MPT 1 - Sample Answer # 1

Statement of the Case - Statement of Facts - Body of the Argument

Allied's provision of mental health services to probationers--including their failure to provide appropriate services to female probationers--is a state action. Determining whether an individual's conduct is state action is a fact intensive question, but there are two basic tests. First, private conduct may be state action where the private entity "exercises a function that has traditionally been a public or sovereign function." Lake.

Second, private conduct may be "state action when the state exercises its coercive or influential power over the private actor or when there are pervasive entanglements between the private actor and the state." Lake. In addition, under either test, the plaintiff must show a nexus between the state action and the claim. Both tests are met here, and there is a sufficient nexus.

1. Because criminal punishment--including probation--is traditionally an exclusive government function, Allied's provision of mental health service to probationers is state action.

Allied's provision of mental health services to persons placed on probation is a state action under the public function test because criminal punishment--whether jail, probation, or a fine--is traditionally an exclusive government function. At issue is whether services connected with probation are traditionally an exclusive government function.

Under the public function test, a private actor exercising a traditionally exclusive government function will be subject to constitutional limits while performing that function as if the private actor were a state actor. Lake. The state's power to enforce its criminal laws and punish violations is one such traditionally exclusive government function. Thus, a private doctor providing health care to prison inmates is a state actor because the "state is required to provide medical care to those it imprisons." Lake, citing West. Likewise, an arrest directed by a private entity is a state action because "[o]nly the state has the power to deprive person of their freedom by arresting them." Lake, citing Camp.

Here, the provision of mental health care as a condition of probation is equivalent because, like an arrest, the terms of probation are a deprivation of a citizen's freedom. The government has the exclusive power to set the terms of probation. As § 35-210 provides, "the court shall determine the conditions of probation." The Director of the Probation Services Unit of Allied acknowledged that the terms of probation are a restriction on a person's liberty similar to jail. Deposition. Because the government has traditionally had the exclusive power to impose criminal sentences, the provision of probation services is a traditional government function and thus a state action.

Allied may argue that the provision of probation services is not an exclusive government because it can expressly be delegated to private actors through statute and because it is more similar to providing health care to private citizens. Neither argument is persuasive.

First, § 35-211 does expressly authorize counties to contract with private entities to provide probation services. This, however, is not dispositive. For example, in Lake, the court found that a lottery was not a traditionally exclusive government function because it was similar to private gambling--not because the state had contracted with a private entity. In contrast, here, there are no similar private actors providing probation services, so the mere authorization of private contracting does not diminish the historically exclusive government nature of probation. Second, Allied may argue that its provision of mental health care is more similar to a privately operated hospital than a prison. This ignores the true nature of these services. Rita Peek and others are not seeking mental health care from Allied because they want mental health care, as they would with a private hospital.
Rather, they are seeking mental health care from Allied because it is a term of their punishment for the crimes they committed. Because criminal punishment is traditionally an exclusive government function, the terms of that punishment are as well.

2. In the alternative, the government's extensive oversight and control of Allied's probation services creates a sufficient entanglement that Allied's services are state action.

The state and county exert significant control over Allied's provision of mental health services through state statute, county approval and direction of services, and public officials on Allied's board of directors, such that the state and county have "exercised coercive power or ha[ve] provided such significant encouragement . . . that the choice must in law be deemed to be that of the state." Rendell-Baker. At issue is the extent of the state and county's influence over Allied's provision of mental health services.

Under the state coercion test, a private entity will be deemed to be a state actor when "the state exercises its coercive or influential power over the private actor or when there are pervasive entanglements between the private actor and the state." Lake. Mere regulation of the private entity is not sufficient. Thus, a private school's employment decisions are not state action simply because of the extensive state regulation of education--regulation that was not relevant to the employment decision. Rendell-Baker. In addition, merely entering into a contract with a private entity is not sufficient. Lake. On the other hand, the acts of a private festival organizer were deemed state action where the city provided the festival grounds at no cost, city employees were closely involved in festival planning while being paid by the city, the city promoted the festival, and the city's airport personnel were involved in the festival's air show. Camp. Likewise, the decision of a high school athletic association was deemed state action where the board of directors was primarily representatives of public schools, the association operated athletics for the state's public high schools, and the State Department of Education formally adopted the association's rules. Brentwood.

Here, the state and county regulate and control Allied's provision of probation services. The state regulations in § 35-211 create requirements for Allied, for Allied employees, and for the county's overseeing of the program. Any entity providing probation services must be a nonprofit, and individuals providing those services must possess a bachelor's degree. More importantly, the entity must receive the county's approval of an annual Plan of Services, of an annual report of services provided, and of quarterly reports. Allied's director of Probation Services Unit confirmed that Allied provides and receives the county's

approval for these reports. The probation services are entirely funded by the county (including fees paid by probationers as a term of their probation). The terms of the probation are determined by the sentencing judge, such that Allied must "carry out whatever the judge orders." Deposition. In addition to these means of control, two public officials (a county judge and the director of public health services) sit on Allied's board of directors. As in Brentwood, public officials on the board of directors increases the likelihood of state control. This control is more than the mere regulation that the court found in Rendell-Baker or a normal contractual relationship as in Lake. As a result of the state statute, the county approval requirements, and the county funding, Allied is sufficiently controlled by the county that its actions are state actions.

Allied may argue that the county does not have much functional control because it only approves quarterly and annual reports. On a day to day basis, Allied does not deal closely with the county. However, this ignores the county's real control over the operations. In addition, while only 2 of the 11 board members are public officials--in contrast to Brentwood, where the board was primarily public officials--these two members probably have more say over the probation operations because they were added to the board when Allied began providing probation services.

3. The county's control over the quarterly lists of probationers awaiting services creates a sufficient nexus between the reason there is state action and plaintiff's complaints.

The county's quarterly approval of the lists of probationers awaiting services is closely related to either reason for finding state action--the traditionally exclusive government function of punishing criminal conduct and the county's control over Allied--meeting the final prong of the Rendell-Baker test. At issue is whether the conduct giving rise to plaintiff's claim--the means of providing mental health services--has a nexus with the state's traditional function or control of Allied.

Under Rendell-Baker, there must be a nexus "between the state and the challenged action," regardless of whether there is state action under the public function or control test. There is no nexus where the plaintiff is challenging conduct unrelated to the state's control of the private entity or to the traditional government function. Thus, for example, a plaintiff challenging her termination must show a government connection to the private entity's employment practices. A contract with the government unrelated to employment is not sufficient.

Here, the plaintiffs are challenging Allied's provision of mental health services, which is closely related to either reason for finding state action. The provision of mental health services is a condition of probation, so it is closely related to the traditional government function. In addition, the county exercises its control over how Allied provides mental health services to probationers, including approving a list every quarter with the probationers who have yet to receive service. Thus, the plaintiff's claims are closely related to the county's control as well.

MPT 1 - Sample Answer # 2

Argument

Allied Behavioral Health Services has been acting under the color of law by providing probationary services to Union County parolees and is therefore subject to 42 U.S.C §1983. Under Franklin Law, a private actor acts under color of law when one of two tests and a nexus requirement are met in order to show that the State is responsible for the specific conduct of which the plaintiff complains. The two tests are the Public Function Test and the Pervasive Entanglement Test. Here, plaintiff will show that the conduct of Union County and Allied Behavioral Health Services meets the criteria of both tests and satisfied the additional nexus requirement such that the Court can find that the defendants were acting under color of law under either of the tests set out by Franklin law.

I. Where the County delegates probational services to a private entity that must carry out the orders of the sentencing court, a private actor is engaged in a public function delegated by the State and the Public Function Test has been met.

The defendants are a private actor engaged in a traditionally public function that has been delegated to them by the State of Franklin through Union County Probation Office.

Under Franklin law state action exists where a private actor is engaged in a public function delegated by the state. (Mega). In West, the Supreme Court found that when a doctor contracted with a state to provide medical care the state was required to provide, the doctor became a state actor. (Mega citing West). In Camp, the Court of Appeals for the 15th Circuit found that a nonprofit entity was a state actor when the Police department was instructed to follow directions given by the nonprofit regarding security and arrests because only the state has the power to deprive persons of their freedom by arresting them. (Mega citing Camp). In the present case, Franklin Criminal Code §35-211(a) requires the County to provide probational services but allows those services to be delegated to a nonprofit entity. Union County has delegated these probation services for misdemeanors to the defendants, Allied Behavioral Health Services (Allied). Allied is required to carry out these services however the Court instructs them but the parolees are ultimately bound by what Allied decides. (Deposition of James Simmons). Since the County is required to provide these probationary services but has delegated them to Allied, Allied is much like the doctor in West. Furthermore, since only the State, via the court and county, has the ability to deprive persons of their freedom by placing them on probation, Allied is must like the nonprofit entity in Camp. These circumstances make Allied a state actor because it is engaged in a purely public function that has been delegated by the State.

The defendants may argue that what constitutes a public function must be narrowly tailored and that mental health counseling like what is provided by Allied is not a public function under the law. In Mega, the Court of Appeals for the 15th Circuit held that courts must narrowly construe public functions to include only those traditionally the exclusive prerogative of the state. (Mega). They found that even though the state delegated the operation of the lottery, the private entity that operated the lottery was not a public actor

because operating a lottery is not a traditional function of state government. This is not the case here. While providing mental health services alone is not a traditional function of state government, only the State of Franklin has the power to sentence someone to probation and set conditions of probation. (Deposition of James Simmons). Since Allied is tasked not just with providing mental health services but also overseeing the probation of the parolees, it has been delegated a traditional state function. Thus, the Public Function Test is met.

II. Where a private entity is providing probationary services and must submit quarterly and annual reports of those services to the County for approval and is bound to follow state law and court orders in its daily operation of those services, there are pervasive entanglements between the State and the private actor and the Pervasive Entanglement Test is met.

There are pervasive entanglements between the defendants and Union County such that the decisions of Allied can be deemed to be that of the State. Under Franklin law, when a state regulates, encourages, or compels the private entity this amounts to excessive entanglement which makes the private entity a state actor. In Rendell-Baker, the Supreme Court found that the State's extensive regulation of education did not make a private school a state actor because the state did not regulate, encourage, or compel the private board of trustees to fire employees. (Mega citing Rendell-Baker). In contrast, in Brentwood, the Supreme Court found that the Association was a state actor when the board of directors was composed primarily of representatives of public schools, the board effectively operated the sports program for the public high schools, and the State Dept of Education adopted the Association's rules for the public school sports program. (Mega citing Brentwood). These circumstances showed the State and Association were pervasively entangled. (Id.). The circumstances of the present case are much more akin to Rendell than Brentwood. Here, FCC §35-211(b)(2) requires Allied to receive approval from the County Probation Officer of an annual Plan of Services as well as meet all other requirements under the Code, including minimum requirements for employee qualification. Furthermore, the court, and therefore the state, is directly involved in sending parolees to Allied. The plaintiff's sentencing order explicitly says, "the Defendant must report to Allied Behavioral Heath Services for those services ordered by this Court and any services ordered by the County Probation Officer." Finally, 100% if the probation unit at Allied is funded, by county money and fees paid by probationers as ordered by the Court. The state is regulating and encouraging Allied as the court suggested in Brentwood. The state plays a very active role in the probation program at Allied and exercises extensive control through court orders, state statute, and funding. Therefore, the state and Allied are pervasively entangled and the second test is met.

The defendants may argue that the relationship with Allied is merely a normal state contract that does not amount to extensive entanglements as well as point out that a majority of the Board are not public representatives. While it is true that the State does not involve itself in the day to day conduct of Allied, the county must approve the quarterly and annual reports. Furthermore, Allied is bound by whatever the court orders and is not free to deviate from this order when supervising parolees. Finally, while only two of the eleven board members are public officials, those board seats were created when Allied began operating its probation unit. (Deposition of James Simmons). Because Allied is not free to deviate

from the court order, and the Board was expanded explicitly to allow for more input from the state, the pervasive entanglements are still present.

III. Where the County continuously approves reports showing the majority of female parolees are disproportionally denied services required by the terms of their parole, there is a connection between the State and the denial of probationary services such that the Nexus Requirement is met.

There is a significant connection between the state action and the shortcomings of Allied such that it is fair to treat the actions of Allied as the actions of the State itself. Franklin Law requires a nexus between the state and the challenged action of the defendant such that the offending conduct must be connected to the state's influence over the private actor. (Mega citing Rendell-Baker). This can be shown if the private actor involves the state in the decision. Such a nexus exists here. Under FCC §35-211(b)(4), Allied must submit quarterly reports listing the names of probationers served during that quarter and the services provided to those probationers. The County Probation Officer must then approve those reports. Additionally, under FCC §35-211(b)(5) Allied must submit to the County Probation Office an annual report of services provided and all expenses incurred and receive approval of that report from the County. During the last three quarters Allied's reports, approved by the County Probation Officer, showed Ms. Peek was on the waiting list for counseling services. (Deposition of James Simmons). These same reports show that 90% of female parolees are never given the chance to start counseling within the probation term and 70% must be given an extension of their parole in order to complete the counseling Allied must provide them. (Deposition of James Simmons). Finally, 75% of male parolees receive and complete counseling within the period of their probation without needing an extension. (Deposition of James Simmons). The County continuously approves reports that show this extreme discrepancy between female and male applicants without requiring any action by Allied. This is a sufficent nexus under Franklin law and thus in conjunction with the two tests discussed above allows the Court to find that Allied has acted with the color of law and is subject to 42 U.S.C. §1983.

MPT 1 - Sample Answer # 3

To: Examiner From: Applicant
Re: Argument Section of Brief

Statement of the Case:
Statement of the Facts:
Legal Argument:

Allied Behavioral Health Services' Actions with Regards to Peek Constitute State Action Due to the Public Nature and Terms of the Provided Services.

Overview:
At issue is whether or not Allied Behavior Health Services (Allied) may be held liable for

damages under 42 USC 1983 which entitles plaintiffs to a civil remedy for the deprivation of constitutional rights. In this case, Ms. Peek was wrongfully denied probation services provided by Allied on account of their discriminatory gender-based policies of giving men preference over women to receive mental health counseling services. Reception of mental health counseling was a condition of Ms. Peek's probation and the failure to receive such services would constitute a violation of her probation terms. Pursuant to Franklin Code 35-211, Union county contracted with Allied for services related to probation. The Plaintiff will show that Allied engaged in a public function and there is a close nexus between the state and the privately behavior.

Under Applicable Franklin and Federal Law, the Relationship Between Allied and the State Makes Actions by Allied Reasonably Attributable to the State and Therefore Relief should be granted.

Franklin should follow the U.S. Court of Appeals precedent set forth in Lake v. Mega Lottery Group (Lake) in analyzing the applicable rules of law for this case. In Lake, a private lottery group contracted with the state to operate state lottery functions. Lake, an employee of Mega Lottery Group, was fired and brought suit alleging that she was denied due process for her termination. At issue was whether or not Mega's actions constituted state actions entitling Lake to relief - the court concluded Lake was not entitled to relief under 42 USC 1983 and set forth rules for determining whether constitutional safeguards should be imputed to private actors conducting state functions.

The Court in Lake relied on Rendell-Bakr v. Kohn which articulated the appropriate test.

Constitutional protections will protect those harmed by private entities when it is fair to say that the state is responsible for the offending conduct (Lake). The Court in Lake presented two tests and an additional nexus requirement in order to hold the private entity liable.

State action exists where the private actor was engaged in a public function delegated by the state (Rendell). In this case, Allied's conduct was a public function. Probation services are typically carried out by the state, so by merit of the contract between Allied and the state to conduct probation services, Allied agreed to take on what has been a traditionally public function. Franklin Code 35-211 requires counties to appoint County Probation Officers in order to provide probation services either directly or through other entities. The statutory requirement imposed by the state legislature on the county governments necessarily makes probation services fall under the ambit of state action. Probation services would not be required otherwise. Additional case law expands on this idea. In West v. Adkins (West) a private doctor was a public employee for purposes of providing medical care to inmates in state prisons. In West, the government delegated a government role to care for wards of the state with a private entity - this is indistinguishable from the case at bar where the government did the same thing. Allied, like the doctor in West, contracted with the government to provide services normally carried out as a public function of the state. Both of these cases can be distinguished from the holding in Lake, because while providing medical services and probation services are functions only of the state, many entities engage in lottery operations. The operation of lotteries is not confined to state

actions. No other entities beside government actors put citizens on probation or incarcerate inmates and provide them with medical care. In his deposition, Allied's Director admitted that the probation services are funded by the county and fees paid by probationers. Since no other sources of income fund the probation services such as donations, grants, or anything else, Allied's behavior looks even more like state action because it is funded by the state itself or by funds that the state ordered probationers to pay. Additionally, Allied's Director admitted that no other services are offered other than what the court orders. Allied seems to be acting merely as an extension of government as a result, not a private actor that conducts its business with any measure of autonomy. Allied appears simply to be an extension of the judicial system of Union county. The worst possible conclusion would be to posit that Allied can effectively increase the sentences of its clients by failing to provide services, as it has done in this case, and force the court's hand in increasing penalties. As such, Allied is engaged, at minimum, in a public function.

A second prong of the test addresses entanglements between the private actor and the state. Stated simply, the rule in Rendell states that a private actor engages in state action when the government uses its coercive or influential powers over the private actor or there are pervasive entanglements. In this case, the Court has ordered that Peek receive mental health counseling within 18 months, but Allied's discriminatory practices make that an impossibility. This denial amounts to the state setting requirements for probation and then denying the probationers from meeting those requirements.

As discussed above, pervasive entanglement between the government and private actors exists. The government, by statute, set up requirements for the probation service providers that substantially diminishes the private actors' ability to act independently. Additionally, the program is wholly funded by the government either through direct contribution or by ordering those on probation to pay. Finally, Allied's board composition itself reveals a certain level of entanglement. One county judge and the director of public health services are members of the board. This creates at the very least an inference of bias or a conflict of interest between Allied and the State. The county judge may in fact double deal because he is incentivized to give out probation terms he know will not be completed because of the discriminatory practices by Allied. In turn, the one on probation will be forced to pay extra fees and face extended probationary periods, all providing income to the probation services provider. The judge and the health director therefore have an interest in seeing more individuals on probation for longer periods of time. Compare the case at bar to Camp in which entanglement was found to exist between a non-profit organization hosting a festival and the government because the government allowed the non-profit to use the municipal airport to host the event and city employees engaged in planning and executing the event. The judge's probation orders amount to planning much like city employees planned the festival in Camp, with Allied viable to see the plans carried out. Similarly in Brentwood, where significant entanglement existed between the athletic association and the public schools organizing athletic events, the association was found to be a state actor because it was composed of public school representatives. The association in Brentwood promulgated rules that the public schools were meant to follow. In this case, the court promulgated rules that Allied was meant to follow, so it is significant that a judge sat on Allied's board and tends to show that Allied's actions may simply be an extension of the

state. Allied may argue that the services have not yet been denied within the 18 month period and that she therefore lacks standing to sue because she has suffered no injury. However, as the deposition records show, the high probability of Peek being denied these services amounts to an injury that even if redressed in this single instance now (before the injury has occurred), the same injury is likely to occur again in the future and therefore the court should hear it now.

It appears both tests have been satisfied in this case.

A Close Nexus exists between the state and the challenged action.

In conclusion, Peek shows that the offending conduct was connected to the state's influence over Allied. Two out of the eleven directors were government employees with an interest in seeing probation terms last longer in order to increase revenue generated from probationers, one of Allied's two sources of income. This direct pecuniary interest of Allied, the directors, and the judges involved reveals a clear nexus between the policy of denying services ordered in a probation order. There is no other compelling reason for Allied's policies in this regard. Denying the mental health services disproportiantely in order to favor men has denied Peek and other women the opportunity to fulfill the terms of their probation. Although the government is not overtly compelling the discrimination, it has allowed the discrimination to occur, for whatever reason, by delegating its authority to supervise probation services to a private entity. 75% of similarly situated men receive their counseling in time as opposed to 70% of women not receiving counseling. The spaces available in these counseling sessions have been given to men, perhaps because men are less likely to object to being treated unfairly. The state here played at least a de minimus role in denying the counseling session, even though allied will attempt to show that the interference was slight, the presence of county officers in the board of directors is enough to create an inference of state control.

MPT 2 - Sample Answer # 1

TO: Carl S. Burns, County Attorney
FROM: Examinee
DATE: July 25, 2017
RE: Complaints about Zimmer Farm

1. The Zimmers' bird rescue operation would likely not be permitted under the county zoning ordinance.

A-1 Agricultural zoning in Hartford County permits the following uses: (1) any agricultural use; and (2) incidental processing, packaging, storage, transportation, distribution, sale, or agricultural accessory use intended to add value to agricultural products produced on the premises or to ready such products for market. Agricultural use means any activity conducted for the purpose of producing an income or livelihood from agricultural products such as: crops, livestock (such as cattle, swine, sheep, and goats), beehives, poultry (such

as chickens, geese, ducks, and turkeys), nursery plants, sod, etc. Agricultural use does not lose its character due to noise, dust, odors, or long hours of operation. Additionally, a seasonal farm stand, operated for less than 6 months per year, and 3 or fewer special events directly related to the sale or marketing of one or more agricultural products are allowed. Hartford County Zoning Code Title 15 § 22. In the past, the Franklin Court of Appeals heard arguments about, but did not rule on, exactly how to interpret statutory language. Wilson v. Monaco Farms (Fr. Ct. App. 2008). That case involved a list of four items protected by the Franklin Right to Farm Ac (FRFA) and whether an additional protection could be added. One argued that the list was exhaustive while the other argued that the court should: (A) determine what is common among the list, and then (B) consider whether the matter at issue is sufficiently similar to the items listed as to be included.

While Franken has not decided how exactly to interpret such a statute, Columbia's Court of Appeal's has. In Koster v. Presley's Fruit (Columbia Ct. App. 2010), they stated they were supposed to "ascertain and give effect to the legislative intent." Brady v. Roberts Electrical Mfg., Inc. (Columbia Sup. Ct. 2009). In doing so, they look to the statute's text and give the words their natural and ordinary meaning in light of their statutory context. If there is ambiguity or the language is otherwise unclear, then the court will look to the purpose of the law. In Koster, they looked at their Right to Farm Act, which has similar activities to the ones listed in Hartford's zoning code, and determined that wood products was not part of the list of activities. They seemed to apply the second test argued in Wilson. Due to this seemingly being a matter of first impression, we would likely want to argue for the stricter test, but due to how Columbia has decided this law, the rest of this analysis will assume that the more lenient test is followed.

Here, the zoning issue involved whether a non-profit bird rescue operation unrelated to the main agricultural processes of the farm is permitted under the current zoning. The bird operation does not seem to be done to produce an income or livelihood at all, since this is a non-profit operation. This is closer to a hobby than some income producing agricultural operation. Additionally, even if the bird operation was income- producing, it would likely not be considered an agricultural product. The list of agricultural products above mostly deal with plants or animals that produce some sellable products, like eggs, wheat, milk, honey, or timber. The closest category would be poultry, but those all deal with birds that can either lay eggs for sale or be killed for their meat. The bird operation does not produce eggs consumable by humans and the birds are not killed for their meat.

Therefore, the operation itself would likely violate the zoning ordinance due to it being a non-profit and the operation not fitting into the exact list or some common characteristic.

2. The Zimmers' bird festivals would likely not be permitted under the county zoning ordinance.

All of the law for the first part of the memo is applicable here.

Here, the zoning ordinance permits food stands and up to 3 festivals per year that are directly related to the sale or marketing of agricultural products. As stated above, the bird

rescue operation would not be considered an agricultural product under the ordinance. Last year, the Zimmers held 4 festivals, with the main purpose seeming to be to help the bird operation. The festivals did, however, market the sale of apples, which is an agricultural product of the Zimmer's farm. In addition, the Zimmers came up with the idea based on agro tourism, which is essentially a festival with other activities to market and sell agricultural products. While this would likely make this a close case, with additional facts about how the proceeds for the sale of the apples were used, these festivals seem to be related to the bird operations instead of the agricultural operations.

Without a more direct connection, and fewer festivals since they held one more festival than would have been allowed, it is likely that a court would find this to be a violation of the ordinance.

Therefore, because the direct purpose of the festival does not seem to be the sale of agricultural products and the Zimmers held more than 3 festivals, a zoning violation would likely be found.

Because the bird rescue operation is not a commercial venture and because the festivals are not primarily for commercial purposes, or would constitute an expansion of the existing one-day apple festival, it would likely not be a farm operation within the meaning of the FRFA.

The FRFA was enacted to "conserve, protect, and encourage development and improvement of [Franklin's} Agricultural land for the commercial production of food and other agricultural products, b limiting the circumstances under which a farming operation may be deemed to be a nuisance." Wilson (quoting Sen. Rpt. Comm. Agric. 1983).

Preemption of a local ordinance by a state law can be done in one of two ways: (A) the statute completely occupies the field that the ordinance attempts to regulate; or (B) the ordinance conflicts with a state statute and undermines its purpose. Shelby Township v. Beck (Franklin Ct. App. 2005). In Shelby, it was determined that the FRFA did not intend to occupy the field, meaning non-conflicting ordinances are allowed. See also FRFA § 4. An example of an impermissible ordinance is one that requires a minimum amount of land for a farm for any farm that existed before the ordinance was passed.

Shelby. The initial date of the farming operation is the date when the operation began, and it will not be affected by the expansion of any of the farming operations. Shelby; Wilson; See also FRFA § 3. The FRFA protects farm operations, which are activities that occur on a farm in connection with commercial production, harvesting, and storage of farm products. FRFA § 2. There is no exact definition of commercial production, harvesting and storage of farm products in the FRFA. However, in Shelby, rasing chickens for sale was considered a protected commercial production. The law on statutory interpretation is listed above.

Here, as stated above, the bird rescue operation is separate from the farming operations and there is no profit of income from any sale of a bird or the rescue of a bird. Due to the commercial requirement in the FRFA, it is likely that similar activities as the ones listed in

the county zoning ordinance would be protected, but not the rescue activity.

The festival presents more of a challenge. The Zimmers already had a one-day-apple festival each year. It was fairly small and only for children. The festivals that the Zimmers now hold focus mostly on the non-farm-operation bird rescue. While there is a sale of apples, these do not seem to be the main part of the festival. In addition, the expansion from only selling apples to having smelly birds around would likely not have been foreseeable for any residents that moved in when the farm was just a fruit and vegetable farm. This is unlike the Wilson expansion where the residents moved next to a dairy farm and the dairy farm later added more cows. These festivals are adding a new animal that the residents did not anticipate.

Therefore, the FRFA will likely not override the ordnance or provide additional protects to the Zimmers.

Therefore, the Zimmers are likely violating the local zoning ordinance by both their bird rescue operation and the festivals and the FRFA will not provide them any additional protection due to the operations and festivals not being related to the production of commercial agriculture.

MPT 2 - Sample Answer # 2

To: Carl S. Burns
From: Examinee Date: July 25, 2017
Re: Zimmer's Farm Complaints

I. The Zimmers' Bird Rescue Operation Is Not Allowed by the Zoning Ordinances Because It Has no Commercial Value.

The Hartford County Zoning Code allows persons to use A-1 land for any agricultural use or incidental use that adds value to the agricultural products or makes them ready for market. An agricultural use is an activity "conducted for the purpose of producing an income or livelihood" from agricultural products. Agricultural products include livestock and poultry.

Here, the Zimmers' bird rescue cannot be considered an agricultural use. Edward admitted that the birds had no commercial value. He did not make a profit from this in any way. Edward may argue that he makes a profit during the festival by promoting his bird rescue, but the zoning requirement states that the income or livelihood must come from the agricultural products. Profits from the festival would be incidental to the birds because he does not sell the birds in any way.

II. The Zimmers' Festivals Are in Violation of the Ordinance Because the Zimmers Hold More Than Three Festivals, but the Ordinance Cannot Stop all Festivals.

The Hartford Zoning Code allows for "special events" that are directly related to the sale or marketing of one or more agricultural products, so long as there are a maximum of three festivals a year. Here, the festival qualifies as a special event. The event is for the promotion of at least one agricultural product: the apples sold by the Zimmers. The festival promotes the apple sales by offering the apples for sale and providing recipes for baking with fruit. While it does not appear to be the primary focus of the festival, the ordinance only requires a direct relation to the sale or marketing of at least one agricultural product. Nothing in the zoning language prohibits the Zimmers from including a promotion of their bird rescue operation as well. Therefore, the Zimmers' festivals qualify as special events.

But the Zimmers do violate the zoning ordinance by holding more than three festivals a year. The Zimmers already hold four festivals a year, and they said they would like to expand the offering to a festival every month. This would be a violation of the ordinance and the county can limit the number of festivals held, but the county cannot prohibit the Zimmers from holding all festivals.

III. The FRFA Does Not Apply to the Zimmers' Bird Rescue Operation or the Festivals Because They Are Not Commercial Products or Connected to the Production of Commercial Products.

The FRFA is used to preserve the farm lands that have been present in Franklin for many years against people who "come to the nuisance." This allows Franklin to continue providing the agricultural products needed by its citizens without subjecting the farmers to the changing areas surrounding their farms. As long as the farm was there first, the farm is generally not subject to nuisance litigation. But there are limits. Before analyzing the Zimmers' activity, this section discusses two general principles in FRFA interpretation, and then proceeds to determine whether the FRFA applies to the bird rescue operation and the festival.

First, the FRFA only preempts local zoning ordinances that conflict with the statute. Preemption can occur in two ways: the state statute can be the exclusive regulation of the subject matter, or it can only preempt conflicting local ordinances (Shelby). The court in Shelby established that the FRFA only preempts conflicting local ordinances. This means that Hartford's zoning ordinances can apply so long as they do not conflict with FRFA.

Second, if FRFA applies, courts must be careful to use the correct date of analysis to compare the use. The courts must use the date that the neighboring land changed. In this case, the court must consider the date when the neighborhoods next to the Zimmers' farm became residential. In this case, the Zimmers' farm in 1990 was a strawberry and apple farm.

A. The FRFA Does Not Apply to the Zimmers' Bird Rescue Operation Because It Does Not Provide a Commercial Product.

The FRFA does not apply to the Zimmers' bird rescue operation because the activity does not fall within section 2. Section 2 defines two things: farm and farm operation.

Under section 3, nuisance actions cannot be brought against the farm or farm operation if the farm or farm operation existed before the neighboring property changed its character. Here, the bird operation would be challenged as a farm operation. The nuisance cannot attack the farm itself because the farm existed long before the neighboring properties became residential.

A farm operation is an operation or management of the farm or an activity in connection with the commercial production, harvesting, and storage of farm products. The statute does not define farm products. Regardless, there is nothing commercial about bird rescue operation (as admitted to by Edward), nor do they plan to create any commercial product through the operation. As discussed previously, the festival cannot be said to be a commercial production of the farm product. This would require some commercial transaction involving the birds themselves (even charging for the services could be argued to be a farm product since it is not defined in the statute), which does not happen. Therefore, the bird operation does not qualify as a farm operation.

B. The FRFA Does Not Apply to the Zimmers' Festivals Because It Does Not Aid in the Production, Harvesting, or Storage of a Farm Product.

The FRFA requires that a farm operation occur in connection with the commercial production, harvesting, and storage of farm products. These do not have to be limited to the operations present when the neighboring property changed in character. As shown in Wilson, the farm can expand. Additionally, Koster, from the Columbia Court of Appeal, interprets a similar statute in Columbia to allow for reasonable expansion of the stated activities as long as they are related to activities mentioned in the statute. Here, FRFA is broader than Columbia's statute, which listed the types of products included as farming products, but it still provides limits.

The farm operation is only protected by the FRFA when it is used to commercially produce, harvest, or store the farm products. The festival does not meet this criteria. The festival does nothing to aid in producing apples and strawberries (in fact, the space needed for the festival may take away from the amount of strawberries and apples that can be produced), and it does not help store the products. The Zimmers may be able to argue that it does help harvest the apples and strawberries if they show that recent past or future festivals will involve picking the fruit like the traditional festivals did before 2016. The court in Wilson seemed to allow for a very loose interpretation of the FRFA requirements by allowing the expansion of a farm to qualify as "technology" to advance the farm. However, even this broad interpretation may not qualify the festival as commercial harvesting because the event's main purpose seems to be promoting the offerings of the farm with any harvesting being incidental.

Accordingly, the bird rescue operation and the festival would not qualify as a farm operation and would not fall under the FRFA. Since the FRFA does not apply to these activities, the Hartford zoning ordinances apply. As established previously, this would prevent the Zimmers from operating their bird rescue operation and limit the number of festivals they

can host to three per year.

MPT 2 - Sample Answer # 3

MEMORANDUM

TO: Carl S. Burns, County Attorney
FROM: Applicant
DATE: July 25, 2017
RE: Complaints about Zimmer Farm

The bird rescue operation is likely not permitted under county zoning ordinance §22, while the festivals will likely be permitted, if the Zimmers comply with a number limitation, and the FRFA would not prevent the ordinance from prohibiting the Zimmers to continue the bird rescue operation while the FRFA may prevent the number of festivals from being limited.

I. The Zimmers' bird rescue operation is not permitted under the county zoning ordinance.

Because the Zimmers' bird rescue operation is not for profit, it would not fall under the permitted agricultural uses under the zoning code.

Title 15, Section §22(a) of the Hartford County Zoning Code indicates that within an A-1 district, agricultural accessory use intended to add value to the agricultural products on the premises is permitted. Under subsection (b)(2), "agricultural use" is defined as any activities conducted for purposes of producing an income or livelihood from agricultural products, including, crops or forage and poultry. Further, an agricultural use does not lose its character as such because it involves noise, dust, orders, and the like.

The bird rescue operation began in 2015. Edwards does not sell the birds, nor does he make any profit from the operation, or intend to make any profit. Therefore, a court would likely find that, because there is no financial gain from the bird rescue operation, it would not be protected under the ordinance.

However, it could be argued that the bird rescue does add value to the agricultural products produced on the premises, because as Edward Zimmer indicated, people drive from miles around to bring him wounded birds. Therefore, this activity could be a marketing technique to raise awareness about the farm, as well as the crops provided and sold by the farm, even if that is not the motivation or the primary purpose of the bird rescue operation.

Having more information about any uses from the birds, such as ability to fertilize manure might help classify the activity as an agricultural accessory use, however, as it stands, it does not appear that the bird rescue operation would fall under the permitted agriculture uses.

II. The Zimmers' festivals will likely be permitted under the zoning ordinance as an agricultural accessory use, however the number must be limited to three.

Under the A-1 district permitted uses are those for agricultural accessory use. Under § 22(3)(b), "agricultural accessory use" includes special events, provided that they are three or fewer per year and are directly related to the sale or marketing of one or more agricultural products produced on the premises.

The festivals will likely be considered an agricultural accessory use, because, under (3)(b), the festivals would be considered a special event that directly relates to the sale or marketing of one or more agricultural products produces on the premises.

While the "Fall Bird Festival" is an event to raise funds for the bird rescue operation, the event flyer also includes "Buy apples and discover the best recipes for baking with fruit." At the festival, the Zimmers also sell apples and strawberries.

However, it could be argued that the agricultural accessory use has to be a derivative use of a category defined under agricultural use, as one producing an income or livelihood, which the bird rescue operation is not. This does not dismiss the fact that the strawberries and apples, which are produced on the farm, are sold and promoted at the Bird Festival. Additionally, just because the festival is named, "Fall Bird Festival", this does not change the fact that a promotional method utilized by the Zimmers is to offer two sessions on cooking and baking with fruit and cookbooks that appear to have recipes from the fruits grown on the farm.

While it could also be argued that, because the Zimmers held four weekend festivals on their farm in 2016 that they are not permitted under the zoning ordinance, this can be limited to three from here on. While it is true that they violated the limit on the number of festivals in a given year, nothing indicates that this would prevent them from carrying out three festivals in the years to come.

Therefore, it is likely that the festivals will be permitted under the ordinance, if the number is limited to three per year and the Zimmers continue to sell their fruit at the festivals.

III. How, if at all, does the FRFA affect the county's ability to enforce its zoning ordinance with respect to the bird rescue operation and the festivals.

It is unlikely that the FRFA will affect the county's ability to enforce the zoning ordinance with respect to the bird rescue operation, however the FRFA will likely prevent the county from limiting the number of festivals.

In Shelby Township v. Beck (2005), the Franklin Court of Appeals explained that state law has the ability to preempt a municipal ordinance in two ways. First, when a statute completely occupies the field that the ordinance attempts to regulate, preemption occurs. Second, when an ordinance conflicts with a state statute and undermines its purpose,

preemption occurs. [Shelby] A conflict can be found when the ordinance permits what the statute prohibits or vice versa. [Shelby] In determining whether there is a conflict, the statute and the ordinance must be read with the policy and purposes in mind, as well as weighing the degree to which the ordinance frustrates the achievement of the state's objectives. [Shelby]

In Shelby, there was a conflict between the size requirement of the ordinance, which prohibited the defendants from raising chickens, and FRFA, which did not. Therefore, the court found that FRFA and the ordinance were in direct conflict, and that the ordinance undermined the purpose of the Act by prohibiting the farm operation. [Shelby] Because the farm operation began before the residential development neighboring it was created and the operation would not have been a nuisance but for the residential development, the court found that the operation was protected by FRFA. [Shelby] Additionally, the court determined that its conclusion also served the purpose of the Act to conserve land for agricultural operations and protect it from the threat of extinction by regulation from units of the local governmental units. [Shelby]

When the court in Brady was faced with this question, the court decided that it must turn to the provisions of the Right to Farm Act (RFA) of the state. [Koster (2010)] This was done to determine the legislative intent of the act and its applicability. The court emphasized that it needed to examine the statute's text and give the words their natural and ordinary meaning based on the statutory context. If the statutory language was clear and unambiguous, the statute's plain meaning should be applied without other consideration. However, when such statutory language is unclear, courts may refer to both the legislative history and purpose of the legislation as an aid.

Here, just as in Shelby, the FRFA does not "occupy the field," because the Franklin legislature has also authorized local governments to enact zoning laws concerning agricultural properties.

A. FRFA will likely have no affect on zoning ordinance with respect to bird rescue

The FRFA will likely not prevent the zoning ordinance from preventing the bird rehabilitation on the property.

Under § 2 of the FRFA, "farm" is defined as the land, animals, plants buildings, structures, machinery and equipment used in the commercial production of farms. Further, "farm operation" means the operation and management of a farm or activity that occurs on a farm in connection with commercial production, harvesting and storage of farm products.

In Koster, because wood pallets were not included within the definition of farm product under the Right to Farm Act, the court found that the manufacturing of the wooden pallets was not an activity protected by the RFA. In this consideration, the court considered that the pallets were constructed of wood and nails, and that these products originated from outside the defendant's property, and was not a product grown or raised on the farm premises.

Here, while the Franklin Right to Farm Act (FRFA) provides continued protection to a farm operation when it expands or changes its operation, the activity of rehabilitating birds only began in 2015, though the Zimmers have owned their property as a farm since 1951. The bird rehabilitation is not used in the commercial production of the farm. Further, the rehabilitation is not an activity that occurs in connection with commercial production, harvesting and storage. Further, though some of the structures used for the bird rehabilitation were apparently already on the premises before the rehabilitation began, it is likely that they would no longer be consider for commercial production, unless there is some way the Zimmers could tie them to the farm.

The Zimmers may argue that they have fixed up some of these buildings for the rehabilitation, which improved the overall quality of the farm. Further the Zimmers could argue that any farm equipment, and the like, that is stored in these buildings also benefitted and there is a connection. However, this is likely a weak argument.

Further, because the rehabilitation of the birds is not a product originated from the property, the rehabilitation will likely be found to be an activity not protected by the FRFA, similar to the finding in Koster.

B. The FRFA will likely prevent the ordinance from limiting the number of festivals on the property.

In Wilson (2008), the Franklin Court of Appeals held that a farmer expanding a dairy farm from 40 cows to eventually 200 cows was exactly the type of farm operation the legislature intended to protect when it enacted FRFA.

Similarly, here, the Zimmers have had festivals for years. The only change is the development of the rehabilitation as part of the festivals. A court would likely find that this is a great way to promote the farm and the products. Further, the farm has been around for much longer than the new residential homes. In order to preserve farm land and promote agricultural products the court will likely find the festivals not to be a nuisance.

Under § 3 of the FRFA, a farm or operation shall not be a nuisance if it existed before a change in land use or occupancy of land that boarders the farmland and if, before the change, there would not have been a complaint made for nuisance. As mentioned above, the complaints have just recently began about the festivals, though the family has been engaged in festivals for many years. Because all of the residential property owners are new, a change of ownership, under § 3(b) a farm or farm operation will not be found to be a public or private nuisance in such cases. This is the exact situation we are faced with.

Thus, the FRFA will likely prevent the ordinance from limiting the number of festivals on the Zimmer farm.

IV. Conclusion

For the above reasons, the zoning ordinance will likely disallow the bird rehabilitation, allow the festivals, if limited in number, and FRFA will likely have no effect on the ability of the county to prevent the bird rehabilitation, however, the FRFA will prevent the zoning ordinances from limiting the number of festivals.