opinion.

Mark David Zahn I strongly disagree with your vote on this issue. I would have happily paid \$20-50 per year rather than an unexpected several thousand dollars in one go. The whole “holding the line on property taxes” thing is bluster and farce. The city fire department uses my street as a shortcut route and the constant back and forth of those huge trucks badly beats up on our street and it takes forever for it to get patched up. I was really hoping this would have passed, but I already knew I couldn't count on your vote on this.

Like · Reply · 2y

Author

Green Bay City Council - John S. Vander Leest The city would jack up the \$20 wheel tax to cover more spending and waste. I believe it would be \$40 per vehicle or more in a few years. That's what government does.

Like · Reply · 2y

Shortly after his rebuttal, and before I had a chance to continue the debate, Alderman Vander Leest blocked me from participating in his Facebook page with no explanation or warning whatsoever - a ban that continued well into 2020. This prevented me from posting, commenting and “liking” his posts, and also prevented me from seeing his content in my regular news feed.

I strongly believe this act prevented me from exercising my First Amendment rights to participate in the exchange of ideas in this public forum, and also my right to petition my elected official on matters that affected me as a taxpayer in the City of Green Bay. While there are certainly other ways for one to contact their alderperson, the fact that Mr. Vander Leest solicits input from constituents and excludes those who have views that differ from his own inaccurately paints a picture of support, slanted to his own political preference. This act of ill-will from one’s own elected representative puts a chilling effect on speech and effectively closes the lines of communication. I have no trust that if I would make a phone call to Mr. Vander Leest about a simple issue like a pothole that he would even work on my behalf.

Mr. Vander Leest has said in the past, “I’m here to represent all the people of the district.” In a March 2020 newspaper profile, he stated, “I listen to residents of my area and know what is important to them.” I believe his actions clearly show he has no intention of “making the public feel welcome” or conveying to the public his “respect and appreciation for the public’s participation, input, and opinions” as the city’s own Code of Conduct for Elected Officials mandates. His conduct during his time in office demonstrates anything but fairness, openness and willingness to work for all he represents. I have no ill-will towards Mr. Vander Leest. On the contrary, I want nothing more than to have a fruitful relationship with my public officials and have the ability to have my viewpoints not only heard but genuinely considered. This has nothing to do with an election and I’m not looking to run him out of office. But I do expect more of my elected officials and I wish for him to take responsibility in this matter and commit to respecting *all* his constituents’ Constitutional rights.

-- Mark Zahn, 4/23/20



# CLAIM THAT PAGE IS A "CAMPAIGN PAGE"

After deleting user Jon Schultz's comments (and prior to blocking him) Alderman Vander Leest claimed that the page is a "campaign page," in an apparent attempt to portray the page as not being subject to First Amendment protections as an official page of an elected official.

On April 10, 2020, all 115 posts on Alderman Vander Leest's page were analyzed for campaign and non-campaign-related content. Only 25 posts, or 22% of the page's content (boxed in green), is related to his campaign or elections in which he was on the ballot. The remaining 78% of content contains posts reflective of an elected alderman:

*tax issues, the local business environment, COVID-19, public works, loose leaf pickups, city budgets, listening sessions, district crime alerts, seeking input on paid volunteerism by city employees, community events, public notices, advertising his official city e-mail and phone number, and asking for input on a proposal he authored that failed in council voting.*

POSTS ARCHIVED: <https://greenbay11th.org/2020/04/alderman-vander-leest-claims-city-facebook-page-is-for-campaign-as-excuse-to-block-citizen-comments/>

**CAMPAIGN POSTS**

**25 POSTS (22%)**

**NON-CAMPAIGN POSTS**

**90 POSTS (78%)**

The Office of Tarl Knight  
405-409 West Walnut Street  
Green Bay, WI 54303

Dear City Clerk Kris Teske,

I'm Tarl Knight. I live at 1341 Taylor Street #B, Green Bay, WI 54303. As you know, I'm a local Green Bay business and property owner and I also participated as a candidate for Green Bay's City Council. I am available both at (920) 562-5612 and tarlknight@tarlknight.com.

I'm writing with a formal complaint against Alderman John S. Vanderleest of the City of Green Bay's 11th District.

As a candidate for local office, I have had the opportunity to visit with several hundreds and thousands of constituents across the west side. Constituents always have various concerns, but none greater than their own alderperson not contacting them back, screening their calls and texts, and blocking them through their official media accounts, such as Facebook.

As public forums, citizens are provided the freedom of speech and the freedom of assembly to speak out and correspond with their alderperson. But over the last year, several constituents have come out with complaints about having been blocked or their posts and comments having been deleted. They have complained about being turned away by message or by phone if they admit to supporting another candidate for alderperson. And I, along with several others, have very serious concerns about the limiting of citizens' First Amendment freedoms, particularly by a local official.

Constituents have complained about being blocked or their posts and comments being deleted since 2016, several of whom continue to be blocked as of 2020. I trust an alderperson to advocate for their constituents, not turn them away and block them if they have concerns. But Alderman John S. Vanderleest continues to prove similar behaviour to be habitual.

The Supreme Court has confirmed social media as a "modern public forum", and as of last year, U.S. Circuit Court of Appeals affirmed public officials' Facebooks, Instagrams, and other media accounts to indeed constitute public forums, citing *Davison vs. Randall*:

"Public officials may not retaliate against speech they dislike by suppressing expression on social media."

Federal courts also stated:

"The suppression of critical commentary regarding elected officials is the quintessential form of viewpoint discrimination against which the First Amendment guards."

Alderman Vanderleest's public Facebook account titled "Green Bay City Council – John S. Vanderleest" is, for all intents and purposes, a public forum. Alderman Vanderleest has consistently and intentionally challenged constituents' freedoms of speech and assembly, not only unconstitutional behaviour but also un-American.

As a member of the City Council of the City of Green Bay, Alderman Vanderleest is mandated to abide by the City's Code of Conduct:

"No signs of partiality, prejudice, or disrespect should be evident on the part of individual Council members toward an individual participating in a public forum. Every effort should be made to be fair and impartial... The Council members are expected to demonstrate, both publicly and privately, their honesty and integrity, and to be an example of appropriate and ethical conduct. All Council members should convey to the public their respect and appreciation for the public's participation, input, and opinions."

Blocking opposing points of view at public forums automatically and categorically violates the City of Green Bay's Code of Conduct. But besides the Code of Conduct, the City's social media policy states:

"City social media sites shall adhere to applicable federal, state, and local laws. This includes any applicable open records requirements. Any content maintained in a social media format that is related to City business is public record. Content must be able to be managed, stored, and retrieved to comply with applicable laws."

Without their original posts and comments, constituents cannot provide the proper proof or information as to their specific content. But several are available to provide proof of having been blocked. I have attached a list of constituents available to testify with means to contact them. Please contact them if necessary.

Please also consider the formal complaint a warning of potential further litigation by the affected parties against Alderman John S. Vanderleest and the City of Green Bay.

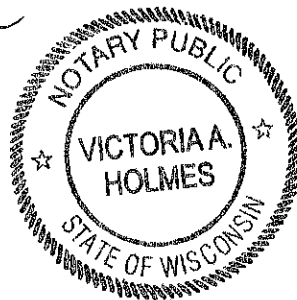
As per Section 8 of the City of Green Bay's Code of Conduct:

"Information contained in the complaint is true and correct, or the complainant has good reason to believe and does believe that the facts alleged are true and correct and that they constitute a violation of the Code."

Thank you for the attention to the matter.

Sincerely,

  
Tarl Knight



*Brown County*  
*21st of April, 2020*  
*Victoria A Holmes*  
*VICTORIA A HOLMES*  
*Exp: 03-28-2021*

(Attachment)

Mark Zahn, 1100 Chantel Street, Green Bay, WI 54304, (920) 403-0403  
Abbey Vizelka, 1009 Chantel Street, Green Bay, WI 54304, (920) 639-0150  
Bethe Lane, 1841 7th Street, Green Bay, WI 54304, (920) 362-4684  
Jon Schultz, 1755 Chateau Drive, Green Bay, WI 54304, (920) 819-1441  
Jennifer Jacobson Carew, 1696 Forest Glen Drive, Green Bay, WI 54304



Report to the  
Ethics Board  
of the City of Green Bay

**MEETING DATE**

October 7, 2020

**PREPARED BY**

**AGENDA ITEM # E.2**

Deliberations and action on the Motions filed in the matter of the Ethics Complaint against Alder John Vander Leest, filed by Mr. Tarl Knight, under the City of Green Bay Code of Conduct for Elected Officials.

The Board may convene in closed session pursuant to Sections 19.85(1)(a), Wis. Stats., for purposes of deliberating concerning a case which was the subject of any judicial or quasi-judicial trial or hearing before that governing body. The Board will thereafter reconvene in open session pursuant to Section 19.85(2), Wis. Stats., to take action on items discussed in closed session, if appropriate, and to consider the remainder of the agenda.

**BACKGROUND**

**RECOMMENDATION**

**FISCAL IMPACT**

**ATTACHMENTS**

None