

Question MPT-2 – February 2026 – Selected Answer 1

CITY OF WHITNEY

OFFICE OF THE CITY ATTORNEY

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

To: Maria Delatorre, City Attorney

From: Examinee

Date: February 24, 2026

Re: Measure 15

You have asked me to write a memo analyzing whether (1) the United States Flag Code bar the flying of the Earth Flag above the United States flag, (2) whether Franklin state law bar the flying of the Earth Flag above the United States flag and if the Measure 15 is enforceable under Franklin State law, and (3) whether the First Amendment to the United States Constitution requires that Franklin Defenders of the Earth [FDE] be allowed to fly the Earth Flag above the United States flag. This memo will analyze my conclusions to each issue, as well as the advice to give the City Counsel as to whether they should adopt the ordinance. This memo will not include a restatement of fact, but will analyze relevant facts to present my analysis. My opinion is below.

I. The United States Flag Code will not bar the flying of the Earth Flag above the United States flag because the language of the statute is permissive and not mandatory.

Language of a statute is deemed mandatory when the words appear as "must" or "shall", while the language becomes permissive when the words appear as "should" or "may". **Walker's Treatise on Legislation § 201 (h).**

Under the **United States Flag Code 4 U.S.C. § 1 *et seq.* (c)**, no other flag or pennant should be placed above or 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.

Under the **United States Flag Code 4 U.S.C. § 1 *et seq.* (f)**, the United States flag should always be at the highest peak when flags are flown on the same halyard. Under the same code, the United States flag should be hoisted first and lowered last, and no flag or pennant may be placed above the United States flag.

Under **United States Flag Code 4 U.S.C. § 1 *et seq.* (e)**, the flag of the United States 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 society are grouped and displayed around the staff.

Here, the United States statute sets forth permissive regulations as to the placements of flags near the United States flags because of the words "should".

Here, the City of Whitney is not required to follow the **United States Flag Code 4 U.S.C. § 1 *et seq.* (e)**, but is permissive. Here, in the City of Whitney, the United States flag is in the center at the highest peak compared to the other two flag poles. However, because it is not mandatory to have other flags above, below, or adjacent to, the Earth Day flag could fly above the United States flag.

Moreover, the term "should" have the flag in the center is permissive and not required. **Walker's Treatise on Legislation § 201 (h)**. Thus, the Earth Day flag could also fly in the center pole in the City of Whitney because the **United States Flag Code 4 U.S.C. § 1 *et seq.* (e)**, is also permissive in language.

Therefore, the United State Flag Code will not bar the flying of the Earth Flag above the United States flag or adjacent to at the same level or above because the statute is not mandatory due to the use of permissive language and therefore does not prohibit other flags from being placed above the United States flag.

II. The Franklin State Law will bar the flying of the Earth Day flag above the United States Flag and the Measure 15 ordinance will not be enforceable under the Franklin State Law because of preemption.

(a) Franklin State Law will bar the flying of the Earth Day Flag above the United States because the Franklin State Government prohibits the flying of state, localities or pennant flags to fly above the United States flag.

In *Mastia v. Ross*, the court affirmed that a local ordinance is preempted by state law if "the subject matter has been so fully covered by general law as to clearly indicated

that is has become exclusively a matter of state concern. *Mastia v. Ross quoting In re Hubbell (Fr. Sup. Ct. 1964)*.

Under the **Franklin State Government Code § 436**, the national and state flags shall be same size, and the national flag shall be above the state flag while the state flag shall be hung in such a manner as to not interfere with any part of the national flag. At all times the national flag shall be placed in a position of first honor. Additionally, under the **Franklin State Government 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.

Like in *Mastia*, where the state law preempted the local ordinance because the State had clearly indicated the matter of term limits as an exclusive state concern, here, the Franklin State Government law will also preempt the earth flag from flying above the United States flag because under the Franklin State Government Code **§ 436 and § 617**, no other flag or pennant shall be placed above the United States flag.

Therefore, because the Franklin State Government Code has clearly indicated the matter of flags being positioned above or adjacent to the United State Flag as prohibited, the FDE will not be permitted to fly the Earth Day flag above the United States Flag.

(b) The Measure 15 ordinance being sought in the City of Whitney will fail because Franklin State Law preempts the ordinance.

A local ordinance is preempted by state law if the subject matter has been partially covered by general law couched in terms as to indicate a paramount state concern that will not tolerate further local action. *Mastia v. Ross quoting Jefferson School Board v. County of Jefferson (Fr. Sup. Ct. 1980)*.

Moreover, the court in *Mastia* reasoned to determined whether by adopting the State Government Code provisions, if the State Legislature has either fully occupied the field or so fully covered it as to indicate a paramount of state concern. To determine this, the court looked to *Elder v. Board of Supervisors*, stating "a similar statute relating to eligibility of elected officers has been held to constitute evidence of the legislatures intent to exercise statewide control over the qualification of elected officials." *Id. at Mastia v. Ross*.

Here, the **Franklin State Government Code § 617** 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, except during church services. This shows intent to to excise statewide control over the position of the United States flag.

Like in ***Mastia***, where the court further determined that a statute relating to a county's elected officers is to be constitute evidence of the Legislatures intent to exercise control statewide, here, the statute under the Franklin State Law will constitute evidence of the legislatures to exercise control statewide as to the position of the United States Flag, as well as the Franklin state flag.

Additionally, the court in ***Mastia*** stated that "cities are simply creatures of the state and as such are parts of the machinery by which the state conducts its government affairs". ***Mastia v. Ross***. Thus, because the City of Whitney is a creature of the state and is part of the State of Franklin's government affairs.

Similar to ***Mastia***, where he attempted to argue the local government entity in Elder is a county and Lakeville is city failed because the preemption applied to all local regulation abilities, here the FDE will also fail in the attempt to assert the distinction because the Franklin State Government code applies to all flags being flown in the state of Franklin.

Furthermore, the court states that voters have the right to pass upon the composition of their local government only within the legal framework established by the constitution of the the state and the law enacted by the legislature. ***Mastia quoting Mancini v. City of Greenwich (Fr. Supp. Ct. 1965)***.

Here, the **Franklin State Constitution Article 4 Section 1**, states that the legislative power of the of Franklin is vested in the Franklin Legislature, which consists of the Senate and Assembly, but the people reserve to themselves the power of initiative and referendum.

Similar to ***Mastia***, where his argument that the ordinance must prevail as it was adopted by ballot initiative in reference to the Franklin State Constitution Article 4 Section 1 fails because no matter the source of the local regulation, it cannot be contrary to the laws adopted by the state legislation, here, the FDA ballot initiate in the Measure 15 will also fail under the same precedent because the ordinance seeks to have the Earth Flag fly higher than the United States Flag, however, the Franklin State Legislature adopted statutes prohibiting such acts.

Therefore, the Measure 15 ordinance will not be enforceable in the City of Whitney because the Franklin Government Code is intended to apply to all flags in the State of

Franklin and the code preempts any ordinance because the state's legislature intended to exercise control statewide as to the positions of the United States Flag.

III. The First Amendment of the United States Constitution will not require the Franklin Defenders of Earth to be allowed to fly the Earth Flag above the United States Flag because the state of Franklin Speaks for itself on the matter.

In determining whether the First Amendment constitutes government speech, the court looks to several types of evidence, include the history of the expression at issue, the public's likely perception as to who (the government or private person) is speaking, and the extent to which the government has actively shaped or controlled the expression. *Shurtleff v. City of Boston*, 596 U.S. 243 (2022).

(a) The History of the Expression

In *Shurtleff*, 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 nation, state, and city, this is not always the case. *Id.*

Similar to *Shurtless*, where the Boston City hall allows people to fly flags on their poles, here the City of Whitney will also allow individuals to fly flags on their poles.

However, unlike *Shurtless*, where the flag in question represents a history of Christianity and violates the Establishment Clause of the First Amendment, here, the FDE seeks permission to fly the Earth Day flag.

Therefore, it is likely that this factor will prove positive for the FDE to fly the Earth Day Flag.

(b) The Public's perception as to who is speaking.

Messages of permanent monuments in public park constituted government speech, even when the monuments were privately funded and donated. *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009).

Here, the flag pole in the City of Whitney would not constitute a permanent monument for the flags flown.

Similar to *Shurtless*, where the flag would not be perceived as government speech and would be identified to *Shurtless* group, here the Earth Day flag would be privately donated by the FDE and identifiable by the FDE group.

Therefore, it could not amount to government speech because the flag would not be identifiable to the City of Whitney.

(c) The extent to which the Government actively shapes and controls the Expression

In *Walker v. Texas Div., Sons of Confederate Veterans Inc.*, the court affirmed that license plate designed by private groups amount to government speech because the State that issued the plates "maintained direct control over the message conveyed by actively reviewing designs and rejecting over a dozen proposals".

Similar to *Shuftless*, where the flag being actively raised up and down the flag pole by the city of Boston does not constitute the Government expression by shaping or controlling the expression, here, the City of Whitney hoisting the Earth Day flag up would also not constitute government expression because they are not shaping or controlling the expression of the flag.

However, Justice Breyer stated "when the government speaks for itself, the First Amendment does not demand airtime for all views".

Here, the Franklin Government spoke for itself under the Franklin Government Code. The code states "At all times the national flag shall be placed in a position of first honor." **F.S.G.C. § 436**. Additionally, 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. ***Id.* at § 617**.

Unlike *Shuftless*, where the court reasoned that because the government was silent and did not speak for itself on the view point, preventing the raising of the flag would be unconstitutional, here, the State of Franklin speaks for itself on the matter of placing flags above the United States Flag. Thus, the First Amendment would not require airtime of the Earth Day flag above the United States flag because the state of Franklin's statute prevents any flag from being above the national flag at all times.

The First Amendment would however, let the FDE fly the flag below the United States flag.

Therefore, the First Amendment does not require the City of Whitney to allow would not be unconstitutional to prevent the FDE from hoisting the Earth Day flag above the United States of America Flag because the state of Franklin speaks for itself on the matter by not allowing any flag to be raised above the United States flag at any time.

IV. Conclusion

In conclusion, the United States Flag Code does not prohibit the Earth Day flag from flying above or adjacent to the United States flag because the statutory language is permissive and not mandatory. However, the Franklin Government Code will prevent the Earth Day flag from flying above the United States because the City of Whitney is constitutes part of the State Government of Franklin, and has mandatory statutory language from preventing any flag from flying above the United States flag.

Furthermore, the Measure 15 ordinance will not be enforceable because the Franklin State Government Code preempts any ordinance in relation to flags flying above the United States flag because the Legislature of Franklin intended to exercise state wide control as to the position of the flags. Finally, the First Amendment of the United States does not require the City of Whitney to allow the FDE to raise the Earth Flag above the United States because the state of Franklin speaks on the matter by not allowing other flags to be hoisted above the United States Flag at all times.

Question MPT-2 – February 2026 – Selected Answer 2

MEMORANDUM

To: Maria Delatorre, City Attorney

From: Examinee

Date: February 24, 2026

Re: Measure 15 (In Re Franklin Defenders of the Earth)

I. Introduction

This memorandum will discuss the issues surrounding the government's denial to allow FDE to fly the Earth Flag above the United States Flag.

II. Discussion

(1) Does the United States Flag Code Bar the Flying of the Earth Flag above the United States flag?

The United States Flag Code does not bar the flying of the Earth Flag above the United States Flag. This question really turns on the terms used in the United States Code. As noted in the Walker's Treatise on Legislation, the use of terms such as "shall" or "must," and similar terms make the action set forth in the legislation

mandatory. If terms such as "should" or "may" are used, then the action set forth in the legislation is permissive, but not mandatory (See Walker's Treatise on Legislation). The United States Code states that no other flag should be placed above the flag of the United States of America and 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. 4 U.S.C § 1 et seq.

Here, the U.S. code uses the term "should" to express that other flags may generally not be flown above the U.S. flag but the Code does not bar the flying of other flags above the U.S. flag. Just considering the U.S. code, FDE would not be barred from flying the Earth Flag above the United States Flag.

(2) Does the Franklin State Law Bar the Flying of the Earth Flag above the United States Flag?

The Franklin State Law does bar the flying of the Earth Flag above the United States Flag. Again, we must look to the terms used in the Franklin State Government Code. The Code states that no other flag or pennant shall be placed above the flag of the United States of America, except during church services, when the church flag may be flown (Franklin State Government Code §617). Again, as noted in the Walker's Treatise on Legislation, the use of terms such as "shall" or "must," and similar terms make the action set forth in the legislation mandatory.

Here, the Franklin State Government Code clearly prohibits the flying of any other flags above the United States Flag and this is mandatory legislation. Thus, Franklin State law does bar the flying of FDE's Earth Flag above the United States Flag.

Is Measure 15 Enforceable under Franklin State Law?

Measure 15 is likely preempted by Franklin State Law. The issue here is whether the Franklin State Legislature has either fully occupied the field or so fully covered it as to indicate a paramount state concern (See *In re Hubbell and Jefferson School Board* as cited in *Mastai v. Ross*).

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* as cited in *Mastai v. Ross*) 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 as cited in *Mastai v. Ross*).

Again, the Franklin State Government Code clearly prohibits the flying of any other flags above the United States Flag and this is mandatory legislation. With this code, it could be argued that the subject matter of the positioning of flag flying has been fully covered by state law as to clearly indicate that it has become exclusively a matter of state concern. Even if the argument is made that the Franklin State Code only partially covers the flag positioning in the code, a case could be made that they indicated it was a paramount state concern by including the relevant language in the code and prohibiting the action (by using shall) instead of using permissive language.

On the other hand, it could be argued that Article 4, Section 1 indicates that the state of Franklin would tolerate further local action on the matter but this seems unlikely given the strong language of the code.

A local ordinance that was adopted by ballot initiative as referenced in Article 4, section 1 of the Franklin State Constitution can be found to be unenforceable if it is contrary to the laws adopted by the state legislature. (See *Mastai v. Ross*).

Here, City Services Administration ("CSA") informed FDE that they would not allow any flag to be flown above the United States Flag. In response, FDE launched a ballot initiative ("Measure 15") by which the City's electorate was asked to vote to approve the flag request; the initiative met all local requirements and the City's voters approved Measure 15 by a vote of 55% to 45%. Even though the City's electorate voted in FDE's favor, Measure 15 will still likely be found to be unenforceable because it is contrary to the laws adopted by the Franklin State Legislature.

With this, Measure 15 is likely preempted by 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?

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. The main issue here is whether the government intends to speak for itself or to regulate private expression (see *Shurtleff v. City of Boston*). The First Amendment's Free Speech Clause does not prevent the government from declining to express a view.

In *Shurtleff v. City of Boston*, similar to the case here, Boston made the City Hall Plaza available to the public for events which made the plaza a "public forum" but what is distinguishable to the case here is that Boston also had a history of allowing groups to hold ceremonies on the Plaza, during which they hoisted a flag of their own choosing in place of the city flag and the City of Boston did not actively control the flag raising and the messages the flags sent. With these facts, the Supreme Court came to the determination that Boston was not speaking for itself in allowing private flags to be flown and that the city violated the Free Speech Clause of the First Amendment when they didn't allow Shurtleff and Camp Constitution to fly their flag based on their religious viewpoint. The facts in *Shurtleff* establish that this was not an issue with the positioning of the flags, but rather the religious content of the flag. Again this is distinguishable from the FDE's request here because FDE would like the right to fly the Earth Flag above the United States Flag not the general right to fly the Earth Flag at all.

Although City Hall Plaza is an open space in front of the City Hall building that the City makes available to the public for events and the city treats the Plaza as a public forum, it could be argued that allowing FDE to fly the Earth Flag above the United States Flag could be considered government speech since it is not content based and it is inconsistent with the Franklin State Government Code as noted above. This could easily be seen as the government implying that groups are in fact allowed to fly flags higher than the U.S. flag which is in clear violation of the State Code.

III. Conclusion

To conclude, the United States Flag Code does not bar the flying of the Earth Flag above the United States Flag. Additionally, the Franklin State Law does likely bar the flying of the Earth Flag above the United States Flag and Measure 15 is likely preempted by Franklin State Law. 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.

Question MPT-2 – February 2026 – Selected Answer 3

CITY OF WHITNEY

OFFICE OF THE CITY ATTORNEY

Municipal Building Annex

130 W. Fifth Street
Whitney, Franklin 33875

MEMORANDUM

To: Maria Delatorre, City Attorney
From: Bar Applicant
Date: February 26, 2026
Re: Measure 15

I. Introduction

You have asked me to prepare a memorandum concluding what advice to give to the City Council as to whether it must adopt the ordinance as described in ballot initiative Measure 15, requiring the City to fly the Earth Flag above the United States national flag. In reaching this ultimate conclusion, you have asked me to conclude and explain: A. Whether the United States Flag Code bars the ordinance; B. Whether Franklin state law bars the ordinance and if Measure 15 is enforceable under Franklin State law; and C. Whether the First Amendment of the United States Constitution requires that Franklin Defenders of the Earth (FDE) be allowed to fly the Earth Flag above the United States Flag. While the United States Flag Code does not bar the ordinance, Franklin State Law preempts it making Measure 15 unenforceable and the First Amendment of the United States Constitution does not require that FDE be allowed to fly the Earth Flag above the United States Flag because the flags on top of City Hall are government speech that have been exclusively controlled by the government. For those reasons and as further explained below, the City Council should be advised that they need not adopt the ordinance.

II. Legal Argument

A. The United States Flag Code does not bar the ordinance because the words "should" and "may" adopted by the Code are merely 'precatory' making the action set forth within permissive, but not mandatory.

Provision (c) of the United States Flag Code § 7 Position and manner of display, states that "No other flag or pennant should be placed above 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." Provision (e) states that "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." Provision (f) 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." Further provision (f) states in relevant part that no flags of States, cities, or localities, or pennants of societies flown from adjacent staff "may be placed above the flag of the United States or to the United States flag's right."

According to Walker's Treatise on Legislation § 201 Principles of Statutory Interpretation (h), using terms such as 'should' or 'may,' makes the action set forth in the legislation permissive, but not mandatory.

Utilizing Walker's Treatise on Legislation with regard to statutory interpretation, The United States Flag Code only makes assertions that are permissive, but not mandatory because the Code exclusively uses 'precatory' language. "No other flag or pennant *should* be placed above the flag of the United States of America," does not bar placing another flag or pennant above the flag of the United States, it merely permits it. The same is true for all of the provision of the United States Flag Code relevant to the ordinance. Unlike the United States Flag Code, the ordinance uses the word "shall" stating that On every Earth Day, "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. According to Walker's Treatise on Legislation, the word "shall" makes the action set forth within the ordinance mandatory.

In sum, the United States Flag Code does not bar the ordinance since the language of the Code relevant to the ordinance is merely permissive but not mandatory.

B. Franklin State law bars the ordinance because the word "shall" adopted by the Franklin State Government Code and Franklin Military and Veterans' Code make the action set forth within each respective code mandatory and Measure 15 is unenforceable under Franklin State law as it is contrary to the laws adopted by the *state* legislature.

Article 4, section 1 of the Franklin State Constitution dictates 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. § 436 of the Franklin State Government Code states that 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 time the national flag shall be placed in the position of first honor. § 617 of the Franklin 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, except during church services, when the church flag may be flown. According to Walker's Treatise on Legislation § 201 Principles of

Statutory Interpretation (h), the use of the term "shall," makes the action set forth in the legislation mandatory.

In *Matsai v. Ross*, a city ordinance limited council members to two consecutive terms and appellee Emily Ross won reelection to a third consecutive term. Appellant Warren Matsai, contested the election pursuant to the ordinance, however the trial courts determination that the ordinance was invalid as preempted by state law was affirmed by the Franklin Court of Appeal. Masai argued that the local ordinance was adopted by ballot initiative as referenced in Article 4, section 1 of the Franklin State Constitution. The Court of Appeal explained that, no matter the source of the *local* regulation, like initiative in a city, it cannot be contrary to the laws adopted by the *state* legislature. *Matsai*. Quoting Franklin Supreme Court opinions, the Court asserted that local ordinances are 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.' *Matsai*.

The Franklin State Government Code and Franklin Military and Veterans' Code use the term "shall" in reference to placement of the national flag, making the language of each respective Code mandatory according to Walker's Treatise on Legislation. While the Franklin State Constitution reserves to the people themselves the powers of initiative and referendum, the Court in *Matsai*, explained that those powers have effect "*only within the legal framework established by the constitution of the state and the laws enacted by the Legislature.*" *Mancini*.

Here, the State Legislature has enacted two statutes with mandatory language as to the positioning of United States national flag, specifically with regard to no other flag or pennant being placed above it, including that of the State. This would suggest that the positioning of the flag is either exclusively a matter of state concern. In the event it does not rise to that standard, the mandatory language of both statutes would indicate that local action in the contrary of the State Legislature's intent would not be tolerated.

In sum and as the Franklin Court of Appeal explained in *Matsai*, the Franklin Supreme Court determined in *Mancini* that while the people reserve to themselves the powers of initiative and reform under the Franklin State Constitution, the exercise of such powers are invalid and preempted by state law when they are contrary to the laws adopted by the *state* legislature. *Matsai*. The ordinance in ballot initiative Measure 15 mandates that the Earth Flag "shall" fly above the United States national flag, directly contrary to the laws adopted by the State legislature in the Franklin State Government Code and Franklin Military and Veterans' Code. Therefore, the ordinance is preempted by Franklin State law and Measure 15 is unenforceable.

C. The First Amendment of the United States Constitution does not require that Franklin Defenders of the Earth be allowed to fly the Earth Flag above the United States Flag because the flags flown on City Hall are government expression that the City of Whitney has actively controlled the expression of.

According to the Rules and Regulations proffered by the City Services Administration of the City of Whitney, "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." However, the Rules and Regulations specifically provide that "No event activities shall occur on or in City Hall itself.... City Hall is not part of City Hall Plaza."

In *Shurtleff*, an organization asked to hold an event at which the "Christian" flag would be hoisted on one of three flagpoles located on City Hall Plaza just outside the entrance to Boston City Hall. The city refused to give permission out of fear that this would violate the Establishment Clause of the First Amendment to the Constitution. The case reached the US Supreme Court, where the Court explained that when the government encourages diverse expression the First Amendment prevents it from discriminating against speakers based on their viewpoint. *Shurtleff*. However, the Court distinguished that when the government speaks for itself, the First Amendment does not demand "airtime for all views." *Shurtleff*. The Court further explained that when the government wishes to state an opinion, to speak for the community, to formulate policies, or to implement programs, it naturally chooses what to say and what not to say and that this must be true for the government to work. *Shurtleff*.

The Court highlighted the dilemma that occurs when a government invites people to participate in a program like the public events Boston and Whitney permit, as the boundary between government speech and private expression can blur. *Shurtleff*. The Court opined that review in such cases is not mechanical, it is driven by context rather than application of rigid factors. However, the Court alluded to past cases where several types of evidence had been used to guide analysis including: the history of the expression at issue; the public's likely perception as to whether the government or a private person is speaking; and the extent to which the government has actively shaped or controlled the expression. *Shurtleff*.

Like the City of Boston in *Shurtleff*, the City of Whitney has City Hall Plaza that it utilizes as a public forum available to the public for events. However, unlike the City of Boston in *Shurtleff*, the City of Whitney does not hold "flag-raising ceremonies." In fact, the Rules and Regulations proffered by the City Services Administration of the City of Whitney, specifically mandate that, "No event activities shall occur on or in City Hall itself.... City Hall is not part of City Hall Plaza." In *Shurtleff*, there was a history of flag-raising ceremonies on flag poles that were located on the City Hall Plaza as part of the public events permitted in that forum. In the City of Whitney's case, the difference is that the flagpoles themselves are located directly on City Hall,

which is distinctly not a part of the City Hall Plaza, Whitney's designated public forum. In the City of Boston's case the Supreme Court reasoned that while the flags flying on the Plaza usually represent the nation, state, and city, this is not always the case and thus the flag at issue would not be perceived as government speech.

Shurtleff. The Supreme Court also asserted that the City of Boston did not to any extent actively control the flag raisings and the messages the flags sent out, concluding that the city 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. *Shurtleff*.

The facts in *Shurtleff* are distinguishable from the facts here. The City of Whitney has made it clear that City Hall itself, including the flags raised directly on top of it by passing rules and regulations that no event activities shall occur on City Hall itself.

Rules and Regulations - Events on City Hall Plaza. Additionally, Whitney does not have a history of allowing private organizations to raise flags on City Hall like Boston did with the flags raised on City Hall Plaza. While Whitney routinely allows private organizations like FDE to hold public events in City Hall Plaza, they explicitly do not permit such organizations to extend their activities in or on to City Hall itself.

Whitney did not deny FDE the right to hold a public event based on their viewpoint, in fact they granted them a permit in compliance with the First Amendment of the United States. They merely informed FDE that it would not allow any flag to be flown above the United States flag located on City Hall itself, consistent with the promulgated Rules and Regulations. Additionally, this action was not inconsistent with the history of public events held in City Hall Plaza as was the case for the City of Boston where the flagpoles were located on the Plaza, not on City Hall itself, and actually used by private organizations to fly their flags.

III. Conclusion

For the foregoing reasons, the City Council should be advised that it is not required to adopt the ordinance. Walker's Treatise on Legislation explains that the statutory interpretation of the United States Flag Code does not bar the ordinance as its 'precatory' language makes the action set forth within merely permissive, not mandatory, and therefore the Code would not bar the ordinance. However, in light of that conclusion, the ordinance directly contradicts the laws of the State Legislature of Franklin which does incorporate mandatory language that specifically dictates that "No other flag or pennant shall be placed above...the flag of the United States of America, except during church services, when the church flag may be flown." The ordinance in Measure 15 mandates that the Earth Flag "shall" be flown above the flag of the United States of America. As the Franklin Court of Appeal explained in *Masai*, the power of initiative reserved to the people under the Franklin State Constitution, is preempted when contrary to the laws adopted by the State Legislature. In accordance with *Masai* and Franklin State law, Measure 15 is unenforceable. Further, the First

Amendment of the United States Constitution does not require that FDE be allowed to fly the Earth Flag above the United States Flag because the flags flown on City Hall are government expression that the City of Whitney has actively controlled through promulgated rules and regulations, and there is no history of flags being flown by private organizations on City Hall that would give rise to a claim that FDE's viewpoint was being discriminated against. The government is allowed to control its own speech and expression. The City Council need not adopt the ordinance.