FROM: Andrew Cuomo, Governor of New York

Alvin Brown, Chief Counsel to the Governor

TO: Deputy Legal Counsel for the Governor

DATE: June 28, 2016

RE: Request for a Legal Memorandum

**Please follow these directions VERY carefully *as questions have to be answered differently***

**Part 1 of your memo**: you will write this section reflecting the current state of the law. (25%)

Down at the Port Authority of New York and New Jersey, a bi-state authority established by both legislatures to fund the ports of the region, as well as bridges, tunnels, airports and other functions, there has been controversy. We had recently seen the former head of the Port Authority, David Sampson, who had been appointed by Gov. Chris Christie (R-New Jersey) indicted for corruption at his time as head of the Port Authority. Hurricane Sandy had severely damaged the Hudson River Rail Tunnel, which carries all the mass transit by train across the river, including PATH and Amtrak trains. This had caused numerous closures and the need for repairs, but the Port Authority was strapped for cash because Sampson had diverted funds to repair the Newark Skyway project, which was perfectly legal, but ill advised. Facing the need for additional funds, Sampson convinces a majority of the Port Authority Board to lease the Hudson River Rail Tunnel to a private company called Tunnel, Inc. for 25 years. As part of the contract, the company would be responsible for repairs and upkeep of the tunnel, and in return they would get any revenue from the tunnel. Another part of the contract is a non-compete clause, meaning that no additional projects could be built in this period that would hurt their revenue. Governor Andrew Cuomo (D-New York) is very upset with this contract, but a few appointees who had been appointed before he became Governor were still on the board. He had no authority for fire them and did not do so, after legal counsel let him know it would be illegal to do so. However, the bottleneck of the Hudson River Rail Tunnel was becoming a further problem. In 2017, Congress passes a massive infrastructure bill, which provided for $15 billion dollars of federal money for a project that would build a massive new rail tunnel under the Hudson River to be known as the Gateway Tunnel. The Port Authority, now without the holdover members who had defied Cuomo, jumps at the chance for this federal money and votes to accept it and move forward with the project. However, Tunnel, Inc. said that they had a 25 year contract with a non-compete clause, and said this would violate the contract, and filed a suit in federal district court to halt it or to compensate them for any financial losses. Further complicating the case was that in the course of the Sampson corruption case, it was revealed that Tunnel, Inc. had bribed him and members of the Port Authority get the project approved. Many had criticized how generous the terms were for Tunnel, Inc. Governor Cuomo seeks your advice as to the current state of the law is for the Port Authority to defend this lawsuit so that the Gateway Tunnel can be constructed.

**Part 2 of your memo**: you will write this section as if *Lochner v. New York* were still good law AND the cases subsequent to it on substantive due process had never been decided, so you would not quote any cases after or including *West Coast Hotel v. Parrish*, but could cite cases before that case. (75%)

The State of New York, dominated by Democrats, but with Republicans in the State Senate holding a nominal majority thanks to a group of rogue Democrats known as the Independent Democratic Conference, pass a minimum wage law consisting of several parts. First, it will raise the minimum wage in the five boroughs of New York City to $15.00 per hour by 2018 for employers with at least 11 employees. However, for businesses with less than that amount, the wage would not raise to $15.00 per hour until 2019. Second, the minimum wage in the suburban counties of Nassau, Suffolk and Nassau Counties would also raise to $15.00 per hour, but by 2021. In the remaining counties in the state, the minimum wage would raise to $12.50 per hour by 2020. The State of New York justifies the minimum wage increases by noting the current state minimum wage of $9.00 per hour is not enough to support a family. They note the regional variations are due to different costs of living. Ed Davis, who owns a small bodega in Queens with 15 employee’s objects to the law on several grounds, including that it violated his right to negotiate with his employees for wages, it treats businesses differently by number of employee number, and it discriminates against him as a business owner in New York City. He also believes this may have exceeded the state’s powers as well.

The State of New York also passes a paid family leave law. It would provide for twelve weeks of paid family leave when caring for an infant, family member with a serious illness or to relieve family pressures when a family member is called to military service. However, it turns out that a series of special elections in the summer give Democrats full control of the Senate and they modify the original bill, which had called for a payroll deduction that was optional for employees and paid only by employees, to a different scheme. Under the amended provision, the law would be mandatory on all employees and employers in New York. It would be funded by a payroll deduction of 1.50% of an employee’s income, paid evenly by the employer and employee. Once in effect, an employee would be eligible for 12 week of family leave and be paid 67% of their average weekly salary. The reason for this law is to allow for family members to be able to bond with a new child or serious illness of a family member without risking both their entire saving and/or their job. Bill Faith, a butcher in the Bronx challenged this law saying he could not be required to be subject to this law because it would violate his constitutional rights, including among (but not limited to) these would be Due Process, the right to contract, and that the state lacked this power.

Another issue facing the state was the issue of housing in New York City, particularly the densely populated borough of Manhattan, as well as the newly gentrified parts of Brooklyn. A big issue from Assemblywoman Linda Rosenthal (D/WF-Manhattan), who represents the Upper West Side is Airbnb and similar companies. She feels that persons using this service are using their apartments and homes as more or less hotels, thus cutting down on the amount of housing available in her area and raising prices and rents. She also noted that many large apartment complexes had buzzer systems that required a key or someone to be buzzed in to enter the building. She feels this contributes to the safety of those residents by keeping out non-residents or those that are not guests of the resident. She convinces the State Legislature to pass a strict bill to crack down on this. Under her law, which Governor Cuomo signs, it makes it a Class A Misdemeanor, which a potential sentence of six months in jail and a $1,000 fine, for a person to rent out a residence or apartment for more than three days in a given year, if that person does not have a hotel license. A subsequent conviction would be a Class D Felony, which could impose punishment of up to 3 years in prison and a $10,000 fine. Jon Krasno, a Binghamton Political Science Professor, owned nine apartments in a building on West 113th Street near Columbia University. Krasno would use one of them when he would visit New York City, but most of them he rented out on Airbnb and made a substantial amount of money doing so. However, Rosenthal found out about it and turned Krasno in. He was convicted of five counts of violating this statute, and fined $5,000 and placed on six months probation. He pays the fine under protest, believing the law unconstitutional for limiting his rights to enter into contracts for people to stay in his apartments.

Krasno, Faith, Davis, and Tunnel, Inc. hire noted and famed attorney Randy Barnett from Georgetown Law School to represent them in challenging all four of these laws. Governor Cuomo is very interested to see what chances the state has to defend this laws and orders his Chief Counsel to let him know the current state of the law. You are a newly hired attorney working for the Chief Counsel of the Governor, and he asks you to write him a legal memorandum assessing the state of the law as instructed (so current state of the law for the Port Authority contract, but the state of the law if *Lochner v. New York* were still good law for the other three issues). He would remind you to please carefully follow these instructions and not quote any cases on the second set of issues (the ones highlighted in light blue) after and including *West Coast Hotel v. Parrish*.

Cuomo and the Chief Counsel have requested that you complete this memorandum by July 6, 2016 by 5:00 PM[[1]](#footnote-1), and submit it to them by turn it in. He further requests that your memorandum be 5 pages or more, double spaced, and that in addition to that, you also submit a table of cases with proper citations. He reminds you that a table of cases should be arranged alphabetically by the first party listed. He further reminds you that if you are citing material from the book, use the case, and a pinpoint citation to the part in the book- you do not have to go and get the actual spot in the case.

\*\*There is no need to make any standing arguments. All parties in this scenario have standing.\*\*

1. This is date is tentative. I have emailed the registrar as to the drop dead date for submission of grades. I will try to give you all as much time as possible to complete this assignment, but I will need several hours to grade it. The course ends on July 1, so you are free to turn it in before that. I will still be in contact with everyone until the final due date though. [↑](#footnote-ref-1)