

CITY OF WHITNEY

OFFICE OF THE CITY ATTORNEY

Municipal Building Annex
130 W. Fifth Street
Whitney, Franklin 33875

MEMORANDUM

To: Examinee
From: Maria Delatorre, City Attorney
Date: February 24, 2026
Re: Measure 15

The City Council has requested our opinion as to whether it must adopt a new city ordinance that was approved by a ballot initiative.

As you know, the City of Whitney maintains three flagpoles on the City Hall building itself; the flagpole in the center is 30 feet high, and the two on either side of it are 20 feet high. The flag of the United States is always flown on the center (highest) flagpole. The flags of the State of Franklin and of the City of Whitney are flown on the lower flagpoles.

Franklin Defenders of the Earth (FDE) is a not-for-profit organization that is devoted to ecology and the well-being of the planet. Last year, they submitted an application for a permit to hold an event on City Hall Plaza on the upcoming April 22, "Earth Day," celebrating the day. City Hall Plaza is an open space in front of the City Hall building that the City makes available to the public for events. The City routinely allows such events, treating the Plaza as a public forum, subject to standard regulations and safety and security measures. The permit was granted.

FDE then notified the City that, as part of its event, it would hoist the "Earth Flag," symbolizing Earth Day and FDE's political viewpoint, above the United States flag on the center flagpole atop the City Hall building itself. The City Services Administration, the agency that grants such permits, informed FDE that it would not allow any flag to be flown above the United States flag.

FDE then launched a ballot initiative ("Measure 15") by which the City's electorate would be asked to vote to approve its request and require the City Council to adopt a local

← The City ALWAYS flies the U.S. flag on the center City Hall pole → supports government speech (Issue 3).

← The Plaza is a public forum, but note Rule 4.2: City Hall itself is not the Plaza (Issue 3).

← FDE targets the City Hall BUILDING pole, not merely the Plaza (Issue 3).

← The City's INITIAL DENIAL, the government action to analyze.

ordinance requiring the City to fly the Earth Flag above the national flag; the initiative met all local requirements. The City's voters approved Measure 15 by a vote of 55% to 45%.

Given the passage of Measure 15, the City Council has now requested our opinion as to whether it must adopt the ordinance as described in the ballot initiative.

Please prepare a memorandum for me separately analyzing the issues noted below, even if you believe that one or more is dispositive. For each issue, state and explain your conclusion as to that specific issue. After you have analyzed each issue separately, state and explain your overall conclusion of what advice to give to the City Council as to whether it must adopt the ordinance. Note that the relevant governmental action by the City to be considered in your analysis is its initial denial of FDE's request.

(1) Does the United States Flag Code bar the flying of the Earth Flag above the United States flag?

(2) Does Franklin state law bar the flying of the Earth Flag above the United States flag? Is Measure 15 enforceable under Franklin state law?

(3) Does the First Amendment to the United States Constitution require that FDE be allowed to fly the Earth Flag above the United States flag?

Do not include a restatement of the facts in your memorandum, but you should refer to relevant facts in presenting your analysis.

← Analyze the City's INITIAL DENIAL of FDE's request, not Measure 15's passage.

← Issue 1: the Flag Code (precatory).

← Issue 2: Franklin law (mandatory) + Measure 15 enforceability.

← Issue 3: First Amendment / government speech.

CITY SERVICES ADMINISTRATION

CITY OF WHITNEY

Rules and Regulations – Events on City Hall Plaza

[Rules regarding permissible events, permit requirements, security and safety issues, etc., omitted]

4.0 Displays

4.1 Permit holders may temporarily erect kiosks and displays, including posters, statues, product demonstrations, and the like, on City Hall Plaza for the duration of the event, subject to conformity with the City fire code and safety and security concerns.

4.2 No event activities shall occur on or in City Hall itself. . . . City Hall is not part of City Hall Plaza.

- ☐ ← Confirms the Plaza / City Hall distinction.
- ☐ ← Rule 4.2: City Hall is NOT the Plaza; the public-forum status does not reach the City Hall pole (Issue 3).

FULL TEXT OF MEASURE 15

Purpose of Measure 15

The voters of the City of Whitney require that the Whitney City Council enact an ordinance stating that it shall be the official policy and practice of the City of Whitney on Earth Day (April 22) to fly the Earth Flag at the top of the tallest city-owned flagpole on City Hall, above the flag of the United States of America, the Franklin flag, the City flag, and any other flags that the City may choose to display.

The reasons for the proposed action are as follows:

Logic and Symbolism

The American flag flies at the top of the highest flagpole on the City Hall building. But isn't the well-being of the entire Earth more important than merely national considerations? Flying the Earth Flag above all others—including the United States flag—will recognize the importance of our planet's health above all other considerations. We should at least do so on the one day a year when the primacy of the Earth is celebrated—Earth Day.

Patriotism

It is not unpatriotic to fly the Earth Flag above the United States flag. After all, our country is part of the iconic image reproduced on the Earth Flag—the "Blue Marble" photograph of the Earth taken December 7, 1972, by the Apollo 17 spacecraft crew. And taking this action will show how our country values the well-being of the Earth.

Priorities

Our world is threatened by challenges such as climate change and nuclear war. Our focus should be shifted from narrow national interests to the safety and health of the entire planet. Flying the Earth Flag above all others will demonstrate our commitment to meeting these challenges.

Stabilizing the climate and advancing peace require that we meet in good faith with other nations and develop a positive plan of action. We can proudly negotiate as Americans, but we must prioritize the overall well-being of our planet and be willing to make political and economic concessions.

Ordinance to be Adopted by the City Council

The people of the City of Whitney do ordain as follows:

On every Earth Day (April 22), it shall be the official policy and practice of the City of Whitney to fly the Earth Flag at the top of the tallest city-owned flagpole on City Hall, above the flag of the United States of America and any other flags that the City may choose to display.

For the purpose of this measure, the Earth Flag shall be defined as the flag featuring the "Blue Marble" image of Earth, photographed from the Apollo 17 spacecraft in 1972.

- ☐ ← A local initiative ordinance, subject to preemption (Mastai).
- ☐ ← Measure 15 commands flying the Earth Flag ABOVE the U.S. flag, the direct conflict with state law.

WALKER'S TREATISE ON LEGISLATION

§ 201 Principles of Statutory Interpretation

...

(h) The use of terms such as "shall" or "must," and similar terms, make the action set forth in the legislation mandatory. The use of terms such as "should" or "may," and similar terms, sometimes called "precatory" terms, make the action set forth in the legislation permissive, but not mandatory.

█ ← 'shall'/'must' = MANDATORY. This drives Issue 2.

█ ← 'should'/'may' = PRECATORY (permissive, not mandatory). This drives Issue 1.

UNITED STATES FLAG CODE

4 U.S.C. § 1 *et seq.*

§ 7 Position and manner of display

The flag, when carried in a procession with another flag or flags, should be either on the marching right; that is, the flag's own right, or, if there is a line of other flags, in front of the center of that line.

. . .

(c) No other flag or pennant should be placed above or, if on the same level, to the right of the flag of the United States of America, except during church services conducted by naval chaplains at sea, when the church pennant may be flown above the flag during church services for the personnel of the Navy. . . .

. . .

(e) The flag of the United States of America should be at the center and at the highest point of the group when a number of flags of States or localities or pennants of societies are grouped and displayed from staffs.

(f) When flags of States, cities, or localities, or pennants of societies are flown on the same halyard [*] with the flag of the United States, the latter should always be at the peak. When the flags are flown from adjacent staffs, the flag of the United States should be hoisted first and lowered last. No such flag or pennant may be placed above the flag of the United States or to the United States flag's right.

[* Halyard: a rope or line for hoisting and lowering something (such as a sail or flag)].

☐ ← §7(c): 'should' = precatory, so the Flag Code does NOT bar the display (Issue 1).

☐ ← §7(f): 'should always' is still precatory; 'always' does not make it mandatory.

FRANKLIN STATE GOVERNMENT CODE

TITLE 1 - GENERAL

DIVISION 2 - STATE SEAL, FLAG, AND EMBLEMS

CHAPTER 3 - Display of Flags

...

§ 436 Where the national and state flags are displayed, they shall be of the same size. If only one flagpole is used, the national flag shall be above the state flag and the state flag shall be hung in such manner as not to interfere with any part of the national flag. At all times **the national flag shall be placed in the position of first honor.**

← §436: 'shall' = mandatory first honor for the U.S. flag (Issue 2).

FRANKLIN MILITARY AND VETERANS' CODE

...

§ 617 **No other flag or pennant shall be placed above,** or if on the same level, to the right of, the flag of the United States of America, except during church services, when the church flag may be flown.

← §617: 'shall' = mandatory bar on any flag above the U.S. flag (Issue 2).

FRANKLIN STATE CONSTITUTION

...

Article 4, section 1. The legislative power of this State is vested in the Franklin Legislature, which consists of the Senate and Assembly, but **the people reserve to themselves the powers of initiative and referendum.**

← Art. 4 §1 reserves the initiative power, BUT a local initiative cannot override state statute (Mastai).

Mastai v. Ross
Franklin Court of Appeal (2004)

In 2003, defendant and appellee Emily Ross won reelection to a third consecutive term on the Lakeville City Council. A city ordinance limits council members to two consecutive terms. Plaintiff and appellant Warren Mastai contested the election, seeking declaratory and injunctive relief to invalidate Ross's election. The trial court ruled that the ordinance was invalid as preempted by state law. Mastai appeals. We affirm.

DISCUSSION

A local ordinance is preempted by state law if "the subject matter has been so fully covered by general law as to clearly indicate that it has become exclusively a matter of state concern," *In re Hubbell* (Fr. Sup. Ct. 1964), or if "the subject matter has been partially covered by general law couched in such terms as to indicate a paramount state concern [that] will not tolerate further . . . local action." *Jefferson School Board v. County of Jefferson* (Fr. Sup. Ct. 1980).

Lakeville's local ordinance limits a person's eligibility for city council to two successive terms. The city's voters adopted the ordinance by ballot initiative after several years of debate over the efficacy of term limits. We note, however, that numerous Franklin State Government Code provisions also affect eligibility for local offices in a city such as Lakeville. For example, Franklin state law provides that a person is not eligible to hold office as council member unless he or she is an elector at the time of assuming office and was a registered voter of the city at the time nomination papers were issued to the candidate. [Citation omitted.] We must determine whether, by adopting these State Government Code provisions, the State Legislature has either fully occupied the field or so fully covered it as to indicate a paramount state concern. *In re Hubbell, supra; Jefferson School Board, supra.*

A similar statute relating to eligibility of county elected officers has been held to constitute evidence of the Legislature's intent to exercise statewide control over the qualifications of elected county officers. *Elder v. Board of Supervisors* (Fr. Sup. Ct. 1979). To support his argument that the ordinance is not preempted by state law, Mastai attempts to distinguish *Elder* on the ground that the local governmental entity in *Elder* was a county

← Preemption standard: field fully covered OR a paramount state concern (Mastai).

← The paramount-state-concern branch of preemption.

and Lakeville is a city. This distinction is not pertinent in this case. The State Government Code establishes that the Legislature intends to preempt *all* local regulation of eligibility for election to local governing bodies, whether they are counties or cities.

Mastai also contends that the city is a distinct, individual entity and is not a political subdivision of the state. He is incorrect. "Cities are simply creatures of the state" and as such are parts of the machinery by which the state conducts its governmental affairs. . . . [Voters] have the right to pass upon the composition of their local government *only within the legal framework established by the constitution of the state and the laws enacted by the Legislature.*" *Mancini v. City of Greenwich* (Fr. Sup. Ct. 1965) (emphasis added). Indeed, local governments do not possess even federal constitutional rights against the state that created them. *E.g., Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907).

Finally, Mastai argues that the local ordinance must prevail, as it was adopted by ballot initiative as referenced in Article 4, section 1 of the Franklin State Constitution. But, as *Mancini* teaches, no matter the source of the *local* regulation, whether by initiative in a city or county, *it cannot be contrary to the laws adopted by the state legislature.*

The trial court correctly found that the city ordinance was preempted by state law. Affirmed.

☐ ← Cities are creatures of the state (Mancini).

☐ ← A local initiative cannot contradict state statute → Measure 15 is preempted (Issue 2).

when does government-public engagement transmit the government's own message? And when does it instead create a forum for the expression of private speakers' views?

In answering these questions, we conduct a holistic inquiry designed to determine whether the government intends to speak for itself or to regulate private expression. Our review is not mechanical; it is driven by a case's context rather than the rote application of rigid factors. Our past cases have looked to several types of evidence to guide the analysis, including **the history of the expression at issue; the public's likely perception** as to who (the government or a private person) is speaking; and the extent to which the government has **actively shaped or controlled the expression**. [Citation omitted.]

Considering these indicia in *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), we held that the messages of permanent monuments in a public park constituted government speech, even when the monuments were privately funded and donated. In *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015), we explained that license plate designs proposed by private groups also amounted to government speech because, among other reasons, the State that issued the plates "maintain[ed] direct control over the messages conveyed" by actively reviewing designs and rejecting over a dozen proposals.

[Applying these factors to the case at hand, the Court noted that for many years, Boston has allowed groups to hold ceremonies on the Plaza, during which they hoisted a flag of their own choosing in place of the city flag. The Court stated that, as far as the history of the expression at issue is concerned, while the flags flying on the Plaza usually represent the nation, state, and city, this is not always the case. Thus, as far as the public perception is concerned, the flag at issue would not be perceived as a government speech, as it would be associated with Shurtleff's group. And, as to the extent the city actively controlled the flag raisings and the messages the flags sent, the answer is not at all. The Court concluded that Boston was not speaking for itself in allowing private flags to be flown, noting that it could have made clear that **it wished to speak for itself**. As to the Establishment Clause argument,] [w]hen a government does not speak for itself, it may not exclude speech based on "religious viewpoint"; doing so "constitutes impermissible viewpoint discrimination." [Citation omitted.]

- ← Factor 2: public perception. A flag atop City Hall reads as the City's own message.
- ← Gov-speech factor 1: history. Here the City Hall pole has always flown the U.S. flag.
- ← Factor 3: control. The City fully controls its City Hall pole.

- ← A city CAN reserve its own pole for its own message, which Whitney does on the City Hall pole.

For the foregoing reasons, we conclude that Boston's flag-raising program does not express government speech. As a result, the city's refusal to let Shurtleff and Camp Constitution fly their flag based on its religious viewpoint violated the Free Speech Clause of the First Amendment.

[Concurring opinions omitted.]

☐ ← Shurtleff's holding: Boston's PLAZA program was PRIVATE speech. Distinguish, our City Hall pole is government speech.