SHELDON SILVER, Member and Speaker, NEW YORK STATE ASSEMBLY and NEW YORK STATE SENATE, Plaintiffs-Appellants, - against - GEORGE E. PATAKI, Governor, State of New York, Defendant-Respondent.

No. 171

COURT OF APPEALS OF NEW YORK

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TITLE: Brief for Plaintiff-Appellant Sheldon Silver, Member and Speaker, New York State Assembly

TEXT: PRELIMINARY STATEMENT

The plain language, structure, and history of the New York Constitution (the "Constitution") limit the Governor's line-item-veto authority to "items of appropriation of money" contained in appropriation bills. In 1998, for the first time in the history of New York State and without any constitutional basis, the Governor exercised the line-item veto to strike fifty-five individual provisions in bills that did not appropriate money. Rather than acknowledge and remedy this blatant constitutional violation, the First Department declined even to address the Governor's facially improper use of the line-item veto. Instead, the court issued an advisory opinion that the Legislature "indirectly" violated the Constitution in amending the Governor's non-appropriation **[*2]** bills. R.1895 (Order of Appellate Division, 1st Dep't Appealed From, entered on Dec. 11, 2003).

The First Department clearly erred in refusing to address the constitutionality of the Governor's misuse of the line-item veto - the very issue this Court previously held the Speaker has standing to raise and the only action that gave rise to a justiciable controversy. The court below also plainly erred in holding the Legislature's amendments to the Governor's non-appropriation bills unconstitutional; for nothing in the Constitution restricts the Legislature's plenary authority with respect to bills that do not appropriate money. Most troubling, however, is the basic premise that underlies the First Department's erroneous decision. The First Department suggested that once the Governor proposes an item of appropriation in an appropriation bill, the Legislature is forever preempted from making any proposals in any legislation that affect the "terms and conditions" of that appropriation. That unprecedented interpretation makes the Governor of New York a virtual czar. It grants the Governor powers enjoyed by no governor in any other state and would utterly abrogate the Legislature's preeminent **[*3]** role in policymaking - a central tenet of republican government.

The First Department's astonishing view that the Governor has exclusive authority to propose laws that have any effect on institutions and programs that receive state funds rests on two plainly erroneous assumptions. The first is that legislative amendments to non-appropriation bills can "indirectly" violate Article VII, Section 4 of the Constitution. That is simply wrong. By its plain terms, Article VII, Section 4 restricts only the Legislature's ability to "alter an appropriation bill." See N. Y. Const, art VII, § 4 (emphasis added). The text of Section 4 is expressly limited to appropriation bills because those bills "when passed by both houses" immediately became law "without further action by the governor." Id. Thus, any legislative alterations to appropriations initially proposed by the Governor would escape subsequent gubernatorial review entirely. See id. In contrast, the Governor retains the general veto power over bills that do not appropriate money. There is no structural reason to grant the Governor line-item veto authority with respect to non-appropriation bills - and certainly no reason whatsoever **[*4]** to ignore the textual limitation of Section 4 to "items of appropriation" in appropriation bills and judicially impose its limitations on the Legislature with respect to non-appropriation bills.

The First Department's second erroneous assumption is that the bedrock grant of "legislative power" to the Legislature in Article III, Section 1 of the Constitution is inadequate to give the Legislature full legislative power over all bills other than appropriation bills. Instead of recognizing what this Court recently reaffirmed as the Legislature's primacy in making "critical policy choices," Saratoga County Chamber of Commerce. Inc. v. Pataki, 100 N.Y.2d 801, 821-22 (2003) (quoting Bourquin v. Cuomo, 85 N.Y.2d 781, 784 (1995)), the First Department dismissed the constitutional foundation of legislative power, commenting that Plaintiff "failed to identify any provision that grants to the Legislature the right to modify an item of appropriation outside the appropriation in which it is contained, other than a reference to the general legislative power conferred to it by Article III. § 1." R. 1901-02 (emphasis added). This is tantamount to questioning **[*5]** this Court's power to decide cases because it cannot cite a constitutional provision authorizing it to do so other than Article VI of the Constitution. In requiring a constitutional grant of authority to the Legislature specifically addressed to non-appropriation bills, the First Department simply disregarded the longstanding principle that because "the legislative power is untrammeled and supreme . . . a constitutional provision [such as Section 4] 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 Thirty-Fourth St. R.R. Co.. 102 N.Y. 343, 350-51 (1886).

In a final blow to the time-honored system of checks and balances, the court below discovered gubernatorial authority - nowhere granted in the text of the New York Constitution nor to any other governor in the country - to line-item veto provisions he deems unconstitutional in non-appropriation bills (as opposed to use of the general veto over such bills). This results in the enactment of bills never approved **[*6]** by the Legislature - a fundamental breach of our tripartite government and wholly antithetical to the carefully crafted process of lawmaking expressly prescribed in the Constitution. It also results in the enactment of bills that, by the Governor's own reasoning, contain unconstitutional provisions; for where the general veto power prevents the enactment of legislation that contains unconstitutional provisions, the line-item veto allows the Governor to retain those assertedly unconstitutional provisions with which he agrees, which is exactly what the Governor, by his own admission, did in this case.

"The foundation of free government is imperiled when any one of the co-ordinate branches absorbs or interferes with another." Oneida County v. Berle, 49 N.Y.2d 515, 522 (1980). This Court must confine the Governor to his constitutionally defined role in the legislative process; restore the Legislature's primacy in matters of policy; and end the uncertainty and gridlock that has gripped the budget process since the Governor's unprecedented actions in 1998.

QUESTIONS PRESENTED

1. Whether the fifty-five provisions that the Governor used the line-item veto to strike **[*7]** were "items of appropriation of money" in "bill[s that] contain several items of appropriation of money" subject to the Governor's line-item veto power in Article IV, Section 7 of the New York Constitution?

2. Whether the New York Constitution grants the Governor authority to line-item veto fifty-five provisions that were not "items of appropriation of money" in appropriation bills based on his belief that the Legislature unconstitutionally added the provisions to bills that do not appropriate money?

JURISDICTION

This Court has jurisdiction to entertain this appeal, which Plaintiff-Appellant has taken pursuant to Civil Practice Law and Rules Section 5601(b)(1). The appeal is from the Decision and Order of the Appellate Division 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. NEW YORK'S TRIPARTITE GOVERNMENT

In contrast to the revolutionary, autocratic system of government envisioned by the First Department, the New York Constitution designs a system for budget bills that preserves **[*8]** the Legislature's primacy in policymaking. That system provides special rules for appropriation bills - and only appropriation bills - to facilitate limiting government spending. It ensures that both the Governor and Legislature retain checks on each other that enable most disputes to be resolved through the political process.

New York has a government in which powers are distributed among three branches. See N.Y. Const, arts. Ill, IV and VI; see Berle, 49 N.Y.2d at 522. "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 (1929) ("Tremaine I"): see also Bourquin. 85 N.Y.2d at 784 (the principal of separation of powers "requires that the Legislature make the critical policy decisions, while the executive branch's responsibility is to implement those policies"); Trade Accessories. Inc. v. Bellet, 184 Misc. 962, 965, 55 N.Y.S.2d 361, 364 (App. Term 1st Dep't 1945) **[*9]** ("In a democracy fundamentally the power to enact statutes is resident in the people or their legislative representatives."). This Court recently reaffirmed that "the Constitution's implied separation of powers doctrine . . . 'requires that the Legislature make the critical policy decisions.'" Saratoga County Chamber of Commerce. 100 N.Y.2d at 84.

The Legislature's supreme role in making laws led James Madison to recognize that in "republican government, the legislative authority necessarily predominates." The Federalist No. 51, at 290 (James Madison (Clinton Rossiter ed. 1999); see also The Federalist No. 73, at 412 (Alexander Hamilton) (Clinton Rossiter ed. 1999) (recognizing the "superior weight and influence of the legislative body in a free government"). It is also a fundamental tenet of the New York Constitution that no branch should go unchecked in exercising its power. The primary check on the Legislature's power to make laws is the Governor's general veto power. The general veto does not elevate the executive to an equal status in the lawmaking arena, but provides a check on "a case in which the public good was evidently and palpably sacrificed." The **[*10]** Federalist No. 73, at 413 (Alexander Hamilton) (Clinton Rossiter ed. 1999). "Every bill which shall have passed the senate and assembly shall, before it becomes a law, be presented to the governor; if the governor

approve, he shall sign it; but if not, he or she shall return it with his or her objections to the house in which it shall have originated . . . . " N.Y. Const, art. IV, § 7. When the Governor exercises the veto, the bill becomes law only if two-thirds of both the Assembly and Senate vote for the bill on reconsideration. See id.

Logrolling, "the practice of 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), means that in deciding whether to exercise the veto power, a governor must often balance the benefits of provisions he desires against the harms of provisions he opposes. Many states responded to logrolling with constitutional provisions requiring that bills, except for appropriation bills to which the line-item veto applied, not encompass more than a single subject. See, e.g. **[*11]** , Cal. Const, art. IV, § 9; Wash. Const, art. II, § 19; Mo. Const, art. Ill, § 23. New York, however, has not adopted a general single-subject restriction on the Legislature's supreme role in lawmaking. The New York Constitution imposes a single-subject requirement only in narrow circumstances in which logrolling is especially problematic: single subjects are required only for bills that (1) propose private or local legislation, N.Y. Const, art. Ill, § 15, or (2) are single-purpose appropriation bills passed after the Governor's proposed appropriation bills are acted on, N.Y. Const, art. VII, §§ 5, 6. With respect to all other legislation, the Governor must continue to balance the pluses and minuses of various provisions in deciding whether to exercise the veto power. The fact that New York has rejected the single-purpose curtailment on legislative power found in many other states makes even more remarkable the holdings of the courts below that grant the Governor exclusive power, possessed by no governor in any other state, to propose legislation that affects programs receiving state funds.

B. THE CONSTITUTIONAL TREATMENT OF APPROPRIATION BILLS

1. The Line Item [*12] Veto Over "Items of Appropriation" in "Bill[s that] Contain Several Items of Appropriation"

New York did, however, alter its constitutional structure with respect to appropriations, the area in which logrolling posed the greatest problem. Logrolling allowed legislators to insert pork barrel projects into large appropriation bills, which resulted in significant increases in government spending. See Briffault, 66 TEMP. L. REV. at 1178-79 (recounting how states concluded that appropriations legislation needed the "most protection against logrolling"). Although the general veto is an effective check on most logrolled bills, it is not be a practical response on large appropriation bills. Vetoing major appropriations bills could shut down much of the government for lack of funding. See Commonwealth v. Barnett, 199 Pa. 161,189,48 A. 976, 984 (Pa. 1901) (recognizing that many states implemented the line item veto because multi-item appropriation bills "frequently led to the executive being coerced to approve many unwise and improper appropriations, as public necessity would not permit him to disapprove of the whole bill"); Anthony Petrilla, Note, The Role **[*13]** of the Line-Item Veto in the Federal Balance of Power. 31 HARV. J. ON LEGIS. 469,470 n.7 (1994) (recognizing that "[t]hrough the use of omnibus budget bills, which combine unrelated government spending projects, Congress forces the executive to accept the entire budget or run the risk of shutting down the government for lack of funding").

In 1874, New York amended its Constitution to provide the Governor with a limited line-item veto aimed at controlling government spending. That provision, unchanged to this day and currently found in Article IV, Section 7, provides: "If any bill presented to the governor contains several items of appropriation of money, the governor may object to one or more of such items while approving of the other portion of the bill." N.Y. Const, art. IV, § 7. As with a general veto, the legislature may override a line-item veto by a two-thirds vote in both houses. See id.

2. Execntive Bndgeting

In the early twentieth century, after most states had already adopted line-item vetoes, a "budget reform movement . . . swept the country" that resulted in most states adopting a system of executive budgeting. See Briffault, 66 TEMP. L. REV. **[*14]** At 1180 (quoting Roger H. Wells, The Item Veto and State Budget Reform. 18 AM. POL. SCI. REV. 782, 786 (1924)). Like the line-item veto, executive budgeting was aimed at controlling the amount of appropriations. See id;

R. 1698-1701 (Report of the Committee on State Finances, Revenues and Expenditures Relative to a Budget System for the State, Document No. 32, State of New York in Convention, Aug. 14, 1915), infra II.A.5. New York adopted executive budgeting in 1927.

Under the executive budget system, the Governor receives estimates and information from each department and holds hearings involving department heads and their subordinates. See N.Y. Const, art. VII, § l. n1 By the middle of January (February 1 in an election year), the Governor must submit the executive budget to the Legislature for its consideration for the fiscal year that will commence on April 1. See N.Y. Const, art. VII, § 2. Article VII, Section 2 generally describes the executive budget as:

> a complete plan of expenditures proposed to be made before the close of the ensuing fiscal year and all moneys and revenues estimated to be available therefor, together with an explanation of the basis of **[*15]** such estimates and recommendations as to proposed legislation, if any, which the governor may deem necessary to provide moneys and revenues sufficient to meet such proposed expenditures. It shall also contain such other recommendations and information as the governor may deem proper and such additional information as may be required by law.

N.Y. Const, art. VII, § 2.

> n1 With respect to appropriations for the Legislature and the Judiciary, the Governor receives itemized estimates of each branch's financial needs directly from that branch which he must submit to the legislature without revision, but with any recommendations that he deems proper. See N.Y. Const, art. VII, § 1.

Article VII, Section 3 provides that there are two categories of bills the Governor may submit with his budget: (1) appropriation bills - "a bill or bills containing all the proposed appropriations and reappropriations"; n2 and (2) "proposed legislation, if any, recommended therein," known as non-appropriation bills. Appropriation **[*16]** and non-appropriation bills submitted by the Governor are collectively referred to as "budget bills." N.Y. Const, art. VII, §§ 2,3; 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); id. § 22 (accord); R.56 (Order of the New York Court of Appeals, dated July 10, 2001) (recognizing that Governor Pataki exercised the line-item veto to strike provisions in non-appropriation bills).

> n2 What the Governor may constitutionally include as part of an appropriation bill is currently disputed by the Executive and the Legislature. The New York State Supreme Court, Albany County affirmed the Governor's inclusion of extensive qualifying language in items of appropriation in appropriation bills in Pataki v. New York State Assembly. 738 N.Y.S.2d 512, 528 (N.Y. Sup. Ct. Albany Cty. 2002) ("Pataki v. Assembly"), appeal transferred to Appellate Division. Third Department. 98 N.Y.2d 644 (2002).

[*17]

Other constitutional provisions confirm that "appropriation bills" are a discrete category of budget bills with special constitutional significance. For example, Article VII, Section 4 provides:

> 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.

N.Y. Const, art. VII, § 4 (emphasis added); see id. §§ 4,5, 6 (all referring to an "appropriation bill"); see also id. § 7 (referring to an "appropriation act").

After the Legislature passes those items of appropriation included in the Governor's appropriation bills - either as proposed by the Governor or reduced in amount - those bills become "law immediately without further action by the governor." Id. § 4 Any separate "items of appropriation" that the Legislature adds under Article VII, Section 4 are subject to the Governor's line-item veto. Id § 7. n3

n3 The appropriations for the Legislature and the Judiciary, see supra note 1, are several other items of appropriation against which the Governor may properly exercise his line-item veto authority. The line-item veto may also be exercised against "items of appropriation" in a "supplemental appropriation bill for the support of government" that the Legislature may initiate.

[*18]

The interaction of executive budgeting and the line-item veto thus creates a structure that ensures that no money is spent above the amounts approved by both the legislature and Governor, except when both houses override the Governor's line-item veto by a two-thirds vote. The Governor submits an "appropriation bill" or bills limited to "items of appropriation." The Legislature may strike the item, reduce the amount of the item, or add new items of appropriation. The Governor may then individually veto any new items added by the Legislature, subject to a two-thirds override by both houses. This structure promotes the goal of the line-item veto and executive budgeting to control spending, while retaining the system of checks and balances fundamental to constitutional government.

That does not mean, however, that the Governor may exercise the line-item veto against proposals contained in non-appropriation bills, the entirely distinct "proposed legislation" expressly provided for in Article VII, Section 3. In its earlier ruling that Speaker Silver has standing to challenge the Governor's vetoes, this Court explained that non-appropriation bills contain "programmatic provisions, and commonly **[*19]** 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." R.55-56 n. 1. These provisions, like most general legislation, may affeet the manner in which appropriations are expended in the implementation of statutorily prescribed government operations, but are not "items of appropriation of money." n4

n4 The non-appropriation bills submitted by the Governor in conjunction with his 2003-2004 budget illustrate that provisions affecting appropriations are properly included in non-appropriation bills. For example, the Governor included provisions calling for:

. the abolition of the State Liquor Authority and transfer of its functions to the Division of Alcoholic Beverage Control ("ABC") (A.2106/S.1406, Part P, § 1) (2003-04 Legisl. Sess.) (Jan. 29, 2003);

. the merger of the vocational rehabilitation services of the Commission for the Blind and Visually Handicapped ("CBVH"), portions of the Vocational and Educational Services for Individuals with Disabilities ("VESID") Program and the Equipment Loan Fund for the Disabled of Office of Children and Family Services ("OCFS"), into the Department of Labor; and the transfer of independent living services for blind persons aged fifty-five and older from CBVH to

the State Office for the Aging (A.2107/S.I407, Part I, § 5) (2003-04 Legisl. Sess.) (Jan. 29, 2003);

. amendment of the Medicaid Managed Care Act to make the program permanent, maintaining the pharmacy carve-out and establishing co-payments for managed care participants equal to those in the fee for service program, and making the six-month eligibility for Medicaid services for managed care participants permanent;

. elimination of Medicaid coverage for an estimated 238,000 low-income children and shifting coverage of these children to the Child Health Plus program, and eliminating health care coverage for approximately 20,000 low income adults under the Family Health Plus program through a reduction in eligibility standards.

[*20]

Such non-appropriation bills are subject to the general legislative process. The Legislature may act upon the Governor's proposed non-appropriation bills in any manner that it sees fit - including eliminating or modifying all or part of the Governor's provisions or adding provisions of its own - after which such bills must be presented to the Governor for his approval or veto in toto. n5 See N.Y. Const, art. IV, § 7. Article VII, Section 4's prohibition on the Legislature making additions or deletions expressly applies only to "an appropriation bill submitted by the governor." See N.Y. Const, art. VII, § 4 (emphasis added). Neither Article VII, Section 4 nor any other constitutional provision constrains the Legislature's actions with respect to the bills containing the Governor's "proposed legislation" submitted with the budget that do not appropriate money. See N.Y. Const, art. VII, § 3.

n5 Moreover, unlike items of appropriation which expire after two years, see N.Y. Const, art. VII, § 7, non-appropriation measures, once enacted, remain in full force and effect until repealed or until they expire by their own terms. And, unlike appropriations, see id. § 5, these provisions may be routinely enacted at any point in the legislative cycle. See R.1486 (Affidavit of Sheldon Silver in Support of Supplemental Memorandum of Law, sworn to on March 12, 2002).

[*21]

It is no accident that the clear constitutional text limits the line-item veto to "items of appropriations of money" contained in an "appropriation bill" and only prohibits the Legislature from making certain additions to an "appropriation bill." These special rules are needed for appropriation bills because an appropriation bill "when passed by both houses [becomes] a law immediately without further action by the governor." N.Y. Const, art. VII, § 4. That structural justification is completely absent in non-appropriation bills, because non-appropriation bills are subject to full, meaningful gubernatorial review via the general veto power.

C. THE BUDGET PROCESS IN PRACTICE

In the years immediately following the adoption of executive budgeting in 1927 and subsequent changes in 1938 that combined various constitutional provisions relating to the budget into a single "State Finances" Article (Art. VII), this Court recognized the constitutional distinction between appropriation bills and non-appropriation bills that accompany the budget. The Court explained that the "Constitution means that . . . it is the items giving this information ["show[ing] what money is to be **[*22]** expended, and for what purpose"] which is embodied in [the Governor's] appropriation bills." People v. Tremaine. 281 N.Y. I, 5 (1939) ("Tremaine II"). The Court cautioned that the "Governor ought not to insert [segregation] provisions," which further itemize the positions, salaries, programs, and other elements funded by an appropriation, into an appropriation bill because such provisions are not "items of appropriation."

Tremaine I. 252 N.Y. at 50. An example from one of Governor Franklin Roosevelt's 1929 appropriation bills, proposed shortly after the enactment of the Executive Budget system, shows the proper subject matter of an appropriation bill: "Investigation of Sale of Securities and Unlawful Corporate Activities, Services and Expenses-$ 210,000." Id at 34.

This practice - appropriation bills limited to items of appropriations and separate non-appropriation bills that included provisions sub-allocating funds or conditioning the expenditure of funds on certain criteria - was apparently the norm for decades. See R. 1312 (Oral Argument Before J. Lehner, Jan. 11, 2000) (Justice Lehner, who served in the Assembly stated, "When I was in the **[*23]** assembly, appropriation bills were appropriation bills. They just allowed money. Somewhere after I left, which is 1980, program bills came out of the governor's office, I don't know if it was Cuomo or Pataki, that contained substantive law and appropriation."); see also R.224-25 (Affidavit of Sheldon Silver in Opposition to Defendant's Motion to Dismiss, sworn to on Aug. 4, 1998).

Despite the unique limits placed on both the Governor and Legislature with respect to appropriation bills, with a significant passage of time after the institution of executive budgeting, both branches stopped scrupulously honoring the constitutional distinction between appropriation and non-appropriation bills. On occasion, after the Governor submitted the appropriation and non-appropriation bills, the Legislature and the Governor compromised on provisions contained in the appropriation and the non-appropriation bills and the Legislature implemented compromises directly in the appropriation bills. See R.225.

In 1993, however, the Court reinforced the distinct constitutional treatment of appropriation and non-appropriation bills. See New York State Bankers Ass'n v. Wetzler, 81 N.Y.2d 98, 104-05 (1993). **[*24]** The Court ruled that, even with the Governor's consent, the Legislature could act upon appropriation bills only in the ways specified in Article VII, Section 4: by striking, reducing or adding an item of appropriation. The programmatic provisions the Legislature added, even though the Governor consented, had no place in appropriation bills. See id.

Since Bankers, the Legislature has honored the special constitutional rules governing appropriation bills. While retaining its constitutional authority to strike out, reduce, or add items of appropriation to appropriation bills, the Legislature ceased providing programmatic provisions for the implementation of the appropriations through amendments to the appropriation bills. R.226. After Bankers reinforced the constitutional structure that appropriation bills be limited to items of appropriations that the Legislature can only strike out or reduce, the Legislature has relied exclusively on non-appropriation bills to provide the necessary implementing and policy provisions. Id. Therefore, subsequent to Bankers, non-appropriation bills have commonly included subschedules for funding provided by the appropriation bills, **[*25]** sub-allocations of monies budgeted in the appropriation bills, and provisions for disbursements of funds budgeted in the appropriation bills "pursuant to a chapter" - that is, pursuant to a subsequent legislative enactment. R.226-27.

D. THE 1998 BUDGET PROCESS

In an unprecedented move during the 1998 budget process, the Governor attempted to abrogate the Legislature's lawmaking authority by ignoring the distinction between appropriation and non-appropriation bills. R.227.

The executive budget, submitted by the Governor on January 20, 1998, contained a number of appropriation and non-appropriation bills. Id. After completion of the public hearings on the budget, the Legislature attempted, as it had in previous years, to initiate negotiations concerning the final budget with the Budget Director and other representatives of the Governor. R.228-29. After these attempts failed, in March 1998, each house of the Legislature passed "one-house bills" embodying each house's own version of both the appropriation and non-appropriation bills submitted by the Governor. R.228. The Senate and the Assembly submitted the appropriation bills to the Budget Conference Committee, a bipartisan **[*26]** committee made up of members from both the Assembly and Senate. R.229

The Budget Conference Committee process resulted in the joint passage and transmission of the following appropriation bills to the Governor: (1) the General Government Budget Bill (which became Ch. 50, S. 6102-D/A.

9102-D); (2) the Legislative and Judiciary Budget Bill (which became Ch. 51, S. 6100-B/A. 9100-B); (3) the Debt Service Budget Bill (which became Ch. 52, S. 6101-C/A. 9101-A); (4) the Education, Labor and Family Assistance Budget Bill (which became Ch. 53, S. 6105-C/A. 9105-C); (5) the Public Protection, Health and Mental Hygiene Budget Bill (which became Ch. 54, S. 6104-C/A. 9104-C) and (6) the Transportation, Economic Development and Environmental Conservation Budget Bill (which became Ch. 55, S. 6103-C/A. 9103-C). R.230. The Legislature also transmitted to the Governor three non-appropriation budget bills which became Chapter 56, S. 6094-B/A. 9094-C, Chapter 57, S. 6096-B/A. 9096-B and Chapter 58, S. 6098-B/A. 9098-C. Id.

On April 29, 1998, the Governor exercised his line-item veto authority to remove more than $ 1,237 billion dollars in "items of appropriation" that the Senate and Assembly added **[*27]** to the appropriation bills. R.230. Among the programs cut were programs relating to education, the environment, real property tax relief, and child care. R.230-31.

For the first time in the history of New York State, the Governor also used the line-item veto to remove fifty-five provisions from the non-appropriation bills. R.231 These provisions vetoed by the Governor did not appropriate any funds and did not alter the amount of any item of appropriation in an appropriation bill. Id.

The thirteen provisions chosen by the parties as representative of the fifty-five provisions struck by the Governor were legislative proposals that sub-allocated appropriated funds or defined the criteria under which those funds would be spent. See R. 1483. These are precisely the types of "critical policy choices" that are at the core of legislative power. See Saratoga County Chamber of Commerce. 766 N.Y.S.2d at 666 (quoting Bourquin, 85 N.Y.2d at 784).

The provisions included by the Legislature in the non-appropriation bills, and line-item vetoed by the Governor, generally fall into three categories: (1) sub-allocation of appropriated funds - the greater specification **[*28]** of spending priorities, (2) criteria relating to the implementation of the appropriated funds, and (3) "PTAC" provisions - provisions that specify that the amount appropriated is only to be expended "pursuant to another chapter law" or that any expenditures are contingent upon the enactment of subsequent substantive legislation to define and delimit specific programs or projects. See R.1483, 1488.

The Governor, for example, line-item vetoed non-appropriation provisions that (1) increased the number of parks and public areas that would receive acquisition and maintenance funding from the aggregate amount appropriated in separate appropriation bills, (2) allocated a portion of the funds appropriated to the New York Department of Enviroumental Conservation for use in the clean air for school program, and (3) directed how the Temporary Assistance to Needy Families would be operated by defining permissive expenditures. R.231, R. 1488-89.

One provision the Governor line-item vetoed did not modify a proposed gubernatorial appropriation in any respect. See R.235, R.1491. Chapter 338 of the Laws of 1994 authorized the Office of General Services to sell or lease surplus property at Creedmoor **[*29]** Psychiatric Center ("Creedmoor") to St. Francis Prep High School. R.1491. The sale of this land was a result of the Community Reinvestment Act that directed the downsizing of institutions such as Creedmoor, but also required that the land be sold at fair market value. Id The Legislature decided to permit the sale of the land for below fair market value. See id. In a non-appropriation bill, it amended the 1994 statute to allow the sale of Creedmoor to St. Francis Prep High School at below fair market value and capped the amount of the sale at $ 500,000. Id The Governor line-item vetoed this provision even though it did not relate to any item of appropriation in any appropriation bill. R.235, R. 1491.

The Governor seeks to dramatically expand his power beyond that enjoyed by any other governor by asserting that that he is authorized to line-item veto provisions in non-appropriation bills merely because the provisions "affect" appropriations. Given that virtually all state operations require money, it is arguable that virtually every legislative act meets this criteria. At the same time, the Governor grossly expands the notion of what an "item of appropriation" is to include substantive **[*30]** and policy considerations that are the core responsibility of the Legislature. The extraordinary result is that the Governor seeks to preempt the Legislature's authority to make basic policy choices with respect to state programs funded by the budget.

The Governor's position is all the more troubling because he did not exercise the line-item veto over numerous other provisions the Legislature added to non-appropriation bills that similarly sub-allocated appropriations or provided programmatic language for appropriations. See Appellants' Appendix of Governor Pataki's Non-Appropriation Bills for the 1998-99 Budget ("Appendix"). By using the line-item veto as opposed to the general veto expressly granted to him with respeet to other "proposed legislation," the Governor asserts the prerogative to "cherry-pick" the provisions he does not like, leaving other provisions - equally unconstitutional under the Governor's view - to beeome law because he agreed with those policy choices.

E. THE PROCEEDINGS BELOW

In June 1998, Plaintiff Sheldon Silver, the Speaker of the New York Assembly, filed a complaint in New York County challenging Defendant Governor George E. Pataki's use of **[*31]** the line-item veto against these fifty-five provisions that did not constitute items of appropriations. See R.117-73 (Complaint dated June 15, 1998). The Governor moved to dismiss Silver's complaint for lack of standing and capacity to sue, and in the alternative, to transfer venue to Albany County. See R.174-217 (Memorandum of Law in Support of Defendant's Motion to Dismiss the Complaint or Change Venue to Albany County, dated June 9, 1998). The Supreme Court, New York County, per Justice Edward Lehner, denied the Governor's motion to dismiss and to transfer venue in early 1999. R702-13 (Decision and Order of J. Lehner, dated January 7, 1999). In a three-to-two opinion, the First Department reversed Judge Lehner's decision, holding that Speaker Silver lacked the standing and capacity to challenge the Governor's exercise of the line-item veto. R.730-51 (Decision and Order of the Supreme Court, App. Div., 1st Dep't, dated July 20, 2000). This Court, in a six-to-one opinion in July 2001, reversed the decision of the First Department and found that Speaker Silver had standing and capacity to raise the claim that the Governor's exercise of the line-item veto violated the New York Constitution. **[*32]** R.752-75. (Decision and Order of the Appeals, State of New York, dated July 10, 2001).

In the trial court, the parties selected thirteen "representative" line-item vetoes for the trial court to review. R.1480 (Stipulation filed March 6, 2002). Both parties submitted motions for summary judgments. See R. 10 (Order and Decision of J. Lehner, June 20, 2002). The Speaker's motion was predicated on the grounds that Article IV, Section 7 of the Constitution expressly limits the Governor's line-item veto authority to "items of appropriation" in appropriation bills. See R. 1498-99 (Plaintiff's Supplemental Memorandum, dated Mar. 14, 2002). The Governor's motion was based on his affirmative defense that the line-item vetoes were lawful because the vetoed provisions were themselves unconstitutional. R. 1536-42 (Defendants' Supplemental Summary Judgment Memorandum, dated Mar. 14, 2002). The Governor argued that although the provisions did not allocate any money and were not enacted in an appropriations bill, the vetoed provisions "indirectly" violated the restrictions Article VII, Section 4 places on the Legislature with respect to "items of appropriation" in appropriation bills. R. 1544-45. In **[*33]** June 2002, the trial court issued its decision granting the Governor's motion for summary judgment. R.9-25. Despite years of litigation over the challenge to the Governor's exercise of the line-item veto, including this Court's discussion in Silver v. Pataki, R.752-75, the trial court did not decide the only claim before it - whether the line-item vetoes were constitutional. See R.25 ("[T]here is no need to determine whether the items were constitutionally vetoed.").

Ignoring the Governor's direct violations of the Constitution's line-item veto provisions, the trial court accepted the Governor's argument that the Legislature "indirectly" violated Section 4 of Article VIII of the Constitution, R.23, which limits the Legislature's ability to "alter an appropriation bill." See N.Y. Const, art. VII, § 4. Although recognizing that the provisions inserted by the Legislature did not "appropriate monies," R.7, Justice Lehner nonetheless concluded that by "inserting these provisions that affect appropriations in bills that do not appropriate money, but which refer to bills that do appropriate money, the legislature impermissibly attempted to do indirectly that which could not be done **[*34]** directly" in an appropriation bill under Article VII, Section 4. R.23. In finding this "indirect" violation, Judge Lehner did not address, but completely ignored the key structural difference that appropriation bills "become law immediately without further action by the governor," N.Y. Const, art. VII, § 4, whereas the Governor retains the general veto power over non-appropriation bills.

As a result of its belief that legislative alterations to non-appropriation bills indirectly violate Article VII, Section

4's limitations on the Legislature's ability to "alter an appropriation bill," N. Y. Const, art. VII, § 4, the court concluded that "the provisions [the Governor] vetoed . . . were unconstitutionally enacted by the legislature and are thus void." R.24. Despite acknowledging that "no provision in the Constitution [grants the Governor the] right" to line-item veto an unconstitutional provision, n6 R.25, the court did not address at all whether the Governor's line-item veto was an appropriate remedy for the Legislature's conduet. Id.

n6 It is apparently the Governor's position that while he may strike provisions in proposed legislation that he deems are unconstitutional, the Legislature has no power to strike provisions in appropriation bills that it deems unconstitutional. In the 2001/2002 budget, the Legislature struck items from the Governor's appropriation bills and submitted thirty-seven single purpose bills which the Governor signed. The Governor brought suit against the Senate and the Assembly alleging that the separate bills unconstitutionally "replaced" the items of appropriations that the Legislature had improperly struck from the Governor's appropriation bills. See Pataki v. Assembly, 738 N.Y.S.2d 512 (2002). The trial court agreed with the Governor and stated that even if the Governor unconstitutionally placed provisions in an appropriation bill that were not "items of appropriation," Article VII, Section 4 rendered the Legislature powerless to delete the provision. See id. An appeal is pending.

[*35]

The Speaker appealed as did the Senate, which was permitted to intervene in the case after the trial court ruling. R.4 (Notice of Appeal of Sheldon Silver, dated July 12, 2002), R.29 (Amended Notice of Appeal of Sheldon Silver, dated Sept. 10, 2002), R.42 (Notice of Appeal of New York Senate, dated Sept. 10, 2002).

The First Department, too, refused to rule on the Speaker's claim alleging that the Governor's exercise of the line-item veto was unconstitutional. R. 1902-03. Instead, the court simply adopted the erroneous decision of the trial court. Id. The Appellate Division focused on rejecting the Senate's argument that items of appropriation cannot contain language directing the "when, how or where" of the appropriated funds, and that such language must be included in non-appropriation bills to which "the legislature can constitutionally make additions or alterations." R. 1899-1901. The court held that "items of appropriation are not limited to dollar amounts and purpose." R.1900.

The Appellate Division then similarly dismissed the Speaker's argument that "because the amendments were included in 'non-appropriation' bills, and not in the 'appropriation bill submitted by the governor, **[*36]** ' no violation of Article VII, § 4 occurred." R. 1898-99. The court concluded that Article VII, Section 4, which applies by its plain terms only to appropriation bills, also limits the Legislature's ability to alter non-appropriation bills because to "conclude otherwise would allow plaintiffs to accomplish by indirection something which the Constitution directly forbids." R.1902.

Like the trial court, the First Department did not even mention the fundamental structural difference, highlighted in the Speaker's brief, between appropriation and non-appropriation bills that explains why Article VII, Section 4 applies only to appropriation bills: because appropriation bills, unlike all other bills, "become law immediately without further action by the governor," Section 4 prohibits the Legislature from making alterations to those bills that would escape the gubernatorial check on legislative power - the veto. See N. Y. Const, art. VII, § 4.

The consequences of the ruling are extraordinary. The First Department's rule that the Legislature cannot amend or add provisions in non-appropriation bills that "affect" appropriations, even though such alterations are subject to full gubernatorial **[*37]** review by general veto, confers on the Governor a preemptive power over policymaking that far exceeds the power of any governor in any other state. Equally troubling, by refusing to review the lawfulness of the Governor's line-item veto and allowing the Governor to selectively strike provisions in non-appropriation bills, the First Department authorized the enactment of laws never passed by the Legislature.

SUMMARY OF ARGUMENT

The Governor's unprecedented exercise of the line-item veto to strike fifty-five provisions in non-appropriation bills exceeded his power under the Constitution. The New York Constitution narrowly circumscribes the use of the line-item veto to striking "items of appropriation of money" in appropriations bills. None of the fifty-five provisions struck by the Governor in this case were "items of appropriation of money," which this Court has said "show what money is to be expended, and for what purpose." Tremaine II. 281 N.Y. at 5. Nor were the fifty-five provisions even in bills that appropriated money. The provisions were contained in non-appropriation bills that were subject to the Governor's general veto power. Courts in other states **[*38]** that limit the Executive's line-item veto authority to "items of appropriation" have recognized that the line-item veto authority extends only to provisions that appropriate money - not to provisions that allocate already appropriated funds or merely affect programs using appropriated funds.

The structure of the Constitution explains why the line-item veto is limited to "items of appropriation of money," which are the only additions the Legislature may make to the Governor's appropriation bills. The line-item veto provides the Governor with his only check on those added items, because otherwise the Governor's appropriation bills "become law immediately" upon passage by the Legislature without further gubernatorial review. No similar role, justifies a line-item veto for bills that do not appropriate money, for those bills remain subject to full gubernatorial review through the general veto power.

The framers of the line-item veto provision expressly rejected proposals that would have given the Governor the power he now seeks - a partial veto over all legislation - in favor of a limited and narrowly-tailored line-item veto for "items of appropriation of money" in appropriation **[*39]** bills. Those framers expressed grave concerns that the power exercised by the Governor in this case would disrupt the delicate, vital balance between the three branches by making the Executive both the primary maker and enforcer of the State's laws.

Instead of addressing the Speaker's claim that the Governor unconstitutionally struck provisions that were not "items of appropriation of money" - the very claim this Court held justiciable in this case - the court below based its ruling on the Governor's affirmative defense that he had the right to line-item veto the provisions added by the Legislature because the additions were unconstitutional. The Governor's affirmative defense requires him to establish two propositions: I) the Legislature is constitutionally barred from amending non-appropriation bills, and 2) if so, in addition to the general veto power, the Governor possesses a line-item veto that enables him to selectively strike unconstitutional provisions from any bill. There is no constitutional support for either of these propositions.

In accepting the first element of this defense, the First Department completely misapprehended the import of Article VII, Section 4. It reasoned **[*40]** that making amendments to non-appropriation bills that Article VII, Section 4 prohibits with respect to appropriation bills results in "accomplish[ing] by indirection something which the Constitution directly forbids." R.I902. This is wrong. What Article VII, Section 4 does "directly" is prevent the Legislature from making additions to appropriation bills that would become "law immediately without further action by the governor," N.Y. Const, art. VII, § 4, in violation of the system of checks and balances. In contrast, legislative amendments to non-appropriation bills are subject to the Governor's general veto power and thus do not implicate the concern about unchecked legislative power that Article VII, Section 4 addresses. The extension of Article VII, Section 4 beyond its explicit text to limit the Legislature with respect to non-appropriation bills is flatly at odds with the longstanding principle that 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 **[*41]** subject, leaves all other matters and incidents under its control." In re Thirty-Fourth St. R.R. Co.. 102 N.Y. 343, 350-51 (1886).

Not only is the First Department's view directly at odds with the text and structure of the Constitution, but it also works a radical transformation of the Legislature's basic role, utterly depriving it of its primacy in matters of policy and lawmaking. According to the Governor- and implicit in the First Department's decision below - only the Governor may propose terms and provisions that "affect" an appropriation. The Legislature's role is reduced to the up or down choice

of approving or rejecting the Governor's budget submissions - including any changes to substantive law that he chooses to attach to the "items of appropriation" contained in his appropriation bills. This radical restraint on the Legislature's authority to propose substantive law dramatically upsets the careful checks and balances established by the Constitution.

The constitutional damage worked by the First Department's acceptance of the Governor's "my-way-or-the-highway" view of the budget process that bars the Legislature from making policy proposals in non-appropriation **[*42]** bills was compounded by the court's failure to address the second essential element of the Governor's affirmative defense-that the Governor may use the line-item veto to selectively strike unconstitutional provisions from a bill. The Governor cannot prevail on his affirmative defense unless he establishes that he has this right. Had the court addressed the issue, it would have found that nothing in the Constitution or case law grants the Governor roving authority to use the line-item veto to strike an individual provision he believes is unconstitutional, especially where, as here, the general veto is available to prevent the bill from becoming law. Such authority is completely unwarranted. It can - and did here - result in the enactment of laws the Legislature never approved and that contain supposedly unconstitutional provisions the Governor elected not to strike.

ARGUMENT

I. THE GOVERNOR'S LINE-ITEM VETO OF FIFTY-FIVE PROVISIONS THAT WERE NEITHER "ITEMS OF APPROPRIATION OF MONEY" NOR EVEN CONTAINED IN APPROPRIATION BILLS WAS UNCONSTITUTIONAL

A. The Plain Langnage of Article IV, Section 7 Confines the Line-Item Veto to "Items of Appropriation of Money" in [*43] Appropriation Bills

There is no question that the Governor's line-item vetoes were unconstitutional. Article IV, Section 7, the only constitutional provision that allows the Executive to abrogate the lawmaking power of the Legislature once a bill has passed both houses, states in relevant part:

> Every bill which shall have passed the senate and assembly shall, before it becomes a law, be presented to the governor; if the governor approve, he or she shall sign it; but if not, he or she shall return it with his or her objections to the house in which it shall have originated If any bill presented to the governor contain several items of appropriation of money, the governor may object to one or more of such items while approving of the other portion of the bill. In such case the governor shall append to the bill, at the time of signing it, a statement of the items to which he or she objects; and the appropriation so objected to shall not take effect.

N.Y. Const, art. IV, § 7 (emphases added). Thus, the plain language of Article IV, Section 7 authorizes the Governor to exercise a line-item veto only with respect to an "item of appropriation of money" in **[*44]** a "bill [that] contain[s] several items of appropriation of money." N.Y. Const, art. IV, § 7. n7 See Anderson v. Regan, 53 N.Y.2d 356, 366 (1981) (discussing governor's authority to "veto specific appropriation measures on a line-by-line basis"); Oneida County v. Berle, 49 N.Y. 515, 522-23 (1980) ("[t]he governor possesses line veto power over appropriation measures"). "When language of a constitutional provision is plain and unambiguous, full effect should be given to 'the intention of the framers . . . as indicated by the language employed' and approved by the People." King v. Cuomo. 81 N.Y.2d 247,253 (1993) (internal citations omitted). n8

> n7 This provision operates only when a bill contains multiple items of appropriation, because there is no need for a line-item veto with respect to a bill containing a single item of appropriation. When presented with a single-purpose appropriation bill, the general veto allows the Governor to strike the appropriation.
> n8 The Supreme Court of the United States recently applied the fundamental principle of republican government

that the Executive's power over legislation is limited to powers granted in express constitutional provisions. See Clinton v. City of New York, 524 U.S. 417,439 (1998) (holding the Line Item Veto Act unconstitutional because "constitutional silence on this profoundly important issue [is] equivalent to an express prohibition." (emphasis added)). Just as the federal line item veto was held improper because no constitutional provisions authorized it, so the New York line item veto power should not be enlarged beyond the express terms of the constitutional provision authorizing it.

[*45]

Moreover, as an exception to the general rule that the Governor must either approve or veto a bill in toto, the line-item veto must be construed narrowly. See Colorado Gen. Assembly v. Lamm, 704 P.2d 1371, 1385-86 (Colo. 1985) ("[T]he veto power is a legislative power, an exception to the separation of powers required by [the Colorado Constitution], and in derogation of the general plan of state government. Therefore, the veto power can be exercised only when clearly authorized by the constitution, and the language conferring it is to be strictly construed."); see also In re Thirty-Fourth St. R.R. Co., 102 N.Y. 343,350-351 (1886) ("Nothing is subtracted from the sum of legislative power except that which is expressly or by necessary implication withdrawn."); N.Y. Stat. § 213 cmt. (McKinney 2003) ("Exceptions must be strictly construed . . . and all doubts should be resolved in favor of the general provision rather than the exception.").

By interpreting the term "item of appropriation" broadly to include any provision that affects expenditures of money, the Governor seeks to expand his line-item veto authority to a degree never recognized **[*46]** in New York or any other state. Contrary to the Governor's boundless interpretation, this Court has recognized the plain meaning of the constitutional langnage, explaining that items of appropriation "show what money is to be expended, and for what purpose." Tremaine II, 281 N.Y. at 5. In fact, the term "line item" veto originated from the "line items" in appropriations schedules that individually listed amounts to be spent. Id. at 6. An example from the 1929 budget, shortly after New York adopted executive budgeting, illustrates this ordinary meaning of the term "item of appropriation": "Investigation of Sale of Securities and Unlawful Corporate Activities, Services and Expenses - $ 210,000." Tremaine I, 252 N.Y. at 34. This Court has long recognized that provisions merely allocating already appropriated funds are not "item[s] of appropriation." See id. at 50. Tremaine I stated that segregation provisions that further delineate the positions, salaries, programs, and other elements funded by moneys already appropriated are "not . . . item[s] of appropriation." n9 Id.

n9 Although Tremaine I speculated that "the governor might veto" a segregation provision the Legislature inserted into an appropriations bill, as discussed infra, that speculation was based on the fact that absent recognition of such a veto power, the segregation amendment would completely "circumvent[]" any gnbernatorial review. 252 N.Y. at 50. In contrast, the Legislature's action in this case did not "circumvent" all gnbernatorial review because the Governor retains the general veto power over non-appropriation bills.

[*47]

Additional text in Article IV confirms that the line-item veto power extends only to (1) "items of appropriation of money" in (2) appropriation bills. Article IV, § 7 states that when the Governor objects to one or more items of appropriation, "the governor shall append to the bill, at the time of signing it, a statement of the items to which he or she objects; and the appropriation so objected to shall not take effect." N. Y. Const, art. IV, § 7 (emphasis added). Article IV, Section 7 further states that the general rule that a bill becomes law if not acted on by the Governor within a certain period of time shall also "apply in cases in which he or she shall withhold approval from any item or items contained in a bill appropriating money." Id. (emphasis added).

B. The Fifty-Five Struck Provisious Were Not "Items of Appropriation of Money" aud Were Not Part of Appropriation Bills

The fifty-five struck provisions satisfy neither of the textual requirements for the exercise of the line-item veto. As the following representative examples demonstrate, the struck provisions I) were not in "bill[s] presented to the governor contain[ing] several items of appropriation **[*48]** of money," n10 and 2) were not themselves "items of appropriation of money." Id.

n10 In State ex. rel Akron Educ. Ass'n v. Essex. 351 N.E.2d 118 (Ohio 1976), the fact that the struck provision was contained in what was "not an appropriation bill, for it simply does not anywhere by its terms appropriate money" was sufficient to hold the Governor's line-item veto unconstitutional without having to determine whether the struck provision was an "item." Id. at 120.

The provisions struck in Veto 5 (tab 3 at R.1257.62) n11 sub-allocated funds appropriated to the Regulation Program of the Insurance Department. In his proposed appropriation bill, the Governor appropriated one amount for both the Regulation of Insurance Organizations Program and the Regulation of Insurance Product Program under the general desiguation "Regulation Program." R. 1484-85. These programs had been previously allocated as two separate appropriations in order to maintain separate accountability within the insurance **[*49]** industry. R. 1485. As part of a non-appropriation bill, the Legislature proposed traditional sub-allocation of the funds between the Regulation of Insurance Organizations Program and the Regulation of Insurance Product Program. See id. This proposal did not alter the dollar amount appropriated. Id.

n11 Exhibit B to the Affidavit of Max R. Shulman, sworn to on November 15, 2001, at R.1251, contains numbered tabs describing (1) the item of appropriation from the Governor's proposed appropriation bill; (2) any thirty-day amendments) made by the Governor to that item of appropriation; (3) the item of appropriation from the Governor's proposed appropriation bill passed by the Legislature; and (4) the provision(s) from the non-appropriation bill subsequently passed by the Legislature that were vetoed by the Governor. See R.1252. The numbered tabs containing the vetoed provisions are referenced in parentheses following the veto.

In Veto 495 (tab 51 at R 1257.485), the Governor struck the Legislature's sub-allocation **[*50]** of an appropriation for drug abuse programs. The appropriation bill allocated funds to the Division of Criminal Justice Services to aid localities in their implementation of the Federal Anti-Drug Abuse Program for the grant period October 1, 1997 through September 20, 1998. R. 1491. As part of a non-appropriation bill, the Legislature proposed a subsehedule outlining the specific drug abuse programs to be funded. R.1491. The provision did not alter the amount appropriated. R.237.

The provisions in Veto 454 (tab 10 at R. 1257.120) involved the Legislature's affirmation of a statutory mandate. R.1488. The Governor had proposed a $ 44 million item of appropriation for the Department of Environmental Conservation ("DEC") for air quality improvement projects, of which he had allocated $ 25 million to fund the clean air for schools program (to eliminate coal burning furnaces in schools). R. 1488-89. Pursuant to Environmental Conservation Law Section 56-0609, the Power Authority of the State of New York ("PASNY") is the entity legally authorized, empowered and expected to implement the clean air for schools program. R. 1489. The Legislature included a provision in a non-appropriation bill **[*51]** that reaffirmed that PASNY should implement the clean air for schools program, preventing the DEC from disbursing those funds to other entities. Id. This provision did not alter the amount of the appropriation. R.232-33.

The provisions struck in Veto 3 (tab 1 at R. 1257.30) relate to the construction of prison facilities located in New York State. R.1483. In 1997, $ 130 million was appropriated for the creation of a super-maximum security prison in Franklin County, of which only $ 25 million was spent that year. R.1484. In 1998, the Governor proposed

re-appropriating the remaining $ 105 million, as well as an additional $ 64 million for the costs of constructing the Franklin County facility. Id. The Legislature passed this item of appropriation without altering the dollar amounts proposed by the Governor. Id. As part of a non-appropriation bill, the Legislature enacted a provision requiring the inclusion of an indoor common space at the prison, consisting of a separate facility where inmates could participate in educational, vocational or recreational activities. Id. n12

n12 The remainder of the thirteen representative vetoes selected by the parties are:

Veto 6

The provisions struck in Veto 6 (tab 4 at R. 1257.72) sub-allocated funds relating to the STAR tax relief program. R. 1485. As part of a non-appropriation bill, the Legislature proposed that money contained in an item of appropriation for educating seniors about the STAR program be sub-allocated among local governments, school districts, local assessing units, and community-based organizations. Id.

Veto 462

The provisions in Veto 462 (tab 18 at R. 1257.80) sub-allocated in equal $ 1 million amounts the Governor's otherwise unspecified $ 13 million proposed item of appropriation to the thirteen Centers for Advanced Technology in New York State. R. 1490.

Veto 463

The provisions in Veto 463 (tab 19 at 1257.187) related to the Dedicated Highway and Bridge Trust Fund, created by the chapter laws of 1996 to finance highway construction projects. R. 1490. Chapter 637 of the Laws of 1996 was enacted to renew a multi-year transportation capital plan. Id. Its components included a five-year state road and bridge plan, a multi-year mass transportation plan and a multi-year plan for other transportation modes (i.e., rail, aviation, ports). Id. This multi-modal program was enacted in a non-appropriation bill that set forth the funding mechanism, project criteria, and multi-year schedule of allocations of funding. Id. This multi-year capital plan has been amended annually via a non-appropriation bill. R.1490-91. As part of a 1998 non-appropriation bill, without altering the dollar amount of the appropriation, the Legislature directed the sub-allocation of $ 100 million to certain critical components of the program in order to ensure the continued viability of this capital plan. R.1491.

Veto 498

Veto 498 (tab 54 at R. 1257.523) involves the legislative sub-allocation of appropriations for criminal justice programs. The Governor's proposed appropriation contained a lump-sum amount-without providing any specifying criteria-for distribution to alternatives to incarceration programs. R.1492. As part of a non-appropriation bill, the Legislature proposed criteria for disbursement via a subschedule. Id.

Veto 466

Veto 466 (tab 2 at R. 1257.214) struck a legislative proposal for a PTAC provision in order to implement the appropriation for the development of the Hudson River Park. R.1488. The Governor had proposed a $ 16 million item of appropriation for the New York State Urban Development Corporation for services and expenses relating to the development of the Hudson River Park. Id. As part of a non-appropriation bill, the Legislature proposed that the funds for the development of the park be expended pursuant to another chapter law. Id. The

Legislature then enacted a separate bill that the Governor signed into law - Chapter 592 of the Laws of 1998-creating the Hudson River Park Trust, a new entity overseeing the development of the park. Id.

Veto 452

The provisions in Veto 452 (tab 8 at R. 1257.100) relate to the Legislature's determination that certain projects ought to be funded from the Environmental Protection Fund ("EPF"). R.1486. State Finance Law Section 92-s (the "SFL") establishes the EPF and creates four accounts within the EPF: (1) the solid waste account, (2) the parks, recreation and historic preservation account, (3) the open space account, and (4) the environmental protection transfer account. R. 1486-87. As part of a non-appropriation bill, the Legislature proposed specific projects that should receive EPF funds. R.1487.

Veto 453

The provisions in Veto 453 (tab 9 at R. 1257.112) relate only to the Governor's proposed non-appropriation bills. R. 1487. Subdivision 7(v) of SFL Section 92-s limits the use of state money allocated to the Hudson River Park and prevents this money from being used by a public benefit corporation. R.1488. As part of a non-appropriation bill (Sections 13 and 14 of S. 609A/A. 9098A), the Governor proposed language that sought (1) to repeal this restriction on public authorities and (2) to authorize the spending of the money without the restrictions imposed by Subdivision 7(v) of SFL Section 92-s. Id. In that non-appropriation bill, the Legislature rejected the Governor's proposed Section 13 and amended Section 14 by adding a PTAC provision in order to implement its policy determinations thereafter. Id. In essence, the Legislature "rescheduled" this legal policy debate from the budget negotiation process to a time after appropriations had been determined and enacted.

Veto 456

The acquisition of land within New York State is a multi-step process involving both the Governor and the Legislature - a process impeded by the Governor's veto of the provisions in Veto 456 (tab 12 at R.1257.I34). See R.1489. Section 49-0207 of the Environmental Conservation Law details the criteria for the state land acquisition plan that must be compiled by the Department of Environmental Conservation. R.1489. State Finance Law Section 92-s creates the open space account as part of the Environmental Protection Fund. Id. Subsection 6(e) of SFL Section 92-s directs the Governor to include a specific item of appropriation in which he proposes potential properties for acquisition from the state open space land acquisition plan described in the Environmental Conservation Law. See id.; SFL § 92-s(6)(e) (McKinney 2001) ("The governor shall include a specific line appropriation . . . describing individual open space land conservation projects proposed to be undertaken by the department of environmental conservation and/or the office of parks, recreation and historic preservation . . . and listed in the state open space land acquisition plan prepared pursuant to title two of article forty-nine of the environmental conservation law.").

During the 1998-99 budget cycle, the Governor allocated $ 32 million from the open space account for land acquisition projects in New York State and proposed a list of properties for potential acquisition as required by SFL Section 92-s(6)(e). R.1489. This list represented the Governor's recommendations for possible acquisition in the next fiscal year. See id. As part of a non-appropriation bill, the Legislature identified other potential acquisitions by New York State for consideration in the same manner as those projects specified in the Governor's proposed list, i.e., pursuant to the criteria set forth in the Environmental Conservation Law. R.1489-90.

Veto 494

The provision struck by the Governor in Veto 494 (tab 50 at R. 1257.482) did not modify a proposed

gubernatorial appropriation in any respect. R.1491. Chapter 338 of the Laws of 1994 authorized the Office of General Services to sell or lease surplus property at Creedmoor Psychiatric Center ("Creedmoor") to St. Francis Prep High School. Id. The sale of this land was a result of the Community Reinvestment Act that directed the downsizing of institutions such as Creedmoor, but also required that the land be sold at fair market value. Id. The Legislature decided to permit the sale of the land for below fair market value. Id. Thus, the amendment to the 1994 statute "notwithstood" the Community Reinvestment Act in order to allow the sale of Creedmoor at below fair market value and capped the amount of the sale at $ 500,000.

[*52]

Because the provisions he struck were not "items of appropriation of money" and were not part of appropriation bills, the Governor's exercise of the line item veto exceeded his power under Article IV, Section 7 of the New York Constitution.

C. Other Jurisdictions Recognize that the Line-Item Veto Is Limited to Provisions in Appropriation Bills that Actually Appropriate Money

Article IV, Section 7's express limitation of the line-item veto to "bills [that] contain several items of appropriation of money" is no accident. See N.Y. Const, art. IV, § 7. "Forty-two of the forty-three states that grant their governors the item veto authority limit it to 'appropriations bills.'" Briffault, 66 TEMP. L. REV. At 1198. The one exception - the State of Washington - recognizes the distinction between appropriations and non-appropriation bills in providing for a more expansive partial veto with respect to appropriation bills. See id. at 1176 n.15 (citing Wash. Const, art. Ill, § 12).

Nor is there any doubt that the term "items of appropriation of money" means just what it says - a provision that actually appropriates specific funds - not one that simply affects an appropriation made **[*53]** elsewhere. The Supreme Court of the United States has explained that an "item of an appropriation bill obviously means an item which in itself is a specific appropriation of money, not some general provision of law." Bengzon v. Secretary of Justice of Philippine Islands, 299 U.S. 410, 414-415 (1937). At issue in Bengzon was a line-item veto provision for the Governor-General of the Philippines that was limited to "particular item or items of an appropriation bill . . . . " Id. at 412 (emphasis added). The Supreme Court invalidated the Governor-General's use of this power to disapprove a section of the Retirement Gratuity Law that abolished certain offices. n13 Id. at 416.

n13 The federal line-item veto statute, which was modeled after the state line-item vetoes, reflects this common understanding that line-item veto provisions are limited to appropriations of money themselves. The Line Item Veto Act empowered the President to use the line-item veto against "(I) any dollar amount of discretionary budget authority; and (2) any item of new direct spending." 2 U.S.C. § 691(a) (1994 ed., Supp. II). The power also extended to striking "any limited tax benefit." Id The Line Item Veto Act was held unconstitutional in Clinton v. City of New York. 524 U.S. 417 (1998), because there was no basis for it in the federal Constitution and it was inconsistent with the Presentment Clause.

[*54]

Courts in other states whose constitutions also grant the Governor line-item veto power over "items of appropriation" have similarly recognized this plain meaning of the term. In Jessen Assoc., Inc. v. Bullock. 531 S.W.2d 593 (Tex. 1975), the Supreme Court of Texas held that a rider, which authorized construction of specific projects, to the general appropriations bill was not an "item of appropriation" subject to the line-item veto. n14 Id. at 596. The court stated:

It can be said then that the term "item of appropriation" contemplates the setting aside or dedicating of

> funds for a specified purpose. This is to be distinguished from language which qualifies or directs the use of appropriated funds or which is merely incidental to an appropriation. Language of the latter sort is clearly not subject to veto . . . . If language is intended to set aside funds for a specified purpose, it is an "item of appropriation" and is therefore subject to veto by the Governor. Otherwise, the Governor must veto the entire bill or let the objectionable part stand.

Id. at 599 (emphasis added). Even though the rider referred to funds appropriated **[*55]** elsewhere and directed how they would be spent, the critical factor was that the provision did not itself make an additional expenditure of government funds. See id. at 599-600.

> n14 Article IV, Section 14 of the Texas Constitution, which deals with the Governor's power to veto legislation, is strikingly similar to Article IV, Section 7, New York's veto provision. It states:
>
> > Every bill which shall have passed both houses of the Legislature shall be presented to the Governor for his approval. If he approve he shall sign it; but if he disapprove it, he shall return it, with his objections . . . . If any bill presented to the Governor contains several items of appropriation he may object to one or more of such items, and approve the other portion of the bill. In such case he shall append to the bill, at the time of signing it, a statement of the items to which he objects, and no item so objected to shall take effect.
>
> Vernon's Ann. Tex. Const. art. 4, § 14 (1997). Like Article IV, Section 7 of the New York Constitution, the Texas provision "is the sole source of the Governor's authority to veto legislation." Jessen Assoc, v. Bullock. 531 S.W.2d 593, 598 (Tex. 1975) (noting that the Governor's veto power "is a legislative function and not an executive function, and it exists only to the extent granted by the Constitution," and "[t]o the extent that the Governor's actions exceed this authority, they have no effect"). It is unlikely the similarity between the Texas and New York provisions is coincidental. In the immediate aftermath of the Civil War, Texas and Georgia were the first two states to enact a line-item veto. New York and forty other states ultimately followed their lead. Briffault, 66 TEMP. L. REV. At 1176 n.19 (citing Wells, 18 AM. POL. SCI. REV. at 782-83 (1924)).

[*56]

Likewise, in Commonwealth v. Dodson. 176 Va. 281, 11 S.E.2d 120 (Va. 1940), Virginia's highest court stated:

> [I]t is plain that the veto power does not carry with it power to strike out conditions or restrictions. That would be legislation . . . . An item in an appropriation bill is an indivisible sum of money dedicated to a stated purpose. It is something different from a provision or condition . . . .

176 Va. at 296, 11 S.E.2d at 127. n15 The provisions held to be unconstitutionally vetoed in Dodson included a provision empowering the Attorney General to appoint attorneys to his office, a provision that prohibited the use of monies appropriated to the State Planning Board for the investigation of county government, and a provision that provided for the reduction of compensation paid to state employees in certain circumstances. n16 176 Va. at 297-300, 11 S.E.2d at 127-130.

> n15 The Virginia Constitution provides: "The governor shall have the power to veto any particular item or items of an appropriation bill, but the veto shall not affect the item or items to which he does not object." Va. Const, art. 5, § 6 (the Dodson decision refers to the same provision, which, at the time of the decision, was contained in

section 76 of the Virginia Constitution).

[*57]

n16 Upon a determination that a governor exceeded his item-veto power, these courts have held that the portion of the bill improperly stricken by the governor retains its vitality. See, e.g., Fulmore v. Lane, 104 Tex. 499,512, 140 S.W. 405, 412 (Tex. 1911) ("[W]here the veto power is attempted to be exercised to object to a paragraph or portion of a bill other than an item or items, or to language qualifying an appropriation or directing the method of its uses, he exceeds the constitutional authority vested in him, and his objection to such paragraph, or portion of a bill, or language qualifying an appropriation, or directing the method of its use, becomes noneffective . . . . [T]he paragraph so attempted to be stricken out will remain as a part of the appropriation bill.").

Other state courts have recognized that provisions that merely affect the allocation of appropriated funds do not constitute items of appropriation. Because such provisions do not increase the amount of state expenditures, the purpose of the line-item veto to control state spending is not implicated. **[*58]** As the Supreme Court of California explained in invalidating the Governor's line-item veto against a provision that required AFDC benefits to be paid from the date of application rather than from the date the application was processed:

> It does not set aside money for the payment of any claim and makes no appropriation from the public treasury, nor does it add any additional amount to funds already provided for. Its effect is substantive. Like thousands of other statutes, it directs that a department of government act in a particular manner with regard to certain matters. Although as is common with countless other measures, the direction contained therein will require the expenditure of funds from the treasury, this does not transform a substantive measure to an item of appropriation. We agree with petitioners that section 45.5 only expresses the Legislature's intention that the AFDC appropriation, whatever its amount, must be used to provide benefits to recipients from the date of application under certain circumstances.

Harbor v. Deukmejian, 43 Cal.3d 1078, 1089-90, 742 P.2d 1290, 1296 (Cal. 1987); see also State ex rel. Akron Educ. Ass'n v. Essex, 47 Ohio St.2d 47, 50, 351 N.E.2d 118, 120 (Ohio 1976) **[*59]** (holding that change in formula for calculating state aid to school districts not subject to line-item veto). See generally Briffault, 66 TEMP. L. REV. At 1201 ("[S]tate courts have generally . . . excluded from the definition of appropriation authorizations and other substantive legislation that create spending programs but do not actually appropriate funds.").

D. The Structnre of the New York Constitution Confirms that the Line-Item Veto is Limited to "Items of Appropriations of Money" Contained in Appropriation Bills

The interaction between the line-item veto and other constitutional provisions confirms that the line-item veto is limited to "items of appropriations of money" in appropriation bills and does not extend to provisions in other legislation that sub-allocate appropriated funds or attach conditions to the use of appropriated funds.

The language of the line-item veto provision is expressly tethered to the language of the constitutional provision limiting legislative alterations to appropriation bills. Article VII, Section 4 provides:

> The legislature may not alter an appropriation bill submitted by the governor except to strike out or reduce items **[*60]** therein, but it may add thereto items of appropriation Such an appropriation bill shall when passed by both houses be a law immediately without further action by the governor, except that . . . separate items added to the governor's bills by the legislature shall be subject to approval of the governor as provided in section 7 of article IV.

See N.Y. Const, art. VII, § 4 (emphasis added). Use of identical terms makes clear that the "items of appropriation" that

the Governor may line-item veto under Article IV, section 7 are the same "items of appropriation" added by the Legislature to "an appropriation bill" under Article VII, Section 4. Structurally, the line-item veto is required with respect to these added items of appropriation because, other than those added items, appropriation bills become law immediately upon passage, without gubernatorial review. See id.

The Governor's position that the line-item veto also extends to non-appropriation provisions so long as they merely relate to appropriations fundamentally alters this time-honored system of checks and balances. Providing the Governor with a double check on provisions added to non-appropriation **[*61]** bills - both the general veto and the line-item veto - is inconsistent with the Constitution, which carefully crafts one gubernatorial check on each type of legislative action. By expanding the Governor's line-item veto authority beyond its express constitutional limits, the Governor will be able to "re-write" complex legislative bills, usurping the Legislature's role as the arbiter of policy determinations. This significantly arrogates the Legislature's lawmaking power because the rewritten bills may be ones that the Legislature would have never approved. As this Court has explained "[e]xtended analysis is not needed to detail the dangers of upsetting the delicate balance of power . . . , for history teaches that a foundation of free government is imperiled when any one of the co-ordinate branches absorbs or interferes with another." Berle. 49 N.Y.2d at 522.

E. The Constitutional History of the Line-Item Veto Makes Clear That It Is Limited to Items of Appropriation of Money

The history of the line-item veto clause in the Constitution also confirms that the line-item veto was intended to apply only to "items of appropriation" in appropriation bills. The delegates **[*62]** to the Constitutional Convention of 1867, n17 who first debated the inclusion of the item-veto power, rejected amendments that would have given the Governor the broad power to veto "parts," "sections," "portions," or "provisions" of any bill. See R.307 (Debates of the Constitutional Convention of 1867, Vol. II) (Del. Greeley) (proposing an amendment allowing Governor to disapprove "certain sections or portions" of a bill); R.310 (Del. C.L. Allen) (addressing an amendment allowing the Governor to disapprove "any part or parts of [a bill], containing separate and distinct provisions").

n17 The amendment to the state constitution that gave the governor line-item veto power- formerly Article IV, Section 9 - was recommended by the Commission of 1872, and accepted by the people in the election of 1874. See Journal of Constitutional Convention of 1938. pp.60-61 (J.B. Lyon Co. Printers, 1938). The recommendations made by the commission were based on the changes suggested by the convention of 1867. Id.

[*63]

Indeed, even Delegate Alvord's suggested amendment, which would have given the Governor veto power over "parts" of appropriation bills, see R.305, was ultimately rejected in favor of an even narrower partial veto power. The line-item veto provision, as ultimately adopted and currently in effect, incorporates the recommendation of Delegate Hale that the veto power would apply only to "items of appropriation" in appropriation bills. n18 Sec R.307 (Del. Hale) (recommending to "limit the veto power of the Governor, to such portions of the bill as appropriate distinct sums of money for distinct purposes") (emphasis added).

n18 The line-item veto was enacted decades before New York moved to a system of executive budgeting. Prior to executive budgeting, appropriation bills, like other legislation, originated in the legislature, and were not limited to items of appropriation.

The delegates believed that granting the Governor any greater partial veto authority would be repugnant to the

constitutional **[*64]** balance of power because it would result "in making the Governor the affirmative and sole lawmaking power of the State, instead of being the negative . . . . " R.306 (Del. Folger) ("I think such a proposition is open to grave objections, so grave as to forbid our acquiescence."); see also R.311 (Del. Church) ("1 am perfectly satisfied that [this radical change] is wrong in principle and should not be adopted as part of the Constitution of the State . . . . [I]t will make the Governor a part of the affirmative legislative power of the State.").

Delegate Prindle explained how a power to veto parts of any bill would give the Governor affirmative legislative power:

> [T]he principle contended for by those who support this section, as it stands, is very extraordinary indeed. It amounts simply to this: it allows laws to be passed without the consent of the Legislature. Now, if a bill is passed by the Legislature, and sent to the Governor, and he refuses to approve a portion of it, and the Legislature has never consented to pass the remainder of it, if the Governor has the power to make the remainder of it a law, it is done without the consent of the rightful lawmaking power. **[*65]**

R.308-09. Numerous other delegates echoed Delegate Prindle's concerns. See R.319 (Del. Church) ("The result of [the partial veto] is, that a bill becomes a law without ever having been passed by the Legislature . . . . No more vicious principle could be introduced into the Constitution of this State."); R.306 (Del. Folger) ("[B]y his approval of one section he has passed a law over the heads of the Legislature and against its judgment and desire "); R.313 (Del. Evarts) ("[I]t is a great mistake to suppose that the Legislature ever sends its enacted will to the Governor, expressed in sections or in parts [The Legislature] expresses its will in a law, and that must stand or fall as the legislative act."). n19

> n19 A constitutional amendment proposed in 1916 would have granted the Governor the power to reduce items of appropriation as well as to individually veto them. See Journal of Constitutional Convention of 1938. pp. 62 (J.B. Lyon Co. Printers, 1938) (emphasis in original). This proposed amendment, which died in committee, reflects the understanding that the line-item veto is limited to items of appropriation, because there is no way to "reduce" provisions that do not appropriate money.

[*66]

The framers of the line-item veto thus confined the line-item veto to "items of appropriation of money" in appropriation bills, the area of legislation in which logrolling had been the most problematic and the general veto the least effective. See Briffault, 66 TEMP. L. REV. At 1178-79. Provisions allocating funds already appropriated, or conditioning the use of funds already appropriated, do not implicate the line-item veto's concern with controlling government spending. They do not require any additional sum to be expended from the public treasury. In rejecting more expansive line-item veto provisions that would have applied to these provisions, the framers intended that the Governor be limited to his general veto power in reviewing such legislation. The Governor's attempt in 1998 to strike "parts" of bills that did not appropriate money violates the intent of the framers and implicates their concerns about the Governor becoming the "affirmative and sole lawmaking power of the State, instead of being the negative " R.306 (Del. Folger).

II. THE GOVERNOR'S AFFIRMATIVE DEFENSE THAT HE POSSESSED ROVING AUTHORITY TO LINE-ITEM VETO THE FIFTY-FIVE PROVISIONS BECAUSE THOSE PROVISIONS [*67] WERE UNCONSTITUTIONAL IS MERITLESS

The courts below failed to address the Speaker's claim, which this Court held was justiciable, that the Governor exceeded the line-item veto authority in Article IV, Section 7 by striking provisions that plainly were not "items of appropriation of money" and were not contained in appropriation bills. Instead, the courts focused exclusively on one - and only one - of the two required elements of the Governor's affirmative defense, and ruled that the Legislature

unconstitutionally added provisions to the non-appropriation bills, some of which the Governor line-item vetoed. This holding is directly at odds with the text and structure of the Constitution; for nothing deprives the Legislature of its constitutional authority to amend bills that do not appropriate money.

Moreover, the Governor's position that once he proposes an item of appropriation - accompanied by whatever policy and programmatic provision he chooses - the Legislature is forever preempted from even proposing provisions that "affect" the appropriation works a wholesale transfer of legislative power from the Legislature to the Governor. It relegates the Legislature to a subordinate **[*68]** role in violation of the fundamental principle of New York government - and the governments of the other forty-nine states and the national government - that the Legislature is supreme in matters of policy. The First Department's holding also needlessly injects the courts into the budget process; for the Judiciary would constantly need to draw the vague line between those provisions that "affect" appropriations, which the Legislature is forbidden to propose, and those that do not. These major constitutional dislocations are wholly unnecessary. They can - and should - be avoided simply by enforcing the express constitutional structure that provides the Governor and the Legislature with carefully designed checks on each other in the budget process.

Indeed, the courts below might have reached the correct result had they addressed the second required prong of the Governor's affirmative defense. As the Governor recognized, his affirmative defense required not only that he demonstrate that I) the Legislature's additions were unconstitutional, but also that 2) the Governor possesses authority to line-item veto individual provisions in non-appropriation bills on the ground that they are unconstitutional. **[*69]** Yet despite the facts that (a) the Governor's vetoes were the only action in this case that had any legal effect; (b) this Court expressly found that the constitutionality of the Governor's line item veto was justifiable in this very case; and (c) determination of the constitutionality of the Governor's line-item veto was necessary to his affirmative defense, the courts below failed even to address the issue.

A. The Legislature's Amendments to the Non-Appropriation Bills Were Constitutional

1. The "Legislative Power" Is Vested in the Legislature, and the Execntive May Not Encroach Upon This Power Except as Expressly Provided by the Constitution

The First Department's acceptance of the Governor's theory stems from its incorrect presumption that it was the Legislature's burden to identify a provision specifically allowing it to amend provisions in non-appropriation bills that affect appropriations. The court declined to find a "constitutional basis for the Legislature's alteration of items of appropriation outside the appropriation bill affected by those alterations," and the Court found the "general legislative power conferred to [the Legislature] by Article III, Section **[*70]** 1" insufficient. R.1902. Yet, the long recognized supremacy of that Article III power creates a presumption exactly opposite of what the First Department believed: unless the Governor identifies any provision specifically limiting the Legislature's actions with respect to non-appropriation bills, the Legislature retains its plenary legislative power under Article III.

Article III, Section 1 of the New York Constitution provides that "[t]he legislative power of this state shall be vested in the senate and assembly." See also Trade Accessories. Inc. v. Bellet, 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."). "It needs no citation of authorities to sustain the postulate, that except as restrained by the Constitution, the legislative power is untrammeled and supreme." In re Thirty-Fourth St. R.R. Co., 102 N.Y. at 350-51. The Legislature retains "its general lawmaking power" in the budget process. Anderson v. Regan. 53 N.Y.2d 356, 365-66 (1981). The Legislature's lawmaking power is curtailed only as expressly **[*71]** stipulated in other provisions of the New York Constitution. See Trade Accessories. 55 N.Y.S.2d at 364. This Court has made clear that any curtailment of this legislative power is to be construed narrowly:

> [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. Nothing is subtracted from the sum of

legislative power, except that which is expressly or by necessary implication withdrawn.

In re Thirty-Fourth St. R.R. Co.. 102 N.Y. at 350-51 (emphasis added). Therefore, unless an express constitutional provision removes a portion of the lawmaking power from the Legislature and allocates it to the executive, "the laws and the policies of the State are established by the lawmaking powers.'" Berle. 49 N.Y.2d at 523 (quoting Picone v. Commissioner of Licenses of the City of N.Y., 241 N.Y. 157, 162 (1925)).

2. The Governor's My-Way-or-the-Highway View of the Budget Process Would [*72] Confer on the Governor Revolutiouary Authority Over Policymaking

Contrary to the Legislature's untrammeled ability to amend legislation absent an express constitutional prohibition, the Governor contends that 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 policies that "affect" the "when, how and where" of that appropriation. Under the Governor's view in this case and Pataki v. Assembly, 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. R. 18 ("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."). If the Legislature does not strike the item of appropriation in its entirety and it becomes law, the Legislature **[*73]** is forever prohibited from proposing amendments in non-appropriation bills that "affect" the appropriation in any way, including, for example, sub-allocating the appropriated funds or establishing conditions for the recipients of such funds.

It is the Governor's position, however, that he - and he alone - may continue to propose in other legislation provisions that affect the "when, how or where" of the item of appropriation. In the 2001 budget process, for example, the Governor proposed in non-appropriation bills numerous provisions transferring authority over appropriations from one department to another and changing the conditions for receipt of previously appropriated funds. See supra n.6. Even with these gubernatorial proposals affecting prior appropriations, the Governor contends that Article VII, Section 4 limits the Legislature's ability to amend them. Simply put, it is the Governor's position that while he is entirely free to offer proposals affecting appropriations, Article VII, Section 4 absolutely precludes the Legislature from doing so. According to the Governor, by proposing an item of appropriation, he completely preempts the Legislature's ability to propose any **[*74]** substantive legislation that affects in any remote way those appropriated funds.

In short, the Governor claims not only primary, but complete control over all policy that has anything to do with appropriations. The Governor's "my-way-or-the-highway" view of the budget process leaves the Legislature with only a narrow Hobson's choice in responding to his policy proposals. It can strike the Governor's proposed appropriation in its entirety, or it can accept the appropriation with its objectionable terms, conditions and policy choices. This revolutionary view completely strips the Legislature of its constitutionally fundamental role in policymaking.

It is hard to overstate the revolutionary nature of the Governor's position. Under the Governor's view, if the Governor, in connection with an appropriation of retirement benefits for state employees, raises the age at which benefits are paid to eighty, the Legislature must either strike the appropriation for the benefits altogether, or accept eighty as the age at which the benefits commence. According to the Governor, the Legislature cannot offer its own proposal, in any bill, that the benefits commence at age seventy, sixty-eight, sixty-five, **[*75]** or any other age. Or, if the Governor proposes an item of appropriation for 500 police cars, the Legislature is prohibited from adding a proposal to a non-appropriation bill requiring that police cars include bullet-proof glass or audio-visual recording devices that document police encounters with citizens. Or, if the Governor proposes a lump sum appropriation of $ 1.2 billion for the Department of Transportation, the Legislature is prohibited from adding a proposal to a non-appropriation bill providing that $ 5 million of that $ 1.2 billion will fund intercity rail. Veto 463 (tab 19 at R.1257.187-97).

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.

3. Article VII, Section 4 Does Not Restrict the Legislature With Respect to Non-Appropriation Bills

As **[*76]** the courts below recognized, there is no textual support for applying Article VII, Section 4 to non-appropriation bills. The First Department accepted the Governor's my-way-or-the-highway view based solely on its erroneous belief that the legislative additions to non-appropriation bills "indirectly" violated Article VII, Section 4. The court was wrong. Additions to non-appropriation bills, which are subject to the Governor's general veto power, do not even "indireetly" implicate Article VII, Section 4's purpose of preventing additions to appropriation bills because the purpose of Article VII, Section 4 is to prevent the addition of provisions to an appropriation bill that would entirely escape the Governor's review because appropriation bills immediately become law "without further action by the Governor." In contrast, legislative additions to non-appropriation bills cannot escape the Governor's scrutiny because non-appropriation bills are subject to the Governor's general veto.

a. The Text of Article VII, Sectiou 4 Does Not Apply to Non-Appropriation Bills

Article VII, Section 4 applies only to appropriation bills: "The legislature may not alter an appropriation hill submitted **[*77]** 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." It is undisputed that the bills the Governor line-item vetoed did not include any appropriations and were not appropriation bills. Indeed, the limitations of Article VII, Section 4 would not make sense if applied to non-appropriation bills. That provision provides that the Legislature "may not alter an appropriation bill submitted by the governor except to strike out or reduce items therein." A Legislature cannot "reduce" a provision of a bill that does not appropriate funds. The alteration limitations of Article VII, Section 4 are clearly directed at amounts of money appropriated. Article VII, Section 4, therefore, does not constrain the Legislature's right to alter non-appropriation bills. Given the absence of an express constitutional limit, the Legislature retains its "untrammeled and supreme" discretion to amend non-appropriation bills as it wishes, subject to the Governor's general veto. In re Thirty-Fourth St. R.R. Co.. 102 N.Y. at 350. **[*78]**

The express limitation of the strictures of Article VII, Section 4 to "an appropriation bill submitted by the governor" is especially significant given that Article VII, Section 3 recognizes that the Governor may submit two distinct types of bills in connection with the budget: (1) "a bill or bills containing all the proposed appropriations included in the budget," and (2) "the proposed legislation, if any, recommended therein." In limiting the Legislature's choices only with respect to "an appropriation bill submitted by the governor," Article VII, Section 4 leaves the Legislature entirely free to exercise its full legislative powers with regard to the "the proposed legislation" submitted by the Governor in connection with his budget. The non-appropriation bills the Legislature amended here were "the proposed legislation" by the Governor; and the Legislature was thus entirely free to amend those bills as it saw fit.

b. The Structnral Pnrpose of Article VII, Section 4 Does Not Justify Its Extratextnal Extension to Legislative Amendments to Non-Appropriation Bills Becanse They Are Subject to Full Gnbernatorial Review

Despite the unambiguous language of Article VII, Section **[*79]** 4 limiting its application to appropriation bills, the Appellate Division widened its scope to limit the Legislature's ability to propose alterations to non-appropriation bills because of the court's mistaken view that legislative amendments to non-appropriation bills attempt "to do indirectly that which could not be done directly." R. 1895. This reasoning reflects a fundamental misunderstanding of the structural concerns that prohibit the Legislature from altering appropriation bills other than in the ways expressly specified in Article VII, Section 4.

The textual limitation that Article VII, Section 4 applies only 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. 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. Non-appropriation bills, however, are subject to gubernatorial review via the general veto power. Legislative alterations to non-appropriation bills do not, therefore, even "indirectly" **[*80]** implicate Article VII, Section 4.

The authorities relied on by the Governor and court below applying Article VII, Section 4 to limit the Legislature's alterations to appropriation bills are therefore inapposite; for concerns about the Legislature's circumvention of gubernatorial review are not present in the context of the non-appropriation bills. See Tremaine 1,252 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. 1 (1939) (holding that a lump sum appropriation bill the Legislature submitted to the Governor violated Section 4); New York State Bankers Ass'n v. Wetzler, 81 N.Y.2d 98 (1993) (holding that the Legislature's addition of an assessment to an appropriation bill violated Section 4); 1978 N.Y. Op. Att'y Gen. 76 (1978) ("[T]here is no authority for the Legislature to add the item to a succeeding appropriation bill . . . " (emphasis added)); 1982 N.Y. Op. Att'y Gen. 21 (1982) at 1, 6 (describing the Legislature's limited authority to alter "the Governor's proposed appropriation **[*81]** bills" (emphasis added)).

In fact, two of these authorities expressly state that the Legislature is allowed to make additions to non-appropriation bills. Tremaine I stated that "[n]othing . . . prevents" the Legislature from "providing how . . . items of appropriations should be segregated" in non-appropriation 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." 1982 N.Y. Op. Att'y Gen. 21 (1982) at 1-2. Indeed, there is no reported case in which a party has even argued that Article VII, Section 4 applies outside the context of appropriation bills. The Appellate Division's decision applying Article VII, Section 4 outside the context of appropriation bills thus lacks textual support, structural justification, or judicial precedent. n20

n20 In the Appellate Division, the Governor attempted to rely on one paragraph of dicta in Saxton v. Carey, 44 N.Y.2d 545 (1978), a case that has nothing to do with Article VII, Section 4. Saxton held that the "degree of itemization" in the governor's appropriation bills is a matter "to be determined by the Governor and the Legislature, not by judicial fiat." 44 N.Y.2d at 551. In discussing the difficulty in determining whether something is sufficiently itemized, the Court of Appeals made the following observation: "In one context an 'item' of $ 5,000,000 for construction of a particular expressway might seem specific; in another, void of indication when, how, or where the expressway or segments of it would be constructed." Id. at 550. From this one sentence implying that the Governor has the authority to propose the "when, how or where" of appropriations in the appropriation bills, the Governor finds a prohibition on the legislature ever proposing further detail on the "when, how and where" of items of appropriations in later non-appropriation bills. The revolutionary view that the Legislature is completely preempted from initiating any policy that affects the "when, how and where" of appropriated funds surely requires more support than this illogical reading of a single phrase of dicta in Saxton.

[*82]

4. Enforcing the Constitutional Distinction Between Appropriation Bills and Other Legislation Is Far More Workable in Practice Than the Framework Proposed by the Goveruor and Adopted by the Conrts Below

To summarize, the New York Constitution creates an integrated framework 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 items which are then subject to the line-item veto. 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, so long as it does not alter the amount of a prior item of appropriation or add an item of appropriation (Article VII, Section 6 requires single purpose bills for additional items of appropriations). The Governor retains his full general veto power over these non-appropriation bills.

Not only is this process fully consistent with the constitutional system of legislative supremacy over policy, individualized executive review of spending provisions (subject only **[*83]** to a two-thirds override of a line-item veto), and a check on each power, but it is far more workable in practice than the Governor's approach. Express constitutional restrictions and the degree of specificity in the Governor's itemizations, which as Saxton v. Carey recognized is largely a self-regulating matter between the Executive and Legislature, define the proper spheres of the two branches. n21 There is little need for judicial line-drawing.

n21 For example, Saxton gives the Governor the discretion to designate $ 10 million in an item of appropriation for the purchase of police equipment or, if he wishes to be more specific, for the purchase of 500 new police cars. See Saxton, 44 N.Y.2d at 550. If the former, nothing prevents the legislature from later allocating in a non-appropriation bill a portion of the $ 10 million to police cars and a portion to police uniforms. If the latter, although the Legislature might not be able to redirect the money away from police cars, nothing prohibits the legislature from enacting a law requiring that police cars shall include bullet proof glass, mobile telephones, and audio-visual recording devices.

[*84]

The constitutional design provides internal means for the Governor to prevent the Legislature from inserting in non-appropriation bills terms and conditions affecting appropriations he does not support. As Saxton recognized, the degree of specificity a Governor includes in the items of appropriation he proposes is largely within the Governor's discretion. The Legislature's ability in 1998 to include a number of provisions in non-appropriation bills directing what programs would receive previously allocated lump sums was largely a product of the Governor's decision to propose lump sum appropriations and not provide further detail. Having decided not to provide that specificity, he left open the possibility that the Legislature would propose in non-appropriation bills which specific programs would receive those funds. Even then, the Governor retained the constitutional authority to exercise the general veto over those proposals if he truly believed as he claimed below, that they "would undermine the foundation of the system." This time-tested traditional system, in which each branch exercises its constitutional checks on the other, is preferable to one that requires the judiciary **[*85]** constantly to referee disputes between the Legislature and the Executive to determine whether provisions the Legislature adds to non-appropriation bills "affect" items of appropriation - a standard that lacks any meaningful guidance and will likely lead to intractable line-drawing problems. See Saxton v. Carey. 44 N.Y.2d 545, 549 (1978) ("[T]he creation and enactment of the State budget is a matter delegated essentially to the Governor and the Legislature.").

5. The Constitutional History of the Executive Budget System Demonstrates That It Was Not Intended to Strip the Legislature of Its Power Over Policy Determinations

The trend toward executive budgeting in the early twentieth century was aimed at creating a budget process that was more efficient and more conducive to controlling spending. See R. 1698-1701 (Report of the Committee on State Finances, Revenues and Expenditures Relative to a Budget System for the State, Document No. 32, State of New York in Convention, Aug. 14, 1915); n22 Briffault, 66 TEMP. L. REV. 1171 (discussing nationwide movement to executive budgeting). The framers believed that it would be more efficient to channel **[*86]** in one person, rather than hundreds of legislators with disparate interests, the task of collecting information from various executive departments and presenting the initial budget:

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 which in his judgment will best meet the needs of the administration of which he is the head.

R. 1773-74 (Report of Reconstruction Comm'n to Governor Alfred E. Smith on Retrenchment and Reorganization in the State Gov't (Oct. 19, 1919)). In doing so, the Executive budgeting system would impose greater responsibility on the heads of the government agencies by requiring them to submit financial statements containing their departments' needs and expenses to the Governor. Upon receiving these statements, the **[*87]** Governor would he responsible for assimilating and revising them, in accordance with the needs of other State agencies as well as the State's revenues insisting, if necessary, that certain departments adjust their estimates. n23 R.1705.

> n22 In 1927, after several efforts to reform the Constitution failed (including the 1915 proposed amendment), a constitutional amendment was adopted that provided for an "executive budget" resembling the type of system discussed, but rejected, a decade earlier.
> n23 Under "Legislative budgeting," the Comptroller compiled the financial statements of government agencies and gave it to the Legislature which, in turn, was required to develop the annual budget. See R.1699. Because the Comptroller had no authority to revise or reduce these estimates, the Legislature often received estimates that were very high and in turn, treated those estimates as mere requests for money. See id.

In contrast to the legislative budgeting system, in which the Governor's line-item veto **[*88]** was the final arbiter of spending decisions (subject to a two-thirds override), executive budgeting was intended to make the Legislature the final arbiter with respect to most spending decisions: n24

> [The executive budgeting system] would add not one iota to the power that [the Governor] now possesses through the veto of item in the appropriation bills. Whereas now that power is subject to no review and thus may be used as an instrument of reward or punishment after the legislative session is over, the proposed system would deprive [the Governor] of his veto as to budget items and would thus compel him to use his influence in advance, in the open, under the fire of legislative discussion and the scrutiny of the entire State. It would thus be the Legislature which would have the final word.

R.1708; see also R. 1774 ("The executive budget would not add to the Governor's power over finances."). While the Governor was limited to an all-or-nothing choice to accept or veto an item of appropriation, the Legislature was given the additional option to "reduce" an item of appropriation, which made it easier to control spending.

> n24 The Governor would be the final arbiter via the line-item veto with respect to items of appropriations added by the Legislature (subject to the two-thirds override). See N.Y. Const, art. IV, § 7.

[*89]

The constitutional history of the executive budget system confirms that it was aimed at controlling state spending and centralizing in one person responsibility for compiling department reports and submitting the initial budget. Nothing indicates that the intent was to strip the Legislature of its general power to amend legislation that does not appropriate money.

The text, structure, and history of the New York Constitution thus all reject the view of the First Department that the Legislature did not possess the power to propose in non-appropriation bills provisions affecting the "when, how and where" of appropriations. The Legislature's proposals did not "indirectly" implicate Article VII, Section 4 because if the Governor did not like the policy proposals, he had the right to veto the entire bill. This Court has recognized the danger when one branch attempts to expand its powers beyond their constitutional limits. New York's Constitution "comprises a system of checks and balances intended to ensure 'the preservation of liberty itself, which is ended by the union of the three functions in one man, or in one body of men. It is a fundamental principle of the organic law that each **[*90]** department should be free from interference, in the discharge of its peculiar duties, by either of the others." Saxton. 44 N.Y.2d at 549.

B. Even if the Legislature's Amendments Were Unconstitutional, the Governor Lacked the Constitutioual Power to Use the Line-Item Veto - as Opposed to the General Veto - to Strike Them

Even if this Court agreed with the decisions below that the Legislature is prohibited from adding proposals to non-appropriation bills that affect appropriations, the Governor's affirmative defense requires this Court to decide an additional issue that the courts below improperly ignored: whether the Governor has authority to strike individual provisions in bills on the ground that they are unconstitutional. The Constitution provides the Governor with the remedy of the general veto in this situation, and there is no basis for judicially granting the Governor a double check of both the general and line-item veto.

1. **To Prevail on His Affirmative Defense, the Governor Must Establish that His Vetoes Were Constitutional**

The courts below failed to address the Governor's blatant violation of the Constitution on the mistaken belief that such **[*91]** a ruling would amount to an advisory opinion. Exactly the opposite is true. By addressing only the first prong of the Governor's affirmative defense to the Speaker's declaratory judgment claim that they ignored, the courts below issued advisory opinions that had no legal effect. The provisions they held "void" were never part of the laws of the State because they never took effect as a result of the Governor's line-item vetoes. This Court should correct this blatant error and address whether the Governor's line-item veto of fifty-five provisions in non-appropriation bills was constitutional.

To prevail on his affirmative defense that his vetoes were lawful because the struck provisions were unconstitutional, the Governor had to establish both that: 1) the Legislature's amendments were unconstitutional, and 2) the Governor may lawfully line-item veto unconstitutional provisions of a bill. See R.1212 (Defendant's Memorandum in Opposition to Plaintiff's Cross-Motion for Summary Judgment and In Support of Defendant's Cross-Motion for Summary Judgment) ("I. The Legislature's Attempt to Alter the Governor's Budget Bills Are Unconstitutional); R.1236 ("IIA- The Governor Can Veto Unconstitutional **[*92]** Alterations Made by the Legislature to Items of Appropriation."). Thus, while the Governor's defense allowed the court to consider the constitutionality of the Legislature's amendments, the court could do so only in the context of answering the ultimate question whether the Governor's exercise of the line-item veto was constitutional. For example, after concluding that the California Legislature had included provisions in a bill that violated the State's single-subject provision, the Supreme Court of California recognized there was a remaining question to be addressed: whether the Governor was authorized to line-item veto those unconstitutional provisions. See Harbor v. Deukmejian. 43 Cal.3d 1078, 742 P.2d 1290 (1987). The First Department thus erred in concluding that ruling on the "propriety of the Governor's use of the line-item veto . . . would have constituted an improper advisory opinion." R.1902. To the contrary, there remained an outstanding issue necessary to the Governor's affirmative defense and of grave constitutional importance: whether the Governor is authorized to use the line-item veto to strike provisions of bills that he believes are unconstitutional. **[*93]** n25

n25 Moreover, even if the Court rules in the Governor's favor on both elements of his affirmative defense, the Court should still consider whether the struck items were "items of appropriation of money" in appropriation

bills subject to the line-item veto in Article IV, Section 7. This case involves a recurring dispute between the Legislature and executive about the budget process. See Pataki v. Assembly. 738 N.Y.S.2d 512 (Sup. Ct. Albany Cry. 2002) (suit between the governor and the legislature regarding the 2001 budget process). "A final determination of these issues will likely enable the parties to ascertain their respective powers in the budgetary process and eliminate uncertainty with respect thereto, and thus, avoid future litigation." R.13. The "item of appropriation" issue is likely to recur even if the Governor has the authority to line-item veto unconstitutional provisions beeause the Governor will not always be right about the constitutionality of vetoed provisions. See R.12-13 (recognizing, even under its restrictive view of the Legislature's authority to amend non-appropriation bills, that one of the struck provisions was entirely constitutional).

[*94]

2. Judicially Granting the Governor Roving Authority to Line-Item Veto Individual Provisions in a Bill Works an Unauthorized Expansion of Gubernatorial Power

a. Granting the Governor a Roving Authority to Line-Item Veto Provisions He Believes Are Unconstitutional Fundamentally Disrupts the Time-Honored Balance of Power Between the Branches

As discussed above, the Legislature's additions to the non-appropriation bills fully complied with the Constitution. But even if the Legislature unconstitutionally added the provisions, the Governor had no authority to line-item veto them. The trial court recognized that "no provision in the Constitution grant[s the Governor a] right" to line-item veto provisions on the ground that they are unconstitutional. n26 R.25. Yet, by refusing to rule on the constitutionality of the Governor's actions, both courts below implicitly held that the Governor may use unconstitutional means to invalidate a law so long as the "correct" result is achieved - the voiding of an unconstitutional provision. But see King, 81 N.Y.2d at 254 ("the end cannot justify the means, and the Legislature, even with the Executive's acquiescence, cannot **[*95]** place itself outside the express mandate of the Constitution"). This holding is not limited to budget bills, but would allow the Governor to strike an individual item in any bill that he believes violates other constitutional guarantees of the New York or United States Constitutions. Granting the Governor this roving, unenumerated right to selectively line-item veto provisions that he believes are unconstitutional has wide-ranging, detrimental ramifications for the balance of power between the Legislature, the Executive, and the Judiciary.

n26 In response to the Governor's assertion during oral argument in the trial court that a Governor can veto allegedly unconstitutional provisions in his bills, the court stated: "Counsel, where in this constitution does that come up? It doesn't come up anywhere and you made it up, didn't you? . . . Counsel, point out where in the constitution it says that the Governor of this state can veto a bill or a portion of a bill because he finds it unconstitutional? The only portions of a veto is where we just read from Article 4, isn't it? . . . Never held by a court in this state, right?" R. 1317-18. After additional prodding by the court, even the Governor's counsel agreed that "He [the Governor] can veto only as provided in Article 4, Section 7." R. 1325-26.

[*96]

The constitutional requirement that the Governor exercise a general veto, rather than a line-item veto, when a bill contains one or more unconstitutional provisions provides a built-in check on abuse of the veto power. The political fallout resulting from an exercise of the general veto prevents the Governor from exercising the general veto because of constitutional concerns unless those concerns are genuine. With a roving power to strike individual provisions based on their perceived unconstitutionality, however, the Governor can largely insulate himself from political accountability by striking provisions that affect few voters. And, of course, allowing the Governor to strike provisions he believes are unconstitutional intrudes on the lawmaking power because it results, as in this case, in the passage of bills that never received the support of the Legislature. See Berle, 49 N.Y.2d at 523 (explaining that absent a veto which complies with

the strictures of Article IV, Section 7, "the executive branch may not override enactments which have emerged from the lawmaking process").

This case illustrates another danger of granting the Governor line-item veto power to strike **[*97]** individual provisions from a bill based on his asserted belief in their unconstitutionality. The Governor exercised the line-item veto over fifty-five provisions the Legislature added to non-appropriation bills that he asserted unconstitutionally "affected" appropriations. But the Governor did not strike a number of other provisions the Legislature added that also affected items of appropriation. See generally Appendix. The Governor approved of some of the "unconstitutional" provisions, but did not like others. It is likely that a general veto would have forced the Governor to think much harder about the constitutionality of the Legislature's position, because provisions he favored would have also fallen victim to it. If the provisions were in fact unconstitutional as the Governor contends, the general veto would have prevented all of the unconstitutional provisions from becoming law, not just those the Governor disliked.

Granting the Governor roving authority to line-item veto unconstitutional provisions also fundamentally alters the role of the judiciary in the tripartite system. If the Governor has extraconstitutional authority to line-item veto unconstitutional provisions, **[*98]** then in assessing whether a gubernatorial veto was lawful the judiciary will have to evaluate whether provisions that never went into effect were unconstitutional. Consider an environmental regulation that the Governor line-item vetoes from a bill based on his belief that the regulation would result in an unconstitutional regulatory taking without just compensation. In assessing whether this veto was lawful, a court would have to evaluate whether the regulation amounted to a taking, something very difficult to do in the abstract when the regulation has never had an effect on actual landowners. Moreover, because a private citizen may have difficulty establishing standing to challenge a provision that did not take effect, the Legislature may frequently have to assert these challenges to line-item vetoes. Roving gubernatorial authority to line-item veto unconstitutional provisions would thus transform judicial review from the current practice in which courts typically assess constitutionality in suits brought by private citizens affected by the laws they are challenging into a practice in which courts resolve suits between the Legislature and executive about whether a provision that was **[*99]** never in force is unconstitutional in the abstract.

b. The Governor's Argumeut Finds No Support in New York Law

One would certainly expect to find clear support in the constitutional text for the awesome power the Governor seeks to veto any individual provision he deems unconstitutional. But nowhere does the language of the Constitution extend the line-item veto to allegedly unconstitutional provisions. The line-item veto, is limited to "items of appropriation of money" in appropriation bills. The Constitution thus leaves the Governor a clear, powerful remedy when he really believes a bill passed by the Legislature is unconstitutional: he may veto the entire bill. See N.Y. Const, art. IV, § 7.

Nor is there any support in New York case law for the view that a Governor may use the line-item veto in place of the general veto when confronted with an unconstitutional provision. Tremaine I commented in dicta that if the Legislature inserted a provision directing how appropriations are to be segregated into an "appropriation bill, much force attaches to the contention that such a direction is one which the governor might veto." 252 N.Y. at 49-50. Even though **[*100]** the segregation was "not an item of appropriation," Tremaine I stated that the "veto power may not be circumvented by any such device of the Legislature." Id. at 50. At most, Tremaine I stands for the proposition that the Governor may exercise the line-item veto over an unconstitutional provision inserted into an appropriations bill that would otherwise escape any gubernatorial review. That danger of unchecked legislative action is not present in this case because the Governor retains a general veto over a non-appropriation bill.

c. Other States Have Emphatically Rejected Arguments that a Governor Possesses Roving Anthority to Liue-Item Veto Unconstitutional Provisions

The Supreme Court of Colorado recognized that when a Governor has the general veto at his disposal, an unenumerated additional right to line-item veto unconstitutional provisions violates the separation of powers:

> The governor, however, contends that he has the power, independent of the item veto authorization, to veto unconstitutional provisions in an appropriation bill . . . . We reject this argument. [T]he veto power is a legislative power, an exception to the separation of powers **[*101]** required by [the Colorado Constitution], and in derogation of the general plan of state government. Therefore, the veto power can be exercised only when clearly authorized by the constitution, and the language conferring it is to be strictly construed. The long-established principles, from which we discern no reason to depart, provide a complete answer to the governor's claim of a power of veto independent of [the Colorado Constitution].

Colorado Gen. Assembly v. Lamm, 704 P.2d 1371, 1385-86 (Colo. 1985). Likewise, in Harbor v. Deukmejian, 43 Cal.3d 1078, 742 P.2d 1290 (Cal. 1987), the Governor had used the line-item veto to strike a provision that he believed violated California's constitutional requirement that a bill contain only one subject. The Supreme Court of California agreed with the Governor that the provision violated the single-subject rule, but nevertheless held that the Governor acted unconstitutionally in exercising the line-item veto against a provision not contained in an appropriation bill. See Harbor. 43 Cal.3d at 1093, 742 P.2d at 1298 (holding that the constitution prohibited the Governor from vetoing **[*102]** "parts of a bill which he determines constitute a separate subject therein"). As those challenging the Governor in Harbor, who received attorneys fees for prevailing on their challenge to the line-item veto even though the underlying provision was held invalid, argued:

> [I]n vetoing legislation, the governor acts in a legislative capacity, and that in order to preserve the system of checks and balances upon which our government is founded, he may exercise the legislative power only in the manner expressly authorized by the Constitution. Since that document only authorizes the governor to veto a "bill" or to reduce or eliminate "items of appropriation" the Governor may not veto part of a bill which is not an "item of appropriation." Section 45.5 is a substantive measure and cannot be so characterized, and it is only one provision of a bill rather than a "bill." Therefore, the governor's attempted veto of that provision is invalid.

43 Cal.3d at 1084, 742 P.2d at 1292.

For these reasons, even if this Court were to find that the Legislature's amendments to non-appropriation bills were unconstitutional, it must reject that as a basis for the Governor's **[*103]** exercise of the line-item veto. An extratextual right to line-item veto provisions he believes are unconstitutional amounts to a power grab by the Governor at the expense of both the Legislature and this Court.

CONCLUSION

The Governor acted unconstitutionally in using the line-item veto to strike provisions that were not "items of appropriations of money" and were not part of appropriation bills. Accordingly, the decision of the courts below should be reversed and the Speaker's motion for summary judgment should be granted.

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