

# How to Attack the In re Franklin Defenders MPT

Con Law + Statutory Interpretation | Objective Memo to the City Attorney | Flag Code, Preemption & Government Speech

## THE METHOD — KARI'S 6 STEPS, APPLIED

- 1. Read the task memo twice.** Delatorre wants a memo analyzing three issues SEPARATELY, each with its own conclusion, then an overall recommendation on whether the Council must adopt the Measure 15 ordinance. Watch the instruction that the relevant government action is the City's INITIAL DENIAL of FDE's request. No restatement of facts.
- 2. Work the Library, pull the rules.** Walker's Treatise §201(h) (shall/must = mandatory; should/may = precatory) is the master key. Then 4 U.S.C. §7(c),(e),(f) (Flag Code); Fr. State Gov. Code §436 and Fr. Military & Veterans' Code §617 (state flag rules); Fr. Const. Art. 4 §1 (initiative power); Mastai v. Ross (preemption of local ordinances); Shurtleff v. City of Boston (government speech).
- 3. Anchor the client and the fulcrum.** You advise the City. One interpretive move, mandatory vs. precatory, resolves Issues 1 and 2 in opposite directions, so read every operative verb.
- 4. Jot each case's loser as your yardstick.** Mastai (the term-limits initiative LOST, preempted by state law). Shurtleff (Boston LOST, its refusal was unconstitutional because the Plaza flag-raising was PRIVATE speech). You will distinguish Shurtleff on its facts.
- 5. Work the File, matching facts to each rule.** Note the flag flies on the center pole atop City Hall (always the U.S. flag); Rule 4.2 says City Hall is not part of the Plaza; Measure 15 passed 55-45 and commands the City to fly the Earth Flag above the U.S. flag.
- 6. Outline, then write.** One IRAC block per issue, separate conclusions, then an overall recommendation. Cite the Library authorities by name.

## ISSUE 1

### Does the U.S. Flag Code bar it?

Walker §201(h): 'shall'/'must' are mandatory; 'should'/'may' are precatory (permissive). Flag Code §7(c),(e),(f) each say the U.S. flag 'should' be at the peak and no other flag 'should' be above it.

## ATTACK SEQUENCE

1. Lead with the interpretive rule from Walker §201(h).
2. Show every operative Flag Code verb is 'should' → precatory.
3. Rebut the 'always' argument in §7(f): 'always' modifies a 'should,' it does not create a 'shall.'
4. Conclude: the Flag Code does NOT legally bar the display.

## HOW IT PLAYS OUT HERE

- **Takeaway.** The Flag Code is aspirational etiquette, not an enforceable prohibition.

*Conclude: the Flag Code does not bar flying the Earth Flag above the U.S. flag.*

## ISSUE 2

### Does Franklin law bar it? Is Measure 15 enforceable?

Fr. State Gov. Code §436 ('shall' be in the position of first honor) and Fr. Military & Veterans' Code §617 ('no other flag shall be placed above') are mandatory under Walker. *Mastai v. Ross*: a local ordinance is preempted where the state fully covers the field or shows a paramount state concern, and a local initiative cannot contradict state statute (Mancini); cities are creatures of the state.

#### ATTACK SEQUENCE

1. Apply Walker again: 'shall' in §436 and §617 = mandatory, so state law BARS flying any flag above the U.S. flag.
2. Turn to Measure 15: acknowledge Art. 4 §1 reserves the initiative power to the people.
3. But apply *Mastai/Mancini*: a local initiative that conflicts with mandatory state law is preempted and void.
4. Conclude: state law bars the display and Measure 15 is unenforceable.

#### HOW IT PLAYS OUT HERE

- ▶ **Preemption hook.** The state has expressly and mandatorily regulated the U.S. flag's position; Measure 15 commands the opposite.
- ▶ **Creatures of the state.** Voters may act only within the state's legal framework (Mancini); the initiative cannot override §617.

*Conclude: Franklin law bars the display; Measure 15 is preempted and unenforceable.*

#### ISSUE 3

### Does the First Amendment require allowing it?

*Shurtleff v. City of Boston*: viewpoint discrimination is barred in a forum for private speech, but the government may choose its own message when it speaks for itself. Government-speech inquiry (holistic): history of the expression, public perception of the speaker, and extent of government control.

#### ATTACK SEQUENCE

1. State the government-speech framework and its three indicia.
2. Distinguish *Shurtleff*: Boston had a HISTORY of private flags on the Plaza pole and NO control → private speech.
3. Apply the indicia here to the City Hall building pole: always the U.S. flag, no private-flag history, public perceives the City speaking, City fully controls → GOVERNMENT speech.
4. Add the forum point: Rule 4.2 says City Hall is not part of the Plaza, so the public-forum status of the Plaza does not entitle FDE to the City Hall pole.
5. Conclude: the First Amendment does not require the City to fly the flag above the U.S. flag.

#### HOW IT PLAYS OUT HERE

- ▶ **Key distinction.** Building flagpole (government speech) vs. Boston's Plaza flag-raising (private speech).
- ▶ **What FDE still gets.** It may display its flag at its Plaza event, just not above the U.S. flag on City Hall.

*Conclude: the First Amendment does not compel the City to allow the flag above the U.S. flag.*

#### OVERALL

### Advice to the City Council

Synthesize: the Flag Code does not bar it, but mandatory Franklin law does and preempts Measure 15; the First Amendment does not compel it.

#### ATTACK SEQUENCE

1. State the overall recommendation clearly: the Council is not required to adopt the ordinance.
2. Explain the controlling reason: the ordinance conflicts with mandatory state law and is unenforceable.

*Overall: advise the Council that it need not, and should not, adopt the Measure 15 ordinance.*

#### TRAPS TO AVOID

- ▶ **Analyze each issue separately.** The memo demands a separate conclusion for each of the three issues, even though Issue 2 is dispositive.
- ▶ **Do not confuse Plaza with City Hall.** The Plaza is a public forum, but Rule 4.2 excludes City Hall itself; FDE's request targets the City Hall building pole.
- ▶ **Watch the operative verb.** The whole Flag Code vs. state-law split turns on 'should' versus 'shall' (Walker §201(h)).
- ▶ **Cite the Library by name.** Use Walker, the Flag Code sections, §436/§617, Mastai, and Shurtleff, not outside law.