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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Reply Brief: Appellant-Petitioner

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TITLE: Reply Brief for Defendant-Appellant New York State Assembly

TEXT: PRELIMINARY STATEMENT

The Governor's Response confirms three overriding points, which provide the fundamental context for decision in this case.

First, this is an unprecedented lawsuit. The Governor fails to cite a single case from any jurisdiction - state or federal - in which the head of the executive branch sued the legislative branch challenging the constitutionality of legislation he affirmatively signed into law. The reason for this absence of citation is simple. Any such suit - like this one - would clearly violate basic principles of standing and legislative immunity. Those patent defects require dismissal of this suit.

Second, the Governor seeks unprecedented powers. The Governor does not deny that he claims complete, exclusive and preemptive powers over all policy decisions that affect any appropriation. No other Governor in the United States **[*2]** possesses such powers - a fact evident from the Governor's failure to point to one. Judicially bestowing such power upon the Governor of New York would violate the basic precept of Article III, Section 1 that "legislative" policy decisions are the province of the legislature. Worse, it would run afoul New York's decision not to make its Governor as powerful as those in a number of other states. Unlike other states that adopted an executive budgeting regime, New York did not adopt a general "single purpose" provision in its constitution requiring that all legislation - not just the Legislature's appropriations bills - be limited to a "single purpose," thereby strengthening gubernatorial control over legislative policy decisions. Yet the power the Governor claims in this suit exceeds even that possessed by governors in states that did adopt a general "single purpose" requirement.

Third, the Governor has no response to the Assembly's arguments from the text, and structure of the constitution. Simply put, the Assembly's position is grounded in the clear text of the provisions of Article VII and the basic structure of the constitution. The Governor's is not. That may be why the **[*3]** Governor chose to spend the bulk of his brief responding to the Senate's position, leaving the Assembly's arguments unanswered.

I. THE GOVERNOR'S UNPRECEDENTED ATTEMPT TO CHALLENGE THE LEGISLATURE'S CONDUCT IN PASSING BILLS HE SIGNED INTO LAW IS NOT JUSTICIABLE

The Governor does not refute that, in two respects, this lawsuit is unprecedented in the more than two hundred years of this State's history. First, the Governor is not a proper plaintiff; for he was injured by the enactment of bills he personally signed into law. Never in the history of this State - or in the history of the federal government or apparently any other state - has a court recognized an executive's ability to challenge the constitutionality of bills he signed into law. Second, the Legislature is not a proper defendant; for the Speech or Debate Clause prohibits a suit challenging "the actions [of the Legislature] in voting upon and passing the forty-six budget bills . . . . " A.99 (Complaint) n1 (emphasis added). No case in the history of this State allows suit to be brought against a legislative body challenging the constitutionality of laws they voted upon and passed. n2

n1 References to Appellants' Joint Appendix are denoted as "A. " with numerical references to the page of the number of the bound volume of Appellants' Joint Appendix to this Court submitted by Appellants.

[*4]

n2 The Governor implies that this Court's statement in Silver v. Pataki, 96 N.Y.2d 532 (N.Y. 2001) that the courts are "'available to resolve disputes concerning the scope of that authority which is granted by the Constitution to the other two branches of Government'" (id. at 542 (quoting Saxton v. Carey, 44 N.Y.2d 545, 551 (N.Y. 1978)) somehow confers jurisdiction and abolishes standing law and the Speech or Debate Clause immunity when a case involves an interbranch dispute. Brief For Plaintiff-Respondent ("Gov. Response") at 51. Silver itself reveals that the Governor takes that statement out of context in using it for such an astonishing position. The Silver opinion is devoted to analyzing whether Speaker Silver suffered an injury-in-fact from the Governor's nullification of his vote via the line-item veto. Were the Governor's view that jurisdiction is automatic in interbranch disputes correct, this Court's entire opinion would have been a pointless exercise. In addition, because the Legislature was not sued in Silver, no Speech or Debate Clause issue was raised or addressed.

[*5]

A. The Governor Suffered No Legally Cognizable Injury from the Enactment of Bills He Signed into Law

The Governor does not identify any injury he suffered from the challenged legislative conduct other than the type of "institutional injury" - an alleged diminution of his "role in the budget process" (Gov. Response at 52) - that this Court rejected as too "abstract" to confer standing in Silver. See Silver, 96 N.Y.2d at 539 n.5. The Governor does not attempt to explain how the injury he alleges is any more concrete than the Speaker's alleged injury of "interference with his ability 'to negotiate the Assembly's priorities and interests in the budget process'" found insufficient in Silver. Id. Nor does the Governor attempt to distinguish his alleged injury from the alleged "dilution of institutional legislative power" resulting from the Line-Item Veto Act that the Supreme Court held insufficient to confer standing in Raines v. Byrd, 521 U.S. 811, 826 (1997) - a seminal standing case the Governor ignores even though this Court relied on it in Silver. See 96 N.Y.2d at 539-40.

Perhaps recognizing that Silver **[*6]** rejects as too abstract the alleged diminished "role in the budget process" injury that he has asserted throughout this litigation, the Governor, for the first time, attempts to invoke the "vote nullification" injury that Silver did recognize. But the Governor cites no support whatsoever for his proposition that the mere act of proposing legislation is akin to a legislator's vote on legislation. See Gov. Response at 52-53. Moreover, the Governor did "vote" on the challenged single-purpose appropriation bills and the nonappropriation bills by signing them into law. His vote on these bills was thus given "full effect"; and this "affirmative approval of the subject legislation prevents him from establishing that defendants' conduct nullified an action taken by him." A.10-11 (Peters, J., dissenting).

The Governor's attempts to overcome the common-sense conclusion that he was not injured by the enactment of bills that became law only because he affirmatively approved them are wholly unpersuasive. First, relying on Silver, the Governor argues that his failure to use the available political remedy of the veto does not negate his standing. Yet, in Silver, it was only after **[*7]** the Court found the existence of a clear vote nullification injury n3 that the Court stated that the "existence of other possible political remedies . . . does not negate the injury in fact" it had found. 96 N.Y.2d at 541. The prospect that the Speaker might have been able to remedy the Governor's line-item veto through a "supermajority override" did not alter the fact that the Governor nullified his right to proper treatment of his vote, which would have provided a victory under simple majority rules. Contrary to the Governor's intimation, the Assembly does not argue that the Governor's signing the bills into law "negates[s] [any] injury in fact" the Governor suffered. Rather, the Assembly's point is that the Governor never suffered an "injury in fact" in the first place: he signed the single-purpose and nonappropriation bills into law and those acts were given full effect.

n3 Even the dissent in Silver did not dispute that the vote nullification alleged in that case was a concrete, cognizable injury. Justice Graffeo's dissent on standing was based on her belief that "any vote nullification claim must be asserted by a sufficient voting bloc or by the institution itself." 96 N.Y.2d at 547 (Graffeo, J., dissenting).

[*8]

The Governor's reliance on the "pocket approval" of the bills at issue in People v. Tremaine, 281 N.Y. 1 (N.Y. 1939) ("Tremaine II") only highlights that the Governor is not a proper plaintiff in this suit. The Governor was not a plaintiff in Tremaine II. Indeed, his branch of government was actually the defendant because the suit was against his comptroller. n4 Moreover, the Governor's refusal to acknowledge a difference between a Governor's affirmative approval of a bill and inaction on a bill (see Gov. Response at 55) ignores that longstanding constitutional distinction. See N.Y. Const. art. IV, § 7.

n4 The Governor's argument that standing should not depend on "whether 'the People' or 'the Governor' is denominated the plaintiff (Gov. Response at 54 n.35) would obliterate standing doctrine, which has the very

purpose of ensuring that only plaintiffs suffering legally cognizable injuries bring claims. Raines demonstrates that the Governor's argument that the plaintiff does not matter for standing purposes is not the law. One year after holding in Raines that a challenge to the Line Item Veto Act lacked standing when brought by senators, the Supreme Court found standing in a suit brought by the City of New York. See Clinton v. City of New York. 524 U.S. 417,448-49(1998).

[*9]

The Governor's final argument about the "consequences" (Gov. Response at 56 n.36) of not granting the Governor standing to challenge the constitutionality of provisions in bills he signed into law ignores the fact that those "consequences" have existed for this State's entire history. No Governor has ever brought such a suit before; yet that has not insulated legislation from judicial review. People v. Tremaine, 252 N.Y. 27 (N.Y. 1929) ("Tremaine I"), Tremaine II, and New York State Bankers Association v. Wetzler, 81 N.Y.2d 98 (N.Y. 1993) ("Bankers") demonstrate that the Governor's lack of standing to bring this type of suit does not prevent others from doing so. Requiring the public to bring these suits ensures that the judiciary decides challenges to laws that actually inflict some "concrete" injury (Silver, 96 N.Y.2d at 539), as opposed to deciding what may be nothing more than a "political dispute" between two branches of government that fails to give rise to legally cognizable injury (id. at 539 n.5).

The Governor's unprecedented act in bringing an abstract "political dispute" before this Court fails **[*10]** for lack of standing; for the Governor has identified no injury more concrete than the injury concerning decreased leverage in the budget process that this Court rejected in Silver. n5

n5 The federal district court decision the Governor cites on the standing issue, Kansas v. United States, 24 F. Supp. 2d 1192 (D. Kan. 1998), does not help his position. First, the defendant in Kansas only challenged the causation element of standing law, see id. at 1195, so the case said nothing about the injury-in-fact requirement that is the basis for the Assembly's standing challenge. Second, the case did not involve the separation-of-powers concerns that are at the core of the standing doctrine and are directly implicated in this suit brought by the Governor against the Legislature. See Raines, 521 U.S. at 820 (stating that "the law of Art. III standing is built on a single basis idea - the idea of separation of powers" (quoting Allen v. Wright, 468 U.S. 737, 752 (1984))). The Supreme Court's discussion in Raines of federal standing in an interbranch dispute - which the Governor does not attempt to distinguish - is certainly more applicable to this case than a federal district court decision that did not involve an interbranch dispute.

[*11]

B. The Speech or Debate Clanse Bars Suiug the Legislature for "Voting Upon and Passing" Laws that Are Allegedly Unconstitutional

The other unprecedented aspect of this lawsuit - that the Legislature rather than an official in the executive branch is being sued to challenge the constitutionality of laws - highlights that what the Governor seeks is the judicial resolution of a political dispute - not a remedy for concrete injuries resulting from enactment of the 2001 budget. When a plaintiff suffers concrete injuries from laws sufficient to confer standing on him to bring suit challenging them, the proper defendant is the executive branch official who enforces the laws. See Romer v. Colorado Gen. Assembly, 810 P.2d 215, 222 (Colo. 1991) (explaining, in dismissing a challenge to the constitutionality of provisions included in an appropriation bill on Speech or Debate Clause grounds, that "[s]uch a challenge would normally be brought by one affected by the legislation against the executive agency responsible for the statute's enforcement"). It is because the Governor can assert only an abstract injury involving a political dispute with the Legislature that he **[*12]** sued the Assembly and Senate instead, n6 and thus violated the Speech or Debate Clause.

n6 Had the Governor sued another executive branch official, this would have highlighted the Governor's lack of standing to challenge bills he signed into law.

The Governor's Response ignores the very language in his complaint, which states that this suit seeks a declaration that "the actions of defendants in voting upon and passing the forty-six budget bills .. . were unconstitutional." A.99 (Complaint) (emphasis added). The Governor does not cite any case authorizing suit against a legislator or legislative body challenging their role in "voting upon and passing" allegedly unconstitutional laws. This conduct lies at the heart of the Speech or Debate Clause because "nothing is more basic to the independence and integrity of the legislature than its ability to pass legislation." Kennedy v. Commonwealth, 119 Pa. Cmwlth. 24, 30, 546 A.2d 733, 736 (1988); see also Romer, 810 P.2d at 222-23 **[*13]** (holding that the Speech or Debate Clause barred the Governor from challenging the state assembly's amendments adding footnotes and headnotes to an appropriation bill).

The Governor's argument that the "voting upon and passing" of legislation he challenges in this case is not within the legitimate sphere of legislative conduct (Gov. Response at 56-57) is expressly rejected by the case upon which he relies. Romer involved a claim that the Legislature's inclusion of headnotes and footnotes in appropriation bills "infring[ed] on the executive function [] or the prohibition against [inserting] substantive legislation" in appropriation bills. Romer, 810 P.2d at 217. The Colorado Supreme Court held that the Speech or Debate Clause barred this challenge because the "act of passing legislation falls squarely within the ambit of legitimate legislative activity." 1d. at 223. The very similar claim in this case that by deleting and proposing certain provisions in budget bills the Legislature unconstitutionally "infringed on the executive function" is likewise plainly barred by the Speech or Debate Clause. n7 The Governor's argument that this core legislative conduct **[*14]** of "voting upon and passing" legislation loses protection whenever it is alleged that the Legislature did so unconstitutionally would eviscerate Speech or Debate Clause immunity. It would relegate its application to only those cases in which the Legislature prevailed after full proceedings before the courts - proceedings it is the core goal of the Speech or Debate Clause to prevent.

n7 The challenge that the Colorado Supreme Court allowed addressed whether the Governor's line-item vetoes were lawful. The Legislature had sent a letter to the Governor "claiming his votes were improper and had no legal effect" and the Governor responded by filing a declaratory judgment action seeking a ruling that his vetoes were valid and the Legislature could not ignore his vetoes Id. at 217-18. Because the Governor merely sought a "declaration that his vetoes are valid," the claim would involve no adjudication concerning legislative conduct and the members would not be "required to defend themselves." Id at 225. The challenged conduct in this case - additions and subtractions from budget bills - is just like the challenge to the addition of provisions in appropriation bills held protected in Romer and nothing like the decision to adjudicate the constitutionality of the governor's conduct which Romer allowed to proceed.

[*15]

Also at odds with the core purpose of the Speech or Debate Clause is the Governor's attempt to distinguish the cases cited in the Assembly's opening brief on the ground that none of them "involved a dispute alleging that one branch of government unconstitutionally encroached on the prerogatives of another." Gov. Response at 58 n.38. This argument is doubly flawed. First, it highlights the Governor's lack of standing in this case. Second, Speech or Debate Clause protection is more - not less - appropriate in this case because it is a separation-of-powers provision, the core purpose of which is to "to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary." Gravel v. United States. 408 U.S. 606, 617 (1972); see also Holmes v. Farmer, 475 A.2d 976, 985 (R.I. 1984) (stating that the purpose of the Speech or Debate Clause is to "protect[] the institution of the Legislature itself from attack by either of the other co-equal branches of government").

The Governor also, again, points to the "consequences" of not being able to name the Legislature as a defendant in suits challenging the constitutionality **[*16]** of laws they "voted upon and passed" (Gov. Response at 59), ignoring that those "consequences" have existed for the more than two hundred years of this State's history. The Governor cannot point to a single such suit in which the Assembly or Senate have been named. n8 Enforcement of the Speech or Debate Clause does not immunize from judicial review laws in which the Legislature has violated Article VII, as Tremaine I, Tremaine II, and Bankers amply demonstrate. But the requirement that such suits be brought against the executive branch officials enforcing those laws, who have the resources of the executive branch at their disposal to defend the suits, ensures that in making policy the "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." Powell v. McCormack, 395 U.S. 486, 503 (1969); accord Kennedy, 119 Pa. Cmwlth. at 30, 546 A.2d at 736.

n8 The Governor's claim that he enjoys the same "Speech or Debate" Clause protection as the Legislature when submitting the budget demonstrates the same disregard for express constitutional text that plagues his arguments on the substantive issues in this case. See Section II(C) infra. The Speech or Debate Clause makes no mention of the Governor, stating that "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.

[*17]

This Court is certainly aware that the Speech or Debate Clause does not inhibit plaintiffs from bringing lawsuits challenging the constitutionality of laws passed by the Legislature. But the law requires that those suits be brought against the executive branch official charged with enforcing the allegedly unconstitutional law, because it is only through such enforcement that a law can result in the concrete injuries that give an injured party standing to bring suit. This suit, which attempts to inject the judiciary into what is nothing more than an interbranch political dispute producing no identified concrete injuries, fails to meet standing requirements and violates the Speech or Debate Clause. Accordingly, it should be dismissed as nonjusticiable.

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

A. The Governor Does Not Dispnte That His Position Denies the Legislatnre Any Ability to Propose Policies Affecting His Appropriations

The Governor's Response confirms that it is his position that "once he makes *any* proposals in connection with an appropriation, no matter how far-reaching, **[*18]** the Legislature is completely pre-empted from altering those proposals or proposing legislation that modifies or changes them in any way." Brief for Defendant-Respondent New York State Assembly ("Assembly Br.") at 1. The extremity of this position, which would result in a form of government without precedent in the state or nation, is compounded by a second contention advanced by the Governor: He has unbridled authority to include in his appropriation bills any provision relating to the "when, how, or where" of government programs, see Gov. Response at 30 - even provisions that violate Article VII, Section 6's express command 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; see Gov. Response at 40 (arguing that headers operating on multiple appropriations are nonetheless permissible because they are a "convenient shorthand").

To balance these virtually dictatorial powers, the only power the Governor would allow a Legislature opposed to a policy **[*19]** proposal he inserts into an appropriation bill is to strike the item of appropriation in its entirety. See Gov. Response at 49 (stating that the Legislature may only "approve[]" or "strike[]" or "compromise"). According to the Governor, the Legislature may not (1) strike the substantive policy items; (2) propose a single-purpose appropriation

bill with terms and conditions different than those included in the Governor's appropriation bills; or (3) amend nonappropriate bills with provisions relating to the "when, how, or where" of programs the Governor's appropriation bills propose to fund. See id at 22. The cumulative effect of these three limitations on legislative authority is to render the Legislature permanently powerless to propose legislation concerning the "when, how, or where" of any government program that the Governor's appropriation bills propose to fund. See id. at 49 (acknowledging the Governor's position that the Legislature may not "start anew" by proposing provisions affecting the "when, how, or where" of programs receiving government funds and arguing that this is "precisely the system that the framers designed").

B. The Governor Fails to Address [*20] the Assembly's Arguments

The Governor has virtually no response to the Assembly's arguments from the text and structure of the Constitution. Instead, he focuses his brief on responding to the Senate's argument that the Governor was not authorized to include the disputed policy provisions in his appropriation bills in the first place. As discussed below, some of the Governor's provisions did violate the plain text of Article VII, Section 6. But the key issue is the Legislature's constitutional authority to respond to the Governor's inclusion of policy provisions; for the authority the Constitution grants the Legislatures empowers it to remedy violations of Section 6 on its own, rendering judicial intervention unnecessary. To this critical issue, the Governor devotes very little of his brief. He largely fails to respond to the Assembly's explanation of why the text, history, and structure of the Constitution support each of the three responses the Legislature exercised in response to the Governor's inclusion of broad substantive policy provisions in his 2001 appropriation bills. The few arguments the Governor does make fail to identify any basis for limiting the Legislature's fundamental **[*21]** constitutional role to "make the critical policy decisions." Saratoga County Chamber of Commerce, Inc. v. Pataki, 100 N.Y.2d 801, 821-22 (N.Y. 2003), cert. denied, 124 S.Ct. 570 (2003) (internal citations omitted).

C. The Governor Ignores the Plain Text of the Constitution

The Governor does not dispute the Assembly's argument (Assembly Br. at 39, 41, 45) that the express text of the Constitution supports each of the Legislature's responses to the Governor's 2001 appropriation bills. The Governor does not dispute that the text of Section 4 expressly authorizes the Legislature to "strike" items the Governor includes in his appropriation bills, including programmatic policy items, (see id. at 40 (citing 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 20-21 ("Bar Report")); n9 and that in order to preserve the system of checks and balances, the "items" the Legislature may strike pursuant to Section 4 must be congruent to the "items" concerning the "when, how, or where" of appropriations **[*22]** that the Governor is permitted to include in his appropriation bills. See Tremaine I, 252 N.Y. at 50 (explaining that without the Section 4 authority to strike, the Governor would be able to "insist that the Legislature accept his propositions . . ., while denying it the power to alter them"); Bar Report at 22 ("[S]ection 4 [] allows the Legislature to strike items of programmatic material without striking an appropriation in its entirety.").

n9 The Bar Report is located at http://www.abcny.org/pdf/report/Budget%20Report%209-11.pdf.

The Governor also ignores the express language of Section 4 in arguing that its provision that the Legislature "may not alter an appropriation bill submitted by the governor, except to strike out or reduce items therein," N.Y. Const. art. VII, § 4 (emphasis added), should be expanded to any of the "Governor's budget bills," Gov. Response at 50; id at 2 (stating that Section 4 limits the Legislature's authority to act on the "Governor's budget"), **[*23]** including his "'non-appropriation' bills," id. at 22. Tremaine II rejects the Governor's position. After quoting Section 4, this Court stated that the "reference here is not to the items in the budget but to the items in the Governor's appropriation bill." 281 N.Y. at 9 (emphasis added). The Governor also fails to confront that his extraconstitutional application of Section 4 would result in the nonsensical reading of that provision as allowing the Legislature to "reduce" policy items that do not

include a dollar amount. See Assembly Br. at 45.

Nor does the Governor dispute that the unambiguous text of another constitutional provision, Article VII, Section 6, authorizes the Legislature to propose appropriations "by separate bills each for a single object or purpose," which are then subject to the Governor's veto. N.Y. Const. art. VII, § 6. Tremaine II, which the Governor contends bars the Legislature's separate Section 6 single-purpose appropriation bills, did not involve an exercise of legislative authority pursuant to Section 6. Tremaine II invalidated a lump sum appropriation the Legislature added to an appropriation bill pursuant to its **[*24]** Section 4 authority to add "items" to the Governor's appropriation bills. See Tremaine II, 281 N.Y. at 6. The Court noted that the "crux of th[e] controversy turn[ed] upon the meaning of the word 'items'" in Section 4, id. at 8, and concluded that the lump-sum appropriations the Legislature added pursuant to Section 4 were not "sufficiently itemized" to be classified as items, id. at 12.

Section 6, on the other hand, does not limit the Legislature's authority to proposing "items." There is no basis for reading Tremaine II's discussion of the term "item" in Section 4 to override the express language in Section 6 - which does not contain that term - authorizing the Legislature to propose appropriations "by separate bills each for a single object or purpose." Moreover, because the bills the Legislature proposed pursuant to Section 6 were not lump sum appropriations, any concerns in Tremaine II about lump sum appropriations undermining the Governor's ability to review the appropriations effectively (see 281 N.Y. at 10-11) do not apply to the Legislature's 2001 Section 6 bills. Given the clear inapplicability of **[*25]** Tremaine II to the Legislature's Section 6 bills, which were subject to full gubernatorial review, the Governor is left with nothing to undermine the Legislature's express authority pursuant to Section 6 to propose appropriations "by separate bills each for a single object or purpose."

While the Governor attempts to create limitations on the Legislature found nowhere in - and refuted by - the constitutional text, he ignores a clear textual limitation on his own authority. Section 6 requires that an item the Governor includes in his appropriation bills "be limited in its operation" to a particular appropriation. N.Y. Const. art. VII, § 6. The Governor, however, contends that an item he proposes may apply to multiple appropriations so long as it is a provision "specifying the 'when, how, or where' of spending." n10 Gov. Response at 36. This theory eviscerates the textual limitations of Section 6. It would allow the Governor to include in his education appropriation bill a provision stating that "no funds shall be available under this bill except to those school districts that provide school vouchers." There is simply no reason to give the Governor this broad authority that contravenes **[*26]** clear constitutional language.

n10 Saxton, which discusses the Governor's authority to include provisions affecting the "when, how, or where" of appropriations in appropriations bills, did not address Section 6 and thus provides no support for the Governor's argument that Section 6 can be ignored. More specifically, the Governor incorrectly relies on Saxton to support his argument that interprogram transfer and interchange provisions are constitutional. See Gov. Response at 38-39. As the Governor was made aware in the Assembly's opening brief in the Appellate Division (see Brief for Defendant-Appellant New York State Assembly in the Third Department at 48-49), the interchange and transfer provisions permitted by the Appellate Division in Saxton and affirmed by the Court of Appeals involved intraprogram transfer and interchange, not interprogram transfer and interchange. The Third Department expressly stated: "Giving the words of section 1 their ordinary meaning, we conclude that the present appropriation bill only permits intraprogram transfer and not interprogram transfers and, therefore, is not unconstitutional." Saxton v. Carey, 61 A.D.2d 645, 650, 403 N.Y.S.2d 779, 783 (3d Dep't 1978), aff'd, 44 N.Y.2d 545, 551 (N.Y. 1978) (affirming Third Department decision that the intraprogram transfer provisions at issue were constitutional because they had been approved by the Legislature).

[*27]

The Governor acknowledges he has not complied with the strictures of Section 6. He admits that his certification

provision "applies to each and every appropriation proposed by the Governor," Gov. Response at 39, but excuses that violation as "convenient shorthand," id. at 40. It is remarkable that a Governor who repeatedly argues that the Legislature cannot do "indirectly that which it is prohibited from doing directly" asserts that he can do directly that which Article 6 prohibits him from doing at all. The Governor's direct violation of Section 6 must render those provisions void ab initio; otherwise, the Governor's highly restrictive view of the Legislature's powers over appropriation bills would insulate his certification provision - or the hypothetical conditioning receipt of funds on implementation of a voucher program - from legislative review. Because he contends such a policy provision cannot be struck on its own, the Governor's "convenient shorthand" leaves the Legislature with only the draconian response of striking every single item of appropriation contained in the bill to which the policy provision applies. This is precisely what Section 6 is designed to prevent **[*28]** by requiring that every provision in an appropriation bill be tied to a particular item subject to the Legislature's Section 4 striking authority. Accordingly, the interchange, fund transfer, and certification provisions in the Governor's 2001 budget bills, which did not "relate[] specifically to some particular appropriation," N.Y. Const. art. VII, § 6, and were not "limited in [] operation" to a particular appropriation, id., were void ab initio. See Assembly Br. at 39.

D. The History of Article VII Rejects the Governor's My-Way-or-the-Highway-View

Devoid of any textual support for his "my-way-or-the-highway" view of the budget process, the Governor argues that the constitutional history of Article VII represented a "dramatic[] shift[]" in the balance of power between the executive and legislative branches. See Gov. Response at 1; see also id. at 48-49 ("Article VII was intended to effect a 'singular reversal' in the roles of the Executive and Legislature and transfer to the Governor powers in legislative in nature."). This "dramatic shift" the Governor draws from the constitutional history is at odds with the insistence of the executive budgeting **[*29]** framers that the changes affected only "the method of providing for the necessary expenditures of the State." Id. at 13 (quoting Elihu Root, President of the 1915 constitutional convention); see also Bar Report at 21 (explaining that the executive budget's "underlying policy goal [was to] enabl[e] the Governor to limit overall spending through control of the budget submission and the item veto"). The framers stated that other than these changes to the proposal and treatment of expenditures, an 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." A.393 (Report of Reconstruction Comm'n to Gov. Alfred E. Smith on Retrenchment and Reorganization in the State Gov't (Oct. 19, 1919) at 316). The Governor's attempt to arrogate legislative authority with respect to nonappropriation proposals and to ignore Article VII's express grant of authority to the Legislature on appropriation matters contravenes that intent.

In addition, the chronology of the enactment of Article VII provisions completely destroys the Governor's argument that Section 4 applies to nonappropriation bills. It is impossible **[*30]** that the framers of Section 4 intended it to limit the Legislature's amendments to nonappropriation bills; for the language now embodied in Section 4 was enacted in 1927, when the Governor possessed only the power to propose appropriation bills. Not until the 1938 amendments to the Constitution did the Governor gain the power to include "other proposed legislation" in his budget submission, which this Court has deemed nonappropriation bills. Silver, 96 N.Y.2d at 535 n.l; see also Bar Report at 7. Critically, those 1938 amendments did not add a provision limiting the Legislature's treatment of the Governor's nonappropriation bills. This sequence of events, along with the plain constitutional text, explains why only a year after the 1938 constitutional changes that granted the Governor the authority to propose nonappropriation bills, this Court was careful to emphasize that the "reference [in Section 4] is not to the items in the budget but to the items in the Governor's appropriation bill." Tremaine II, 281 N.Y. at 9 (emphasis added).

The Governor also completely ignores New York's rejection of a general single-purpose requirement, **[*31]** which further undermines his attempt to glean a broad reduction in legislative power from the enactment of an executive budget. See Assembly Br. at 4-5. New York adopted a single-purpose requirement, which strengthens gubernatorial review by preventing logrolling, only for appropriation bills submitted by the Legislature. It did not follow many other states and enact a general single-purpose requirement to strengthen gubernatorial power with respect to nonappropriation policy legislation. Yet the powers the Governor seeks here far eclipse those granted to governors in states that adopted a general single purpose requirement applicable to all legislation. Judicially expanding Article VII

provisions to grant the New York Governor broader powers over nonappropriation legislation than any governor in a single-purpose state possesses would thus run directly counter to the balance of powers New York opted for in its Constitution.

E. The Governor Ignores the Structural Purposes of Article VII

The Governor's mantra is that by proposing Section 6 single-purpose appropriation bills and amendments to nonappropriation bills, the Legislature impermissibly does "indirectly what it may not **[*32]** do directly." Gov. Response at 42. To show why he believes this legislative conduct indirectly violated Section 4, the Governor points out that the Legislature proposed an amendment to a nonappropriation bill limiting the use of appropriated university funds to "enrollment growth" and "collective bargaining agreements," and proposed a single-purpose appropriation bill providing homeless housing funds to the Office of Temporary and Disability Assistance. Id. Yet those proposals, which the Governor implies without explanation show the pernicious consequences of the Legislature's conduct, actually demonstrate why the legislative conduct of which the Governor complains does not violate the Constitution, either directly or indirectly.

The cases prohibiting indirect violations prevent conduct that would result in the same harm as the conduct falling within the express limits of the constitutional provision. Thus, in Tremaine I, this Court prevented the Legislature from appointing the unnamed chairman of legislative committees to a civil position even though the Civil Appointments Clause expressly prohibited only appointing a specifically named "member of the Legislature." See **[*33]** 252 N.Y. at 40. The semantic device of appointing the unnamed holder of a committee chair rather than a specifically named legislator obviously posed the same danger the Civil Appointments Clause aimed to prevent. See id. at 41 -42 (noting the Clause "applies equally when a member of the Legislature receives a civil appointment ex officio, as chairman of a committee and when he is appointed by name").

The single-purpose appropriation bills and amendments to nonappropriation bills do not in any way implicate the danger that Section 4 seeks to prevent. The danger Section 4 seeks to prevent is unchecked legislative power, *i.e.*, a situation in which the Legislature could add language to an appropriation bill that becomes "law immediately without further action by the governor." But both the single-purpose appropriation bills and the amendments to the nonappropriation bills were subject to full gubernatorial review. They thus do not raise the danger that Section 4 is designed to prevent and there is no "indirect" violation of that provision. n11

n11 The 1978 Attorney General report the Governor cites (see Gov. Response at 44-45) provides no support for his "indirect" violation argument. That report addressed a legislative attempt to add to a subsequent appropriation bill language concerning the terms and conditions of an appropriation contained in an earlier appropriation bill. See 1978 N.Y. Op. Arty Gen. 76, 1978 WL 27523, at *1. Because Section 4 applies by its terms to all "appropriation bills" the Governor submits and adding language to any appropriation bill would result in the enactment of that language without gubernatorial review, such additions would directly violate Section 4.

[*34]

The Governor's contention that the review he was afforded of these proposals is inadequate is also at odds with the constitutional structure. n12 Because of the single-purpose requirement for appropriations the Legislature proposes pursuant to Section 6, the Governor has individualized review over these appropriations and the Legislature cannot engage in logrolling. But the New York Constitution allows only the general veto power over nonappropriation bills. It does not prevent logrolling of nonappropriation provisions, where a general veto does not force the draconian result of denying funding to vital services. Indeed, the statement from the Attorney General's Tremaine II brief that the Governor cites in support of his position makes clear that the concern was only to prevent the Governor from having to deal with

logrolling "in acting upon appropriation bills." Gov. Response at 47 (emphasis added). The constitutional structure thus guarantees that the Governor will not be confronted with any logrolled appropriations, but - consistent with New York's rejection of a general single-purpose requirement - logrolling may occur with respect to policy choices in nonappropriation **[*35]** bills.

n12 The Governor's argument that the gubernatorial vetoes result in a pre-executive budget system (see Gov. Response at 46) ignores that regardless of how many single-purpose appropriations are proposed, the executive still proposes the initial budget, which furthers the executive budget's goal of promoting efficiency and public knowledge concerning the budget. See Assembly Br. at 7-8. Moreover, the framers of the executive budget enacted Section 6 authorizing the Legislature to propose single-purpose appropriation bills, so they clearly intended that there be a role for gubernatorial vetoes.

F. The Governor's Position Is Plagued by the Same Lack of Judicially Manageable Standards the Governor Attributes to the Senate's Position

In addition to the lack of any textual, historical or structural support for the unprecedented power he seeks, the Governor's position would require the judiciary to enforce unintelligible standards whenever a budget dispute arose. The Governor criticizes the Senate's **[*36]** argument concerning what the Governor may include in an appropriation bill on the ground that the Senate's "'substantive' and 'general'" labels "afford no discernable basis for distinguishing between permissible and impermissible conditions in items of appropriation." Gov. Response at 27. Yet just pages later in his brief, the Governor proposes his own dividing line - between "a valid condition of spending" and "a general legislation rider" (id. at 35) n13 - that is no less lacking in "judicially discoverable and manageable standards," and which would "saddle[]" the courts with the same "unenviable task" that the Governor predicts would result from the Senate's position (Gov. Response at 27 (internal citations omitted)).

n13 The Governor's attempt to delineate this division by explaining that impermissible riders have "nothing to do with money matters" (Gov. Response at 38 (internal citations omitted)) does not assist in creating a judicially manageable standard. For example, the Governor's assertion that the deleted provisions proposing maximum awards and eligibility criteria for Improving Pupil Performance grants is not general legislation having "nothing to do with money matters" (id) is incorrect. Providing eligibility criteria for this program, or for any state program, is a fundamental policy decision that is properly the province of the Legislature. See Saratoga County Chamber of Commerce. Inc., 100 N.Y.2d at 821-22. Yet if the Governor's view is adopted, the Governor - in accordance with his claimed right to determine eligibility criteria - will be able to alter everything from who qualifies for social programs to which students are accepted into state universities.

[*37]

The genius of the constitutional structure that the Assembly seeks to enforce is that it does not require the judiciary to engage in these intractable line-drawing exercises on the frequent occasions when a budget dispute arises. The Constitution affords the Legislature remedies to respond to appropriation bills in which the Governor includes provisions that violate Section 6 or are insufficiently itemized. The Legislature may (1) strike the unconstitutional items, see N.Y. Const. art. VII, § 4; (2) strike an entire appropriation and propose a separate single-purpose appropriation with different conditions for that funding, see id; or (3) propose terms and conditions to that funding in the Governor's nonappropriation bills. The Governor, in turn, has the constitutional response to veto the single-purpose appropriation bills and the nonappropriation bills. See N.Y. Const. art. IV, § 7. This Court should uphold this time-honored constitutional system that does not require judicial micromanagement of these budget issues that are "delegated

essentially to the Governor and the Legislature." Saxton, 44 N.Y.2d at 549.

CONCLUSION

For the foregoing reasons, **[*38]** and for the reasons stated in the Assembly's Brief, dated August 12, 2004, this Court should reverse the decisions of the courts below and grant Defendant-Appellant New York State Assembly's cross-motion for summary judgment.

Dated: New York, New York
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Respectfully submitted,

/s/ [Signature]
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