

Re: *Application of 4 U.S.C.A. § 1 – 10 A.K.A. “The Flag Code” to Proposed Message of Unity.*

Dear Recipients:

Please know that the undersigned represents the legal interests of the McCracken County local government, as well as all McCracken County offices, officers, elected officials, boards, commissions and special districts. In this capacity, I have been asked to provide a legal opinion as to whether any provisions of 4 U.S.C.A. § 1 – 10, AKA The Flag Code (Flag Code), or any other controlling legal authority, would prevent the depiction of the proposed Message of Unity upon the 1-24 elevated Paducah Water storage tank. Please allow this correspondence to serve as the McCracken County Attorney’s legal opinion on this matter, as well as an explanation of the analysis leading to the same.

A true and accurate depiction of the final design for the Message of Unity is attached hereto as **Exhibit “A”**. It has been asserted that this design, incorporating elements of the United States flag into an artistic depiction and including a design symbolizing harmony and unity across racial lines, constitutes a violation of the Flag Code. In light of this assertion, and particularly, because this assertion sounds like an alleged violation of federal law Paducah Water understandably seeks to ensure that the depiction of the Message of Unity would not reflect negatively upon the organization.

Synopsis of Legal Conclusions

Neither the Flag Code, nor provisions of Kentucky statutory law pertaining to flag use and/or display, apply to expressly prohibit the Message of Unity or counsel against its completing as designed for the following reasons:

1. The Flag Code is not a public law mandating or prohibiting the doing of any act. Without a legal duty imposed, there can be no legal violation;
2. The spirit and intent of the Flag Code is to ensure that proper respect is given to the flag of the U.S;
3. The Flag Code applies only to the actual flag of the U.S. pursuant to its definitional sections, its substantive provisions and the pronouncements of the President of the United States and United States Supreme Court;
4. Common misconception is that the Flag Code applies to any visual duplication or representation of the U.S. flag is a result of misapplication of the significantly limited definition of “the flag of the United States” in 4 U.S.C.A. § 3 to entirety of the Flag Code;
5. All flag-related conduct taking place outside of Washington D.C. is subject to the general definition of “the flag of the United States” in the Flag Code which applies only to the actual U.S. flag meeting the stated design and dimensions;

6. Message of Unity bears none of the design and dimensional elements of the Flag Code's definition of "the flag of the United States" and therefore is outside of the Flag Code's application;
7. Reference to statutory construction rules and the definition of "the flag of the United States" within the Flag Code, shows that Kentucky flag-related statutes are also inapplicable to the Message of Unity;
8. First Amendment prohibits governmental suppression of symbolic speech involving the U.S. flag when such speech is peacefully carried out, involving privately owned/controlled property and not imposed upon a "captive audience".
9. Above First Amendment protection extends to elected members of a representative government in their official capacities;
10. The Message of Unity is consistent with letter and spirit of the Flag Code as it respectfully incorporates components of the U.S. flag within a message that promotes the diversity and unity of the American people at a time when racial unity is a social issue at the forefront of our local and national consciousness.
11. Given the protected nature of the Message of Unity's symbolic and literal speech, suppression of its display on the basis of a perceived federal Flag Code violation – or any other public law – threatens an actual constitutional violation never intended by Congress in enacting the Code.

A. FEDERAL AUTHORITY PERTAINING TO DISPLAY AND USE OF THE FLAG OF THE UNITED STATES – THE FLAG CODE.

As a preliminary matter, it bears mentioning that there are many resources readily accessible on the internet that purport to explain the Flag Code and its application. However, while generally instructive, these resources take the form of self-contained summaries and discussion pieces prepared for general informational purposes, rather than an in-depth analysis of actual text of 4 U.S.C.A. § 1 – 10 and the legal authorities interpreting it. In order to provide a thorough legal analysis of this matter, the entirety of 4 U.S.C.A. § 1 – 10, in its presently written and officially published form – along with the legal authorities interpreting it – must be the primary point of focus.

1. Stated Purpose and Intent of The Flag Code.

4 U.S.C.A. § 5 provides that the Flag Code is a "codification of existing *rules and customs* pertaining to the display and use of the flag of the United States of America...established *for the use* of civilians or civilian groups or organizations as may not be required to conform with regulations promulgated by one or more executive departments of the Government of the United States." Congress's selection of the words/phrases "rules and customs", along with "for the use of" makes the Flag Code read more like a pronouncement of acceptable and best practices on the subject of display and use of the flag of the United States, rather than a binding public law setting forth mandatory requirements or direct prohibitions.

The advisory nature of The Flag Code's provisions was clarified in *Lapolla v. Dullaghan*, 311 N.Y.S. 2d 435, 63 Misc. 2nd 157 (N.Y. Sup. 1970), when the court held as follows:

"A joint resolution of Congress, on June 22, 1942, enacted a Federal flag code...[formerly contained in 36 U.S.C. §§ 171-178 before renumbered to 4 U.S.C.A. § 1 – 10]. Title 36 **is not** intended to proscribe behavior. Rather, it is fashioned as an expression of prevalent custom and usage regarding the display of the American Flag. This court agrees with respondents that the United States Code provisions **are not** to be accorded the full weight of statutory proscription but finds that they are an expression of custom and usage which is designed for and should be used by civilian authorities..."

Id. at 437; 159 (emphasis added).

As to the concern of an alleged "violation" of The Flag Code, it is important to know that in the context of statutory "offenses" or "violations", both federal and Kentucky law require that before there can be an "offense" or "violation" of the law, there must be an affirmative legal duty in place, whether that duty be the mandatory performance of an act or the mandatory prohibition of an act. 18 U.S.C.A. § 3156(a)(2); KRS 501.030.

The plain language of §5 of the Flag Code – as well as the case law interpreting the Flag Code's purpose and intent – definitively show that the Flag Code is not to be accorded the full weight of a statutory law that either mandates or proscribes certain acts. As such, it has been made certain that the Flag Code cannot be legally interpreted as imposing any type of statutory duty. Without the imposition of a statutory duty, there cannot be a statutory violation. Accordingly, from a legal standpoint, it is impossible for the Flag Code to be "violated".

Conclusion 1 – Because the Flag Code is not legally viewed as a public statutory law, either affirmatively mandating or prohibiting certain acts, it is legally impossible for there to be a violation of its provisions. Without a statutory duty, there cannot be a statutory violation.

2. Underlying Principle Behind the Flag Code.

Though it does not set forth any affirmative duties upon civilians or civilian groups and organizations, the Flag Code's underlying principle, and motivation for its enactment, can be easily recognized and appreciated. In the widely consulted publication, *The United States Flag: Federal Law Relating to Display and Associated Questions*, John R. Luckey (Lib. Of Congress – Congressional Research Service June 14, 2000), this underlying principle is identified as follows:

"The Flag Code itself, however, suggests a general rule by which practices involving the flag may be fairly tested: No disrespect should be shown to the flag of the United States of America [citing

4 U.S.C.A. § 8]. Therefore, actions not specifically included in the Code may be deemed acceptable as long as proper respect is shown.”

The above treatise points out the commonsense reality that not all potential uses and methods of display of the United States flag could be directly contemplated and addressed within the Code. However, the author points out that underlying principle and general rule of the Flag Code would support certain unenumerated practices as long as proper respect is shown to the flag.

Conclusion 2 – While certain potential uses or methods of display of the flag of the United States may not be affirmatively addressed in The Flag Code, such practices would nonetheless be supported by the spirit and intent of Flag Code so long as proper respect is shown for the flag.

3. What Constitutes “The Flag of the United States” For Purposes of The Flag Code.

The most critical aspect of statutory interpretation is to determine exactly what the particular statute applies to. As the Flag Code specifically references “the flag of the United States”, it is then critical to determine exactly what constitutes “the flag of the United States” for purposes of the Code.

Fortunately, Congress made it easily to discern what they intended “the flag of the United States” to mean by expressly including a definition for this term within the Code. 4 U.S.C.A. § 5 provides this definition as follows:

“The flag of the United States for the purpose of this chapter shall be defined according to sections 1 and 2 of this title [4 U.S.C.A. § 1; 4 U.S.C.A. § 2] and Executive Order 10834 issued pursuant thereto.”

These referenced authorities provide individually as follows:

4 U.S.C.A. § 1 – “The flag of the United States shall be thirteen horizontal stripes, alternate red and white; and the union of the flag shall be forty-eight stars, white in a blue field.”

- This section establishes the flag of the United States as it appeared on July 30, 1947, at the drafting of its current version.

4 U.S.C.A. § 2 – “On the admission of a new State into the Union one star shall be added to the union of the flag; and such addition shall take effect on the fourth day of July then next succeeding such admission.”

- This section provides for the modification of the original appearance of the flag of the United States upon States being subsequently recognized and incorporated into the nation.

Executive Order 10834 – Enacted on August 21, 1959, by President Dwight D. Eisenhower upon the admission of Hawaii to the Union. The Executive Order provided that as of July 4, 1960, the flag of the United States shall mean the following:

- a. A flag bearing thirteen horizontal stripes, alternate red and white, and a union consisting of white stars on a blue field;
- b. The position of the stars in the union of the flag and in the Union Jack shall follow a staggered and sequential pattern representing the States of the Union;
- c. A flag having dimensions of a length of 1.9 times that of the width. Specific examples are delineated ranging from flags the size of 20 ft. x 38 ft., to 1.32 ft. x 2.5 ft.

The critical takeaway from these definitional authorities is that “the flag of the United States”, for purposes of the Flag Code, is an **actual flag** that bears the proper number and design of stripes, the proper number and design of stars, and the proper dimensions, consisting of a length being 1.9 times its width. By the definition components selected, Congress made clear that the Flag Code applies to the use and display of **actual flags** meeting the above-referenced design and dimension standards.

The definitional authorities above conclusively establish that the Flag Code applies to **actual flags**. However, additional support for the conclusion that the Code’s application was intended to apply only to **actual flags** can be inferred from the actual language of the Code itself. The following sections of 4 U.S.C.A. – representing nearly the entirety of the Flag Code’s pronouncements – clearly pertain to **actual flags** and make no sense in any other context:

- The flag is to be displayed from sunrise to sunset. 4 U.S.C.A. § 6(a);
- The flag may be displayed at night if properly illuminated. 4 U.S.C.A. § 6(a);
- The flag should be hoisted briskly and lowered ceremoniously. 4 U.S.C.A. § 6(b);
- The flag should not be displayed during days of inclement weather unless an all-weather flag is used. 4 U.S.C.A. § 6(c);
- The flag should be displayed daily on or near the main building of every public institution, in or near polling places on election day, and in or near schools on school days. 4 U.S.C.A. § 6(e)-(g);
- Specifics as to the flag being used in processions. 4 U.S.C.A. § 7;
- Specifics as to the flag being displayed on a float. 4 U.S.C.A. § 7(a) & (i);
- Specifics as to the flag being displayed on a motor vehicle. 4 U.S.C.A. § 7(b);
- Specifics as to the flag being displayed along with other flags. 4 U.S.C.A. § 7(d)-(f);

- Specifics as to the flag being displayed from a flagpole. 4 U.S.C.A. § 7(h)-(j);
- Specifics as to when and how the flag is to be displayed at half-staff. 4 U.S.C.A. § 7(m);
- Specifics as to the flag being used to cover a casket. 4 U.S.C.A. § 7(n);
- Specifics as to the flag being suspended across a building corridor or lobby. 4 U.S.C.A. § 7(o);
- Specifics as to appropriate conduct during the hoisting, lowering and passing of the flag. 4 U.S.C.A. § 9;

The application of the Flag Code to only **actual flags** is made clear not only by the express terms of the definitional authorities and the practical application of its provisions, but is also supported by the decisions of the Supreme Court of the United States and the pronouncements of the United States President wherein the significance of flags are discussed in general, and specifically with regard to the flag of the United States. Such decisions and pronouncements are as follows:

***Halter v. State of Nebraska*, 205 U.S. 34 (1907)**

“From the earliest periods in the history of the human race, banners, standards, and ensigns have been adopted as symbols of the power and history of the people who bore them...[T]he American people...early in their history, prescribed a flag as symbolical of the existence and sovereignty of the nation.”

“[T]o every true American the flag is the symbol of the nation’s power, the emblem of freedom in its truest, best sense...[I]t signifies government resting on the consent of the governed; liberty regulated by law; the protection of the weak against the strong; security against the exercise of arbitrary power; and absolute safety for free institutions against foreign aggression.”

***Proclamation No. 2605*, Franklin D. Roosevelt (Feb. 21, 1944)**

“The flag of the United States of America is universally representative of the principles of justice, liberty, and democracy enjoyed by the people of the United States”.

***Spence v. State of Washington*, 418 U.S. 405 (1974)**

“For the great majority of us, the flag is a symbol of patriotism, of pride in the history of our country, and of the service, sacrifice, and valor of the millions of Americans who in peace and war have joined together to build and to defend a Nation in which self-

government and personal liberty endure. *It evidences both the unity and diversity which are America.*

The forgoing authorities show that our **actual flag** symbolizes the patriotism and pride held by the American people for a country that was established and carried forward by the service, sacrifice and valor of those that ensured that the principles of liberty and self-government would be maintained for the benefit of our citizens and that the unity of our diverse citizenry perpetuate. The veneration and symbolic value of **the actual flag** of the United States merited the literal “act of Congress” that was required to enact the guidelines for its use and display.

Conclusion No. 3 – Pursuant to the express definitional language of §§ 1, 2 and 5 of the Flag Code, the substantive provisions of the Code itself, as well as the pronouncements of the United States Supreme Court and United States Presidents, it is evident that the Flag Code applies only to **the actual flag** of the United States bearing the design and dimensions set forth in said definitional sections.

4. *The Message of Unity Is Not “The Flag of the United States” For Purposes of the Flag Code.*

i. Common Misconception Broadening the Flag Code’s Application.

While researching this matter, publications were repeatedly located on the internet that incorrectly interpreted the Flag Code as applying not just to **the actual flag** of the United States, but also to any representation or depiction of any part of the actual flag of the United States in such a way that one can readily discern that the flag of the United States was intended to be incorporated into the work. The alleged application of the Flag Code to the Message of Unity is a prime example of this misconception.

This misconception is the product of an incorrect understanding of the language in 4 U.S.C.A. § 3 and its significantly limited application. 4 U.S.C.A. § 3 specifically states that it applies only to actions taken by persons *within the District of Columbia* – nowhere else – and prohibits one from displaying the flag of the United States that has placed upon it any word, figure, mark, picture, design or drawing.

Consistent with its limited application to *only the District of Columbia*, 4 U.S.C.A. § 3 also provides a separate and distinct definition of “the flag of the United States” for purposes its prohibitions on conduct within D.C. The misapplication of this definition to all other sections of the Flag Code is the primary reason for this misconception. 4 U.S.C.A. § 3 provides the following definition:

“The [word] flag...*as used herein*, shall include any flag, standard, colors, ensign, or any picture or representation of either, or of any part or parts of either, made of any substance or represented on any substance, of any size evidently purporting to be...said flag...of

the United States of America or a picture or a representation of [the same], upon which shall be shown the colors, the stars and the stripes, in any number of either thereof, or of any part or parts of either, by which the average person seeing the same without deliberation may believe the same to represent the flag...of the United States.”

The definition above is broad enough to apply not only to a picture or artistic representation of the United States flag itself, but also to any visual representation containing any component features of the U.S. flag, or colors of the U.S. flag, if it would be readily apparent that the actual flag of the U.S. was what was intended to be represented by the artist. This definition, if applicable to the other provisions of the Flag Code, would bring the Message of Unity within the Code’s provisions. However, Congress’ inclusion of the words “as used herein” were intended to ensure that this broad definition was not applied to the other provisions of the Flag Code.

In the block-quoted language above, the words “as used herein” were given emphasis because they denote the limited application of this distinct definition of “the flag of the United States”. In ***Gatliff Coal Co. v. Cox***, 142 F.2d 876 (6th Cir. 1944), the court discussed the operation of the word “herein” in the context of statutory construction as follows:

“Herein as used in legal phraseology is a locative adverb and its meaning is to be determined by the context. It may refer to the section, the chapter or the entire enactment in which it is used.”

The ***Gatliff*** case, dealt with which sections of a federal statute an exclusion applied to when that exclusion was accompanied with the words “herein contained”. The court looked to the context and noted that the words “herein contained” were found in the first section of the act, which was made up entirely of definitions and exceptions to the substantive provisions of the act that are set forth in subsequent sections. The court found that because “herein” was used in an introductory section, where none of the statute’s substantive provisions were stated, then “herein” was intended to apply to, i.e. refer to, the entirety of the subsequent substantive provisions of the act – application to the entire Act based on the context.

However, the opposite scenario is presented by the use of “herein” in the definitional portion of 4 U.S.C.A. § 5. As stated above, 4 U.S.C.A. § 5 applies only to actions taken within the District of Columbia. Obviously, within D.C., Congress wanted to significantly broaden the protections accorded to the U.S. flag. However, Congress wanted such protections to extend not just to the U.S. flag itself, but also to visual representations of the U.S. flag, readily discernable as such due to inclusion of design component parts and/or colors of the U.S. flag.

Because Congress was aware that the entirety of the Flag Code’s other provisions applied only to ***the actual flag*** of the United States, and focuses primarily on the use and display of the U.S. flag in contexts associated with use and display of ***actual flags***, it was necessary to draft a

separate section to accomplish their objective. This separate and distinct section 3 lays down strict limitations in D.C. on conduct in connection with the U.S. flag. Further, section 3 makes its prohibitions applicable to any and all representations of the flag as well by inclusion of the broad definition of “the flag of the United States” as used within section 3, AKA “as used herein”.

Because the words “as used herein” accompany the broad definition of “the flag of the United States” as used in 4 U.S.C.A. § 3, and in conjunction with 4 U.S.C.A. § 3’s extensive D.C. specific regulations, it is evident that Congress intended such language apply only to 4 U.S.C.A. § 3. As such, said definition has no application to the present matter.

Conclusion 4 – The common misconception that the Flag Code applies to not just *the actual flag* of the U.S., but also to any and all visual representations of *the actual flag* of the U.S. or any of its design components or colors, is due to the incorrect application of the extraordinarily broad definition of “the flag of the United States” contained within 4 U.S.C.A. § 3 to the other provisions of the flag code.

Conclusion 5 – Because the above definition of 4 U.S.C.A. § 3 applies only to the subject matter specifically contained within 4 U.S.C.A. § 3, then all other flag-related conduct ***NOT TAKING PLACE WITHIN D.C.*** is subject to the definition of “the flag of the United States” as set forth in 4 U.S.C.A. § 1 & 2 and Executive Order 10834.

- ii. The Message of Unity Falls Outside of the Flag Code’s Application By the Plain Language of the Definition of “the flag of the United States” in §§ 1 & 2.

As discussed in subsection A(3) above, the definition of “the flag of the United States” for purposes of the Flag Code is gleaned from 4 U.S.C.A. § 1; 4 U.S.C.A. § 2; Executive Order 10834, and the practical application of the Code’s flag-related provisions, as follows:

- An Actual Flag;
- Having dimensions of a length of 1.9 times that of the width;
- Having thirteen horizontal stripes, alternating red and white;
- Having a union of the flag in a blue field with stars representing the States of the Union in white in a staggered and sequential pattern.

A true and correct duplication of the final design for the Message of Unity is attached as **Exhibit “A”**. Tracking the aforesaid elements of the Flag Code’s definition provided for “the flag of the United States”, the following can be observed with regard to the Message of Unity:

- An artistic rendering - not an actual flag;
- Design does not bear the necessary dimensions of length 1.9 times that of width;
- Only 11 horizontal stripes;
- Only 34 white stars depicted on blue union.

Because the Message of Unity does not meet any of the necessary definitional elements of “the flag of the United States”, it cannot be legally interpreted as being a “flag” subject to the Flag Code’s provisions. As such, the Flag Code has no application to the Message of Unity.

Conclusion No. 6 – Because the Flag Code provides a specific definition for what is meant by “the flag of the United States”, and because the Message of Unity bears none of the elements of such definition, the Flag Code’s provisions have no application to the Message of Unity.

B. KENTUCKY STATE AUTHORITY PERTAINING TO DISPLAY AND USE OF THE FLAG OF THE UNITED STATES.

1. Statutory Sections Relating to the Flag of the United States.

Three Kentucky statutory sections pertain to flag-related practices. These sections, along with the pertinent parts of their provisions appear below:

1. **KRS 2.050** – “Printing or lettering of any kind on *the flag of the United States*, or the use of the flag for advertising purposes in any manner, is prohibited.”
2. **KRS 2.060** – “No person shall in any manner, for exhibition or display, place or cause to be placed upon, or expose or cause to be exposed to public view any *flag...of the United States* upon which has been placed, or to which is attached, appended, affixed or annexed, any word, figure, mark, picture, design or drawing, or advertisement of any nature...”.
 - Criminal Penalty for violation = Class B misdemeanor – KRS 2.990.
3. **KRS 525.110** – “A person is guilty of desecration of venerated objects in the second degree when he intentionally desecrates in a public place the *national or state flag...*”.
 - Criminal Penalty for violation = Class A misdemeanor
 - Section created to protect the sensibilities of the public from affront under circumstances that would not meet the elements of Criminal Mischief sections of the penal code.

1. The Message of Unity Falls Outside the Application of Kentucky Statutes Relating to the Flag of the United States.

Similar to the Flag Code, Kentucky statutory law makes its substantive provisions applicable to “the flag of the United States” and/or “the national flag”. Unlike the Flag Code though, Kentucky statutory law provides no definition for what is intended by the legislature by these terms. However, Kentucky law provides rules of statutory construction that clarify the intended meanings.

As stated in *Pennyrile Allied Com. Serv. Inc. v. Rogers*, 459 S.W.3d 339 (Ky. 2015):

“Our ultimate goal when reviewing and applying statutes is to give effect to the intent of the General Assembly. We derive that intent from the language the General Assembly chose, either as defined by the General Assembly or as generally understood in the context of the matter under consideration.”

As to how these generally understood meanings of undefined terms are determined, the court explained in *Kentucky Properties Holding LLC v. Sproul*, 507 S.W.3d 863 (Ky. 2016), that “we begin our inquiry by examining the language employed by the legislature, relying generally on the common meaning of the particular words chosen, which meaning is often determined by reference to dictionary definitions.”

The following relevant definitions were located using *Merriam-Webster Dictionary*, 2011, <https://www.merriam-webster.com> (October 5, 2020):

- “**Flag**” - a usually rectangular piece of fabric of distinctive design that is used as a symbol (as of a nation), as a signaling device, or as a decoration.
- “**National flag**” - a flag serving as a distinctive emblem of a particular nation.

Again, we see the commonly understood definitions of “flag” and “national flag”, as used in Kentucky’s statutory authorities, to be intended to mean **an actual flag** – not an artist’s rendering of a design incorporating the components and colors of **the actual flag** of the U.S. Further, guidance is naturally drawn from the meaning assigned to “the flag of the United States” by Congress in the Flag Code itself. As discussed in detail within subsection A(3) above, “the flag of the United States”, for purposes of the foremost authority upon its use and display, was intended to denote **the actual flag** of the U.S.

Accordingly, in keeping with the recognized meanings of the words “flag” and “national flag” pursuant to the Merriam-Webster Dictionary, as well as the definition expressly selected by Congress in their federal counterpart – and presumed model for their drafting – the Kentucky Statutes also reveal the intent of the Kentucky General Assembly that their prohibitions apply only to **the actual flag** of the U.S. Because these provisions of the above Kentucky statutes apply only to **the actual flag** of the U.S., they have no bearing upon the Message of Unity at all.

Conclusion No. 7 – Because no definition is included for the words “flag of the United States” or “National flag” in the Kentucky Statutes pertaining to flag-related actions, the commonly accepted meanings of such words, according to Merriam-Webster’s Dictionary, are relied upon to determine that the Kentucky General Assembly had the same intent as Congress when enacting the Flag Code, i.e. that “flag” is to mean **the actual flag** of the U.S.

C. EVEN IF THE FLAG CODE & KENTUCKY AUTHORITIES APPLIED TO THE MESSAGE OF UNITY, THE SUGGESTED EFFECT OF SUCH APPLICATION WOULD VIOLATE THE FIRST AMENDMENT.

Concerned individuals believe that the Flag Code – and most likely the KRS sections discussed above – apply to the design of the Message of Unity. These concerned individuals further believe that the design is in violation of the provisions of these authorities and for that reason, should not go forward as designed. Even if the Flag Code, and/or the Kentucky flag-related statutes were presumed to apply to the Message of Unity, the argued result of this application, i.e. effectively prohibiting the display of the design, would result in a U.S. Constitutional violation of a type that has been condemned for the last 46 years.

If the Flag Code and/or the KRS sections discussed above could actually operate to prevent, or even counsel strongly against, the completion of the Message of Unity, then a general concern of governmental overreach is implicated that would apply well beyond the present matter. This general concern can be articulated as follows:

General Concern – A government would be permitted to affirmatively prohibit private citizens from utilizing an artistic representation of the image of the U.S. flag, or components thereof, in furtherance of symbolic speech.

Government regulation of flag-related conduct can be seen in 2 different types of laws: first, “flag-misuse laws”; second, “flag-desecration laws”. However, both flag-misuse laws and flag-desecration laws have been struck down by the U.S. Supreme Court as impermissible governmental restrictions upon symbolic speech under the First and Fourteenth Amendments of the U.S. Constitution.¹

These stricken laws were found to be “content-based restrictions” of speech because the motivation for regulation was dependent upon the content of the symbolic speech, i.e. utilization of the flag to facilitate delivery of the message. Under the First Amendment, the government may regulate certain aspects of speech but has “no power to restrict expression because of its message, its ideas, its subject matter, or its content.” ***Police Dept. of Chicago v. Mosley***, 408 U.S. 92 (1972). “Content-based regulations are presumptively unconstitutional and analyzed under strict scrutiny. ***Reed v. Town of Gilbert, AZ***, 576 U.S. 155 (2015).

For a content-based restriction of speech to survive strict scrutiny, the government must “prove that the restriction furthers a compelling governmental interest and is narrowly tailored to achieve that interest.” ***Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett***, 564 U.S.

¹ **Flag-Misuse Laws** - ***Street v. New York***, 394 U.S. 576 (1969); ***Spence v. Washington***, 418 U.S. 405 (1974).
Flag-Desecration Laws - ***Texas v. Johnson***, 491 U.S. 397 (1989); ***U.S. v. Eichman***, 496 U.S. 310 (1990).

721 (2011). Further, to establish that a law regulating or restricting speech is narrowly tailored, “the Government carries the burden of showing that the challenged regulation advances the Government’s compelling interest in a direct and material way.” **Rubin v. Coors Brewing Co.**, 514 U.S. 476 (1995).

Of the cases striking down content-based restrictions on symbolic speech involving the U.S. flag, most instructive is **Spence v. Washington**, 418 U.S. 405 (1974). In **Spence**, a person was convicted under Washington State’s flag-misuse statute that provides as follows:

“No person shall...for exhibition or display...[p]lace or cause to be placed any word, figure, mark, picture, design, drawing or advertisement of any nature upon any flag...of the United States or of this state...or...[e]xpose to public view any such flag...upon which shall have been printed, painted or otherwise produced, or to which shall have been attached, appended, affixed or annexed any such word, figure, mark, picture, design, drawing or advertisement.”

The citizen’s conduct giving rise to the alleged violation consisted of affixing a large upside-down peace sign on both sides of a U.S. flag and displaying the same for public viewing from his window. The citizen stated that he did this as a protest against the invasion of Cambodia and the killings at Kent State University, events which occurred a few days prior to his arrest. He said that his purpose was to associate the American flag with peace instead of war and violence.

The court first held that the use of the U.S. flag has for many years been recognized as a form of symbolic communication... “as a way of communicating ideas associated therewith as a form of shortcut from mind to mind.” *Id.* at 410; citing **Stromberge v. California**, 283 U.S. 359 (1931); **West Virginia State Board of Education v. Barnette**, 319 U.S. 624 (1943).

Turning specifically to the conduct at issue, the Court stated that there can be no doubt that the citizen was using the flag as a means of communication of an idea and that this idea was advanced with the additional adherence of the peace symbol to the U.S. flag. *Id.* The Court explained that because the Kent State killings and the invasion of Cambodia occurred close in time to the citizen’s actions, the symbolic nature of his use of the flag would be evident to all in light of the social climate at the time. *Id.* Because the Defendant’s actions constituted symbolic speech, the court then had to determine whether the government had a compelling interest in suppressing this speech and whether the statute at issue was narrowly tailored to advance that interest.

The court found **6 factors** to be important to the decision of the case as they directly bear upon, and negate, the potential governmental interests in suppressing this symbolic speech. These factors, and the governmental interests negated are as follows:

1st Factor - The flag was privately owned by the citizen.

Gov. Interest Negated - Prohibition on damage to public property or property not otherwise owned by the actor.

2nd Factor - The flag was displayed on Defendant's private property.

Gov. Interest Negated - Prohibition on trespass, breach of peace.

3rd Factor - No evidence of breach of peace associated with display. No attempt to incite or stimulate public demonstration or any type of un-rest at.

Gov. Interest Negated – Prohibition on breach of peace.

4th Factor - Displayed in a way that those wishing not to see the message are not forced to do so – no captive audience. Those disagreeing with the message or affronted by it may “avert their eyes”. Citing ***Cohen v. California***, 403 U.S. 15 (1971).

Gov. Interest Negated – Prohibition on compelling unwilling parties to endure a message running against their beliefs and/or sensibilities.

5th Factor - Unconstitutionality of punishing/prohibiting a person from failing to show the proper respect for the U.S. flag. Citing ***Street***, 394 U.S. at 593.

Gov. Interest Negated – Ensuring that proper respect is shown to the U.S. flag.

6th Factor - Defendant displayed the privately-owned flag on privately owned property and in a way that plainly and peacefully expressed his view without risk that the presence of the flag would impute U.S. governmental endorsement of the message.

Gov. Interest Negated – Ensuring that the U.S. flag is preserved solely as a symbol of our country.

As seen through the discussion of ***Spence*** above, the Supreme Court has carefully considered the potential governmental interests in suppression of symbolic speech involving the U.S. flag as a communicative element. The ***Spence*** Court held that in light of the protected character of the citizen's symbolic speech, and the reality that no asserted governmental interest was significantly impaired by Defendant's actions, the law at issue was not narrowly tailored to advance these interests and was for that reason violative of the First Amendment to the U.S. Constitution.

With regard to the Message of Unity, the following factors are equally present: (1) the artistic work is privately “owned”; (2) the place of display is privately owned; (3) no risk of trespass or breach of the peace in process of display; (4) no captive audience – passersby can “avert their eyes”; (5) punishment/prohibition on speech-related flag alteration is unlawful under ***Street***, 394 U.S. at 593; (6) no implication that the U.S. federal government was responsible for the installation nor expressly adopts the symbolic speech as that of its own.

For these reasons, as was seen in *Spence*, a prohibition, or even the counseling against the completion of the Message of Unity as designed, would effectuate a type of prior restraint on First Amended symbolic speech that has been condemned for decades in this country.

Conclusion No. 8 – The First Amendment, as interpreted by the Supreme Court of the U.S. prohibits governmental suppression of symbolic speech involving the U.S. flag when such speech is peacefully carried out, involving privately owned/controlled property (the flag and grounds displayed on) and not imposed upon a “captive audience”.

Further, the fact that the Message of Unity is being advanced at the behest of McCracken County does not detract from the protected nature of the speech. McCracken County is a representative government wherein “County actions” are implemented by elected Fiscal Court members. In *Bond v. Floyd*, 385 U.S. 116 (1966), the Supreme Court held that elected members of a representative government are to be accorded the full protections of the First Amendment within their official capacities and given the widest latitude to express their views. The Court found this critical to ensuring uninhibited, robust debate on public issues, as well as allowing the represented citizens to know exactly where their representatives stand on matters of public importance. *Id.* at 136.

Conclusion No. 9 – First Amendment symbolic speech protection extends to elected members of a representative government equally as it does to private citizens.

For the reasons stated above, even if the Flag Code or the above-referenced Kentucky authorities applied to the Message of Unity – which they do not – these authorities could not constitutionally prohibit the completion of the Message of Unity as this would violate the First Amendment’s protections of symbolic speech. The same result would effectively come to fruition if the Message of Unity was “encouraged or counseled” to be abandoned due to a perceived, but legally non-existent, violation of their provisions.

D. THE MESSAGE OF UNITY IS ACTUALLY CONSISTENT WITH THE SPIRIT AND GENERAL PRINCIPLE OF THE FLAG CODE AS WELL AS WHAT THE IDEALS REPRESENTED BY THE U.S. FLAG.

As discussed in subsection A(2) above, the general principle and intent lying behind the Flag Code is ensuring that no disrespect should be shown to the U.S. flag. Further, as discussed in subsection A(3) above, the collective pronouncements contained in *Halter*, *Spence*, and *Presidential Proclamation No. 2605*, the U.S. flag can be seen as representing the following ideals:

The U.S. flag is a universal representation of the American people. It represents the pride in the service and sacrifice of those that led the way, and of those that continue to persevere, in ensuring the

continuation of liberty and democracy for the people **while evidencing the diversity and unity that is America**.

The Message of Unity cannot be reasonably argued to represent any type of disrespect for the U.S. flag. Rather, components of the U.S. flag are included within the design to symbolize support, acceptance and pride in the exact diversity and unity of the American people that the U.S. Supreme Court and U.S. President have previously advocated. The reality that the Message of Unity is sought to be displayed during a time when racial unity is a social issue at the forefront of our local and national consciousness goes significantly strengthens the propriety of its display in light of the intent of the Flag Code and ideals represented by the U.S. flag itself.

Conclusion No. 10 – The Message of Unity does not violate the letter or spirit of the Flag Code. Rather, the design contains a respectful inclusion of components of the U.S. flag within a message that promotes the national pride, diversity and unity of the American people as advocated by the President and Supreme Court of the United States, and at a time when racial unity is a social issue at the forefront of our local and national consciousness.

E. LEGAL CONCLUSION.

Neither the Flag Code, nor the Kentucky authorities identified, apply to the Message of Unity because the design does not constitute ***the actual flag*** of the U.S. Further, the Flag Code itself expressly carries no type of mandate or prohibition that would give it the force of law. When no force of law is imposed, no “violation” is legally possible. As such, even if the Flag Code applied to the Message of Unity, the Code carries no binding mandates or prohibitions on the matter. However, if the Flag Code did in fact apply to the Message of Unity, and if the Code in fact operated to prevent the completion of the design, either expressly or impliedly, such effect would be a violation of the First Amendment’s protections of symbolic speech.

For the reasons discussed above, neither the Flag Code, nor the Kentucky authorities discussed, can be seen as legally prohibiting the completion of the Message of Unity, or even counseling for the same. In reality, the Message of Unity is consistent with the underlying principle/general rule of the Flag Code and directly advances the ideals represented by the flag of the U.S. It is for this reason that the prohibition or suppression of the display of the Message of Unity is the actual impending First Amendment violation that must be guarded against.

Respectfully,

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McCracken County Attorney

