

Question MPT-2 - February 2026 - Selected Answer 1

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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: Examinee
Date: February 24, 2026
Re: Measure 15

Introduction

In this memorandum, I will analyze Measure 15 and answer three key questions regarding it. Each question will be defined by a clear heading. My answers are based on Franklin Law, United States law, Walker's Treatise on Legislation, and relevant caselaw.

I. Does the United States Flag Code bar the Flying of the Earth Flag Above the U.S. Flag?

The United States Flag Code states that "No other flag or pennant should be placed above or, if on the same level, to the right of the flag of the USA, 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..." (US Flag Code (7)(c)). It also states that "The flag of the USA 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.

Measure 15 states that it "shall be the official policy and practice of the City of Whitney on Earth Day to fly the Earth Flag at the top of the tallest city-owned flagpole on City Hall, above the flag of the USA, the Franklin Flag, the City flag, and any other flags.

So on their faces, we have two rules that directly conflict with each other. The US flag code, a federal statute, states that the US Flag must be at the center and highest point of a group of flags. Measure 15, however, demands that the Earth flag fly higher than all flags, including the USA flag.

A federal statute typically preempts and takes rule over a local ordinance, which is what Measure 15 is. However, we must pay attention to the wording of each rule. To tell us why the wording is so crucial, we look to Walker's Treatise on Legislation, Section 201 "Principles of Statutory Interpretation", which states: (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 such terms as "should" or "may" and similar terms, sometimes called precatory terms, make the action set forth in the legislation permissive, but not mandatory.

The US Flag code says the US Flag should be the highest. This is precatory, purely permissive, and not mandatory. The People of Franklin have a reserved right to the powers of initiative and referendum. They exercised this right to referendum and passed Measure 15, which states that on Earth Day the Earth flag SHALL be the highest flag.

The United States Flag code does not bar the flying of the earth flag above the US flag. Therefore, the US flag code does not provide the City of Whitney the ability to deny FDE's request.

II. Does Franklin State Law Bar the Flying of the Earth Flag Above the US Flag, and is Measure 15 enforceable under Franklin State Law?

The issue here is if any relevant Franklin State law bars Measure 15's demand of flying the Earth flag above the US flag. I will look to Franklin State laws to see if the City of Whitney is even authorized to enforce this measure, or if the measure is preempted by a state law.

Franklin Military and Veterans' Code Section 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 USA, except during church services, when the flag may be flown. Note the lanugage: shall be placed above.

Here again, we have conflicting rules. This time it is a Franklin State Law that conflicts with Measure 15. This time, we have one rule that makes it mandatory that no flag (other than that of a church) fly higher than the US flag, while Measure 15 makes it mandatory that the Earth Day flag fly higher than the US flag.

The Franklin State law will be controlling. In *Mastai v Ross*, a 2004 Franklin Court of Appeals case, the court ruled "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."

Here, the City of Whitney is faced with a local ordinance, Measure 15, that has already been approved by vote. The issue is whether the city can adopt and enforce this ordinance. Whitney cannot enforce the ordinance if it is preempted by state law. 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 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 action. *Mastai v Ross*, *In re Hubbell*, *Jefferson School Board v County of Jefferson*.

Here, we have a state law that is couched in such terms as to indicate a paramount state concern that will not tolerate further state action. The Franklin State Legislature did not mince words in Section 617 of the Franklin Military and Veterans Code. They are clear that no flag shall be placed above the US Flag except for church services. The Earth Day Flag and FDE are not a church, this is not a church service.

Under Measure 15, Measure 15 is preempted by the Franklin Veterans Code, therefore barring the flying of the Earth Flag above the US flag and preventing enforcement of Measure 15. Therefore, the City's original denial

III. Does the First Amendment to the US Constitution Require that FDE be Allowed to Fly the Earth Flag Above the US Flag?

The first thing to note is the location of the flags and where Measure 15 would take effect. The flag poles that are in question are on City Hall. Fronting City Hall is City Hall Plaza which the City considers and is effectively a public forum. Whitney has regularly allowed different groups to have events on City Hall Plaza. FDE got a permit to have their Earth Day event on city hall plaza. They then informed the city that they would hoist the earth flag on the poles on the city hall building itself. The permitting body told FDE that they would not allow any flag to be flown above the US flag. Measure 15 of course seeks to allow FDE to fly their flag on city hall's staffs.

One case that is seemingly on point here is *Shurtleff v City of Boston*. Here, Boston did not allow the plaintiff to fly their flag on City Hall Plaza because Boston believed this would be a violation of the establishment clause. The Supreme Court found in favor of the plaintiff for two reasons: they found that the raising of the flags did not constitute government speech, and therefore not allowing the flag to be raised meant Boston was excluding speech based on the plaintiff's religious viewpoint and violated Plaintiff's free speech clause rights under the first amendment.

Let's distinguish the case at hand from *Shurtleff*. A big difference here is that the flag poles in Whitney are not in City Hall Plaza; they are actually affixed to the building of City Hall. In

Shurtleff, the flag poles were on the city hall plaza, a place considered a public forum. The Court in Shurtleff focused on the public forum and the fact that the flagpoles were in the Plaza as opposed to on the building that is City Hall. One of the reasons the Supreme Court found that the flying of the flags was not government speech is because they were not attached to a government building. However, the flagpoles in the case at hand are in fact attached to the roof of City Hall.

When determining whether something is government speech, the Supreme Court in Shurtleff gave us a few factors to analyze a case with. One of which is the public's likely perception as to who is speaking. Another is history and control; there is nothing here to suggest that Whitney has regularly allowed groups to hoist their flags onto the poles atop City Hall. All we have is evidence that the City has allowed groups to come together and hold events on City Hall Plaza, which again is very different than City Hall itself. Another key point is that the City Services Administration Rule 4.2 clearly states that no event activities shall occur on or in City Hall itself. This further goes to the point that if Whitney allowed FDE to fly the earth flag at all, it would be seen as the government speaking.

This means that flag at issue would likely be found to be government speech.

Why does government speech matter? The Court in Shurtleff held that "The First Amendment's Free Speech Clause does not prevent the government from declining to express a view. 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 say. That must be true for the government to work." The government of Whitney can decline to express a view, decline to make a comment. And as discussed above, the flying of the Earth Flag above the American Flag would likely be viewed by the public as the local government speaking and making a comment.

This case is also distinguishable because FDE is not a religious organization and they are not trying to fly a religious flag. The City's denial of FDE's request to fly the flag is not due to any religious thoughts or discrimination. The only 1st amendment clause involved here is the free speech clause, analyzed above.

The 1st Amendment does not require that FDE be allowed to fly the Earth Flag above the US Flag. It does not require Whitney to allow the flag to fly from the poles on City Hall at all. Instead, the 1st amendment and US Supreme Court allow the City of Whitney to decline to fly the flag as that would constitute government speech.

Conclusion

The City of Whitney can effectively prevent FDE's request to fly the earth flag above the US flag. Under the Franklin Veterans Code, Measure 15 directly conflicts with an issue already handled by the Franklin legislature. Therefore, the ordinance may not be adopted and enforced since it is preempted.

The City is also not required by the 1st Amendment of the US constitution to allow FDE to fly their flag.

The US Flag Code is not controlling and does not prohibit enforcement of Measure 15. However the City can decline to enforce Measure 15 under both Franklin State law and The US Constitution.

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Question MPT-2 - February 2026 - Selected Answer 2

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City of Whitney Office of the City Attorney

Memorandum

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

You have asked for our opinion on whether Franklin Defenders of Earth (FDE) a non-profit org is allowed to fly its flag higher than the US flag atop the City Hall building and relatedly, whether measure 15 is enforceable under Franklin state law or the First Amendment,

In summary, Here, the US Flag Code provides that no other flag or pennant should be placed above or if on the same level, to the right of the US flag; however, the language of the US Code is only precatory, so we must then look to state law. Here, Franklin state code provides that the displays of flags should be the same size and not above the US flag if upon the US flagpole and the provisions are mandatory. Moreover, although under **Franklin State Constitution** Article 4, Section 1, vests legislative power in Franklin Legislature but people reserve power of initiative and referendum, the State Code preempts this initiative as it explicitly provides mandatory legislation with respect to how the US flag is to be treated and displayed, which preempts state law. Finally, we must look to see if there is any federal case law that is superior to Franklin law. Given the context and differences from the Shurtleff Supreme Court Case, the City of Whitney's denial of the flag being flown is not expected to be prohibited by the first amendment.

1. Does the US Flag Code bar flying of the Earth Flag above US Flag?

The issue is whether the terms "should" or "may" make it such that the US flag code bars the flying of the Earth Flag above the US Flag. Based on the foregoing, these factors are simply precatory in nature meaning the US Flag code is simply stating its wishes with respect to the US Flag and thus not a bar to the earth flag being flown.

US Flag Code

The United States Flag Code (4 USC) §7(c) provides that no other flag or pennant should be placed above or if on the same level, to the right of the US flag except during church services conducted by the Navy. Under Section 7(e) the US Flag Code provides, that the US flag should be the center and highest when a number of flags of states or localities or pennants of societies are grouped and displayed from staffs and under subsection (f) no other flag may be placed above the US flag or the US flag's right and the US flag should always be at the peak.

Walker Treatise

The Walker Treatise principals of interpretation on legislation provide, that the term "shall" or "must" and similar terms make the legislation mandatory, but that the use of terms such as "should" or "may" can be considered "precatory" and make the action permissive, but not mandatory.

Here, the US Flag Code provides that no other flag or pennant should be placed above or if on the same level, to the right of the US flag, which is directly contrary to FDE's wishes to fly the flag on their flag on the center flagpole, above the US flag, which is directly contradictory with the US Flag Code.

However, as stated above, in all instances the flag code uses the terms "should" or "may" when discussing the flying of any flag above the US flag. Consistent with the terms of the Walker treatise, these terms are likely to be considered precatory in nature, meaning that the terms of

the act are not mandatory, and instead make an action permissive.

Therefore, the US flag code is not a bar to FDE's flying a flag above the US flag, rather the flag code merely sets precatory language of its wishes.

2(a) Does Franklin state law bar the flying of the Earth Flag above the US flag?

The issue is whether the terms "shall" or "must" make it such that the Franklin state code bars the flying of the Earth Flag above the US Flag. Based on the foregoing, these factors are mandatory in nature meaning the Franklin State Legislature intended to create mandatory state law with respect to flying of national and state flags.

Franklin State Code on Display of Flags - Section 436

Franklin state code Section 436 on the display of flags provides that where the national and state flags are displayed, they shall be of the same size. It further provides if only one flagpole is hung the national flag shall be above the state flag in a manner so as not to interfere with any part of national flag. At all times US flag shall be position of first honor.

Franklin Military and Veterans code - Section 617

No other flag or pennant shall be placed above, or if on same level, to right of US flag, except during church services.

Here, Franklin state code provides that the displays of flags should be the same size and not above the US flag if upon the US flagpole. These code sections are directly contrary to FDE's wishes to fly the flag on their flag on the center flagpole, above the US flag.

Furthermore, in line with Walker treatise in all instances the Franklin code uses the terms "shall" or "must" when discussing the flying of any flag above the US flag. Consistent with the terms of the Walker treatise, these terms are likely to be considered mandatory in nature, meaning that the terms of the act are permissive and must be followed.

However, the determination next is to be made whether this can be modified by a ballot initiative, as under **Franklin State Constitution** Article 4, Section 1, vests legislative power in Franklin Legislature but people reserve power of initiative and referendum, which is discussed below.

2(b) is Measure 15 enforceable under Franklin state law?

The issue is whether by adopting Franklin Military and Veterans code - Section 617 and Franklin State Code on Display of Flags - Section 436, the Franklin state legislature intended to preempt the entire field.

In **Mastai v. Ross**, the court determined whether a local ordinance adopted by ballot initiative is invalid if it was pre-empted by state law. (Mastai v. Ross, Franklin Court of Appeals). The court determined the ballot initiative was invalid based on the foregoing factors.

In **Mastai** citing Hubbel (Fr. Sup. Ct 1964), the court determined 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 it has become exclusively a matter of state concern." Mastai looked at whether by adopting a State Government Code, the Legislature has fully occupied the field or so fully covered it as to indicate a paramount state concern.

A statute relating to eligibility of county elected officers has been held to constitute legislatures intent of state wide control. Further the court determined whether it is a city or county does not matter as if the "code establishes that the Legislature intends to preempt all local regulation . . ." Further, the court states that cities are simply creatures of state law and voters have rights to pass upon composition of their local government within legal framework established by the state.

Lastly, Mastai refutes the argument that if it were a ballot initiative reference in **Article 4, Section 1**, which vests legislative power in Franklin Legislature but people reserve power of initiative and referendum, it must prevail. The court found this argument to be without merit as no matter the source it cannot be contrary to laws of state legislature.

Similar to Mastai, we are of the opinion that "local ordinance is preempted by state law if the

subject matter has been so fully covered by general law as to clearly indicate it has become exclusively a matter of state concern."

Here, the State Code explicitly provides mandatory legislation with respect to how the US flag is to be treated and displayed. The Franklin State Code intended in all circumstances to give the US flag, first honor. Mastai looked at whether by adopting a State Government Code, the Legislature has fully occupied the field or so fully covered it as to indicate a paramount state concern. Here, there can be no room for interpretation, this statute did not use precatory language, nor did it leave open exceptions, therefore, it is likely the entire field is to be pre-empted.

FDE will argue that because **Article 4, Section 1**, which vests legislative power in Franklin Legislature but people reserve power of initiative and referendum, it must prevail. However, the court in Mastai found this argument to be without merit as no matter the source it cannot be contrary to laws of state legislature.

Therefore, due to the supremacy clause, only if the state action violates the first amendment, will this proposed flying of the Earth Day Flag be allowed, which is further discussed below.

3. Does the First Amendment (1A) to US constitution require that FDE be allowed to fly the Earth flag above the US flag?

In *Shurtleff* the US Supreme Court looked at whether flying of other flags was permissible on Boston City Hall on City Hall Plaza. In the case, the City Hall Plaza was a public forum (consistent with our facts); however in our case Whitney City Hall itself has never been a public forum and only the Plaza is under City Whitney guidance, the Whitney City Hall building itself is not part of the Plaza.

In *Shurtleff* Boston has NO record of refusing to hoist a flag before the events that gave rise to the case and these flags were hoisted directly on the Plaza. Moreover, in Boston in the past has allowed groups to hold ceremonies on the Plaza during which they hoisted a flag of their choosing in place of the city flag. The court stated that as far as history of expression is concerned while the flags flying in the Plaza usually represent the nation state and city this is not always the case. The court further found that when a city speaks for itself, First Amendment does not demand air time for all views.

The First Amendment does not prevent the government from declining to express a view. The Court determined that in determining whether a government intends to speak for itself is driven by context rather than route application.

Based on the above, given the context, this is not expected to be prohibited by the first amendment.

Here, unlike *Shurtleff*, the government action by the City was an initial denial of FDE's request and has not consistently allowed such behavior prior to FDE's request.

Unlike *Shurtliffe*, the city of Whitney has no history of allowing flags to replace the flags typically flown on City Hall. Moreover, unlike *Shurtliff*, it is not the city flag in question being taken down, rather it is the US flag, which the facts indicate the City Hall has always flown on top of the building. Lastly unlike *Shurtliff*, the flags in question were directly in the free speech plaza space itself, here the flags are atop the government building.

Here, the city should argue that unlike in *Shurtliff*, this is government speech and therefore not prohibited by the first amendment. While the city has issued permits for displays on the Plaza itself, it has never permitted activities to occur on top of City Hall itself and does not consider city hall to be a free speech forum, only the Plaza in front of it is the open space made available for public event.

Moreover, the city should argue that this is a political viewpoint, which is consistent with Ballot Measure 15s argument, as it expresses the challenges such as climate change and nuclear war which is political speech and that the goal is to be willing to make political concessions.

Further if the City grants the measure, then it may be considered to allow this type of speech

going forward and may open itself up to more unsavory flags rather than merely a flag of the Earth.

Conclusion

In summary based on the above facts in Section 1, the US Flag Code provides that no other flag or pennant should be placed above or if on the same level, to the right of the US flag; however, the language of the US Code is only precatory, so we must then look to state law. As stated in Section 2, Franklin state code provides that the displays of flags should be the same size and not above the US flag if upon the US flagpole and the provisions are mandatory. Moreover, although under **Franklin State Constitution** Article 4, Section 1, vests legislative power in Franklin Legislature but people reserve power of initiative and referendum, the State Code preempts this initiative as it explicitly provides mandatory legislation with respect to how the US flag is to be treated and displayed, which preempts state law. Finally, in Section 3, must look to see if there is any federal case law that is superior to Franklin law. Given the context and differences from the Shurtleff Supreme Court Case, the City of Whitney's denial of the flag being flown is not expected to be prohibited by the first amendment.

Sincerely,
Examinee

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