

ANSWER TO MPT 2

TO: Maria Delatorre, City Attorney

FROM: Examine

DATE: February 26, 2026

RE: Measure 15

MEMORANDUM

STATEMENT OF FACTS

[omitted]

LEGAL ANALYSIS

I. The issue is whether the United States Flag Code bars the flying of the Earth Flag above the United States Flag.

Statutes should be interpreted in the following manner: (i) "shall" or "must" means the action is mandatory; (ii) "should" or "may" means the action is permissive (i.e., not mandatory). Walker's Treatise on Legislation § 201(h). Under the United States Flag Code, a flag should not be placed above, or on the same level, to the right of the United States flag, except during naval chaplains' church services at sea. 4 U.S.C. § 7(c). The United States flag should be placed at the center, highest point of a group of flags. 4 U.S.C. § 7(e).

Here, as an initial matter, the United States Flag Code makes the provisions set forth therein permissive, rather than mandatory, because it uses "should" rather than "shall" or "must." The Franklin Defenders of Earth (herein "FDE") wishes to fly the Earth Flag above the United States flag during its Earth Day celebration hosted at City Hall Plaza. The Earth Day flag is permitted to fly over the United States flag under the U.S. Code because the Code does not use mandatory language, rather it states that the United States flag "should" not be placed below, or on the same level as, another flag. Thus, the United States Flag Code permits flying another flag above, or at the same level as, the United States flag.

Therefore, the United States Flag Code does not bar the flying of the Earth Flag above the United States flag.

II. The issue is whether Franklin state law bars flying the Earth Flag above the United States Flag, and whether Measure 15 is enforceable under Franklin state law.

A. Franklin State Law Barring Action

See statute interpretation rule above. Under Franklin law, the United States flag shall be placed in the position of first honor. Fr. St. Gov. Code § 436. No other flag shall be placed on the same level, or above, to the right of the United States flag, except during church services. Fr. Military and Veterans Code § 617.

Here, as an initial matter, Franklin law makes the provisions regarding the United States flag position mandatory because it uses "shall" rather than "should" or "may." Under this strict mandatory provision, the Earth Day flag cannot be permitted to fly above the United States flag because Franklin law mandates that the United States Flag be placed in the position of first honor.

Therefore, Franklin state law bars flying the Earth Flag above the United States Flag.

B. Measure 15 Enforceability

Under Franklin law, the legislative power is vested in the Franklin Legislature (i.e., the Senate and Assembly). Fr. Const. Art. 4 § 1. However, the people reserve the powers of initiative and referendum. Fr. Const. Art. 4 § 1. If the subject matter of a local ordinance has been so fully covered by general law as to clearly indicate that it has become exclusively a matter of state concern, then the local ordinance is preempted by state law. *Mastai v. Ross* (Fr. Ct. App. 2004); *In re Hubbell* (Fr. Sup. Ct. 1964). Similarly, if the subject matter of the local ordinance 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, then the local ordinance is preempted by state law. *Mastai; Jefferson School Board v. County of Jefferson* (Fr. Sup. Ct. 1980). For example, a local ordinance that sets term limits for city council is preempted by State Code that affects eligibility for local office, even though the Code does not contain an identical provision, because State Code evidenced the State's intent to exercise statewide control over election candidate qualifications and eligibility. *Mastai; Elder v. Board of Supervisors* (Fr. Sup. Ct. 1979). It is irrelevant as to whether the local ordinance is a county or city because cities are simply creatures of the state. *Mastai; Mancini v. City of Greenwich* (Fr. Sup. Ct. 1965). Thus, voters have the right to pass upon the composition of their local governments only within the State's constitutional legal framework and the laws enacted by the State's Legislature. *Mastai; Mancini*. Even local governments do not possess federal constitutional rights against the state that created them. *Mastai; Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907).

Here, Franklin state law clearly covers the position of the United States flag because it expressly discusses the mandatory positioning of the United States flag. While the Franklin law does not expressly cover flying the Earth Flag, it arguably still preempts the proposed local ordinance because Franklin partially covers the subject matter of flag positioning to the extent that Franklin has the intent to exercise statewide control over flag positioning, especially in relation to the United States flag. Although the voters reserve the powers of initiative and referendum through Measure 15, Measure 15 must fit into Franklin's constitutional framework and laws. *Mastai; Mancini*. Measure 15 clearly does not do so because of the preemption.

Therefore, Measure 15 is not enforceable under Franklin state law.

III. The issue is whether the First Amendment to the United States Constitution requires that FDE be allowed to fly the Earth Flag above the United States flag.

If the government encourages diverse expression, the First Amendment prevents it from discriminating against speakers based on their viewpoint. *Shurtleff v. City of Boston*, 596 U.S. 243 (2022). For example, a city may encourage diverse expression by making city property, such as a plaza, available to the public for events, meaning the property is a public forum. *Id.* The question is whether there is government speech because the First Amendment does not prevent the government from declining to express a view. *Id.* Whether there is government speech or private speech may blur when the government invites people into a program, and courts must look at the totality of the circumstances on a case-by-case basis to determine which category the speech falls into. *Id.* Factors a court may look at include the history of the expression at issue, the public's likely perception as to the speaker, and the extent to which the government actively shaped or controlled the expression. *Id.* Courts have held that permanent monuments in public parks are government speech, even if privately funded. *Id.*; *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015). Similarly, courts have held license plate designs to be government speech because the government maintained direct control over the message conveyance by actively reviewing and rejecting designs. *Shurtleff*. In *Shurtleff*, the city's refusal to allow a group to fly their flag was unconstitutional because (i) the city allowed groups to hold ceremonies on its plaza, during which they hoisted their own flag; (ii) while the flags usually represented the nation, state, and city, it was not always the case, meaning the flag would not be perceived as government speech; and (iii) the city did not control the flag raisings or the flags' messages.

Here, Measure 15 itself does not comply with the Rules and Regulations because no event activities are to occur on City Hall itself, which Measure 15 calls the flag raising to take place on. However, if Whitney has allowed other groups to hoist flags atop of City Hall in the past, then Whitney must allow FDE to do so, but Whitney is not constitutionally required to allow FDE to hoist the Earth Flag above the United States flag under the First Amendment. Specifically, Whitney has made the City Hall Plaza a public forum because

it allows groups to hold events there, subject to permit requirements, and security and safety issues. Rules and Regulations - Events on City Hall Plaza. Further, although the flags typically represent the United States, Franklin, and Whitney, that is not always the case assuming that Whitney allows other groups to raise flags during their events, meaning that the public would not view the expression as governmental. Further, although Whitney controls some aspects of the events, these aspects do not relate to the expression itself because it is regulating security and safety issues, among other things. Thus, FDE has the right to display the flag under the First Amendment but not necessarily above the United States flag in violation of Franklin law.

Therefore, the First Amendment to the United States Constitution does not require that FDE be allowed to fly the Earth Flag above the United States flag, only that the flag must be allowed during the event.

CONCLUSION

Therefore, the United States Flag Code does not bar the flying of the Earth Flag above the United States flag because the relevant provisions use permissive, rather than mandatory, language regarding the United States flag position. However, Franklin state law bars flying the Earth Flag above the United States Flag because the relevant provisions use mandatory language regarding the United States flag position. Thus, Measure 15 is not enforceable under Franklin law because the state law preempts the ordinance. Lastly, the First Amendment to the United States Constitution does not require that FDE be allowed to fly the Earth Flag above the United States flag because the First Amendment only guarantees the right to fly the flag not in regard to position.

ANSWER TO MPT 2

To: Maria Delatorre

From: Examinee

Date: February 26, 2026

Re: Measure 15.

Memorandum

Pursuant to the February 24 memo, please see each requested question analyzed below. In addition, this memorandum concludes with the overall recommended advice to be provided to the City Council regarding whether they must accept the ordinance as recommended in Measure 15.

(1) The United States Flag Code Likely Does Not bar the Flying of the Earth Flag above the U.S. Flag.

The first issue is whether the U.S. Flag Code bars the flying of the Earth Flag above the U.S. Flag. The applicable laws in the U.S. Flag Code (4 U.S.C Section 7) list a number of practices with regard to the U.S. flag, so statutory interpretation is key to understanding the rules. As explained in Walker's Treatise on Legislation, Section 201 (Principles of Statutory Interpretation), section (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." As such, in order to understand whether the Flag code is mandatory or permissive, these such words are key.

As such, it is likely that the statute will be considered precatory/permissive and therefore would not serve as a complete bar of the flying of the Earth Flag. Throughout the statute, the language used is clearly precatory - subsections (c), (e) and (f) each contain the operative word "should". Each of these subsections proscribe directions. For example, subsection (c) states that "no other flag...*should* be placed above or, if on the same level, to the right of the flag of the United States...." Further, section (e) states that the flag "*should be...at the highest point of the group when a number of flags...or pennants of societies are grouped and displayed from staffs.*" Section (f) finally states that "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. Such language indicates that these directions, though recommended, are not mandatory - there is no reason why, if the legislators wanted to make such rules mandatory, they wouldn't have used "shall" or "must" in place of each "should." Though one may argue that the use of

"always" following "should" imply a mandatory reading, this is not persuasive, as there is again no reason why, if this was intended to be mandatory, the rules wouldn't have said "shall always". Legislative intent can be gleaned from the specific words chosen, and in this case, the words chosen express highly recommended, but still permissive, directions regarding the flag. As such, these rules do not serve to bar the flying of the Earth flag above the U.S. flag.

(2) Franklin State Law likely bars the Flying of the Earth Flag above the U.S. Flag, and Measure 15 is/is not enforceable under Franklin State Law.

The second issue is whether Franklin State Law bars the flying of the Earth flag above the U.S. Flag, and separately, whether Measure 15 itself is enforceable under Franklin State Law.

a. Franklin State Law Likely Bars the Flying of the Earth Flag above the U.S. Flag.

Similar to the topic discussed in Section (1), statutory interpretation of the applicable Franklin state laws will be key in understanding whether such laws bar the Earth Flag flying above the U.S. Flag. The statutory interpretation principles discussed in Section (1) are equally applicable in this case. However, here, we likely arrive at the opposite conclusion, because the words used are mandatory in nature. For example, Section 436, though focusing on national and state flags being displayed (rather than flags of societies), states that "at all times the national flag shall be placed in the position of first honor." In addition, Section 617 of the Military and Veterans' Code states that "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", subject to certain exceptions. The consistent use of the word "shall" indicates, as explained in Section (1), that such actions are mandatory.

It is possible that one could argue that these rules are inapplicable to the current case at hand, given Section 436 is discussing national v. state flags, and Section 617 involves military and veterans, both of which do not seem related to this case (as discussed below). This is not likely to be persuasive, because the language still indicates a mandatory intent, and there is nothing in the text that indicates such rule should only be applied in only certain cases. This is especially true of Section 617, which has no language implying that it only applies to military and veteran situations, despite appearing in the military and veterans code.

b. Measure 15 is not enforceable under Franklin State Law.

The second sub issue is whether the ordinance itself is enforceable under Franklin State Law. The Franklin State Constitution states in Article 4, Section 1, that the "legislative power of the State is vested in the Franklin Legislature...but the people reserve to themselves the powers of initiative and referendum." As such, the act of passing an

ordinance is valid, but there is a closer question here: whether the ordinance is preempted by any other state law. The Franklin Court of Appeals provided certain rules in *Mastai v. Ross*, where the local ordinance in Lakeville regarding term limits of council members was found to be invalid. The court stated that 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'...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" (*Mastai v. Ross*). The court reasoned that, because the State Government Code contained "numerous...provisions also affect[ing] eligibility for local offices in a city such as Lakeville" and the court noted that "a similar statute relating to the 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" (*Id.*). Mastai's attempt to argue that because Lakeville was a city, not a county, these preemption rules don't apply was not persuasive. Lastly, the court noted that "no matter the source of the local regulation, whether by initiative in a city or a county, it cannot be contrary to the laws adopted by the state legislature.

In this case, it seems likely that the state laws will be determined to preempt the local ordinances. As discussed above, the two relevant laws that are cited contain mandatory language. Though Section 436 primarily focused on how the national flag should be flown vis-a-vis a state flag, the legislature did indeed state that "at all times the national flag shall be placed in the position of first honor." They did not indicate that this was only with regard to state flags. Further, it is likely that the focus on state flags is only because this appears in the state flag section of the state government code (it's hard to imagine that there would be another section about flag placement). As such, it seems likely that the state intended for such laws to apply statewide. Section 617 is more dispositive here, as it states broad that "no other flag or pennant shall be place above" the United States flags, except for one unrelated exception. As such, though the ordinance was validly approved by the people pursuant to the State Constitution, it seems likely that such ordinance will be preempted by Franklin State Law.

(3) The First Amendment to the U.S. Constitution requires/does not require that FDE be allowed to fly the Earth Flag above the U.S. flag.

The final issue in this case is whether the first amendment of the U.S. Constitution requires that FDE be allowed to fly the Earth Flag above the U.S. flag. The primary focus here will be whether the raising of the flag itself constitutes government speech, as the First amendment does not compel the government to make any specific speech. In *Shurtleff v. City of Boston*, the U.S. Supreme Court determined that, in order to determine whether something is government speech, the court must "conduct a holistic inquiry designed to determine whether the government intends to speak for itself or to regulate private expression." They noted specific factors, such as the history of the expression at

issue, the public's likely perception as to who is speaking...and the extent to which the government has actively shaped or controlled the expression." They further noted that, even if something (such as a monument) is privately funded, it may still be considered government speech if the government maintains control over the monuments. (*Id.*). If something is considered government speech (as opposed to private speech), then there is no first amendment protection, as the government has the right to "choose what to say and what not to say" (*Id.*).

In this case, it seems likely that this would be considered government speech and therefore would not be protected under the first amendment. First, the flags themselves are flown atop City Hall, not in the City Hall Plaza where FDE intends to celebrate Earth Day. Per the City of Whitney Rules and Regulations - Events on City Hall Plaza, Section 4.2, "no event activities shall occur on or in City Hall itself. City Hall is not part of City Hall Plaza. As such, onlookers would see two separate events: the Earth Day event in City Hall Plaza, hosted by FDE, and the flag flying atop City Hall. As a private organization, it seems unlikely that one would expect them to be allowed to fly the flag atop city hall - as such, it's likely one would think it is City Hall specifically supporting the event, and therefore, asserting some implied speech agreeing with the Earth Day viewpoints. This is distinct from the *Shurtleff* case, where it was determined that, because Boston has allowed groups to hoist their own flags historically, it was unlikely to be considered government speech. Here, however, the flag of the United States is always flown in the center, with the state and city flags below. There is nothing that indicates that the city has allowed other groups who host events in the plaza to fly their flags atop City Hall. As such, the holding in *Shurtleff* is not as applicable. Further, the reasons and purposes provided by the writers of the measure itself support the idea that the flag flying was intended to be seen as government speech. The intent is to fly the flag to express certain viewpoints about the importance of the earth and the priorities to fight climate change. If the FDE was truly only intending to speak for itself, it should suffice to temporarily erect kiosks, including posters and statutes, as allowed under the Rules and Regulations. However, here, the intent was likely to have the city make certain implied statements.

(4) Final Opinion

Overall, I suggest that we advise City Council that the ordinance is likely invalid under state law, and in the alternative, preempted by state law. Further, there does not seem to be any requirement under the First amendment that the flag be flown, as this is likely to be considered government speech. As such, the city council does not need to adopt the ordinance.