ANSWER TO MPT 1

MEMORANDUM

TO: Beverly Garcia
FROM: Examinee
DATE: February 24, 2026
Re: Kari Otto matter

INTRODUCTION

Our client, Kari Otto ("Kari"), and her husband, Eric Nolan ("Eric") want to obtain a divorce and prior to doing so they would like to reach an agreement regarding their property. As such, I was tasked with analyzing (1) whether the parties' marriage was created in 2006 or 2019; (2) if the marriage was created in 2006, which property is marital and which is separate; and (3) if the marriage was created in 209, what effect, if any, that has on the characterization of property. Below is a discussion of each issue based on the relevant Franklin Family Law ("FLC") and case law.

DISCUSSION

I. Whether the parties' marriage was created in 2006 as a common-law marriage or in 2019 when they held a ceremony, obtained a marriage license, and filed for a marriage certificate.

It is more likely that the parties' marriage was created in 2006 as a common-law marriage, even though in 2019 Kari and Eric held a wedding ceremony and filed their marriage certificate in the county clerk's office in 2019.

FLC § 211 recognizes common law marriage as a valid marriage in the State of Franklin. According to *Schwartz v. Darrow*, a common law marriage may be established by clear and convincing evidence showing the mutual agreement of the couple to enter the legal and social institution of marriage, followed by conduct manifesting that mutual agreement, often referred to as "holding out." (Fr. Ct. App. 2022); *See also Howard v. Howard* (Fr. Sup. Ct. 2015). The burden of proving common-law marriage lies with the person claiming its existence. *Id.*

The key question is whether the parties mutually intended to enter a *marital* relationship, i.e., to share a life together as spouses in a committed, intimate relationship of mutual support and mutual obligation. *Id.* Ultimately, a common-law marriage finding depends on the totality of circumstances. *Schwartz v. Darrow* (Fr. Ct. App. 2022). Relevant conduct includes, but is not limited to, (1) cohabitation; (2) reputation in the community as spouses; (3) maintenance of joint banking and credit accounts; (4) purchase and joint

ownership of property; (5) filing of joint tax returns; (6) evidence of shared financial responsibilities, such as leases in both parties' names, joint bills, or other payment records; (7) evidence of joint estate planning, including wills, powers of attorney, and beneficiary designations; (8) symbols of commitment, such as ceremonies, anniversaries, cards, and gifts; and (9) the couple's references to or labels for one another. *Id.*

In *Ridley v. Brooks* the court found no common-law marriage even though the parties lived together, shared living expenses, and indicated that they were husband and wife on a health insurance form and their apartment lease. (Fr. Ct. App. 2008). This is because the designation on the health insurance form was done to save money and Brooks often stated to her friends that she had no intention of remarrying. In *Schwartz v. Darrow,* the appellate court remanded the case to the magistrate court to reconsider whether a common law marriage existed because, even though the couple maintained separate finances, other factors and evidence, like the fact that before his death, Cohn presented Darrow with a wedding ring, proposed to her, which she accepted, and their family, friends, co-workers, acquaintances all considered them to be married, suggested the existence of a common law marriage. (Fr. Ct. App. 2022). The appellate court indicated that the shared financial responsibility factor is relevant but not necessarily indicative of lack of intent to be married, especially if the parties agree to and do hold themselves out to be married, even if they are not ceremonially married and others know of this fact. *Id.*

Here, based on the factors enumerated in *Schwartz v. Darrow,* and the totality of the circumstances, Kari and Eric likely entered a common law marriage in 2006. Kari and Eric began dating in 2005 and moved in together in 2006, and have been living together ever since, thereby cohabitating. In August 2006, Eric gave Kari a ring and asked her to marry him and she said yes. Eric also admitted that he intended to marry Kari when he asked her. Even though Eric believes that it was a promise ring and Kari believes that it was engagement ring and the fact that they did not have an official ceremony and let the marriage license they obtained expire because of Eric's nervousness of a lifelong commitment, the fact that they did obtain a marriage license on September 19, 2006, is likely indicative of an intent to marry. Moreover, unlike *Ridley*, based on the aforementioned facts, Kari had the intention of marrying Eric. Further, on September 19, 2007, Eric gave Kari an anniversary card, stating that he has "learned to be a good husband" to her, indicating his intent to be married to Kari. Further, they also had a reputation in the community as spouses. They told their friends that they were married and their friends referred to them as married, much like Cohn and Darrow. Kari and Eric also received a cross-stitch from Kari's grandmother of two people in wedding attire, named "Kari" and "Eric" with the caption "United in Love, 2006." They also send their friends and family an annual Christmas card signed "Mr. and Mrs. Nolan." Additionally, since 2006, Kari and Eric have had a joint bank account, which the both contribute to and pay bills from (including a mortgage on the bungalow they live in) and they have been filing their taxes jointly since 2007.

While it may be argued that it was in 2019 that the two were married because that is when they held a small wedding ceremony after re-obtaining a marriage license and filing for a marriage certificate, the aforementioned facts weigh in favor of finding a common law marriage in 2006. Although Kari has never used Eric's last name, except in the Christmas cards, and has only since 2019 referred to herself as "Otto-Nolan," these factors, while relevant, likely will not add much weight to the argument that the marriage only existed in 2019. Eric also admitted that he intended to marry Kari in 2006 and that the ceremony in 2019 was held only to make the relationship stronger when they began experiencing some problems when Kari expressed her wish to have had a ceremony.

Given the totality of the circumstances and the fact that Eric and Kari have been sharing financial responsibilities since 2006, it is likely that they entered a common law marriage in 2006.

II. If the marriage was created in 2006, which property is marital property and which is Eric's or Kari's separate property.

FLC § 215 provides how property is to be disposed in divorce actions and states that unless provided by a valid pre or postnuptial agreement, the court shall determine the respective rights of parties in their separate or marital property. This section of the FLC also provides how property is distributed, absent such agreements: (1) separate property shall remain such; (2) marital property shall be distributed equally between the parties, considering the circumstances of the case and of the respective parties; and (3) in determining equitable distribution or property under (2), the court shall consider certain factors.

FLC § 200(c) defines marital property as all property acquired by either or both spouses during the marriage, subject to exceptions enumerated in § 200(d). Whereas § 200(d) defines separate property as (1) property acquired before marriage or property acquired by bequest, devise, or descent, or gift from a party other than the spouse; (2) compensation for personal injuries; (3) property acquired in exchange for or the increase in value of separate property, except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse; and (4) property described as separate property by written agreement.

In *Jones v. Cardiff,* the court, relying on *Price v. Price* (Fr. Sup. Ct. 2001), stated that any appreciation in the value of the separate property due to the contributions or efforts of the nontitled spouse will be considered marital property. (Fr. Sup. Ct. 2023). This includes any direct contributions to the appreciation, like financial contributions to the property, as well as nonfinancial contributions, such as by personally maintaining, making improvements to, or renovating a marital residence. *Jones v. Cardiff* (Fr. Sup. Ct. 2023). In *Jones*, the court affirmed the lower court's decision to lower Megan's share of this type of property from 50% to 25%. The court found that the home was Samuel's separate

property, the improvements made were the efforts of both parties, and therefore the increase in value was considered marital property. *Jones v. Cardiff* (Fr. Sup. Ct. 2023). However, because Samuel's income was the sole source of the funds expended on the property and his involvement in the renovations was far more extensive than Megan's, equitable distribution of the appreciation would mean that Megan receives 25%, whereas Samuel receives 75%. *Jones v. Cardiff* (Fr. Sup. Ct. 2023).

Defining separate property to include acquisitions during the marriage in *exchange* for the premarital or gift property of one of the spouses or an *appreciation* in the value of such property would generally presume some rough equivalency in value at the time between the premarital property and that which was acquired in exchange. *Bower v.* Bower (Fr. Ct. App. 2014). The court in *Bower* found that because depreciated premarital property was *replaced* by property greater in quantity and value that was largely produced or paid through activities of the marital economic partnership. The significant expansion in the farming operation was not due to unrelated market factors, rather it occurred through marital efforts, during which the wife initially directly benefitted the business, pledged her personal credit for its debts, and then contributed indirectly through her services as a homemaker and wife. The court, relying on *Litman v. Litman* (Fr. Ct. App. 2010), also indicated that even if the farm had been started after the parties were married and the wife only indirectly contributed, she would have been entitled to some share of the appreciation of the farm's value. The court concluded that the husband is entitled to be credited with the value of his initial contribution of his premarital cattle and equipment, however, the size of the present herd and equipment demonstrates that the farm experienced a manifold expansion beyond the initial cattle and equipment, due to marital efforts. As such, it would be subject to equitable distribution as marital property, rather than separate property of the husband just because it was his premarital cattle and equipment that started the operation.

A. Marital Property

The house at 1505 Clark Street was acquired in 2008, even though Eric made the 20% down payment and has a 15-year mortgage solely in his name, the house itself was acquired during the common law marriage of the spouses. It is likely that it will be subject to equitable distribution as marital property, with any appreciation in value from $400,000 to $800,000 to be distributed equitably to Eric and Kari, based on their marital efforts on the property.

The Toyota, Kari's vehicle, and Nissan, Eric's vehicle, were both acquired in 2024 during the common law marriage and after the 2019 marriage ceremony. As such, they would be considered marital property. The bank account and mortgage will both be considered marital property as they were acquired during the common law marriage in 2006.

B. Separate Property of Eric and Kari

The tract of land in Frankfurt Acres was acquired by Kari in 2001, before her relationship with Eric began. This would be separate property under the FLC. Kari also made improvements to the land during her common law marriage to Eric, however, she did so with a gift from her mother. As such, that would also be considered separate property, even though Eric mentioned wanting to receive his share of the shed on the property. If the shed was built through his efforts during the common-law marriage, it is likely that a court will be inclined to distribute that portion equitably as marital property.

The photography equipment obtained by Eric in 2005 will likely be considered separate property because he acquired it prior to the common law marriage in 2006.

III. If the marriage was created in 2019, what effect, if any, that has on the characterization of property?

Based on the FLC and case law discussed above, if the marriage was created in 2019, the property acquired prior to this marriage would likely be considered separate property of the two. Therefore, the house, additional photography equipment prior to 2019, and improvements to Kari's tract where Eric made efforts in prior to 2019, and mortgage in Eric's name, would likely all be considered separate property. Whereas, the value of the photography equipment acquired after 2019 and the cars acquired in 2024, would likely be considered marital property and be subject to equitable division.

CONCLUSION

It is likely that Eric and Kari entered a common-law marriage in 2006 and therefore any property acquired prior or appreciated in value through marital efforts will be considered marital property, whereas property acquired prior to 2006 and through gifts to one spouse, will be considered separate property. However, if a court deems that the marriage was created in 2019, the distribution of property would be affected because all property acquired prior to 2019 would be considered separate and not subject to equitable distribution.

ANSWER TO MPT 1

MEMORANDUM

To: Beverly Garcia
From: Examinee
Date: February 24, 2026
Re: Kari Otto Matter

Dear Beverly,

Please see below answers to your questions about Kari Otto and Eric Nolan's marriage following your meetings with both parties.

1. The parties marriage was created in 2006.

The issue here is whether Kari and Eric created a common-law marriage in 2006.

The state of Franklin recognizes common-law marriage as a valid marriage. *FFC §211* A common-law marriage may be established by clear and convincing evidence showing the mutual agreement of the couple to enter the legal and social institution of marriage, followed by conduct manifesting that mutual agreement, often referred to as "holding out." *Howard* The burden of proving common-law marriage lies with the person claiming its existence. *Id.*

A common law marriage finding depends on the totality of the circumstances. Relevant conduct includes, but is not limited to, cohabitation; reputation in the community as spouses; maintenance of joint banking and credit accounts; purchase and joint ownership of property; filing of joint tax returns; evidence of shared financial responsibility, such as leases in both parties' names, joint bills, or other payment records; evidence of joint estate planning, including wills, powers of attorney, and beneficiary designations; symbols of commitment, such as ceremonies, anniversaries, cards, and gifts; and the couple's references to or labels for one another. *Schwartz* In *Schwartz v. Darrow,* the court stated that a couple's decision to maintain separate finances is relevant, but not necessarily indicative of the lack of the parties' intent to be married.

In *Ridley v. Brooks*, the court found that there was no common-law marriage even though the parties lived together, shared expenses, and indicated that they were husband and wife on a health insurance form and their apartment lease because the health insurance designation was only done to save money and the wife often states to friends that she had no intention to remarry. However, in *Schwartz v. Darrow,* the court said asking someone to marry you (and having them accept) and providing a ring *could* be evidence of the couple's express agreement to marry even without a formal ceremony.

Here, we must look to the totality of the circumstances to determine whether a common law marriage between Kari and Eric was created in 2006. First, the parties have lived together since January 2005 (cohabitation); the parties "told their friends that they had gotten married, and their friends started referring to them as a married couple" ("holding out" and reputation in the community as spouses); they maintained joint bank account since December 2006 to which they have both contributed funds and paid their bills from; family members were upset that they were not included in the 2006 wedding (Eric's mother and grandmother); Eric's grandmother gave them a cross-stitch that they hung up in their house that says "United in Love September 19, 2006"; Eric and Kari sent out holiday cards saying from "Mr. and Mrs. Nolan" (symbols of commitment); Eric gave Kari a diamond ring in August 2006 and asked her to marry him (symbols of commitment); and Eric gave Kari a first anniversary card saying "I have learned to be a good *husband* to you" (symbols of commitment). The totality of these circumstances are highly indicative that there is a common-law marriage between the parties as evidenced by the amount of factors satisfied here.

However, Eric's argument that the parties were not married until the formal marriage in 2019 will be based on the fact that he only gave her a promise ring in September 2006 because "it seemed like the right thing to do", that he didn't follow through with the marriage ceremony because he was "nervous about making a lifelong commitment" and he only called Kari his wife "once in awhile". Eric's argument will likely not prevail over the totality of the circumstances like it did in the *Ridley* case because unlike there, Eric did not explicitly tell others that he was nervous about making the commitment to Kari and further, it is unlikely that a person who is receiving a ring in addition to hearing the words "will you marry me" would assume it was a promise ring and not an indication that he wanted to marry her. Further, while they kept their property in separate title, it is not necessary indicative of the lack of their intent to be married, just like with the separate finances in *Schwartz.*

Therefore, based on the totality of the circumstances, Kari and Eric's marriage was created in 2006.

2. The division between martial property and separate property based on a 2006 marriage.

Under FFC §200(c), the term "marital property" shall mean all property acquired by either or both spouses during the marriage except as specified in subsection (d). Subsection (d) of FFC §200 states that the term "separate property" shall mean: (1) property acquired before marriage or property acquired by bequest, devise, or descent, or gift from a party other than the spouse; (2) compensation for personal injuries; (3) property acquired in exchange for or the increase in value of separate property, except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse; and (4) property described as separate property by written agreement.

In *Bower*, the court concluded that cattle and equipment purchased during the marriage was indeed within the statutory definition of marital property and since they were not acquired by gift or inheritance, they cannot be excluded from equitable distribution. Under FFC §215(a), except when the parties have a valid prenuptial or postnuptial agreement resolving all issues related to the parties, the court shall determine the respective rights of the parties in their separate or marital property: (1) separate property remains such; (2) martial property shall be distributed equitably between the parties, considering the circumstances of the case and of the respective parties; (3)....

Any appreciate in the value of separate property due to the contributions or efforts of the non- titled spouse will be considered marital property. *Price* This includes any direct contributions to the appreciation, such as when the non-titled spouse makes financial contributions to the property, as well as when the non-titled spouse makes direct non-financial contributions, such as by personally maintaining, making improvements to, or renovating a marital residence. *Id.*

Defining separate property to include acquisitions during the marriage in exchange for the premarital or gift property of one of the spouses or an appreciation in the value of such property would generally presume some rough equivalency in value at the time between the premarital property and that which was acquired in exchange. *Bower* For example, in *Bower*, this was not the case when the depreciated premarital property was replaced by property greater in quantity and value that was largely produced or paid for through the activities of the martial economic partnership. Further, in that case, the court looked at whether the increase in value in value was due to unrelated market factors/inflation or due to the parties' mutual marital efforts. A spouse is entitled to appreciation of other spouse's separate property asset even if spouse's contributions were indirect. *Litman*

(a) House at 1505 Clark Street

Here, Eric bought the house at 1505 Clark Street in his name for $400,000 in 2008. Eric used the money that he had earned as a photographer to make the 20% down payment on the house. He took out a 15-year-mortgage in his name alone, but paid the remaining purchase price with money from the joint account.

If the parties were married in 2006, this would be considered marital property because Eric used money he earned while in the married and the mortgage was paid from the joint bank account. Eric may argue that he bought the house with separate money and it was his house before, but he did not own the house prior to the marriage (he merely rented it) and while he used money he had acquired as a photographer, he earned that money during the marriage and money earned during the marriage is marital property unless an agreement says otherwise.

Therefore, the house at 1505 Clark Street is marital property.

(b) Tract of land in Frankfurt Acres

Here, the tract of land in Frankfurt Acres was owned by Kari before the marriage (acquired in 2001). Further, Kari made significant improvements to the land using funds she had received as a gift from her mother to build a large gardening shed on the property to store equipment. Since Kari owned the land before marriage and all the improvements done were using funds Kari acquired by gift, the whole tract of land is Kari's separate property. Eric cannot argue that any of it is martial property because he did not make or contribute anything to appreciate the property using either his separate property or marital property. All improvements were done using Kari's separate property.

Therefore, the tract of land in Frankfurt Acres is entirely Kari's separate property (including the appreciation in value).

(c) Photography Equipment

Here, Eric purchased $50,000 worth of photography equipment in December 2005. This was property acquired before the marriage and therefore is separate property under §200(d)(1).

Therefore, the photography equipment purchased in December 2005 is Eric's separate property.

(d) Additional Photography Equipment

Here, Eric purchased additional photography equipment beginning in October 2006, one month after the marriage was created. The equipment was bought for $150,000, but is now only worth $120,000. Since the photography equipment was acquired during marriage, it is considered marital property.

Therefore, the additional photography equipment is martial property.

(e) 2024 Toyota Tundra

Here, the Toyota Tundra (Kari's vehicle) was purchased in May 2024 and has depreciated in value. Since it was purchased in 2024 during the marriage and there is no indication that the car was paid off using separate property, the car is considered marital property.

Therefore, the Toyota is marital property.

(f) 2024 Nissan Altima

Here, the Nissan Altima (Erics vehicle) was purchased in January 2024 and has depreciated in value. Since it was purchased in 2024 during the marriage and there is no indication that the car was paid off using separate property, the car is considered marital property.

Therefore, the Nissan is marital property.

(g) Joint Checking Account

Here, the joint checking account holds $120,000 as of December 2006. Since this joint account was created after marriage, it is separate property.

Therefore, the joint checking account is separate property.

(h) Balance on Mortgage for 1505 Clark Street

Here, the balance on the mortgage is $50,000. Since we determined above that the property is martial property, the balance will also be martial property.

II. The division between martial property and separate property based on a 2019 marriage.

See rules under Section II above.

(a) House at 1505 Clark Street

Here, Eric bought the house at 1505 Clark Street in his name for $400,000 in 2008. Eric used the money that he had earned as a photographer to make the 20% down payment on the house. Therefore, this will be considered separate property.

However, the house appreciated in value over the years and has been paid off through the joint bank account. Therefore, like in Bowers, the appreciation is due to the parties' mutual marital efforts and the appreciation will be considered martial property.

(b) Tract of land in Frankfurt Acres

This analysis does not change from the 2006 analysis.

(c) Photography Equipment

This analysis does not change from the 2006 analysis.

(d) Additional Photography Equipment

Here, Eric purchased additional photography equipment beginning in October 2006 until 2025. The equipment was bought for $150,000, but is now only worth $120,000.

Here, part of the equipment is martial property (anything purchased after 2019) and part is separate property (anything purchased before 2019). The court must look at how much was contributed to distribute equitably. However, since there was no appreciation in value, there is no need to do an analysis on that here because like in *Bower*, this was not the case when the depreciated premarital property was replaced by property greater in quantity and value that was largely produced or paid for through the activities of the martial economic partnership.

Therefore, part of the property is separate and part is marital.

(e) 2024 Toyota Tundra

This analysis does not change from the 2006 analysis.

(f) 2024 Nissan Altima

This analysis does not change from the 2006 analysis.

(g) Joint Checking Account

This analysis does not change from the 2006 analysis.

(h) Balance on Mortgage for 1505 Clark Street

This analysis does not change from the 2006 analysis because while the mortgage was separate property (Eric's), it was being paid through the mutual martial efforts of the parties and is therefore considered martial property. If the court finds that the house is martial property, both parties will be responsible for the remaining mortgage.

Please let me know if you have any further questions.
Sincerely,
Examinee

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 <u>always</u> 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) <u>Final Opinion</u>

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.