GEORGE E. PATAKI, in his Official Capacity as the Governor of the State of New York, Plaintiff-Respondent, - against - The NEW YORK STATE ASSEMBLY and the NEW YORK STATE SENATE, Defendants-Appellants, -and- H. CARL McCALL, in his Official Capacity as the Comptroller of the State of New York, Defendant.

No. 171

COURT OF APPEALS OF NEW YORK

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Initial Brief: Appellant-Petitioner

COUNSEL: [*1] To be Argued by: STEVEN ALAN REISS.

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TITLE: Brief for Defendant-Appellant New York State Assembly

TEXT: PRELIMINARY STATEMENT

This case presents an historic challenge to New York's republican form of government. The bedrock of New York's government - like that of the United States and every state in the union - is a three-branch system in which the legislature makes policy and passes laws, the executive executes those laws and the judiciary interprets and enforces them. Each branch holds sway within its sphere, checked and balanced by the other two. The Legislature's primacy over lawmaking and policy is set forth in Article III, Section 1 of the New York Constitution: "The legislative power of this state shall be vested in the senate and assembly."

In this suit, the Governor seeks nothing less than the destruction of that primacy, and the arrogation of the Legislature's core policy making function to himself. The Governor contends that his responsibility to propose a budget,

[*2] with its attendant appropriations, gives him virtual *carte blanche* to propose any substantive legislation he wishes as part of the proposed appropriations - even legislation that works major changes in existing substantive law. Even more remarkably, the Governor asserts that once he makes *any* proposals in connection with an appropriation, no matter how far-reaching, the Legislature is completely pre-empted from altering those proposals or proposing legislation that modifies or changes them in any way. No governor in the history of the United States has ever held such dictatorial power.

Worse, the Governor seeks to have these unfettered powers bestowed upon him by the judiciary; and he requests that the judiciary do so in a suit the judiciary clearly has no power to hear. The Governor challenges the Legislature's actions with respect to forty-one bills passed in connection with the 2001 budget. The Governor could have - but did not - veto every one of those bills. Instead, he affirmatively signed each one into law. Less than twenty-four hours later, he instituted this suit directly against the Assembly and the Senate challenging the constitutionality of those laws.

The Governor's **[*3]** contrived use of the judiciary to accomplish what he could - but chose not to - achieve through use of his veto powers is a direct affront to the separation of powers. It also violates a bedrock requirement for the assertion of judicial power - a controversy brought by an injured plaintiff with standing to sue. Because the Governor did not suffer injury from the passage of laws he affirmatively approved, he lacks standing and the courts lack jurisdiction. Were that not enough, the legislative actions the Governor challenges - the Legislature's "voting upon and passing" the challenged legislation - are core legislative activities completely immune from suit under the Speech or Debate Clause of the New York Constitution.

This suit should be dismissed. If it is not, the Court should, as the text, structure and history of the Constitution - and the republic - require, resoundingly reject the Governor's bold attempt to become a Czar.

QUESTIONS PRESENTED

1. Whether the Governor suffered an injury in fact from the enactment into law of bills he signed sufficient to confer standing in this lawsuit.

2. Whether the Speech or Debate Clause bars the Governor's suit challenging the **[*4]** Legislature's actions "in voting upon and passing" 46 budget bills.

3. If the Court reaches the merits, whether the provisions the Legislature struck from the Governor's appropriation bills operated on more than one appropriation in violation of Article VII, Section 6 of the Constitution.

4. Whether Article VII, Section 4 authorizes the Legislature to strike certification and interchange items contained in appropriation bills that are not limited in operation to a particular appropriation.

5. Whether Article VII, Section 6 authorizes the Legislature to propose separately stated single-purpose appropriation bills, which are then subject to the Governor's veto power.

6. Whether the Legislature may propose amendments to nonappropriation bills, which are then subject to the Governor's veto power.

JURISDICTION

This Court has jurisdiction to entertain this appeal, which Defendant-Appellant New York State Assembly has taken pursuant to Civil Practice Law and Rules Sections 5601(a) and 5601(b)(1). The appeal is from the Decision and Order of the Appellate Division "which finally determines the action, where there is a dissent by at least two justices on a question of law in **[*5]** favor of the party taking the appeal," (N.Y. C.P.L.R. § 5601(a) (McKinney 2003)) and "which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States" (N.Y. C.P.L.R. § 5601(b)(1) (McKinney 2003)).

STATEMENT OF THE CASE

A. Fundamental Principles of New York Government

The Governor's position and the decisions below are at odds with the constitutional allocation of power between the legislative and executive branches. A hallmark of republican government and a fundamental command of the Constitution is that the "legislative power of this state [is] vested in the senate and assembly." N.Y. Const. art III, § 1. "It may be said in general terms that the legislature makes law and the Executive enforces them when made and each is, in the main, supreme within its own field . . . ." People v. Tremaine, 252 N.Y. 27, 39 (N.Y. 1929) ("Tremaine I"); see also Bourquin v. Cuomo, 85 N.Y.2d 781, 784 (N.Y. 1995) ("[T]he principal of separation of powers "requires that the Legislature make the critical policy decisions, while the executive branch's responsibility **[*6]** is to implement those policies."); Trade Accessories, Inc. v. Bellet, 184 Misc. 962, 965, 55 N.Y.S.2d 361, 364 (N.Y. App. Term 1st Dep't 1945) ("In a democracy fundamentally the power to enact statutes is resident in the people or their legislative representatives."). This Court recently reiterated that the Constitution "'requires that the Legislature make the critical policy decisions.'" Saratoga County Chamber of Commerce v. Pataki, 100 N.Y.2d 801, 821-22 (N.Y. 2003) (internal citations omitted). Because "the legislative power is untrammeled and supreme, . . . a constitutional provision which withdraws from the cognizance of the Legislature a particular subject, or which qualifies or regulates the exercise of legislative power in respect to a particular incident of that subject, leaves all other matters and incidents under its control." In re Application Thirty-Fourth St. Ry. Co., 102 N.Y. 343, 350-51 (N.Y. 1886).

A second hallmark of republican government - also a fundamental principle of the New York Constitution - is that no branch should be unchecked in exercising its power. The Governor's check on the Legislature's power to **[*7]** make laws is the general veto power. See N.Y. Const, art. IV, § 7. Yet the Legislature maintains ultimate supremacy over lawmaking as the Legislature may override the veto by a two-thirds vote. See id.

Significantly, New York has refused to adopt a second basic constraint on the Legislature's lawmaking power - a general single-subject requirement for legislative bills that exists in many other states to enhance the Governor's power in the legislative process (see, e.g., Cal. Const. art. IV, § 9, Wash. Const. art. II, § 19, Mo. Const. art. HI, § 23). The single-subject requirement was designed to reduce a Legislature's ability to pass legislation by "logrolling" - "adding together in a single bill provisions supported by various legislators in order to create a legislative majority." Richard Briffault, The Line Item Veto in State Courts, 66 TEMP. L. REV. 1171, 1177(1993). The single-subject requirement prevents a Governor from having to confront the difficult situation in which the Governor must weigh in a single bill the benefits of legislation on one subject that he desires against the detriments of legislation on another subject that he opposes. **[*8]** In refusing to adopt a general single-subject requirement, n1 New York affirmed the traditional primacy of the Legislature in making policy. New York leaves the Governor, in most cases, with only the general veto power - and the gubernatorial compromises it may require - as a check on the Legislature.

n1 The Constitution imposes a single-subject requirement only in the following types of bills in which logrolling is particularly problematic: (1) bills that propose private or local legislation (N.Y. Const. art. III, § 17) or (2) appropriation bills passed after the Governor's proposed appropriation bills are acted on (N.Y. Const. art. VII, § 6).

B. Article VII of the Constitution

Article VII of the Constitution, which governs the budget process, does not displace these fundamental principles of checks and balances and legislative supremacy over lawmaking and policy. It does not grant the Governor preemptive control over all policy decisions affecting appropriations. Rather, Article VII places responsibility **[*9]** with the Governor to propose initial budget bills; provides the Legislature with additional powers to control the spending

proposed by the Governor in appropriation bills; and implements concomitant structural changes to ensure that checks on each branch remain given that it is the Governor, rather than the Legislature, who initiates appropriation bills. Article VII does nothing to alter the Legislature's plenary power to propose or alter nonappropriation bills.

To understand the structure and effect of Article VII, it is instructive to consider the constitutional treatment of appropriation bills prior to the 1927 enactment of an executive budget system. Although New York never adopted the curtailment of legislative power enacted in other states through general single-purpose requirements, New York did recognize that logrolling was problematic in appropriation bills; and in 1874 amended its Constitution to provide the Governor with the power to line-item veto individual items of appropriation. N.Y. Const. art. IV, § 7. Thus, prior to 1927, the Governor had the final say over whether "items of appropriation of money" became law. The Legislature proposed appropriation bills, and the **[*10]** Governor could sign the bill while striking individual items. The potency of the line-item veto led the 1915 Committee that recommended a change to executive budgeting to express concern that under "present methods the Legislature has been gradually surrendering its most vital power in financial legislation to the executive veto," which had "very nearly resulted in an abandonment to the Executive of the priceless legislative function of holding the purse." Association of the Bar of the State of New York, Report of the Committee on State Affairs, The New York State Budget Process and the Constitution: Defining and Protecting the "Delicate Balance" of Power at 3 ("Bar Report") n2 (citing Journal of the Constitutional Convention of the State of New York at 394, 401 (1915) ("1915 Journal")). It was hoped that the "proposed system would restore that [legislative] power and make it final." Id. (citing 1915 Journal at 401).

n2 The Bar Report is located at http://www.abcny.org/pdCreport/Budget%20Report%209-11.pdf.

[*11]

The pre-1927 system was plagued by a number of inefficiencies that made it difficult to control spending. First, executive departments submitted their estimated expenditures to the Legislature without any review or revision by an authority outside the department, resulting in very high estimates. Bar Report at 3 (citing 1915 Journal at 390-91). Funds were appropriated in a piecemeal fashion in numerous different bills, so "nowhere, either in the Legislature or outside, [was there] ever formulated or made public a really complete financial plan or budget." Id. (citing 1915 Journal at 392). The appropriations process was also slow, with appropriation bills being proposed at the last minute, resulting in a lack of meaningful scrutiny. Id. (citing 1915 Journal at 390-91).

In 1927, New York adopted the executive budget system now reflected in Article VII as part of a nationwide movement aimed at eliminating these inefficiencies and providing more controls on government spending. See Briffault, The Line Item Veto in State Courts. 66 TEMP. L. REV. at 1180 (citing Roger H. Wells, The Item Veto and State Budget Reform. 18 AM. POL. SCI. REV. **[*12]** 782, 786 (1924)). Article VII provides both the Governor and Legislature with additional tools for controlling spending. First, Article VII provides for gubernatorial review of the executive department's expenditures estimates. After revising the estimates of the departments he presides over, the Governor submits "a complete plan of expenditures proposed . . . and all moneys and revenues estimated to be available therefor . . . " N.Y. Const. art. VII, § 2. Article VII also imposes a deadline, requiring submission of the "complete plan" to the Legislature by the middle of January (February 1st in an election year). See id The 1919 Report recommending these changes explains the rationale:

> The executive budget does not deprive the Legislature of any of its prerogatives. It does not, as it [sic] sometimes said, make the Governor a czar. It simply makes the Governor who represents the whole State and not a single assembly or senate district, responsible in the first instance for collecting, consolidating, reviewing and revising the estimates of the several departments of government and also for presenting to the Legislature a complete plan of expenditures and revenues-a plan **[*13]** which in his judgment will best meet the needs of the administration of which he is the head.

A.393-94 (Report of Reconstruction Comm'n to Gov. Alfred E. Smith on Retrenchment and Reorganization in the State Gov't (Oct. 19, 1919) at 316-17). n3

n3 References to Appellants' Joint Appendix are denoted as "A. " with numerical reference to the page of the number of the bound volume of Appellants' Joint Appendix to this Court submitted by Appellants.

Article VII also sought to control spending by increasing the power of the branch reviewing the proposed appropriation bills. In the pre-1927 system, upon receiving the Legislature's appropriation bills, the Governor had only the options of accepting an entire line item or taking the often draconian step of deleting the item in its entirety. Article VII provides the Legislature with an additional option in reviewing the Governor's appropriation bills: it may "reduce" the amount of an item of appropriation. N.Y. Const. art. VII, § 4.

The 1927 amendments authorized **[*14]** the Governor to propose appropriation bills. Because the structure of the Constitution generally contemplates that the Legislature initiates bills, Article VII required structural changes to account for gubernatorial initiation of appropriation bills. The appropriation bills "when passed by both houses [become] a law immediately without further action by the governor" Id. Were the Legislature able to add provisions to appropriation bills, those additions would become law without any review by the Governor in violation of the principle that no branch should go unchecked. To prevent this, Article VII, Section 4 provides that the "legislature may not alter an appropriation bill submitted by the governor except to strike out or reduce items therein, but it may add thereto items of appropriation provided that such additions are stated separately and distinctly from the original items of the bill and refer each to a single object or purpose." Id. These separately stated items do not avoid gubernatorial review because appropriation bills are the one category of bills that the Governor may line-item veto. Id., (". . . separate items added to the governor's bills by the legislature shall **[*15]** be subject to approval of the governor as provided in section 7 of article IV); see also N.Y. Const. art. IV, § 7 ("the governor may object to one or more of such items"). Pursuant to Section 6 of Article VII, the Legislature is also authorized to propose "separate bills each for a single object or purpose," which bills are "subject to the governor's approval as provided in section 7 of article IV." N.Y. Const. art. VII, § 6.

The 1938 recodification of the executive budget into the current Article VII also authorized the Governor to submit other "proposed legislation" in connection with his proposed budget. N.Y. Const. art. VII, § 3. This "proposed legislation," which this Court has called "nonappropriation bills," Silver v. Pataki, 96 N.Y.2d 532, 535 (N.Y. 2001), does not become law "immediately without further action by the governor." The Governor retains the power to exercise a general veto over such bills. See N.Y. Const. art. IV, § 7. Because the Legislature's additions to these nonappropriation bills would not escape gubernatorial review, nothing in Article VII limits the Legislature's ability to make changes to these bills as it sees fit.

Because **[*16]** of the special constitutional treatment afforded appropriation bills, the Constitution "prevent[s] the inclusion of general legislation in an appropriation bill." Tremaine I,, 252 N.Y. at 48. Section 6 of Article VII provides that "[n]o provision shall be embraced in any appropriation bill submitted by the governor . . . unless it relates specifically to some particular appropriation in the bill, and any such provision shall be limited in its operation to such appropriation." N.Y. Const. art. VII, § 6. By confining appropriation bills to items of appropriation, Section 6 prevents the Governor from taking advantage of the unique limitations on the Legislature's treatment of appropriation bills by inserting in them general provisions that the Legislature should be free to amend without restriction.

Article VII thus carefully calibrates a system in which, although it is the Governor rather than the Legislature who initiates budget bills, each branch still retains a check on the other. An example from one of Governor Franklin Roosevelt's appropriation bills shortly after the enactment of the Executive Budget system shows how the process is

intended to work. A 1929 **[*17]** appropriation bill included the following item: "Investigation of Sale of Securities and Unlawful Corporate Activities, Services and Expenses-$ 210,000." Tremaine I, 252 N.Y. at 34. Section 4 gives the Legislature the right to strike or reduce this appropriation and to add separately-stated items to the appropriation bills subject to the Governor's Article IV, Section 7 veto power. Section 6 also empowers the Legislature to propose its own single-purpose bills that the Governor would then have the opportunity either to sign or veto. And, after the 1938 amendments, if the Governor also submits "other proposed legislation," or nonappropriation bills, the Legislature can amend those bills as it sees fit because the Governor retains a veto power over those bills.

C. The Governor Departs from the Article VII System in 1998

Governor Pataki's appropriation bills in recent years dramatically upset this carefully balanced scheme. In his 1998 budget, the Governor included not just items of appropriation in his appropriation bills, but also items detailing "the utilization of appropriated funds or propos[ing] changes in the operation of certain programs." Silver, 96 N.Y.2d at 535. **[*18]** In an attempt to gain exclusive power to propose provisions affecting what he characterizes as the "when, how, and where" of appropriations, Governor Pataki then attempted to prevent the Legislature from making similar proposals in nonappropriation bills. n4 After the Legislature proposed amendments to the Governor's nonappropriation bills, the Governor took the unprecedented action of exercising his line-item veto to delete certain of those amendments. The Governor's 55 line-item vetoes in 1998 were the first time in the history of New York State that a Governor used the line-item veto in bills that did not contain any appropriations and against which he retained the check of his general veto power. The constitutionality of these line-item vetoes is currently before this Court in Silver v. Pataki, New York County Supreme Court Index No. 110553/98.

n4 The Legislature did not strike these items from the appropriation bills, but amended the Governor's nonappropriations bills to include programmatic provisions that, among other things, increased the number of parks and public areas that would receive acquisition and maintenance funding and directed how Temporary Assistance to Needy Families funds would be used. Although the Constitution grants the Governor only the general veto over nonappropriation bills, the Governor used the line-item veto to remove 55 provisions from these bills. See id That use of the line-item veto is at issue in Silver, which is currently on appeal to this Court from the decision of the Appellate Division, First Judicial Department. See Silver v. Pataki, New York County Supreme Court Index No. 110553/98.

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D. The Governor Approves the Legislature's Amendments to his 2001 Bndget Bills

The Governor continued to include general policy items in the appropriation bills he submitted in 2001. On January 16, 2001, the Governor submitted his proposed executive budget to the Legislature which included six appropriation and five nonappropriation bills. A.546-47 (Supporting Affidavit of Dean Fuleihan, sworn to November 13, 2001 ("Fuleihan Aff.") P33). Five of the Governor's appropriation bills n5 included general legislation (e.g., "certification" provisions and "interchange" provisions) or purported to amend or repeal substantive law through the appropriations process. For example, the Governor included in an appropriation bill more than twenty-five pages of substantive provisions altering section 3620 of the Education Law. A.549 (Fuleihan Aff. P 41(a)). He also proposed reauthorizing the lapsed section 153-i of the Social Services Law. A.551 (Fuleihan Aff. P 41(c)). The Legislature struck such items from the appropriation bills. See A.547-52 (Fuleihan Aff. PP 36-42). On August 2, 2001, the Legislature passed the appropriation bills without the struck provisions. A.554 (Fuleihan **[*20]** Aff. P 45). n6

n5 The Debt Service Bill (S.901-A/A.1301-A) was the exception. On March 29, 2001, the Legislature passed the

Debt Service Bill as amended. A.547 (Fuleihan Aff. P 35). It was signed into law by the Governor on March 30, 2001, as Laws of 2001, Chapter 52. Id.
n6 It also added one separately-stated item of addition. See A.552-53 (Fuleihan Aff. P 43).

The Legislature then considered and passed thirty-seven single-purpose appropriation bills pursuant to Article VII, Section 5 - each for a different purpose than the items included in the Governor's appropriation bills (e.g., refusing to create a new state agency or directing funding to a different agency). A.554-59 (Fuleihan Aff. PP 46-53). Each bill was presented to the Governor for his approval or veto. A.554 (Fuleihan Aff. P 46). On August 15, 2001, the Governor personally signed each and every one of the thirty-seven single-purpose appropriation bills into law. A.554 (Fuleihan Aff. P 47). As a result of the Governor's action, each **[*21]** of these bills became law as a Chapter of the Laws of 2001. Id.

Four nonappropriate budget bills, as amended, were also voted upon and passed by the Legislature on August 2, 2001. A.559 (Fuleihan Aff. P 54). These bills did not appropriate sums of money, but contained substantive legislation that provided the criteria pursuant to which the appropriations were to be spent. A.559-65 (Fuleihan Aff. PP 54-55). The Governor did not exercise the general veto power the Constitution grants him with respect to such bills. Nor did the Governor exercise a line-item veto over any portions of those bills, despite his position in the 1998 budget dispute that there is extraconstitutional authority to do so. Instead, the Governor signed the four nonappropriation bills into law on August 14, 2001. A.559 (Fuleihan Aff. P54).

E. The Governor Files Suit Seeking to Invalidate the Bills He Had Just Signed

Less than twenty-four hours after he affirmatively approved the Legislature's single-purpose bills and the four nonappropriation bills by signing them into law, the Governor filed this lawsuit seeking a declaratory judgment that the Legislature violated the Constitution in striking programmatic **[*22]** items from the appropriation bills, proposing a separately-stated item of addition and thirty-seven single-purpose appropriation bills, and proposing amendments to the nonappropriation bills. See A.85-105 (Complaint, dated August 16, 2001 ("Complaint")); A.565 (Fuleihan Aff. P 56). The Assembly served an Answer and Counterclaims on October 4, 2001, that denied the Governor's allegations in their entirety, and sought a declaration that the Governor's inclusion of general provisions and substantive legislation in the appropriation bills violates the New York Constitution and impermissibly usurps the Legislature's authority to enact substantive legislation. See A. 115-26 (Answer and Counterclaims of New York State Assembly, dated October 4, 2001); A.565 (Fuleihan Aff. P 57). n7

n7 The Senate served an Answer and Counterclaims on the same date also seeking a declaration that the Governor had acted unconstitutionally and that the Legislature's response was permissible. A.565 (Fuleihan Aff. P 57).

The parties **[*23]** filed cross motions for summary judgment. The Assembly first argued that the Governor's lawsuit was not justiciable because (1) he was not injured by the enactment of legislation that he signed into law and (2) it violated the Speech or Debate Clause, which immunizes the Assembly from lawsuits challenging its conduct in passing legislation. In the event that the court found jurisdiction over the lawsuit, the Assembly sought declarations that (1) the Governor's inclusion of interchange and certification provisions in his appropriation bills was unconstitutional and the provisions were, therefore, void, (2) the Constitution authorized the Legislature's striking of the void provisions from appropriation bills, and (3) the Legislature acted constitutionally in proposing (a) single-purpose appropriation bills and (b) amendments to the nonappropriation bills, both of which were subject to the Governor's veto power.

The Supreme Court denied the Assembly's cross-motion for summary judgment and granted the Governor's motion

for summary judgment. Although acknowledging that the Governor's position gave it "some pause," the court summarily concluded that "the actions of the defendants Assembly **[*24]** and Senate in enacting the forty-six budget bills on August 2, 2001 and August 3, 2001 . . . were unconstitutional in violation of article VII of the State Constitution." Pataki v. New York State Assembly, et al., 190 Misc. 2d 716, 737, 738 N.Y.S.2d 512, 528 (N.Y. Sup. Ct. Albany Cty. 2002). The Supreme Court ignored Article VII, Section 6 of the Constitution, which this Court has held prevents the inclusion of "general legislation" in an appropriation bill (Tremaine I, 252 N.Y. at 48), and concluded that the Governor has unlimited discretion to include any provisions in appropriation bills. It reached this patently incorrect holding by reading Article VII, Section 3 to allow a single bill containing "all the proposed appropriations" and other "proposed legislation." Pataki, 190 Misc. 2d at 733-35, 738 N.Y.S.2d at 525-26.

The Assembly and Senate appealed. Notably, the Governor did not defend the reasoning of the Supreme Court in the Third Department. Over two dissenting votes, the Third Department held that the Governor had standing to bring suit challenging the constitutionality of bills he signed into law. A.5. Stating that "'the **[*25]** budgetary process is not always beyond the realm of judicial consideration,'" the Third Department concluded that when the Legislature "altered plaintiff's appropriation bills in an allegedly unconstitutional manner, plaintiff was injured." Id. (internal citations omitted).

Justice Peters, joined by Justice Carpinello, dissented. Justices Peters and Carpinello explained that "because plaintiff affirmatively approved the subject legislation, he lacks standing and thus, this Court is precluded from reaching the merits of the constitutional claims." A.8. Unlike the Governor's line-item vetoes at issue in Silver v. Pataki, which this Court thus found sufficient to confer standing because they nullified the votes of prevailing legislators, (96 N.Y. 2d at 540) Justice Peters noted that the Governor's "affirmative approval" of laws he is trying to challenge "prevents him from establishing that defendants' conduct nullified an action taken by him." A.10.

After its 3-2 ruling that the Governor had standing to bring this lawsuit, the Third Department, without addressing Section 6's express limitation on what may be included in appropriation bills, concluded that "substantive **[*26]** modifiers," such as the general legislation the Governor included in his 2001 bills, "are part of a gubernatorial appropriation bill." A.6. The court then cursorily held that the Legislature's "proper constitutional action was to refuse to pass plaintiff's appropriation bills and induce negotiations, not to alter and amend them and then substitute their own spending plans in the form of 37 single-purpose bills in violation of NY Constitution, article VII, § 4." A.7 (internal citations omitted). The court, however, did not identify any text from Article VII, Section 4 that prohibits the Legislature from striking substantive provisions from appropriation bills or proposing separate single-purpose appropriations subject to the Governor's veto. It also completely ignored the question whether the Legislature may freely propose amendments to nonappropriation bills to which Article VII, Section 4, by its terms, does not apply. The Court rejected the defendants' arguments without explanation, stating only that their "contentions are either academic or unpersuasive." Id. Despite its professed belief that a court "should not and will not immerse itself into the very heart of the 'political **[*27]** process' upon which the formulation of the state budget depends," the Third Department thus invalidated all or part of forty-six bills both the Legislature and Governor had approved. Id.

SUMMARY OF ARGUMENT

The Governor's revolutionary view of Article VII would undo the "delicate balance of power" that the Constitution constructs. County of Oneida v. Berle, 49 N.Y.2d 515, 522 (N.Y. 1980). It would confer on the Governor radically new powers that no Governor has ever possessed in the more than two hundred years of this State's history, and that no Governor in any other State possesses. The first new power sought by the Governor and bestowed by the courts below is the right to bring the Legislature into court to challenge the constitutionality of laws passed by the Legislature and signed into law by the Governor. This new power would abrogate basic, constitutionally enshrined limitations that bar the judiciary from deciding intrabranch disputes that the Constitution reserves to the political process.

Because he signed the single-purpose appropriation bills and amended nonappropriation bills submitted by the Legislature into law, the Governor cannot show **[*28]** that he was injured by the bills' enactment. Correctly applying

this Court's precedents, two dissenting justices in the Third Department recognized that because the Governor's affirmative approval of these bills was not nullified but given full effect, he lacked standing to challenge the constitutionality of the bills in court. The decision of the Third Department majority that the Governor has standing based on his allegation that passage of these bills diminished his power in the budget process is directly at odds with this Court's recent ruling in Silver v. Pataki that one branch does not have standing to sue another based solely on an alleged injury to that branch's institutional power in the budget process. Silver recognized, as did the Supreme Court in Raines v. Byrd, 521 U.S. 811, 829 (1997), that an alleged injury of diminished institutional power is too abstract for judicial resolution and should be left to the political process. See 96 N.Y.2d at 539 n.5. These precedents, which involved plaintiffs who resisted - rather than acquiesced in - the asserted institutional injury, leave no doubt that standing is lacking in this case, where the **[*29]** Governor affirmatively approved the bills he now claims unconstitutionally diminished his power. Neither the Governor nor the courts below could cite any case from any court in any jurisdiction in which an executive has even attempted to challenge - let alone succeeded in challenging - laws the executive affirmatively approved. This glaring dearth of authority demonstrates just how antagonistic this lawsuit is to the injury-in-fact requirement of standing law and the separation-of-powers principles the requirement preserves.

This lawsuit, which names the Assembly as a defendant and directly challenges the actions of its members in "voting upon and passing" legislation, is also directly at odds with Article III, Section 11 of the Constitution. That provision, known as the "Speech or Debate Clause", provides: "For any speech or debate in either house of the legislature, the members shall not be questioned in any other place." N.Y. Const. art. III, § 11. The clause embodies the "doctrine of absolute legislative immunity" and prevents suits against the Legislature challenging its procedures "in enacting . . . legislation." Pataki v. Warden, 35 F. Supp. 2d 354, 358 (S.D.N.Y. 1999). **[*30]** Yet the Third Department did not even address the clause, despite extensive briefing that it barred this suit. Allowing this case to proceed would irreparably erode the constitutional protection for legislative conduct as legislators could no longer conduct their core responsibilities without fear of litigation.

The second new power the Governor seeks in this lawsuit is the exclusive power to propose policies that affect the "how, when, or where" of any appropriations. Under the Governor's view, adopted by the courts below, once he proposes an item of appropriation - with whatever terms, conditions and policies he sees fit to attach to it - the Legislature is forever preempted from proposing any legislation or policies that "affect" the appropriation. The Legislature's only "option" is to delete the appropriation in its entirety and risk that a program the Legislature deems vital will receive no funding because the Governor has attempted to impose conditions the Legislature opposes. See Brief for Defendant-Respondent, George E. Pataki, in Silver v. Pataki to the Court of Appeals, dated July 19, 2004 ("Gov. Resp. Br.") at 54 (conceding that the Governor's view of the **[*31]** Constitution provides the Legislature with the choice either to "strike the appropriation in its entirety or accept the appropriation with its objectionable terms"); Bar Report at 16 ("Pataki reads section 4 to give the Legislature only one response: to reject the appropriation in its entirety, and attempt to force a compromise on that basis.").

Specifically, the Governor's view is that the Legislature (1) may not strike the conditions attached to an appropriation without striking the appropriation itself; (2) may not delete the appropriation in its entirety and then propose a separate single-purpose appropriation, which is subject to the Governor's veto, without the Governor's conditions or with different conditions; and (3) may not propose amendments to the Governor's nonappropriation bills, which are subject to the Governor's general veto, that relate in any way to an appropriation. According to the Governor, he alone - but not the Legislature - may continue to propose provisions in other legislation that affect the "how, when or where" of the items of appropriation. This is just what he did in 2001, when he proposed in nonappropriation bills numerous provisions transferring **[*32]** authority over appropriations from one department to another and changing the conditions for receipt of previously appropriated funds.

When all of the limitations the Governor would impose on the Legislature are viewed together, the result is nothing less than a fundamental abrogation of the Legislature's basic power to legislate - a power vested in the Legislature by Article III, Section 1 of the Constitution. The Governor envisions a system in which his mere proposal of an item of appropriation completely preempts the Legislature's ability to amend or propose any substantive legislation that affects

in any remote way those appropriated funds. The Governor's revolutionary "my-way-or-the-highway" view of the budget process - and the Constitution - would, in the words of the State Affairs Committee of the New York City Bar, make him "all powerful" in the budget process. Bar Report at 1.

Not surprisingly, the Constitution clearly rejects this revolutionary theory of the Governor's power. By depriving the Legislature of any meaningful check on conditions the Governor attaches to his appropriations and prohibiting the Legislature from even proposing its own conditions, the Governor's **[*33]** "my-way-or-the-highway" view violates the fundamental constitutional tenets that the Legislature is supreme in making policy and that no branch should be able to act unchecked by another.

The courts below ignored the plain text and structure of the Constitution, which reject each element of the Governor's attempt to displace the Legislature's role in making policy for this State. First, Article VII, Section 6 expressly prohibits the Governor from including in his appropriation bills provisions that operate on more than one item of appropriation, which the interchange and certification provisions included in the Governor's 2001 appropriation bills clearly did. In removing these unconstitutional provisions from the Governor's appropriation bills, the Legislature acted pursuant to its express power in Article VII, Section 4 to "strike" items in appropriation bills. Second, Section 6 expressly authorizes the Legislature to propose single-purpose appropriation bills that are subject to the Governor's veto power. Third, nothing in the Constitution limits the Legislature's plenary power to propose amendments to nonappropriation bills, which are then subject to the Governor's **[*34]** veto power. Section 4 bars legislative additions to appropriation bills because those bills become " a law immediately without further action by the governor," a structural concern absent from nonappropriation bills which are subject to full gubernatorial review. N.Y. Const. art. VII, § 4.

This Court has previously rejected the Governor's "my-way-or-the-highway" approach. Shortly after the 1927 constitutional amendments changing the budget process, this Court explained that the Governor "may not insist that the Legislature accept his propositions in regard to segregations without amendment, while denying to it the power to alter them." Tremaine I, 252 N.Y. at 50. Such an interpretation of the budget process, this Court explained, would leave the Legislature with the unacceptable "alternative [of] striking out the items of appropriation thus qualified in toto [resulting in] possible deadlock over details of a political question outside the field of judicial review." Id. That is precisely the alternative the Governor seeks to impose on the Legislature in this case. It is once again necessary for this Court to enforce the fundamental principle of republican government **[*35]** "that the legislature make the critical policy decisions." Saratoga County Chamber of Commerce, 100 N.Y.2d at 821-22 (quoting Bourquin, 85 N.Y. 2d at 784).

ARGUMENT

I. THE GOVERNOR'S UNPRECEDENTED ATTEMPT TO SUE THE LEGISLATURE CHALLENGING THE CONSTITUTIONALITY OF BILLS HE SIGNED INTO LAW IS NOT JUSTICIABLE

A. The Governor Lacks Standing to Challenge the Constitutionality of a Bill That He Signed into Law

The Governor's lawsuit challenging the constitutionality of bills he signed into law is an extraordinary affront to the bedrock requirement of standing that a plaintiff must have suffered an "injury in fact" from the challenged conduct. Silver. 96 N.Y.2d at 539. As the Governor affirmatively signed the single-purpose appropriation bills and nonappropriation bills into law, the enactment of the bills did not injure him. See A.11 (Peters, J., dissenting) (explaining that the Governor's "approval of the budget has been given 'full effect'"). Indeed, the Governor's initiation of this lawsuit is so contrary to principles of standing and separation of powers that there is no case in which a New York Governor **[*36]** - or any Governor of any state or the President - has even attempted to bring a lawsuit challenging the constitutionality of a law that he signed. There is not even an instance of the President filing suit to challenge the constitutionality of a law he vetoed. n8 See Raines, 521 U.S. at 826 (noting, among other examples, that President Andrew Johnson did not file suit to challenge the Tenure of Office Act, which effected a significant diminution in the power of the Presidency). The Governor's unprecedented attempt to challenge the constitutionality of bills he signed

into law is thus directly at odds with the "injury in fact" requirement that "serves to define the proper role of the judiciary." Society of the Plastics Indust. v. County of Suffolk, 77 N.Y.2d 761, 773 (N.Y. 1991).

n8 This Court looked to Raines and other federal standing law in Silver v. Pataki. See 96 N.Y.2d at 539.

The Third Department majority identified as the Governor's basis **[*37]** for standing the exact type of institutional injury that this Court recently rejected as a basis for standing in Silver v. Pataki. The Third Department concluded that despite the Governor's affirmative approval of the bills he now challenges, "when defendants altered plaintiff's appropriation bills in an allegedly unconstitutional manner, plaintiff was injured" because the assertion of legislative power resulted in a "usurpation of [gubernatorial] power." A.5. In Silver, the Speaker had similarly argued that the Governor's line-item vetoes diminished the power of the Assembly in the budget process. This Court unanimously rejected that asserted basis for standing, concluding that "plaintiff's allegation of injury to the Assembly as a whole, characterized as interference with his ability 'to negotiate the Assembly's priorities and interests in the budget process,' at best reflects a political dispute. This type of political harm is no more than an abstract institutional injury that fails to rise to the level of a cognizable injury in fact." 96 N.Y.2d at 539 n.5 (quoting Silver. 96 N.Y.2d at 543 (Graffeo, J., dissenting)); see also Raines, 521 U.S. at 829 **[*38]** (stating that alleged injury of "dilution of institutional legislative power" resulting from Line-Item Veto Act was "wholly abstract and widely dispersed" and thus insufficient to confer standing on legislators); Chenowith v. Clinton, 181 F.3d 112, 115 (D.C. Cir. 1999) (holding that plaintiffs' alleged injury of "a dilution of their authority as legislators" resulting from executive orders protecting rivers was "identical to the injury the Court in Raines deprecated as 'widely dispersed' and 'abstract'").

The only injury that this Court found sufficient to confer standing in Silver - an allegedly unlawful nullification of the Speaker's vote via the Governor's line-item vetoes - is indisputably lacking in this case. As the dissent, unchallenged by the majority, noted below, the Governor's "role in the budgetary process was neither 'stripped of its validity' nor 'virtually held for naught.' Rather, plaintiff's approval of the budget has been given 'full effect.'" A.10-11 (Peters, J., dissenting) (internal citations omitted).

A comparison to cases in which courts have rejected legislative standing demonstrates the extremity of the Governor's position. Courts **[*39]** have repeatedly held that legislators who lose votes do not have "loser standing" to contest laws that they were unable to defeat politically. See Raines, 521 U.S. at 829-30 (legislator who opposed federal Line-Item Veto Act did not have cognizable injury sufficient to challenge its constitutionality); see also Matter of Posner v. Rockefeller, 26 N.Y.2d 970, 971 (N.Y. 1970) (holding that legislators lack standing to challenge laws passed by the Legislature). The Supreme Court noted that the same principle would apply to a case in which the executive challenged the enactment of a law passed over his veto. Raines, 521 U.S. at 826. Allowing such suits by executives or legislators to challenge legislation they were unable to defeat politically would "improperly and unnecessarily plunge[]" courts into a "political battle being waged between the" executive and legislative branches. Id.

The Governor's attempt in this lawsuit to challenge legislation he signed into law is even more troubling. If a political branch member who unsuccessfully opposed a law does not have a legally cognizable injury (absent an alleged unlawful nullification **[*40]** of his vote), surely the Governor's argument for "winner standing," in which a political actor who supported the enactment of a law can nonetheless haul another supporter into court seeking to declare the law unconstitutional, must fail. This unprecedented theory would allow a government official to avoid the political accountability that may come from opposing a law but then defeat the law in the courts, thus replacing the constitutional "system of checks and balances [with] a system of judicial refereeship." Moore v. U.S. House of Representatives. 733 F.2d 946, 959 (D.C. Cir. 1984) (Scalia J., concurring).

The Third Department apparently construed this Court's statement that the "budgetary process is not always beyond the realm of judicial consideration," Silver. 96 N.Y. 2d at 532 (internal citations omitted), to mean that there is always

standing to challenge conduct in budget disputes. See A.5. But the possibility that standing may exist to resolve budget disputes does not override the fundamental injury-in-fact requirement that exists for all cases. See Society of Plastics Indus.. 77 N.Y.2d at 772-73 (stating that "'injury **[*41]** in fact' has become the touchstone during recent decades" and is necessary to "ensure [] that the party seeking review has some concrete interest in prosecuting the action which casts the dispute 'in a form traditionally capable of judicial resolution") (quoting Schlesinger v. Reservists to Stop the War. 418 U.S. 208, 220-21 (1974)). If standing were automatic in cases concerning the budget process, this Court would not have needed to analyze the standing issue in Silver to identify the concrete individualized injury suffered by the Speaker through the Governor's nullification of his vote. As this Court has emphasized, "[t]hat an issue may be one of 'vital public concern' does not entitle a party to standing." Society of Plastic Indus.. 77 N.Y.2d at 769.

There is no basis for relaxing the standing requirement in this case. Barring the lawsuit based on the Governor's clear lack of injury would not impose "an impenetrable barrier to any judicial scrutiny of legislative action." Saratoga County Chamber of Commerce, 100 N.Y.2d at 811. Similar issues concerning the constitutional roles of the legislative and executive branches **[*42]** in the budget process are currently before this Court in Silver v. Pataki, in which this Court has already found that standing exists based on nullification of the Speaker's votes. See 96 N.Y. 2d 532 (N.Y. 2001). Moreover, prior lawsuits challenging the Legislature's conduct in the budget process demonstrate the availability of other potential plaintiffs. New York courts have allowed the Attorney General to challenge the Legislature's amendments to appropriation bills on behalf of the people, see Tremaine I, 252 N.Y. at 27 ("Tremaine I"); People v. Tremaine, 281 N.Y. 1 (N.Y. 1939) ("Tremaine II"), and, least problematic for separation-of-powers principles, an affected private party can bring suit to challenge the Legislature's amendments to appropriation bills, see New York State Bankers Ass'n v. Wetzler, 81 N.Y. 2d 98 (N.Y. 1993) ("Bankers").

Allowing gubernatorial standing in this case would significantly expand the role of the judiciary in political disputes. The Governor or a single legislator could bring suit challenging a law - even one he or she supported - based solely on the abstract and unmoored **[*43]** allegation that the enactment of the law diminishes his or her power in the political process. This Court's recent decision in Silver rightly rejects this expansive notion of standing. It defies logic to conclude that the Governor was injured by the enactment of laws he approved. In order to enforce the standing requirement that "is critical to the proper functioning of the judicial system," Saratoga County Chamber of Commerce, 100 N.Y.2d at 812, this Court should dismiss this lawsuit and determine the allocation of power between the Legislature and Executive in Silver v. Pataki.

B. The Speech or Debate Clanse Immnnizes the Legislature from This Suit Challenging Its Condnct in "Voting Upon and Passing" Laws

Not only does this case differ from the prior cases challenging budget legislation in that it is the Governor - who lacks injury - rather than a private citizen or the Attorney General who is bringing suit, but also because the naming of the Assembly as a defendant further raises separation-of-powers concerns. In seeking a declaration that "the actions of defendants in voting upon and passing the forty-six budget bills . .. were unconstitutional, **[*44]** " A.99 (Complaint) (emphasis added), the Governor's lawsuit expressly challenges conduct the Speech or Debate Clause indisputably protects. The Third Department completely disregarded this constitutional provision, which provides: "For any speech or debate in either house of the legislature, the members shall not be questioned in any other place." N.Y. Const. art. III, § 11. By questioning the Legislature's "voting upon and passing" of budget bills in this judicial forum, the Governor violates this core constitutional immunity, which preserves "the integrity of the Legislature by preventing other branches of government from interfering with legislators in the performance of their duties," so that "legislators are free to represent the interests of their constituents without fear that they will be later called to task in the courts for that representation." Urbach v. Farrell, 229 A.D.2d 275, 276, 656 N.Y.S.2d 448, 449 (3d Dep't 1997).

Previous challenges to budget bills were brought against the agency officials charged with enforcing the law, either the Comptroller (Tremaine I and Tremaine II) or the Commissioner of the Department of Taxation (Bankers) **[*45]** . Perhaps the Governor avoided suing only the Comptroller n9 because such an intrabranch suit by the Governor against the Comptroller would have further highlighted the Governor's obvious lack of standing to challenge the

constitutionality of laws he signed. But in attempting to camouflage his lack of standing, the Governor cannot avoid the Speech or Debate Clause, which bars this suit challenging the Legislature's "voting upon and passing" the challenged budget bills. See Romer v. Colorado, 810 P.2d 215, 222 (Colo. 1991) (holding that Speech or Debate Clause barred the Governor from challenging the Legislature's amendments adding footnotes and headnotes to appropriation bill).

n9 The Governor included the Comptroller as a defendant when this suit was filed. The Comptroller was dismissed and the Governor did not challenge that dismissal. See Pataki v. McCall, Decision and Order (N.Y. Sup. Ct. Albany Cty. Nov. 7, 2001).

The immunity of the Speech or Debate Clause is absolute. It "not only **[*46]** shields legislators from the consequences of litigation, but also protects them from the burden of defending themselves in court." Straniere v. Silver, 218 A.D.2d 80, 83, 637 N.Y.S.2d 982, 985 (3d Dep't 1996). n10 Therefore, the Clause bars suits challenging legislative conduct, whether civil, criminal, or "initiated by the Executive Branch," for damages, injunctive, or declaratory relief. See Eastland v. United States Servicemen's Fund. 421 U.S. 491, 502-03 (1975); see also Tolman v. Finneran, 171 F. Supp. 2d 31, 35-36 (D. Mass. 2001) ("Legislative immunity applies even when the relief sought is only equitable [such that] the failure, even if unconstitutional, to appropriate funds for an election reform does not constitute a flagrant violation of a fundamental constitutional protection so extraordinary as to abrogate legislative immunity"). n11

n10 Accord Supreme Court of Virginia v. Consumers Union of the United States. Inc., 446 U.S. 719, 731-32 (1980); Gravel v. United States. 408 U.S. 606, 616, 624 (1972); Powell v. McCormack, 395 U.S. 486, 502-03 (1969); Dombrowki v. Eastland, 387 U.S. 82, 85 (1967).

[*47]

n11 See also Supreme Court of Virginia. 446 U.S. at 733 (declaring that if the Virginia Legislature had enacted the State Bar Code and been sued for refusing to amend the Code after Supreme Court cases indicated that certain parts of the Code would be held invalid, the Legislature could have successfully sought dismissal on the grounds of "absolute legislative immunity"); Star Distributors, Ltd. v. Marino, 613 F.2d 4, 9 (2d Cir. 1980) (holding legislative immunity exempts state legislators from suits for damages or injunctive relief under § 1983 to the same extent as their federal counterparts under the Speech or Debate Clause).

It is well recognized that the immunity provided by the Speech or Debate Clause and the common-law doctrine of legislative immunity applies not only to suits against individual legislators, but also to suits against legislative bodies. See, e.g., Pataki v. Warden, 35 F. Supp. 2d 354, 358 (S.D.N.Y. 1999) (court dismissed claims challenging amendments passed by the State Legislature and the Governor, declaring **[*48]** that "[t]he well-settled doctrine of absolute legislative immunity, however, bars actions against legislators or Governors - and, *a fortiori*, Legislatures - on the basis of their roles in enacting or signing legislation"); Kessel v. Purcell, 119 Misc. 2d 449, 450, 463 N.Y.S.2d 384, 385 (N.Y. Sup. Ct. Nassau Cty. 1983) (declaring that the "State Legislature also enjoys absolute immunity from liability for actions which are, as here, in the sphere of legitimate legislative activity"); United States v. Craig, 528 F.2d 773, 780 (7th Cir. 1976) ("[T]he Speech or Debate Clause is intended to provide a personal safeguard for the individual legislator and an institutional immunity for the legislature itself); Holmes v. Farmer, 475 A.2d 976, 985 (R.I. 1984) ("The privilege [of the Speech or Debate Clause] protects the institution of the Legislature itself from attack by either of the other co-equal branches of government.").

This lawsuit attacking the Legislature for its conduct in "voting upon and passing" budget bills strikes at the heart

of the Speech or Debate Clause. See Kennedy v. Commonwealth, 119 Pa. Cmwlth. 24, 28-31, 546 A.2d 733, 735-36 (1988) **[*49]** (holding suit against the Legislature challenging a legislative enactment barred by the Speech or Debate Clause of the state constitution because "nothing is more basic to the independence and integrity of the legislature than its ability to pass legislation"). "The Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch." Gravel, 408 U.S. at 616. The Clause protects "voting, preparing committee reports and conducting committee hearings" even if the substance of the legislation itself may be illegal or unconstitutional and may be reviewed by the court independently. See Straniere, 218 A.D.2d at 84, 637 N.Y.S.2d at 986 (holding that the protection of the Speech or Debate Clause attaches early in the legislative process, and that activities entitled to protection include "the drafting of bills and the reference of bills to committee"). It "is difficult to imagine a more 'integral' legislative function than the formulation of budgetary legislation." Campaign for Fiscal Equity v. State, 179 Misc. 2d 907, 908, 687 N.Y.S.2d 228, 230 (N.Y. Sup. Ct. N.Y. Cty. 1999); **[*50]** see also San Pedro Hotel Co. v. City of L.A., 159 F.3d 470, 476 (9th Cir. 1998) (stating that budgetary decisions of local legislators are entitled to legislative immunity which is "parallel to the immunity provided by the Speech or Debate Clause"); L.B. Moore v. Baca. No. CV01-03552FMC(RCX), 2002 WL 1040997, at *4 (CD. Cal. May 21, 2002) (accord, citing San Pedro Hotel Co.). The Speech or Debate Clause, ignored by the court below without explanation, thus immunizes from legal challenge the vital legislative function of amending and passing budget bills that the Governor attacks in this lawsuit.

II. THE LEGISLATURE CONSTITUTIONALLY RESPONDED TO THE GOVERNOR'S UNPRECEDENTED ATTEMPT TO ENACT SUBSTANTIVE POLICY PROVISIONS IN APPROPRIATION BILLS.

Were this Court to reach the merits of this case despite the clear lack of injury to the Governor and the direct challenge to immunized legislative conduct, it should reject the Governor's revolutionary attempt to prevent the Legislature from having any meaningful role in enacting policy that relates in any way to appropriations. The Third Department recognized that in his 2001 appropriation **[*51]** bills, the Governor included not just items of appropriation, but also what it obliquely termed "substantive modifiers" that significantly changed policies relating to the programs receiving appropriations. A.6. Yet the Third Department ignored the express limitations Article VII, Section 6 places on what the Governor may include in his appropriation bills and granted the Governor unfettered power to include whatever he wishes. Compounding the separation-of-powers concerns raised by allowing the inclusion of general legislation in appropriation bills, the Third Department endorsed the Governor's position that the Legislature cannot counter the Governor's improper inclusion of substantive provisions in his appropriation bills in any of the following ways:

> 1. The Legislature may not strike substantive policy items from the Governor's appropriation bills even though Article VII, Section 4 authorizes the Legislature to strike "items." See Brief to Plaintiff-Respondent, George E. Pataki, in Pataki v. Assembly to the Third Department (Governor's Third Department Brief) at 4-5.
>
> 2. The Legislature may not propose single-purpose appropriation bills, even though Article **[*52]** VII, Section 6 expressly authorizes such bills and the Governor retains a veto over them. See id.
>
> 3. The Legislature may not amend nonappropriate bills proposed by the Governor, even though the restrictions in Article VII, Section 4 do not apply to nonappropriation bills and the Governor retains a veto over such bills. See id. at 5-6; Gov. Resp. Br. (Silver v. Pataki) at 53-54.

The Third Department quoted no constitutional text that prohibited the Legislature from exercising these options; and it refused to recognize text in Article VII, Sections 3, 4 and 6 that expressly authorizes the Legislature to strike items in appropriation bills and to propose singlepurpose appropriation bills subject to the Governor's veto.

The Third Department thus ignored express limits on what the Governor may include in appropriation bills and imposed restrictions on the Legislature found nowhere in the Constitution. The only support the Third Department cited for imposing restrictions on the Legislature's treatment of appropriation bills was Article VII, Section 4. But in discovering limitations in Section 4 found nowhere in the text of that provision, the Third Department ran **[*53]** afoul of the well-established interpretive principle that "a constitutional provision which withdraws from the cognizance of the Legislature a particular subject, or which qualifies or regulates the exercise of legislative power in respect to a particular incident of that subject, leaves all other matters and incidents under its control." In re Application Thirty-Fourth St. Ry. Co., 102 N.Y. at 350-51. And in implicitly extending Section 4 to nonappropriation bills, the Third Department not only ignored the plain language of the Constitution, but also the structural considerations that animate Section 4.

The Third Department did not address - let alone grapple with - the cumulative effect of its judicial imposition of these three limitations on the Legislature. Foreclosing all of these options precludes the Legislature from ever proposing policies that affect a program for which the Governor has proposed an appropriation. According to the Governor and the courts below, the Legislature's only response to this remarkable assertion of executive power is the Hobson's choice of deleting an entire item of appropriation along with the modifying substantive policy provision **[*54]** - which would deny funding that the Legislature may think essential - simply because it disagrees with the policy conditions the Governor has proposed. See Bar Report at 1 (explaining that to "interpret Article VII, as Pataki has done, to empower the Governor to set all the conditions on the use of appropriated moneys and leave the Legislature with only the option to strike the entire appropriation or to accept it with all of such conditions, sets up the Governor as all-powerful, not as a partner in the budget process").

Surely the grant of such sweeping gubernatorial power - and the wholesale abrogation of the Legislature's core responsibility over policy - would have support in the constitutional text and history or the judicial precedents of this State. Not only is such support absent, but the constitutional text, structure, and history plainly empower the Legislature to fulfill its policymaking duties and propose policies affecting appropriations.

A. The Governor's "My Way or the Highway" Approach Would Fundamentally Alter the Balance of Power and Grant the Governor Powers Enjoyed by No Governor in Any Other State

It is critical to highlight the effect of the ruling **[*55]** below upholding the Governor's view of Article VII on the "the delicate balance of powers" between the three branches of government, because "history teaches that a foundation of free government is imperiled when any one of the co-ordinate branches absorbs or interferes with another." County of Oneida. 49 N.Y.2d at 522. The Governor contends that once he proposes an item of appropriation, the Legislature is forever preempted from proposing policies that "affect" the "when, how and where" of, or otherwise relate to, that appropriation. According to the Governor, the Legislature faces the following "choice" when confronted with an appropriation it finds necessary accompanied by a substantive provision that it dislikes: (1) accept or reduce the appropriation with the undesirable condition attached, or (2) delete the appropriation altogether. See Gov. Resp. Br. (Silver v. Pataki) at 54 ("The Speaker complains the Legislature is left with 'only a narrow Hobson's choice' if it does not like 'when, how, or where' aspects of an item of appropriation-i.e. it can either strike the appropriation in its entirety or accept the appropriation with its objectionable terms. **[*56]** This, however, is not a 'Hobson's choice' but part of the plan carefully established by the Executive Budget System.") (internal citations omitted); Silver v. Pataki, 192 Misc. 2d 117, 123, 744 N.Y.S.2d 821, 826 (N.Y. Sup. Ct. N.Y. Cty. 2002) ("In Pataki v. Assembly, the governor apparently took the position that the legislature lacked even the authority to adopt such a separate [single purpose] bill" funding the deleted item without the objectionable qualifications "if it altered an item in an appropriation bill.").

The Governor contends that the Legislature lacks the power to strike the substantive policy item itself. If the Legislature deletes the appropriation altogether, the Governor takes the position that it may not propose a single-purpose appropriation with different or no conditions attached. And, according to the Governor, if the item of appropriation becomes law, the Legislature is forever prohibited from proposing amendments in nonappropriation bills that "affect" the appropriation by, for example, suballocating the appropriated funds or establishing conditions for the

recipients of such funds. Yet the Governor retains such authority to propose **[*57]** in other legislation the "when, how or where" of the item of appropriation. During the 2001 budget process, for example, the Governor proposed in nonappropriation bills numerous provisions transferring authority over appropriations from one department to another and changing the conditions for receipt of previously appropriated funds. Even though these gubernatorial proposals affecting prior appropriations are contained in nonappropriation bills, Section 4, according to the Governor, limits the Legislature's ability to amend them.

Thus, according to the Governor, by proposing an item of appropriation, the Governor completely preempts the Legislature's ability to propose any substantive legislation that affects in any remote way those appropriated funds. The Governor's "my-way-or-the-highway" view of the budget process places policy decisions that are the heart of the legislative function in the hands of the Governor, and leaves the Legislature with a Hobson's choice in responding to his policy proposals. The State Affairs Committee of the New York City Bar Association characterized the Supreme Court's adoption of this view as follows:

> [the] lower court decision in *Pataki* **[*58]** reveals a budget process increasingly inconsistent with the basic norms of the "delicate balance of powers that exist between the legislative and executive branches . . . . Section 3 is taken to be completely open-ended: not only may existing statutes be stretched to accommodate a Governor's budget plan, but they may be completely rewritten and wholly new statutes may be submitted by the Governor as part of an appropriation bill. Moreover, *Pataki* reads section 4 to give the Legislature only one response: to reject the appropriation in its entirety, and attempt to force a compromise on that basis.

Bar Report at 16. The Constitution does not put the Legislature to that "Hobson's Choice" of "forego[ing] funding altogether and precipitat[ing] a budgetary crisis." Id. at 21.

Examples help illustrate the revolutionary nature of the Governor's view. The Governor has conceded to this Court in Silver v. Pataki that if he proposed an appropriation of retirement benefits for state employees and included in that appropriation a provision raising the age at which benefits are paid to eighty, then the Legislature "could not alter that appropriation by changing that age. **[*59]** " Gov. Resp. Br. (Silver v. Pataki) at 54. All the Legislature could do, according to the Governor, is strike in its entirety the appropriation funding retirement benefits.

This hypothetical is not far removed from what the Governor attempted in his 2001 appropriation bills. For example, the Governor's Education, Labor and Family Assistance Bill included a provision establishing new eligibility criteria for Improving Pupil Performance grants. A.64 (Affidavit of Carole E. Stone, Esq., sworn to October 22, 2001 ("Stone Aff") at P 13(g)). Assuming the Legislature opposed the Governor's proposed new criteria, the Governor's position would leave the Legislature only with the "choice" of striking the appropriation in toto, without the opportunity to propose a new appropriation for Improving Pupil Performance Grants that lacked the new, undesirable criteria. Under the Governor's view, the Legislature could not approve the appropriation while striking the item establishing new criteria, could not strike the appropriation in toto and propose a new single-purpose Improving Pupil Performance Grant appropriation with different eligibility criteria for the Governor's approval or veto, **[*60]** and could not enact the appropriation but then later propose other criteria in the Governor's nonappropriation bills.

The Governor's my-way-or-the-highway approach to the budget process would confer on the Governor authority over policy decisions possessed by no Governor in any other state and disrupt the fundamental principle of republican government "that the legislature make the critical policy decisions." Saratoga County Chamber of Commerce, 100 N.Y.2d at 821-22.

It is thus not surprising that the text and structure of the Constitution reject this unprecedented theory. Indeed, this Court rejected the Governor's position long ago, explaining that the Governor "may not insist that the Legislature accept his propositions in regard to segregations without amendment, while denying to it the power to alter them" because that would leave the Legislature with the draconian "alternative [of] striking out the items of appropriation thus qualified in

toto [resulting in] possible deadlock over details of a political question outside the field of judicial review." Tremaine I, 252 N.Y. at 50.

B. The Constitution Expressly Authorizes the Legislature's [*61] Striking of Substautive Policy Items in the Governor's Appropriation Bills

The Legislature's striking of certification, interchange, and general policy items improperly included in the Governor's appropriation bills was constitutional. First, the programmatic provisions the Governor included in his 2001 appropriation bills violated Article VII, Section 6 and were thus void. Second, the Legislature's constitutionally authorized remedy to prevent the enactment of these unconstitutional provisions was to strike them pursuant to Article VII, Section 4. See Bar Report at 22 (concluding that "legislation that is included by the Governor must be specifically related and limited in its operation to an appropriation" and "Section 4 [] allows the Legislature to strike items of programmatic material without striking an appropriation in its entirety").

1. Article VII, Section 6 Renders the Substautive Policy Provisions Included in the Governor's Appropriation Bills Unconstitutional

The substantive policy items the Governor included in his 2001 appropriation bills were void ab initio because they violated Article VII, Section 6's command that "no provision shall be embraced **[*62]** in any appropriation bill submitted by the Governor . . . unless it relates specifically to some particular appropriation in the bill, and any such provision shall be limited in its operation to such appropriation." This Court has already noted that this provision, previously part of Article III, "prevent[s] the inclusion of general legislation in an appropriation bill." Tremaine I, 252 N.Y. at 48. Indeed, the framers of the current Section 6 enacted it to make "contrary to the Constitution" the inclusion in appropriation bills of "sections regulating the transfer of appropriations, authorizing classification of expenditures . . . and regulating the lapsing of appropriations" - precisely the kind of sections the Governor improperly included in his 2001 appropriation bills. A.371 (State of New York Report of the Joint Legislative Comm. on State Fiscal Policies. Leg. Doc. No. 41 at 37 (1938)).

Section 6 serves a vital purpose because it ensures that the Governor cannot take advantage of the unique constitutional rules governing appropriation bills to abrogate the Legislature's supreme role in making substantive policy decisions. By completely ignoring Section **[*63]** 6, the Third Department endorsed a constitutional scheme previously rejected by this Court in which the Governor can include substantive policy provisions in his appropriation bills and then invoke Section 4 to "insist that the Legislature accept his propositions . . . without amendment, while denying to it the power to alter them." Tremaine I, 252 N.Y. at 50. Just as Section 4 prohibits the Legislature from adding substantive provisions to appropriation bills, Section 6 prohibits the Governor from including substantive provisions in appropriation bills in the first place. See id. ("If the Legislature may not add segregation provisions to a budget bill proposed by the Governor without altering the appropriation bill . . . it would necessarily follow that the Governor ought not to insert such provisions in his bill.").

The Third Department, making no mention of Section 6 and its role of ensuring that appropriation bills are properly confined to items of appropriation, simply cited Saxton v. Carey, 44 N.Y.2d 545 (N.Y. 1978), for the proposition that the "Constitution does not require any particular degree of itemization." A.6. That proposition, **[*64]** while correct, is irrelevant. Saxton did not involve Section 6 and the issue whether modifying provisions affect more than one appropriation. Saxton involved the specificity required in an appropriation itself, such as whether the Governor may simply propose $ 5,000,000 for repairs to a particular highway, or whether he must specify which portion of the highway will be repaired. See 44 N.Y.2d at 550. Saxton did not involve a challenge to substantive policy provisions included in an appropriation bill that operated on more than one appropriation in violation of Section 6.

Had the Third Department addressed Section 6, it would have had to conclude that the substantive policy provisions struck by the Legislature were unconstitutional because they were not limited in their operation to a particular appropriation. The more than 60 general provisions included in the Governor's 2001 appropriation bills, see, e.g., A.62,

66-75 (Stone Aff. PP 12, 14a-s, 15a-g), can be classified as either: (1) interchange provisions or (2) budget certification provisions. n12 Similar provisions - "general provisions dealing with the power of allocation of appropriations made, and **[*65]** with the transfer and interchangeability of such appropriations within departments and between bureaus, etc.," A.529 (Brief of the Attorney General to the Court of Appeals in People v. Tremaine, 281 N.Y. 1 (1939) ("Tremaine II Br.") at 89) - were at issue in Tremaine II. This Court unequivocally rejected the inclusion of such provisions in appropriation bills: "All agree that the 'general provisions' are unconstitutional and have no place in the budget." Tremaine II, 281 N.Y. at 12.

> n12 For example, the Governor's appropriations for the Department of Health were replete with interchange provisions that constituted a clear attempt to usurp legislative authority by "notwithstanding" Section 51 of the State Finance Law. These general interchange provisions would have enabled the Director of the Budget to reallocate funds to other objects or purposes within the Department of Health appropriation or to any other agency and program funded through the same general fund account.

[*66]

The interchange and fund transfer provisions contained in the Governor's appropriation bills sought to vest authority in the Director of the Budget to transfer or re-allocate appropriated funds, without regard to the specific purposes for which those funds were appropriated. These provisions allowed the Director of the Budget to interchange funds within the State's budget without regard to the appropriation bills or budget plan proposed by the Executive and enacted by the Legislature. The Governor's interchange language would have enabled a lone executive officer - an unelected official - to move and transfer funds at whim between programs and departments with absolute disregard for the budget enacted through the two-branch process mandated by the Constitution.

The New York Constitution bars the inclusion of provisions for the interchange and transfer of funds in appropriation bills because (1) they do not, "relate[] specifically to some particular appropriation"; and (2) they are not "limited in [] operation" to a particular appropriation as they would apply to all the appropriations. See N.Y. Const. art. VII, § 6. Because they render the appropriations plan drafted by **[*67]** the Executive and altered and approved by the Legislature largely meaningless, "provisions which permit free interchange and transfer of funds are unconstitutional on their face." Hidley v. Rockefeller, 28 N.Y.2d 439, 448 (N.Y. 1971) (Fuld, J., dissenting on the issue of standing). As the Attorney General explained in his successful brief in Tremaine II, if general provisions of allocation and control "are proper in the budget bills, the Legislature is hog-tied." A.530 (Tremaine II Br. at 90).

Also violating Section 6 are the budget certification provisions the Governor included in his appropriation bills - cookie-cutter provisions placed atop each appropriation bill and purporting to affect "each and every item of appropriation" included in each bill - that are general provisions by design. A.62 (Stone Aff. P 12); A.215, 250 (Memorandum of Law in Support of Governor Pataki's Motion for Summary Judgment, dated October 22, 2001 ("Gov. Mem.") at 3, 38). The certification provision provided:

> No moneys appropriated by this chapter shall be available for payment until a certificate of approval has been issued by the director of the budget, who shall file **[*68]** such certificate with the department of audit and control, the chairperson of the senate finance committee and the chairperson of the assembly ways and means committee.

A.62 (Stone Aff. P 12). The certification provisions are invalid because, as the Governor conceded below, they purport to apply generally to all of the appropriations, and are not limited in operation to any appropriation. See A.600 (Memorandum of Law in Reply to Defendants' Opposition to the Governor's Motion for Summary Judgment and in Opposition to Defendants' Cross-Motion for Summary Judgment, dated December 5, 2001 ("Gov. Opp. Mem.") at 28); see also A.605 (Gov. Opp. Mem. at 33) (the certification provisions were "intended to and did apply, by [their] terms, to

each item of appropriation submitted in the bill[s]"). The provisions therefore neither (1) "relate[] specifically to some particular appropriation," nor are (2) "limited in [] operation" to a particular appropriation. See N.Y. Const. art. VII, § 6. Instead, in placing these general provisions atop the bills - not linked to any monetary amount, object or purpose - the Governor sought to apply the provision to all of the appropriations **[*69]** in each bill. A.62 (Stone Aff. P 12); A.215, 250 (Gov. Mem. at 3, 38).

Yet another violation of Section 6 was the Governor's insertion of a new formula for distributing education aid to schools, which he intended to supersede the prior formula. See Governor's Third Department Br. at 35-40. As the new formula was not "limited in its operation" to a "particular appropriation," but would have operated to nullify existing substantive law, it violated Section 6.

Because the Governor's substantive policy items were not limited in their operation to a particular appropriation, they violated Section 6 and were void ab initio. See Tremaine I, 252 N.Y. at 45 (holding that the Legislature's additions of segregation provisions to appropriation bills were "were unconstitutional and void"); id. at 50 ("If the Legislature may not add segregation provisions to a budget bill proposed by the Governor without altering the appropriation bill . . ., it would necessarily follow that the Governor ought not to insert such provisions in his bill."). As the Attorney General successfully argued in Tremaine II, such general provisions are "destructive of all fiscal **[*70]** plan and control" and are unconstitutional. A.531 (Tremaine II Br. at 91). They have no place in appropriation bills. They are, rather, "the proper subject of action by general laws" enacted at the prerogative of the Legislature. A.530 (Tremaine II Br. at 90).

2. Article VII, Section 4 Expressly Authorizes the Legislature to Strike Items in Appropriation Bills, Including Items Proposing Substautive Policy Changes

Faced with this unconstitutional inclusion of programmatic provisions in appropriation bills, the Legislature invoked the remedy authorized by Section 4 to "strike out" the interchange and certification items in the appropriation bills. The Legislature did not match the Governor's unconstitutional actions by attempting to add its own programmatic proposals to the appropriation bills, but limited itself to the striking of items expressly authorized by the plain language of the Constitution. Section 4 authorizes the Legislature to "strike" items in the Governor's appropriation bills because the Legislature must have some check to prevent the enactment of provisions proposed by the Governor. Without this legislative check, the Governor would be able to "insist **[*71]** that the Legislature accept his propositions . . ., while denying it the power to alter them." Tremaine I, 252 N.Y. at 50. Unlike legislative additions to appropriation bills that Section 4 bars because they would become law without gubernatorial review, see Bankers, 81 N.Y.2d at 104-05; Tremaine I, 252 NY. at 49-50, the striking of items at issue here is one of the "specific instances" in which Section 4 authorizes the Legislature to alter appropriation bills because striking provisions does not offend the system of checks and balances by resulting in the enactment of items never proposed or approved of by the Governor.

Based on an analysis of the constitutional text, the history of executive budgeting, and judicial precedents, the State Affairs Committee of the New York City Bar Association endorsed this view that the Legislature may, pursuant to Section 4, strike as items "programmatic provisions" the Governor includes in his appropriation bills without having to delete the appropriation itself: "For example, the Legislature can delete language giving the Director of the Budget control over the flow of appropriated funds without **[*72]** deleting the appropriation to which the language was attached. Further, the Legislature can delete the detailed specifics for an appropriation for the construction of a new prison without deleting the appropriation for the prison." Bar Report at 20-21. The Bar Report explains that "such a reading is entirely consistent with the both the textual provisions and case law barring Legislative additions-as well as the underlying policy goal of enabling the Governor to limit overall spending through control of the budget submission and the item veto. So, too, it would be consistent with the constitutional structure of simultaneously curbing the Legislature's power to add new material while protecting its power to reject gubernatorial proposals." Id. at 21. n13

n13 A decision by the Supreme Court of Washington recognizes that when one branch of government improperly attaches substantive or general legislation to items of appropriation in an attempt to insulate the substantive provisions from review, the branch reviewing the appropriation bill must have a corresponding power to strike the substantive legislation. See, e.g., Washington State Legislature v. Lowry, 931 P.2d 885, 896 n.11 (Wash. 1997) ("When the Legislature places a proviso in an appropriations section not containing a specific dollar amount, it may do so at the peril of having the proviso invalidated. Such a proviso often has all the characteristics of substantive legislation. We have repeatedly indicated the Legislature may not abolish or adopt substantive law in an appropriations bill."). The Washington court recognized that to the extent it "immunize[d] nonappropriations provisos in appropriations bills" from review, the branch proposing the appropriation bills "will try to slip substantive law provisos into appropriations bills to derive political advantage" thus "upsetting the constitutional framework of checks and balances."

[*73]

The text, structure, and history of the Constitution thus all support the constitutionality of the Legislature's striking of the unconstitutional programmatic items included in the Governor's 2001 appropriation bills. Affirming the Legislature's Section 4 authority to strike these items ensures that the Legislature has a political remedy for responding to the Governor's violations of Section 6, a far preferable alternative to forcing the Legislature or another affected party to bring suit seeking judicial invalidation of the programmatic items. By removing from the courts disputes over whether Section 6 has been violated, with their attendant uncertainty about the legality of the budget, the Legislature's Section 4 power to strike advances the principle that "the creation and enactment of the State budget is a matter delegated essentially to the Governor and the Legislature." Saxton, 44 N.Y.2d at 549.

C. The Constitution Expressly Authorizes the Legislatnre to Propose Separate Single-Purpose Appropriation Bills

Article VII, Section 6 also expressly authorizes the Legislature to propose items of appropriation that are "by separate bills each for a single object **[*74]** or purpose." N.Y. Const. art. VII, § 6. For example, after striking an appropriation to the Division of Housing and Community Renewal for a homeless housing program, the Legislature proposed a homeless housing appropriation in a single purpose bill for the Office of Temporary and Disability Assistance. See A.558 (Fuleihan Aff. P 53(a)). This proposed appropriation fully complied with Section 6. The appropriation was "by [a] separate bill[] [] for a single object or purpose" - funding a homeless shelter through the Office of Temporary and Disability Assistance. Because Section 6 subjects this single-purpose item of appropriation "to the governor's approval as provided in section 7 of article IV [the veto section]," the proposed appropriation is consistent with the constitutional system of checks and balances. N.Y. Const. art. VII, § 6.

The Third Department identified nothing in the text of the Constitution that undermines Section 6's authorizing of the Legislature to propose a single-purpose item of appropriation for a homeless housing program. The Governor's sole support for his far-reaching theory that the Governor's submission of an appropriation for a homeless housing **[*75]** program completely preempts the field of homeless housing - preventing the Legislature from proposing any appropriations for homeless housing or from proposing substantive policy provisions that affect homeless housing, see Governor's Third Department Br. at 40-43 - is an unsupportable reading of Tremaine II.

Tremaine II involved a specific claim challenging the Legislature's striking out the Governor's itemized appropriations and proposing a lump sum appropriation in their place. See 281 N.Y. at 10 ("[T]he Legislature cannot strike out the itemized appropriations in the Governor's appropriation bills and substitute therefor lump sums for the same personal services and maintenance.); id. ("To strike them all out and substitute lump sums is to revert to the old system which years of agitation and endeavor have sought to abolish.). Because the "Governor is obligated to furnish the items of appropriation making up the appropriation, and cannot submit it as a lump sum" in order that the "Legislature may be able to strike out or reduce any of its items," Tremaine II held that the Legislature's proposed appropriations also must be sufficiently itemized **[*76]** so that the Governor can effectively line-item veto them. Id. at

9-10. Tremaine II is thus about the level of itemization that is required for the checks of Section 4 to function properly. It does not announce a revolutionary global rule that limits the subjects of the Legislature's proposed items of appropriation.

The Governor's asserted rule that his submission of an appropriation concerning a subject preempts the Legislature from proposing any bills concerning that subject is not only unsupported by Tremaine II, but utterly without any constitutional foundation. Section 6 requires only that the Legislature limit its proposed items of appropriation to a single "object or purpose." N.Y. Const. art. VII, § 6. It does not place limits on the "object or purpose" of the Legislature's proposed appropriation. Because the Legislature's proposed items of appropriation complied with the limited qualification in Section 6, they are constitutional.

Even if this Court were to impose a requirement found nowhere in the constitutional text that the Legislature may not propose single-purpose appropriation bills that have the same purpose as struck gubernatorial proposals, **[*77]** the Legislature's proposed bills did not have the same purpose as the Governor's proposals. The Legislature's appropriations contained different substantive terms and conditions than the Governor's proposals. See A.76-78 (Stone Aff. PP 20, 21b and c) (declaring that the Legislature enacted single-purpose bills purporting "to alter the substantive terms and conditions of spending proposed by the Governor" or "to modify the terms and conditions proposed by the Governor" regarding Temporary Assistance for Needy Families ("TANF"), state funding for child welfare services, and a continued reappropriation for land acquisition and design costs for a new secure youth facility and to expand existing facilities). Appropriations for programs with different "terms and conditions" than those proposed by the Governor are clearly not for the same "purpose" as the appropriations proposed by the Governor.

Moreover, many of the Legislature's single-purpose bills not only modified the terms and conditions of the Governor's appropriations, but they also directed the funding to different agencies or institutions. For example, twenty-two of the single-purpose appropriation bills were enacted to restore **[*78]** oversight and control of the State Museum and State Library to the State Education Department rather than to the Governor's proposed "Office of Cultural Education" - an agency that has yet to be created. See A.558-59 (Fuleihan Aff. P53b). This Court recently reiterated that the "choice of which agency shall regulate an activity can be as fundamental a policy decision as choosing the substance of those regulations." Saratoga County Chamber of Commerce, 100 N.Y.2d at 823 (emphasis in original). By changing the regulatory agency - a policy choice this Court recently held is central to the Legislature's lawmaking authority - these twenty-two single-purpose appropriation bills had a different purpose than the struck items proposed by the Governor.

Because the constitutional text expressly supports the Legislature's proposal of single-purpose appropriation bills that are subject to full gubernatorial review, the Third Department erred in invalidating the thirty-seven single-purpose bills proposed by the Legislature in the 2001 budget.

D. The Legislature Is Free to Propose Changes to Nonappropriation Bills.

Although it did not discuss or analyze the issue, **[*79]** the Third Department also held unconstitutional the Legislature's proposed amendments to the nonappropriation bills. It did so despite its acknowledgement that by their terms, the restrictions in Section 4 apply only to "altering appropriation bills." A.4 (emphasis added). Section 4 prohibits legislative additions to appropriation bills because those bills become law "immediately" when passed by the Legislature without any further gubernatorial review. Section 4 does not impose any restrictions on the Legislature's amendments to nonappropriation bills because those bills are subject to the Governor's general veto power. The Third Department's expansion of Section 4 beyond its textual reach and structural purpose undermines the constitutional design, which "'requires that the Legislature make the critical policy decisions.'" Saratoga County Chamber of Commerce. 100 N.Y.2d at 821-22.

1. The Text of Section 4 Does Not Apply to Nonappropriation Bills

Article VII, Section 4 applies only to appropriation bills: "The legislature may not alter an appropriation bill submitted by the governor except to strike out or reduce items therein, but it may add thereto **[*80]** items of appropriation provided that such additions are stated separately and distinctly from the original items of the bill and refer each to a single object or purpose." N.Y. Const. art. VII, § 4 (emphasis added). Indeed, the limitations of Section 4 would not make sense if applied to nonappropriation bills. Section 4 says that the Legislature "may not alter an appropriation bill submitted by the governor except to strike out or reduce items therein." Id A Legislature cannot "reduce" a provision of a bill that does not appropriate funds. The limitations of Section 4 are thus clearly directed at amounts of money appropriated and do not constrain the Legislature's otherwise plenary right under Article III, Section 1 to alter nonappropriation bills. Given the absence of an express constitutional limit, the Legislature retains its "untrammeled and supreme" prerogative to amend nonappropriation bills as it wishes, subject to the Governor's general veto. In re Application Thirty-Fourth St. Ry. Co., 102 N.Y. at 350.

It is undisputed that the four 2001 budget bills the Legislature amended did not include any appropriations and were thus not appropriation bills. This Court **[*81]** has recognized the distinction between appropriation bills and the "nonappropriation bills" submitted by the Governor in connection with the budget. It described the latter as bills that "contain programmatic provisions and commonly include sources, schedules and sub-allocations for funding provided by appropriation bills, along with provisions authorizing the disbursement of certain budgeted funds pursuant to subsequent legislative enactment." See Silver, 96 N.Y.2d at 535. These nonappropriation bills are the other "proposed legislation" referenced in Article VII, Section 3's description of the Governor's budget submission. See also N.Y. State Fin. Law § 24 (McKinney 2003) (describing budget bills as including bills "for all proposed appropriations and reappropriations" and bills, submitted separately from and simultaneously with, appropriation bills, "for the proposed measures of taxation or other legislation, if any, recommended therein.") (emphasis added); Winner v. Cuomo, 176 A.D.2d 60, 64-65 (3d Dep't 1992) (holding that the Governor was required to submit proposed measures of taxation and other proposed legislation at the same time **[*82]** that he submitted his appropriation bills); Silver v. Pataki, 192 Misc. 2d 117, 744 N.Y.S.2d 821 (N.Y. Sup. Ct. N.Y. Cty. 2002). Nothing in the language of Section 4 or elsewhere in the Constitution limits the Legislature's plenary power to propose amendments to such nonappropriation bills.

2. The Structural Purpose of Section 4 Does Not Justify Its Extratextual Extension to Legislative Amendments to Nonappropriation Bills Becanse They Are Subject to Full Gubernatorial Review

Despite the unambiguous language of Section 4 limiting its application to appropriation bills, the courts below widened the scope of Section 4 to limit the Legislature's ability to propose alterations to nonappropriation bills. This extension ignores the fact that the textual limitation of Section 4 to "appropriation bills" is tied to the provision's structural purpose: it prevents the Legislature from adding provisions to appropriation bills that would become law without any gubernatorial review. See N.Y. Const. art. VII, § 4. Allowing the Legislature to add provisions to appropriation bills would thus violate the fundamental constitutional principle that no branch should go unchecked. **[*83]** But nonappropriation bills are subject to gubernatorial review via the general veto power and, therefore, legislative alterations to nonappropriation bills in no way implicate the concerns of Section 4.

The authorities relied on by the Governor below applying Section 4 to limit the Legislature's alterations to appropriation bills are inapposite because concerns about the Legislature's circumvention of any gubernatorial review are absent in the context of the nonappropriation bills. See Tremaine L 252 N.Y. at 27 (stating in dicta that the Legislature's addition of a segregation clause to an appropriation bill violated Section 4); Tremaine II, 281 N.Y. at 10 (holding that a lump-sum appropriation bill the Legislature submitted to the Governor violated Section 4); Bankers. 81 N.Y.2d at 104-05 (holding that the Legislature's addition of an assessment to an appropriation bill violated Section 4); 1978 N.Y. Op. Atty Gen. 76, 1978 WL 27523, at *1 ("[T]here is no authority for the Legislature to add the item to a succeeding appropriation bill . . . " (emphasis added)); 82-F5 Op. Atty Gen. (1982) at 1-2 **[*84]** (describing the Legislature's limited authority to alter the Governor's proposed "appropriation bills") (emphasis added). In fact, two of these authorities expressly state that the Legislature is allowed to make additions to nonappropriation bills. Tremaine I observed that "[n]othing . . . prevents" the Legislature from "providing how . . . items of appropriations should be segregated" in nonappropriation bills, which are "subject to the veto power." 252 N.Y. at 49. Attorney General Abrams

similarly concluded that the Legislature "can accomplish its objective to restrict or allocate the expenditure of appropriated funds by enacting separate bills." 82-F5 Op. Atty. Gen. at 2.

There is no reported case in which a party has even argued that Section 4 applies outside the context of appropriation bills. The Third Department's decision applying Section 4 to nonappropriation bills thus lacks textual support, structural justification, or judicial precedent.

3. Enforcing the Constitutional Distinction Between Appropriation Bills and Other Legislation Is Far More Workable in Practice Than the Framework Proposed by the Conrts Below or the Governor. [*85]

While stating that a court "should not and will not immerse itself into the very heart of the 'political process,'" the Third Department actually created a permanent role in the budget process for the judiciary as the arbiter in a likely torrent of disputes over whether an amendment to a nonappropriation bill - or any other legislation proposed by the Legislature - "affects" items of appropriation proposed by the Governor. See A.7. Fidelity to the constitutional design, which provides each branch with meaningful checks on the other, would allow budget disputes to be resolved through the political process instead of lawsuits. As discussed above, the New York Constitution creates a scheme in which the Governor submits appropriation bills made up of items of appropriation. The Legislature is limited to striking these items or reducing them, and to adding new separately stated items which are then subject to the line-item veto. But with respect to legislation that does not include items of appropriation, whether submitted by the Governor in tandem with his appropriation bills or originated in the Legislature, the Legislature is free to amend these bills, over which the Governor retains **[*86]** his full general veto power.

This time-tested system, in which each branch exercises its constitutional checks on the other, is preferable to one that requires the judiciary to constantly referee disputes between the Legislature and Executive. This is especially so where the disputes will require the Judiciary to determine whether provisions the Legislature adds to nonappropriation bills or enacts in other legislation "affect" items of appropriation - an amorphous inquiry that lacks any meaningful standard and will likely lead to intractable line-drawing problems. See Saxton, 44 N.Y.2d at 549 ("[T]he creation and enactment of the State budget is a matter delegated essentially to the Governor and the Legislature.").

CONCLUSION

The New York Constitution plainly rejects the view of the Governor and the courts below that the Legislature does not possess the power to make any proposals concerning the "when, how and where" of appropriations proposed by the Governor. Article VII, Sections 4 and 6 expressly authorize the Legislature to strike items in the Governor's appropriation bills - including substantive policy items that violate Article VII, Section 6 **[*87]** by applying to more than one appropriation - and to propose separate single-purpose appropriations subject to the Governor's veto. Section 4 imposes no restriction on the Legislature's ability to propose amendments to nonappropriation bills, which are subject to the Governor's general veto power. By depriving the Legislature of all three of these options, the courts below transferred an extraordinary, unique and unprecedented amount of power to the Governor, and rendered the Legislature effectively powerless to influence substantive policy relating to programs receiving state funds. This dangerous encroachment on legislative power exists in no other state and would eviscerate the centuries old balance of power between the Governor and Legislature in New York Government. Accordingly, if the Court finds it necessary to reach the merits of this case, the decision below should be reversed.

Dated: New York, New York
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Respectfully submitted,

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