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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Initial Brief: Appellee-Respondent

COUNSEL: [*1] To be Argued by Max R. Shulman.

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Max R. Shulman, Of Counsel.

TITLE: Brief for Defendant-Respondent

TEXT: Preliminary Statement

This case concerns a straightforward interpretation of Article VII, Section 4, of the New York Constitution. Section 4 unambiguously prohibits the Legislature from altering the Governor's appropriation bills in any way except by striking out entire items of appropriation or reducing their dollar amount (or by adding separate and distinct items that are not mere substitutions for items proposed by the Governor). Relying upon the plain language of the Constitution and a long line of Court of Appeals precedent interpreting that language, the courts below unanimously held that the legislative amendments at issue altered various aspects of the Governor's appropriation bills-including the terms, conditions and recipients (i.e., the "when, how, or where") of spending-without striking out items in their entirety or reducing their dollar amount. Accordingly, the courts properly found that the provisions violated Article [*2] VII, Section 4, and were void ab initio.

In the proceedings below, the Speaker of the New York State Assembly (the "Speaker") conceded that the legislative amendments had the effect of altering the Governor's appropriation bills in ways that would be prohibited by Article VII, Section 4, were those provisions inserted directly into appropriation bills. He maintained, however, as both he and the New York State Senate (the "Senate") argue on appeal, that the provisions-which carefully cross-referenced particular appropriations in the Governor's appropriation bills, repeated their language verbatim and then altered the "when, how, or where" of spending-were proper because they were not placed directly into the appropriation bills that they altered, but rather were inserted into other budget bills. The courts below correctly held, however, that the Legislature could not accomplish indirectly what Section 4 prohibits it from doing directly. To hold otherwise would elevate form over substance, would eviscerate Article VII, Section 4, and would revive a system of legislative budgeting that the people of the State of New York abolished decades ago.

Having found that the Legislature's [*3] alterations were unconstitutional and void ab initio, the courts below properly declined to rule on the constitutionality of the Governor's use of the line-item veto to strike the unconstitutional provisions. Such a determination would have constituted an improper advisory opinion because the void provisions were without effect whether or not the Governor's vetoes were found to be constitutional.

Moreover, even if the lower courts erred in declining to address the issue (and they did not), the Governor's use of the line-item veto to strike the amendments added by the Legislature was fully consistent with the State Constitution. The amendments, by cross-referencing and repeating verbatim the Governor's items of appropriation, effectively constituted items of appropriation subject to the Governor's authority to line-item veto under Article IV, Section 7. In addition, the Governor must have the ability to strike unconstitutional alterations to items of appropriation-even if the alterations do not constitute independent items of appropriation-or the constitutional authority to exercise the line-item veto would be rendered meaningless.

The genius of Article VII of the State Constitution [*4] is twofold. First, it places responsibility for formulating the budget in the hands of a single person-and it is a person who answers to the entire state, not to one particular group, one particular region, one particular constituency or one particular interest. In this way, in the words of Elihu Root, president of the 1915 Constitutional Convention, Article VII constituted a "radical change in the method of providing for the necessary expenditures of the state" as compared to the old system of legislative budgeting. Seeond, by giving the Legislature power to approve, reject or reduce the dollar amount of (but not alter) the Governor's proposed items of appropriation, Article VII prevents either the Governor or the Legislature from having decisive power over the budget process and creates the potential for constructive negotiation and political compromise.

What the Legislature attempted to do in this case is to alter or avoid both of those critical aspects of Article VII. Evidently recognizing that it could not directly alter the Governor's items of appropriation, the Legislature first went through what turned out to be the charade of purporting to pass the Governor's budget [*5] without condition, qualification or alteration of any kind-even though the Legislature plainly wanted substantial changes to the proposed items of appropriation. It then inserted those changes into what it calls "non-appropriation" bills.

In following that tactic, the Legislature simply ignored the limited "up" or "down" authority it has under Article VII. It avoided the need to engage in negotiation and compromise with the Governor and chose to impose its own-i.e., legislative-budget on the state. Those are the very evils that the framers sought to eliminate in devising the Executive Budget System and incorporating it into Section VII of the State Constitution. If allowed to stand, the Legislature's actions would, in the words of this Court in People v. Tremaine, 281 N.Y. 1, 21 (1939), make the Executive Budget submission nothing more than "a mere source of information" for the Legislature, thereby "revert[ing] to the old system [of legislative budgeting] which years of agitation and endeavor have sought to abolish".

For all the reasons set forth herein, the Governor respectfully submits that this Court should affirm the decision of the Appellate Division, [*6] First Judicial Department ("First Department"), which affirmed Supreme Court's decision granting the Governor's motion for summary judgment.

Counterstatement of Questions Presented

1. Whether the Legislature altered the Governor's appropriation bills in ways that violated Article VII, Section 4, of the New York Constitution.

2. Whether the constitutionality of the Governor's exercise of the line-item veto to strike the Legislature's alterations should be adjudicated even if it is held that those alterations were unconstitutional and, thus, void ab initio.

3. Assuming that the courts below erred in declining to decide the issue, was the Governor's exercise of the line-item veto to strike the Legislature's alterations constitutional?

Counterstatement of the Case

A. Origin of New York's Executive Budget System.

Before the people of the State of New York approved amendments to the State Constitution in 1926 establishing an Executive Budget System, the Legislature had plenary authority over the form and substance of the state budget. Although estimates of the state's fiscal needs were transmitted to the Legislature by various officials and boards [*7] (such as the State Comptroller and a State Board of Estimate), those recommendations were nonbinding and purely advisory in nature. See Report of the State Reorganization Commission, 1926 Legis. Doc. No. 72, at 9 (1926) (R. at 1718); Report of the Committee on State Finances, Revenues and Expenditures, Relative to a Budget System for the State, 1915 Constitutional Convention Doc. No. 32, at 7 (1915) (R. at 1701). n1 Prior to adoption of the Executive Budget System, the Governor's only constitutional role in the budgeting process was his exercise of veto power.

n1 References in the form "R. at " are to the Record on Appeal. References in the form "Sp. Br. at " are to the Brief for Plaintiff-Appellant Sheldon Silver, Member and Speaker, New York State Assembly, dated March 26, 2004. References in the form "Sen. Br. at " are to the Brief on Behalf of Plaintiff-Appellant New York State Senate, dated March 29, 2004.

The rapid growth of state spending and borrowing in the early part of the twentieth [*8] century attributable to legislative budgeting led to a corresponding and increasing demand for a more sound financial methodology to conduct the business of government. In response, the 1915 Constitutional Convention established a Committee on State Finances, Revenues and Expenditures, Relative to a Budget System for the State ("Committee") to study the state's dismal experience under its system of legislative budgeting and to suggest improvements. The Committee identified numerous deficiencies in the state's fiscal practices and recommended radical changes.

The Committee's recommendations followed from its central conclusion that the Legislature is not the proper institution to develop the state budget. As the Committee explained, the Legislature's members, "instead of being responsible solely to the State as a whole, are each responsible to and dependent upon a single district of the State". 1915 Constitutional Convention Doc. No. 32, at 8 (R. at 1702). This necessarily resulted, the Committee said, in the process of "give and take which has become so common in America as to be stigmatized by the terms 'log rolling' and 'pork barrel'". Id.

Pursuant to the Executive Budget System [*9] developed by the Committee, "executive authority must be responsible for preparing and completing a consistent plan for the proposed expenditures of the State under which those proposed expenditures will be brought into proper relation to the expected revenues". Id. at 14 (R. at 1705). The Committee explained that only the Governor has the necessary accountability to all New Yorkers to produce a fiscally sound and responsible budget:

"[A]s the head of the State [the Governor] is the one who can best explain and defend a given fiscal

> policy to the people of the State and he is the one who, above all others, is interested in upholding before the people of the State a policy of economy and who should be held responsible to them for the success or failure of such a policy."

Id. at 15 (R. at 1705).

In order to address the shortcomings associated with the state's system of legislative budgeting, the State Reorganization Commission crafted a comprehensive package of constitutional amendments designed "to establish on an authoritative basis the relations between the Governor and the Legislature in disposing of the Budget". 1926 Report [*10] of the State Reorganization Commission, Legis. Doc. No. 72, at I1 (R. at 1720). Those amendments were approved by the people of the state in 1926 and became part of the State Constitution in 1927, first as Article IV-A and today as the first six sections of Article VII.

B. Pnrpose and Structure of Article VII.

The passage of Article VII constituted a broad and unprecedented transfer by the people of the State of New York of powers legislative in nature from the Legislature to the Governor, as well as a concomitant broad and unprecedented limitation on the powers of the Legislature in relation to budgetary matters.

The process by which the Executive Budget is developed and submitted to the Legislature is set forth in the first three sections of Article VII. The process starts with the heads of each Executive department presenting their estimates to the Governor and to "appropriate committees of the legislature" at public hearings. N.Y. Const. art. VII, § 1. The Governor then compiles those departmental estimates, with any modifications or adjustments, into a complete plan of expenditures for the ensuing fiscal year.

Early in the calendar year, the Governor submits [*11] to the Legislature a proposed state budget "containing a complete plan of expenditures proposed to be made before the close of the ensuing fiscal year" along with "such other recommendations and information" as the Governor "may deem proper and such additional information as may be required by law". Id. § 2. The Governor's budget submission also must include bills "containing all the proposed appropriations and reappropriations included in the budget and the proposed legislation, if any, recommended therein". Id § 3. Thus, Sections 2 and 3 of Article VII confer upon the Governor the legislative power to originate, draft and secure the introduction of budget bills comprising the proposed Executive Budget.

Section 3 also provides a means by which the Governor can amend or supplement his budget bills prior to final action by the Legislature and can amend or supplement the enacted budget after final action by the Legislature. The Governor may amend or supplement the Executive Budget as of right within thirty days after its submission and, with the consent of the Legislature, at any time before the Legislature adjourns. Id.

Legislative action on the Governor's budget bills is restricted [*12] by Article VII, Section 4, which is the heart of the Executive Budget System. The first sentence of Section 4 provides that "[t]he legislature may not alter an appropriation bill submitted by the governor" except for three very specific and highly limited exceptions. Under Section 4: (a) the Legislature may accept an item proposed by the Governor in its entirety; (b) the Legislature may strike out an item proposed by the Governor in its entirety; (c) the Legislature may reduce the dollar amount of an item proposed by the Governor but otherwise accept its stated terms and conditions; or (d) the Legislature may add new items of appropriation but only if separate and distinct from items proposed by the Governor and not mere substitutions therefore.

Section 4 clearly bars the Legislature from making any substantive change to the terms and conditions of items of appropriation proposed by the Governor. In that way, the framers of Section 4 powerfully expressed their conviction that New York's chronic fiscal crises required not only a broad grant of legislative powers to the Governor, but also a strict limitation on the Legislature's former plenary power to alter or otherwise amend budget [*13] bills.

Those sweeping limitations on the Legislature's power are absolutely essential to the Executive Budget System. Any other approach would undermine the foundation of the system. If the Legislature were authorized to modify the terms and conditions of any one item of appropriation submitted by the Governor, it follows that the Legislature would be authorized to modify the terms and conditions of every item of appropriation submitted by the Governor. The ensuing result, of course, would be a system of legislative budgeting-precisely what the people of this state rejected.

The framers of Section 4 understood that a fiscally responsible budget depends upon more than the dollar amount of each appropriation. Of equal importance are the purpose for which appropriated funds lawfully may be spent, the timing of spending, the recipients of the money, the manner in which funds are apportioned among recipients and other essential terms and conditions relating to the expenditure-i.e., what this Court has labeled the "function", "context" and "when, how, or where" of the appropriation. Saxton v. Carey, 44 N.Y.2d 545, 550, 406 N.Y.S.2d 732, 734-35 (1978). Accordingly, [*14] Section 4 expressly prevents the Legislature from altering in any way those provisions of the Governor's appropriation bills.

To be sure, the framers understood that this broad grant of authority to the Governor presented special risks. A Governor might attempt to include general legislation within appropriation bills and claim that those provisions are immune from legislative amendment. Addressing precisely that possibility, Article VII, Section 6, prohibits the Governor from including in an appropriation bill any provision that does not relate specifically to some particular appropriation in the bill. As a further safeguard, Section 6 requires that any such provision be limited in operation to the particular appropriation to which it relates. In that way, the framers neatly prevented the inclusion of general legislation in appropriation bills while still granting the Governor broad legislative powers in connection with fiscal matters.

Thus, Article VII effectively reversed the respective powers and obligations of the Governor and the Legislature. n2 Under the discredited legislative budget scheme, the Legislature had proposed the budget and submitted it to the Governor for his [*15] or her scrutiny. As a result, the Governor was faced with the sometimes difficult choice of whether to approve, veto or reduce each item of appropriation or negotiate with the Legislature with regard to the amount of the item and/or its terms and conditions. Under Article VII, it is the Governor who is charged with responsibility for submitting bills containing proposed items of appropriation and it is the Legislature that now faces the sometimes difficult decision whether to approve, reject or reduce the Governor's proposed items-or attempt to negotiate modifications with the Governor.

n2 When discussing the budget process prior to the Executive Budget System, the 1915 Committee recognized that its reform proposals (later encompassed within Article VII) would require just such a reversal:

> "The present system presents a singular reversal of the proper relation which should maintain between the Executive and the Legislature. Instead of the Executive coming to the Legislature with a request for funds, which it is the province of the Legislature to pass upon and either grant or refuse, our system has gradually resulted in the Legislature presenting to the Executive appropriation bills which he is expected to reduce."

1915 Constitutional Convention Doc. No. 32, at 12 (R. at 1704) (emphasis added).

[*16]

But what the Legislature cannot do (just as the Governor could not under the prior budget system) is unilaterally alter a proposed item of appropriation. If the Legislature could do that, it would undermine what the framers of Article VII considered "essential to the success of the whole system" of Executive budgeting-i.e., it would allow the Legislature to yield to "the easy temptation . . . to throw [the Executive Budget] aside and begin over again a new budget of its own" (1915 Constitutional Convention Doc. No. 32, at 18-19 (R. at 1707))-and the framers would have accomplished nothing.

The process by which the Governor's appropriation bills become law is the subject of the second paragraph of Article VII, Section 4, which provides that such an appropriation bill "shall when passed by both houses be a law immediately without further action by the governor, except that appropriations for the legislature and judiciary and separate items added to the governor's bills by the legislature shall be subject to [his veto power]". In that regard, the framers removed a portion of the line-item veto power previously available to the Governor.

The line-item veto is limited to "appropriations [*17] for the legislature and judiciary and separate items added to the governor's bills by the legislature" because the Governor has no need to veto items of appropriation that he proposed and that have been acted upon by the Legislature in accordance with Section 4; the Governor has already manifested approval of those items by submission of the appropriation bills and again by choosing not to alter them within the thirty-day period during which the Governor can amend them as of right.

C. Previous Unconstitutional Attempts By the Legislature to Return to Legislative Budgeting.

Since the people of New York State added the Executive Budget System to the State Constitution in 1927, the Legislature has tried on a number of occasions to reclaim the plenary authority it formerly possessed over budgetary matters. On each of the three occasions that this Court was presented with claims arising out of such attempts, it found that the Legislature had violated the Constitution.

In People v. Tremaine. 252 N.Y. 27, 35-36 (1929) ("Tremaine I"), the Legislature altered the Governor's appropriation bills by adding language to items of appropriation that purported [*18] to designate the manner in which certain of the Governor's "lump sum" appropriations could be segregated. The Governor vetoed each of the segregation clauses. Id. at 37. This Court recognized that the Legislature had gone beyond its constitutionally limited authority under Article VII, Section 4, to strike out, reduce or add new items of appropriation and that the segregation clauses were therefore invalid. Id at 48-49. The Court further stated that the unconstitutional provisions could properly be vetoed by the Governor. Id. at 49-50.

In People v. Tremaine, 281 N.Y. 1, 6-7 (1939) ("Tremaine II"), the Legislature altered the Governor's budget bills by eliminating itemized appropriations and replacing them with lump sum appropriations for the same purpose. This Court held that the Legislature had violated Article VII, Section 4, because, once again, it had gone beyond merely striking out, reducing or adding new items of appropriation; it had "substituted" one item for a group of other items. Id. at 10-11. The Court ruled that the Legislature could not, through such indirection, expand its limited authority [*19] to modify appropriation bills submitted by the Governor.

Most recently, in New York State Bankers Ass'n v. Wetzler, 81 N.Y.2d 98, 100-01, 595 N.Y.S.2d 936, 936-37 (1993) ("Bankers"), this Court rejected an attempt by the Legislature to add a provision to one of the Governor's budget bills that would have authorized assessment of fees against banks that were subject to a tax audit under Article 32 of the Tax Law. The Court held that the amendment violated the limited authority to strike out, reduce or add new items of appropriation that was granted to the Legislature by Article VII, Section 4. Id. at 104-05, 595 N.Y.S.2d at 939.

D. The Legislature's Unconstitutional Attempt in 1998 to Return to Legislative Budgeting.

The Legislature's attempt in 1998 to alter the Governor's budget bills in ways prohibited by Article VII, Section 4, was yet another salvo in the Legislature's continuing battle to return to legislative budgeting. On January 20, 1998, the Governor submitted his Executive Budget to the Legislature along with twelve budget bills, six of which contained the appropriations recommended in the budget and six of which contained [*20] legislation recommended in the budget. The Legislature acted on the bills in various ways. In some instances, it lawfully struck out or reduced certain items of appropriation or added separately stated new items of appropriation.

In regard to the provisions at issue here, however, the Legislature took an unusual approach. First, the Legislature approved each item submitted by the Governor in its entirety. Those items therefore became law without any further

action by the Governor. Second, the Legislature inserted into a so-called "non-appropriation" bill an amendment that expressly incorporated by reference the Governor's proposed item and repeated its language verbatim. n3 Third, having incorporated the Governor's proposed item by reference, the Legislature then changed the item in various ways other than by striking it out or reducing its dollar amount. For example, the Legislature itemized lump sum appropriations, modified the purposes for which appropriations were made, affected the timing of spending, restricted the recipients of funds and created conditions for spending to occur. n4 Exercising his authority under Article IV, Section 7, the Governor vetoed at least [*21] fifty-five of the provisions inserted by the Legislature that altered the Governor's appropriations in ways other than by striking out or reducing them.

n3 As the First Department explained, this Court has noted that the term "non-appropriation" bill is not found in the Constitution. (R. at 1892 n.1 (citing Silver v. Pataki. 96 N.Y.2d 532, 535 n.1, 730 N.Y.S.2d 482, 484 n.1 (2001)).) It is the Governor's position, discussed in more detail below, that the Legislature's so-called "non-appropriation" bills effectively created new (or substitute) items of appropriation. See infra III.A.

n4 For an analysis of each of the thirteen legislative alterations presented to the lower courts, see infra I.B.2.

E. Prior Proceedings in This Case.

The Speaker commenced this action on June 15, 1998, challenging fifty-five of the Governor's vetoes. (R. at 1103.) On July 9, 1998, the Governor moved to dismiss the complaint on the ground that the Speaker lacked standing and legal capacity [*22] to sue. (R. at 113, 174.) On January 7, 1999, Supreme Court denied the Governor's motion. (R. at 702.) The Governor appealed to the First Department and on July 20, 2000, the First Department reversed, holding that the Speaker had neither standing nor legal capacity to sue. (R. at 79.)

The Speaker appealed to this Court and on July 10, 2001, the Court reversed the First Department's decision in part, holding that the Speaker had standing as a member of the Assembly and had legal capacity to sue. (R. at 55.) On July 26, 2001, the Governor filed a motion for reargument (R. at 659), which was denied on September 13, 2001 (R. at 1096.1).

Proceedings in Supreme Court were stayed during the appeals process discussed above. Subsequently, that court returned the case to its active calendar. (R. at 1097.) On January 11, 2002, the court heard oral argument on cross motions for summary judgment. (R. at 1299.) During the hearing, the court suggested that the parties attempt to reduce the number of vetoes to be considered. The parties subsequently stipulated, with the court's approval, to limit the vetoes to thirteen and to submit supplemental briefs addressing those vetoes. (R. at 1480.) The [*23] court heard additional oral argument on February 14, 2002. (R. at 1396.)

The court also expressed concern during the January 11, 2002, hearing that the Governor's Ninth Affirmative Defense-i.e., that "[p]laintiff's claims are barred, in whole or in part, because the items that were subject to the vetoes in question were unconstitutional and therefore void and unenforceable ab initio" (R. at 776)-was not asserted as a counterclaim for declaratory judgment. At the court's suggestion, the parties resolved that issue by stipulating that: (1) "[t]he Court may fully adjudicate the issue" of the constitutionality of the Legislature's amendments "without the need for defendant to file a counterclaim seeking a declaration of unconstitutionality"; and (2) "[p]laintiff hereby waives his right to assert either in [Supreme] Court or in any appellate court, that the issue . . . was not properly before this Court on the parties' cross-motions for summary judgment or that the issue had to be raised by means of a counterclaim seeking declaratory relief rather than by means of an affirmative defense". (R. at 1394-95; see also id. at 10.)

On June 17, 2002, Supreme Court entered [*24] a decision and order granting summary judgment on behalf of the Governor and declaring "that the provisions he vetoed (other than Veto 494 which did not relate to appropriations, but

which is moot) were unconstitutionally enacted by the legislature and are thus void". (R. at 24.)

On July 12, 2002, the Speaker served a notice of appeal to the First Department. On July 22, 2002, the Senate filed a motion to intervene in Supreme Court and for reargument of the cross motions for summary judgment. (R. at 1665.) At a hearing on the motion, the parties stipulated, with the court's approval, that the Senate be permitted to intervene as a party plaintiff nunc pro tunc and that there be no reargument. (R. at 1869.) On August 28, 2002, the court entered an amended judgment reflecting the addition of the Senate as a party plaintiff. (R. at 37.)

The Speaker served an amended notice of appeal to the First Department on September 9, 2002, and the Senate served a notice of appeal on September 10, 2002. (R. at 29, 35.) On December 11, 2003, the First Department entered a decision and order unanimously affirming Supreme Court's amended judgment in all respects. The First Department found that "the [*25] actions taken by the Legislature in this case clearly violated the non-alteration provision of Article VIlI, § 4 of the State Constitution which, if upheld, would seriously undermine the 1927 constitutional amendments adopting an Executive Budget System for this State" (R. at 1891) and the "Supreme Court properly declined to rule on the constitutionality of the Governor's exercise of the line-item veto to strike provisions that had been unconstitutionally enacted" (R. 1902).

On January 6, 2003, the Senate served a notice of appeal to this Court from the First Department's ruling, and on January 7, 2003, the Speaker served a notice of appeal. n5

n5 A related case was recently decided by the Third Department. See Pataki v. New York State Assembly. 2003 WL 23415952, at *1 (3d Dep't April 22, 2004). In that case, the Governor sued the Senate and New York State Assembly (the "Assembly") seeking a declaratory judgment that forty-six budget bills passed by the Legislature in 2001 violated Article VII, Section 4. See id. The trial court granted the Governor's motion for summary judgment, and the Third Department affirmed. See id The Third Department held that legislative alterations to the Governor's proposed items of appropriation, similar to the alterations at issue in this case, were unconstitutional under Article VII, Section 4, because they changed the Governor's items of appropriation other than by striking them out or reducing their amount. See id at 2. As the Third Department explained, "we are of the opinion that defendants' [i.e.. the Legislature's] proper constitutional action was to refuse to pass plaintiff's [i.e., the Governor's] appropriation bills and induce negotiations, not to alter and amend them and then substitute their own spending plans in the form of 37 single-purpose bills in violation of NY Constitution, article VII, § 4". Id at *3 (citation omitted).

[*26]

F. The Opinion of Supreme Court.

Supreme Court granted summary judgment in favor of the Governor, declaring that the legislative alterations that were the subject of the Governor's line-item vetoes violated Article VlI, Section 4, of the New York State Constitution and were thus void ab initio. (R. at 24.) Because the Legislature's amendments were void whether or not vetoed, the court properly did not address the constitutionality of the Governor's use of the line-item veto to strike them. (R. at 25.)

The court explained that the vetoed provisions, which the Legislature inserted into so-called "non-appropriation" bills, had the effect of altering items of appropriation in the Governor's appropriation bills by segregating or itemizing lump sum appropriations, making appropriations contingent upon the enactment of subsequent legislation and/or altering the recipients identified in the appropriations. (R. at 16.)

The court then addressed "the meaning of the term 'item of appropriation' as used in the Constitution". (R. at 19.) The court explained that, based upon this Court's opinion in Saxton v. Carey, an item of appropriation "may set forth the 'when, how or [*27] where' the monies appropriated therein may be spent". (R. at 20.) The court noted that Saxton's

definition is consistent with Article VII, Section 6, which requires that "the contents of an appropriation hill . . . relate 'specifically to some particular appropriation in the bill'". (R. at 20.) Thus, the court held, because "when, how, or where" provisions are "part of an item of appropriation, these provisions are subject to the 'no alteration' restriction of section 4 of Article VII". (R. at 20.)

The court emphasized that the Speaker had conceded that if the Legislature's amendments had been made directly to the appropriation bills which they affected, they would have violated Article Vll, Section 4. (R. at 17.) The essence of the Speaker's argument was that the amendments were proper because they were inserted into so-called "non-appropriation" bills rather than appropriation bills. The court rejected that argument as an "impermissibl[e] attempt[] to do indirectly that which could not be done directly". (R. at 23.) The court concluded that the Legislature could not "place alterations of the Governor's appropriation related legislation stating 'when, how or where' monies [*28] may be expended in non-appropriation programmatic bills" without violating Article VIl, Section 4. (R. at 24.)

In regard to the Governor's vetoes, the court ruled that, having determined that the vetoed amendments were unconstitutional, "there is no need to determine whether the items were constitutionally vetoed". (R. at 24-25.)

G. The Opinion of the First Department.

The First Department unanimously affirmed Supreme Court's grant of summary judgment. The First Department held that the actions taken by the Legislature violated the "no alteration" rule of Article VlI, Section 4, of the New York State Constitution and that, in light of that ruling, Supreme Court correctly declined to address the constitutionality of the Governor's line-item vetoes. (R. at 1891-92.)

The First Department started by pointing out that "the Legislature approved each of the Governor's appropriation bills", but "[n]otwithstanding its approval of his appropriation bills, the Legislature amended three of the Governor's so-called 'non-appropriation bills' in ways that had the effect of modifying some of the Governor's appropriations by re-allocating or itemizing such appropriations, or conditioning [*29] them on subsequent legislative action". (R. at 1892.) Citing Tremaine I. Tremaine II and Bankers, the First Department concluded-as had Supreme Court-that those amendments violated Article VII, Section 4. (R. at 1898.)

The Speaker and the Senate argued that the above three cases were distinguishable because the legislative alterations here "were included in 'non-appropriation' bills, and not in an 'appropriation bill submitted by the Governor' (NY Const, art VII, § 4)". (R. at 1898-99.) The First Department found that attempted distinction "not convincing". (R. at 1899.)

Like Supreme Court, the First Department cited this Court's decision in Saxton v. Carey-along with Article VII, Section 6, and several lower court decisions-as "ample authority supporting the Governor's argument that the 'when, how or where' directory language, whether in an appropriation bill or not, is part of an item of appropriation". (R. at 1899-900.) The First Department concluded that "the explicit language" of Article VII, Section 4, prohibited the Legislature from altering those aspects of an item of appropriation *"by any means*"-including by "an alteration to the [appropriation] bill [*30] itself or by passage of a different appropriation measure". (R. at 1901 (italics in original).)

The court rejected Appellants' assertion that "the Legislature [had] the right to modify an item of appropriation outside the appropriation [bill] in which it is contained", reasoning that "[t]he framers of the Constitution did not mean to grant the Legislature carte blanche to modify appropriations at will in some other piece of legislation". (R. at 1901-02.) The court explained-as had Supreme Court-that "[t]o conclude otherwise would allow [the Legislature] to accomplish by indirection something which the Constitution directly forbids" and "would also fatally undermine the non-alteration provision of Article VII, § 4 and the other amendments adopting the Executive Budget System". (R. at 1902.)

Finally, the First Department agreed with Supreme Court that, had it gone on to consider the constitutionality of the

Governor's line-item vetoes of the unconstitutional-and therefore void-legislative alterations, the decision on that issue "would have constituted an improper advisory opinion". (R. at 1902 (citations omitted).)

Summary of Argument

The Governor respectfully [*31] submits that the courts below were correct in holding that the Legislature's attempt to do indirectly what it cannot do directly was unconstitutional. The Legislature sought to alter the Governor's proposed items of appropriation-not by striking them out or reducing their amount but by changing their function, their context or the "when, how, or where" of spending. That violated Article Vll, Section 4, of the New York State Constitution. As the courts below held, those unconstitutional alterations were invalid and void ab initio, whether or not vetoed by the Governor. Given that fact, the courts properly declined to rule on the constitutionality of the Governor's use of the line-item veto, since reaching that issue would have been to render an advisory opinion.

However, even if this Court does address the constitutionality of the Governor's line-item vetoes-which, the Governor respectfully submits, it need not do-the vetoes were proper for two independent reasons: (1) the amendments that were stricken were themselves "items of appropriation" that are expressly subject to the line-item veto under Article lV, Section 7; and (2) the Governor must be able to strike unconstitutional [*32] alterations to items of appropriation or his authority to line-item veto under Article IV, Section 7, would be eviscerated.

Argument

I. THE COURTS BELOW CORRECTLY HELD THAT THE LEGISLATURE'S ALTERATIONS TO THE GOVERNOR'S ITEMS OF APPROPRIATION WERE UNCONSTITUTIONAL AND THEREFORE VOID *AB INITIO.*

The courts below correctly held that the Legislature's alterations to the Governor's items of appropriation other than by striking the items or reducing their dollar amount violated Article VII, Section 4. That the provisions altering the Governor's items of appropriation were inserted into other bills, ones that the Legislature seeks to characterize as "non-appropriation" bills, is irrelevant. As the First Department recognized, "[t]o conclude otherwise would allow plaintiffs to accomplish by indirection something which the Constitution directly forbids", which "would 'violate[] the spirit of the fundamental law'" and "would also fatally undermine" Article VII, Section 4, and other aspects of the Executive Budget System. (R. at 1902 (quoting Wein v. State, 39 N.Y.2d 136, 145, 383 N.Y.S.2d 225, 229 (1976) (quoting People ex rel. Burby v. Howland, 155 NY 270, 280 (1898))).) [*33]

A. The "When, How, or Where" Measures Altered By the Legislature Were Properly Part of Items of Appropriation Proposed By the Governor.

Citing this Court's opinion in Saxton v. Carey-as well as the language of Article VII, Section 6, and several lower court decisions (i.e., Schuyler v. South Mall Constructors. 32 A.D.2d 454, 303 N.Y.S. 2d 901 (3d Dep't 1969); Rice v. Perales, 156 Misc.2d 631, 594 N.Y.S. 2d 962 (Sup. Ct. Monroe Cty. 1993), aff'd as modified on other grounds. 193 A.D.2d 1135, 599 N.Y.S. 2d 211 (4th Dep't 1993))-the First Department properly held that an item of appropriation may include not only the dollar amount appropriated and its purpose, but also a description of the function, context and "when, how, or where" the funds are to be spent. (R. at 1899-900.) The Speaker has conceded that both Saxton and Section 6 support the lower courts' interpretation of what the Governor may permissibly include in proposed items of appropriation. (See Brief for Plaintiff-Appellant Sheldon Silver, Member and Speaker, New York State Assembly, before the First Department ("Sp. First Dep't Br.") at 35 n.23, [*34] 38-39.) The Speaker has further acknowledged that whether or not the Governor could include "when, how, or where" provisions in appropriation bills is not at issue in this case. (Id at 42 n.27.) The Senate, however, contends that the First Department erred in holding that the "when, how, or where" measures altered by the Legislature were aspects of items of appropriation. (See Sen. Br. at 41, 87.) Rather, the Senate argues that an item of appropriation encompasses only the amount of the appropriation and its purpose. (Sen. Br. at 39.) The Senate's contention is manifestly wrong.

1. Items of Appropriation May Include a Description of the "Function" and "Context" of the Appropriation and "When, How, or Where" Appropriated Funds Are To Be Spent.

In Saxton, this Court held that an item of appropriation includes not just the dollar amount appropriated, but also the "function and the context in which [the appropriation] is used", including "when, how, or where" appropriated funds are to be spent. 44 N.Y.2d at 550, 406 N.Y.S.2d at 734-35. The Speaker accepts the Saxton rule. (Sp. Br. at 5I ("As Saxton recognized, the degree of specificity a Governor [*35] includes in the items of appropriation he proposes is largely within the Governor's discretion").) The Senate attempts to distinguish Saxton on the ground that in that case there was no dispute between the Legislature and the Governor over the propriety of the Legislature's conduct. (Sen. Br. at 84.) That is a meaningless distinction. Even though the Legislature and Governor were on the same side in Saxton, this Court nonetheless squarely addressed the precise question at issue here: i.e., the definition and permissible content of an item of appropriation. See Saxton, 44 N.Y.2d at 550, 406 N.Y.S.2d at 734-35.

Other New York courts-cited by the First Department-have similarly refused to limit items of appropriation solely to a dollar amount and purpose. See Schuyler. 32 A.D.2d at 456-57, 303 N.Y.S.2d at 903-05 (language in an item of appropriation authorizing the Commissioner of General Services to negotiate a construction contract was constitutional); Rice, 156 Misc. 2d at 640, 594 N.Y.S.2d at 968 (language in an item of appropriation changing the previously existing formula for calculating "Home Relief benefits for certain [*36] households under New York's Social Services Law was constitutional).

Likewise, the Third Department in Pataki v. New York State Assembly, 2003 WL 23415952, at *3, held that provisions similar to those in this case were properly included in the Governor's proposed items of appropriation. The Third Department concluded that "when, how, or where" measures are "substantive modifiers [that] are part of a gubernatorial appropriation bill and subject to the protection of NY Constitution, article VIl, § 4". Id. at *2 (citation omitted). The court "decline[d] [the Legislature's] invitation to establish a bright-line rule" that would have strictly limited-as the Senate is attempting to do here-what can be part of an item of appropriation. Id. Indeed, the rule that items of appropriation may consist of more than just a dollar amount and purpose predates the Executive Budget System. See, e.g., Op. Att'y Gen. 368 (1915) (R. at 1778-1782) (language in Legislature's appropriation bill imposing conditions and restrictions upon the increase of state employees' salaries was constitutional).

2. Under Article VII, Section 6, an Appropriation Bill May Include [*37] **Any Provision That Relates Specifically to Some Particular Appropriation in the Bill and Is Limited in Its Operation to Such Appropriation.**

Under Article VII, Section 6, any provision that "relates specifically to some particular appropriation in the bill" and is "limited in its operation to such appropriation" may be included in an appropriation bill. That obviously encompasses what this Court in Saxton referred to as the "function", the "context" and the "when, how, or where" of spending. The First Department properly recognized that the Saxton definition coincides neatly with the requirements of Section 6:

> "[T]he language of Article VlI, § 6, which requires that all provisions within the Governor's appropriation bills 'relate[] specifically to some particular appropriation in the bill, and any such provision shall be limited in its operation to such appropriation,' provides further support that the Governor's items of appropriation include not just the appropriation itself, but also may include directory or programmatic language that . . . is integrally related to it . . . . [T]he relatedness requirement of § 6 supports the idea that 'items of appropriation' [*38] properly include both the appropriation itself (amount and purpose) as well as directory provisions relating to the appropriation ('when, how or where')."

(R. 1900-01 (emphasis added).)

The Speaker has conceded that Section 6 "limit[s] what the Governor may include in the appropriation bills he

submits". (Sp. First Dep't Br. at 35 n.23.) The Senate, however, maintains that Section 6 defines only what the Legislature can include in items of appropriation that it adds to or enacts separately from the Governor's bills and has no relevance to the Governor's proposed items of appropriation. (See Sen. Br. at 62-83.) Not only does the Senate's construction ignore the plain language of Section 6, but it also directly conflicts with-and, if adopted, would critically disrupt-other fundamental aspects of Article VII.

The fallacy of the Senate's argument is apparent from the language of Section 6:

> "Except for appropriations contained in the bills submitted by the governor and in a supplemental appropriation bill for the support of government, no appropriations shall be made except by separate bills each for a single object or purpose. All such bills and such supplemental [*39] appropriation bill shall be subject to the governor's approval as provided in section 7 of article lV.
>
> "No provision shall be embraced in any appropriation bill submitted by the governor or in such supplemental appropriation bill unless it relates specifically to some particular appropriation in the bill, and any such provision shall be limited in its operation to such appropriation."

By its express terms, Section 6 applies to "provision[s] . . . in any appropriation bill submitted by the governor". N.Y. Const. art. VII, § 6 (emphasis added). This language clearly includes the Governor's appropriation bills as submitted pursuant to Article VII, Section 3.

Under the Senate's construction, the words "submitted by the governor" that appear twice in Section 6 would be mere surplusage, since the restriction would in fact not apply to appropriation bills as submitted by the Governor. That cannot be correct. Interpretations that are contrary to the plain language of statutory or constitutional provisions or that ignore language in those provisions should not be adopted. See King v. Cuomo, 81 N.Y.2d 247, 253, 597 N.Y.S.2d 918, 921 (1993) ("If the guiding principle [*40] of statutory interpretation is to give effect to the plain language [e]specially should this be so in the interpretation of a written Constitution, an instrument framed deliberately and with care, and adopted by the people as the organic law of the State") (internal quotation marks and citation omitted); People v. Carroll, 3 N.Y.2d 686, 689, 171 N.Y.S.2d 812, 814 (1958) ("The most compelling criterion in the interpretation of an instrument is, of course, the language itself, "[p]articularly . . . in the case of a constitutional provision").

Moreover, it is axiomatic that every word in a constitutional or statutory text must be given effect. See N.Y. Stat. Law § 231 (McKinney 2003) ("In the construction of a statute, meaning and effect should be given to all of its language, if possible, and words are not to be rejected as superfluous when it is practicable to give to each a distinct and separate meaning"); Ivey v. State, 80 N.Y.2d 474, 480, 591 N.Y.S.2d 969, 972 (1992) (it is a "well-established precept that every part of a statute is to be given effect and meaning, and no word may be excised by the courts in such a way as to deprive it of meaning [*41] and effect"). The Senate's interpretation of Section 6 violates that rule.

The Senate contends that the introductory phrase in the first sentence of Section 6-i.e., "Except for appropriations contained in the bills submitted by the governor . . . "- refers to "appropriations added by the Legislature". (Sen. Br. at 77.) That makes no sense. The purpose of the "[e]xcept" clause is to make it clear that appropriations submitted by the Governor pursuant to Article VII, Section 3, do not have to be contained in "separate bills each for a single object or purpose", as Section 6 requires of other appropriations. To read the initial clause of the first paragraph of Section 6 as applying only to the Legislature's appropriation bills would require just that-i.e., it would require that the Governor's appropriations each be contained in a separate bill with a "single object or purpose"-thereby creating an irreconcilable conflict between Section 6 and Section 3, which allows the Governor to submit "a bill or bills containing all the proposed appropriations and reappropriations included in the budget". (Emphasis added.) It is an interpretation, therefore, that cannot be correct. [*42] See, e.g., In re Fay, 291 N.Y. 198, 216 (1943) (language of the Constitution "should not be given a construction that leads to manifestly unintended results", "defeat[s] the purpose and intent of the . . . provision[s]" or leads to an "absurd" interpretation).

The Senate's interpretation of Section 6 would also create an irreconcilable conflict between Section 6 and Section 4 of Article VII. Under Section 6, in the Senate's view, the Legislature can make changes to an appropriation bill submitted by the Governor only if the changes relate specifically to appropriations that are in the Governor's bill. But Section 4 allows the Legislature to add wholly new appropriations to the Governor's appropriation bills so long as the new appropriations are not mere substitutes for the Governor's appropriations. See Tremaine II, 281 N.Y. at 11. The Senate's gloss on Section 6 would remove from the Legislature a right that Section 4 gives it.

In addition, the Senate's interpretation of Section 6 would disrupt the fundamental structure of Article VII. If, as the Senate argues, the relatedness restriction does not apply to appropriation bills initiated by the [*43] Governor (Sen. Br. at 62-83), then all kinds of unrelated general legislation could be inserted into the Governor's appropriation bills and, under the restrictions of Article VII, Section 4, the Legislature would be powerless to amend the provisions.

The Senate responds by arguing that Section 6 contains a "negative" command and therefore an affirmative use of Section 6 is prohibited. (Sen. Br. at 69-70.) That is mere sophistry. Section 6 sets forth two requirements for a provision in an appropriation bill: it must "relate[] specifically to some particular appropriation in the bill" and it must be "limited in its operation to such appropriation". Assuming, as the Senate argues, that those requirements do not apply to the Governor's appropriation bills, then there would be no other constitutional restriction (and the Senate identifies none) on what the Governor could place in those bills. Accordingly, unless Section 6 applies to appropriation bills "submitted by the Governor", nothing would prevent the Governor from inserting unrelated general legislation into an appropriation bill, which, under Article VII, Section 4, it would be beyond the power of the Legislature to amend.

[*44] Tremaine I is not to the contrary. The Senate cites the following passage from that case in support of its argument:

> "But the provision of section 22, article 3, which is prohibitory in terms, has no affirmative application to 'an appropriation bill submitted by the governor' so as to permit the addition of the rider in question. The converse of the proposition stated negatively in section 22 is not true as applied to such bill."

(Sen. Br. at 70 (quoting Tremaine I, 252 N.Y. at 49).) In Tremaine I. the Legislature was arguing that its alterations to the Governor's budget bills were constitutional since they related to a particular appropriation and thus complied with Section 22 (the predecessor to Section 6). The Court rejected that argument because (unlike the Governor) the Legislature faced an additional hurdle in regard to appropriation bills: i.e., the "no alteration" rule of Article VII, Section 4. The Senate omits the sentence that follows the passage quoted above: "The rider is an alteration of such bill other than by striking out or reducing items therein; it is not an addition of an item of appropriations stated separately and distinctly [*45] from the original items of the bill and referring to a single object or purpose and its insertion in the bill was improper". Tremaine I, 252 N.Y. at 49. Thus, the Court found that the rider added by the Legislature was improper because it violated the "no alteration" rule of Article VII, Section 4, and compliance with Section 22 could not save it; the Court did not rule that Section 22 was irrelevant to what could be included in an appropriation bill.

The Senate's reliance on legislative history is also misplaced. (See Sen. Br. at 64-69.) Certainly, the legislative history of the predecessor to Section 6-i.e., Article III, Section 22, of the 1894 New York State Constitution-indicates that Section 22 was meant, as the 1915 Attorney General Opinion cited by the Senate states, to prohibit the Legislature from inserting into appropriation bills riders that contained general legislation. See Op. Att'y Gen. 368, 375 (1915) (R. 1781), cited in Sen. Br. at 65. But in 1894 (and in 1915 when the Attorney General issued his opinion) New York had a system of legislative budgeting. At that time, it was only the Legislature (and not the Governor) that could introduce [*46] appropriation bills. (See Sen. Br. at 65 ("the Governor had no budgetary lawmaking power in 1894").) However, when the State later adopted Article VII, Section 6, the drafters ensured that the prohibition on inserting general legislation would apply to any appropriation bill, whether submitted by the Governor or the Legislature.

The Senate argues that the lack of legislative history pertaining to the "anti-rider" provision when the Executive Budget System was initially adopted in 1927 suggests that the rider was meant to apply only to the Legislature. (Sen.

Br. at 66.) This ignores the fact that the same policy goals inherent in the "anti-rider" provision apply to restricting the Governor's conduct-once the Executive Budget System was adopted-as applied to restricting the Legislature's conduct under the old system of legislative budgeting. Moreover, in 1938, when the rider was incorporated into Article VII, Section 6, the 1938 Report of the Committee on the Proposed Constitutional Amendment, in a passage cited by the Senate (Sen. Br. at 67), made it crystal clear that the provision was meant to apply to all appropriation bills, including the Governor's bills:

> "Section [*47] 22 of Article III was adopted in 1894 and is designed to prevent the inclusion of riders in appropriation bills. Its language was not conformed when the Executive budget system was adopted, nor was it incorporated in Article IV-A although relating thereto. The proposed amendment incorporates this section in the section relating to appropriation bills and extends its operations to include not only the Governor's budget bills but any supplemental appropriation bill."

(R. at 1746-47 (emphases added).) n6

> n6 Neither Schuyler. 32 A.D.2d at 455-56, 303 N.Y.S.2d at 903, nor Rice, 156 Misc.2d at 640, 594 N.Y.S.2d at 968 (Sen. Br. at 70-71), supports the Senate's argument. Those decisions concern the Legislature's conduct, not the Governor's. The fact that they refer to the "anti-rider" history of Section 22 when addressing the propriety of additions to budget bills by the Legislature says nothing about whether Section 6 similarly limits what the Governor may include in an appropriation bill.

[*48]

The Senate also argues that if Section 6 imposed a "relatedness" restriction on the appropriation bills which the Governor submits to the Legislature, it "would not be in harmony with the systematic organization of Article VII". (Sen. Br. at 81.) That organization, however, makes perfect sense. Sections 1 through 3 of Article Vll delineate the powers of and restrictions on the Governor in the budget process; Sections 4 and 5 do the same for the Legislature. Because Section 6 applies to both the Governor and the Legislature, it is properly situated-i.e., after provisions regarding what the Governor may do and provisions regarding what the Legislature may do.

At bottom, if the drafters of the second paragraph of Section 6 meant it to apply only to the Legislature's changes to the Governor's appropriation bills, they could have-and would have-said so clearly and directly, not in the cryptic and convoluted way that the Senate assumes was done. Section 6 would have read:

> "No provision shall be added by the Legislature to any appropriation bill submitted by the Governor or be embraced in such supplemental appropriation bill unless it relates specifically to some particular [*49] appropriation in the bill . . . . "

That the drafters did not include the underscored language shows that they could not have intended Section 6 to be limited as the Senate suggests. Accordingly, the Senate's interpretation should be rejected.

In sum, the plain language and intent of Section 6, the overall constitutional structure into which Section 6 has been placed and the history of the relevant constitutional provisions are all flatly inconsistent with the Senate's interpretation. Both Saxton and Section 6 support the conclusion of the courts below that the Legislature unconstitutionally altered items of appropriation lawfully proposed by the Governor.

B. The Legislature's Alterations to the Governor's Items of Appropriation Were Unconstitutional.

Under Article Vll, Section 4, the Legislature may not alter appropriation bills submitted by the Governor except by striking out entire items of appropriation or reducing their dollar amount (or adding new items of appropriation that are

separate and distinct from the Governor's items). This Court has repeatedly confirmed that Section 4 forbids the Legislature from altering any other aspect of an item of appropriation-such [*50] as the recipients of the funds, the terms and conditions of spending or the "function", "context" or "when, how, or where" of the appropriation. Yet that is exactly how the Legislature attempted to alter the Governor's proposed items of appropriation in this case. The Legislature's alterations effectively created new items of appropriation that were improper substitutes for the Governor's proposed items. The fact that those alterations were physically placed into so-called "non-appropriation" bills rather than directly into the appropriation bills that they changed does not avoid the constitutional infirmity.

1. The Legislature Cannot Alter Items of Appropriation Proposed By the Governor Except By Striking Entire Items or Reducing Their Dollar Amount.

a. Article VII. Section 4.

Article VII, Section 4, provides as follows:

> "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." (Emphases added.)

Thus, the unambiguous, [*51] express command of Section 4 is that the Legislature may take only three types of action on an item of appropriation proposed by the Governor. The Legislature may: (a) "strike out" the item; (b) "reduce" the dollar amount of the item; or (c) approve the item by not availing itself of options (a) or (b). See Tremaine II, 281 N.Y. at 10 ("the limitation on the Legislature is to reduce or strike out the items"). Because, as the First Department recognized (R. at 1899-1900), measures detailing the function or context of an appropriation, or explaining "when, how, or where" the money is to be spent, are "part of an item of appropriation", the Legislature may not make alterations to any such measures included in the Governor's appropriation bills.

The unambiguous language of Section 4 is buttressed by the basic structure of Article VII, which carefully restricts the Legislature's role in the budget process. Section 4 limits not only the Legislature's ability to alter the Governor's appropriation bills but also its ability to add new items. Although the Legislature can add items of appropriation, it cannot add pieces or parts of items, or conditions or qualifications to [*52] items that are mere substitutes for the Governor's items. See Tremaine II, 281 N.Y. at 11. Moreover, any newly added item is subject to the Governor's line-item veto pursuant to Article IV, Section 7.

b. The Court of Appeals Has Repeatedly Held That tbe Legislature Cannot Alter Items of Appropriation Proposed By the Governor Except By Striking Entire Items or Reducing Their Dollar Amount.

That the Legislature may not alter the function, context or "when, how, or where" of spending proposed by the Governor is further confirmed by three Court of Appeals decisions, relied upon by the courts below, that rejected legislative efforts to alter budget bills in ways that are not authorized by Article VII, Section 4.

In Bankers, the Legislature added a provision to an appropriation bill to authorize the assessment of fees against banks that were subject to certain tax audits. This Court held that the alteration constituted an "outright disregard of the dictates of the Constitution". 81 N.Y.2d at 104, 595 N.Y.S.2d at 939. The Court emphasized that "article VII, § 4 is not, as defendant suggests, a mere procedural requirement in a constitutional [*53] process aimed at facilitating agreement in adopting the budget", but rather "constitutes a limited grant of authority from the People to the legislature to alter the budget proposed by the Governor, but only in specific instances". Id. (emphasis added). The Court emphasized that "[t]he constitutional command is unambiguous" and that to countenance legislative usurpation of the Governor's budgetary powers "would be to disparage the very foundation of the People's protection against the abuse of power by the State-the tripartite form of government established in the Constitution". Id. at 104-105, 595 N.Y.S.2d at 939.

More than five decades earlier, in Tremaine II. this Court rejected another ploy by the Legislature to return to the

discredited system of legislative budgeting. In that case, the Legislature struck out virtually all the appropriations proposed by the Governor and substituted lump sum appropriations for the same purpose but in different form. In holding that the Legislature's actions were unconstitutional, the Court explained:

> "[T]he Legislature may not alter an appropriation bill by striking out the Governor's items and replacing [*54] them for the same purpose in different form. Thus reads the fundamental law binding on us all, Judiciary, Governor, Legislature. It may, however, add items of appropriation, provided such additions are stated separately and distinctly from the original items of the bill and refer each to a single object or purpose. The items thus proposed by the Legislature are to be additions, not merely substitutions. These words have been carefully chosen. The added items must be for something other than the items stricken out."

Tremaine II, 281 N.Y. at 11 (emphases added).

As the Court recognized, a contrary ruling would have allowed the Legislature to rewrite all the Governor's appropriations in whatever form it desired, thereby making the Executive Budget nothing "more than a mere source of information" and "revert[ing] to the old system [of legislative budgeting] which years of agitation and endeavor have sought to abolish". Id. at 8, 10.

The same outright rejection of legislative budgeting occurred in Tremaine I. There, the appropriation bills submitted by the Governor contained lump sum appropriations for certain departments and [*55] gave the Governor authority to segregate the lump sums (i.e., to itemize the positions and salaries for which the money would be used). Tremaine I, 252 N.Y. at 35. In an effort to seize that control from the Governor, the Legislature altered the bills to require that the lump sums be segregated by a committee consisting of the Governor and two members of the Legislature. Id. at 35-36. In essence, the Legislature in Tremaine I tried to do just what the Legislature in the present case has tried to do-i.e., preserve the Governor's items of appropriation but alter the terms and conditions of spending.

The Court of Appeals in Tremaine I first held that the Legislature's alteration violated the Civil Appointments Clause of the State Constitution. Id. at 45. The Court then expressed the view that if the issue "were necessarily before us, an additional reason would appear for" declaring the segregation clause unconstitutional: i.e., that the provision "is an alteration of [the Governor's appropriation] bill other than by striking out or reducing items therein" and therefore "its insertion in the bill was improper" under [*56] Article VII, Section 4. Id at 48-49.

Legal opinions of the New York Attorney General provide additional confirmation that the Legislature is forbidden to do what it has attempted here-i.e., alter items of appropriation proposed by the Governor by changing the conditions of spending rather than by striking them out in their entirety or reducing their dollar amount. In 1982, Attorney General Robert Abrams explained that under Article VII, Section 4, the Legislature, in acting upon the Governor's proposed appropriation bills:

> "(a) may strike out items of appropriation, including the accompanying text;
>
> "(b) may reduce items of appropriation but may not alter the accompanying text:
>
> "(c) may not increase items of appropriation;
>
> "(d) may add items of appropriation with accompanying text stating the object or purpose;
>
> "(e) may not, at least in the absence of concurrence by the Governor, amend the bill otherwise than to the extent set forth in (a), (b) and (d) above."

Op. Att'y Gen. 82-F5, 1982 N.Y. AG LEXIS 77, at *19 (1982) (emphases added).

In 1978, Attorney General Louis J. Lefkowitz similarly held that the [*57] Legislature may not, as it attempted here, use a subsequent budget bill to alter the terms and conditions of an item of appropriation proposed by the Governor that the Legislature had approved in another budget bill. See Op. Att'y Gen. 76, 1978 WL 27523 (1978). After finding that the Governor had properly vetoed the provision, the Attorney General stated:

> "I would further note that Article VII, § 4 of the Constitution only authorizes the Legislature to act in relation to appropriation bills by reducing, striking or adding items of appropriation and that where there is no change in the dollar amount of an item of appropriation, there is no authority for the Legislature to add the item to a succeeding appropriation bill for the sole purpose of adding qualifying language thereto."

Id. (emphasis added).

As discussed below, the alterations added by the Legislature in the present case are functionally identical to those previously found unconstitutional by this Court and the Attorney General.

2. The Legislature Altered the Governor's Appropriation Bills Other Than By Striking Entire Items or Reducing Their Dollar Amount.

The legislative [*58] provisions at issue plainly altered the "function", the "context" or the "when, how, or where" of spending of the Governor's items of appropriation. Indeed, the Speaker has conceded as much. (See, e.g., Sp. Br. at 16 ("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") (internal citation and quotation marks omitted).)

Appellants nonetheless argue that these alterations do not violate Article VII, Section 4, because they changed neither the amount of an item of appropriation nor its "purpose". (Sp. Br. at 51; Sen. Br. at 39.) Section 4, however, prohibits the Legislature from making any alteration whatsoever to the Governor's items of appropriation-not just alterations to their "purpose"-except for reducing their amount or striking them out. Thus, whether or not the Legislature altered the "purpose" of the Governor's items of appropriation simply does not matter. As this Court has held, Section 4 prohibits the Legislature from "replacing" the Governor's items with items having "the [*59] same purpose" but a "different form". Tremaine II, 281 N.Y. at 11. Likewise, as Attorney General Lefkowitz concluded, the addition by the Legislature of any "qualifying language", even "where there is no change in the dollar amount" of an item of appropriation, is unconstitutional. Op. Att'y Gen. 76, 1978 WL 27523 (1978). Indeed, in both Bankers and Tremaine 1, the legislative amendments that violated Section 4 changed neither the amount nor the purpose of the Governor's items of appropriation. See Bankers, 81 N.Y.2d 98, 595 N.Y.S.2d 936; Tremaine I, 252 N.Y. at 48-49. n7

> n7 See also Pataki v. New York State Assembly. 2003 WL 23415952, at *3, where the Third Department held that, under Article VII, Section 4, the Legislature could not amend "substantive modifiers in a gubernatorial appropriation bill" even though the amendments affected neither the dollar amount nor purpose of the appropriations. If the Legislature was unhappy with the "substantive modifiers", its "proper constitutional action was to refuse to pass [the Governor's] appropriation bills and induce negotiations, not to alter and amend them". Id. (citation omitted).

[*60]

Attorney General Lefkowitz also made clear that it does not matter whether the qualifying language is added directly to the appropriation bills themselves or, as attempted here, is inserted into another budget bill that expressly incorporates by reference the Governor's proposed item, repeats the language of the item verbatim and then changes the item in various ways other than by striking it out or reducing its dollar amount. See Op. Att'y Gen. 76, 1978 WL 27523

(1978). Whether done directly or indirectly, the effect is the same-i.e., to replace the Governor's item of appropriation with a new, substitute item drafted by the Legislature. n8

n8 The Senate argues that the Legislature's alteration of "when, how, or where" provisions in the Governor's items of appropriation should be excused because the Governor inserted similar "when, how, or where" measures in certain of his so-called "non-appropriation" bills. (Sen. Br. at 16-17, 59.) That is an irrelevant "two wrongs make a right" argument for which the Senate not surprisingly cites no authority. The dispositive fact-as the cases cited in the text uniformly make clear-is that the Governor was entitled to include "when, how, or where" provisions in his appropriation bills (even if he also put other "when, how, or where" provisions in his so-called "non-appropriation" bills) and, to the extent that he put such measures in appropriation bills, the Legislature was prohibited by Article VII, Section 4, from altering them.

[*61]

An analysis of each of the twelve vetoed amendments now at issue clearly illustrates their unconstitutionality. In every case, the Legislature approved the Governor's proposed item of appropriation in its entirety, thereby immediately giving it legal effect, and then sought to change it in ways that violated the "no alteration" rule of Article VII, Section 4, including (in some instances) the "no segregation" rule of Tremaine I or the "no substitution" rule of Tremaine II.

Because the vetoed alterations fall into several distinct categories, we include below, for the Court's convenience, a table that groups them by type. The discussion that follows addresses the provisions in numerical order by veto.

1. Legislative attempts to make expenditure of funds conditioned upon subsequent Legislative approval.	2. Legislative attempts to segregate or itemize lump sum appropriations.	3. Legislative attempts to increase the amount of the Governor's proposed item of appropriation.
Veto No. 3	Veto No. 6	Veto No. 463
Veto No. 453	Veto No. 452	(This veto also covers a Legislative attempt to itemize a lump sum appropriation.)
Veto No. 466	Veto No. 454	
	Veto No. 462	
	Veto No. 495	
	Veto No. 498	

[*62]

1.	4.	5.
Legislative attempts to make expenditure of funds conditioned upon subsequent Legislative approval.	Legislative attempts to add to the list of properties for which appropriated funds could be spent.	Legislative attempts to reallocate funds from one budget line item to another.
Veto No. 3 Veto No. 453 Veto No. 466	Veto No. 456	Veto No. 5

a. Veto 3 (R. at 1257.33-.56).

The Governor proposed $ 180 million for the Department of Correctional Services to be used for "the development of a new 750 cell maximum security facility to be located in the county of Franklin".

The Legislature then added a condition that "no funds shall be available for the purpose of such appropriation from any source until a subsequent chapter of the laws of 1998 is enacted which allocates and authorizes the disbursement of such funds". Pursuant to this provision, the Legislature would have had authority to determine whether any money at all was to be spent and, if so, how much, when it was to be spent, where it was to be spent, on what it should be spent, who should receive the funds and whether any other conditions or qualifications should [*63] be placed on construction or use.

The Speaker argues that the "Legislature passed this item of appropriation without altering the dollar amounts proposed by the Governor". (Sp. Br. at 31.) But, as mentioned above, the same point could have been made about the unconstitutional legislative alterations in Bankers and Tremaine I. See Bankers, 81 N.Y.2d at 98, 595 N.Y.S.2d at 936; Tremaine I. 252 N.Y. at 48-49. Whether or not the Legislature here altered the "dollar amounts" of the Governor's item of appropriation is irrelevant-as it was in Bankers and Tremaine I-because Section 4 prohibits any change other than a reduction in dollar amount or a complete striking out of the item. By adding conditions to the "when, how, or where" of spending that were not present in the Governor's proposed item of appropriation, the Legislature violated the "no alteration" rule of Article VII, Section 4, as well as the "no substitution" rule of Tremaine II. 281 N.Y. at 11, 21 N.E. at 895 (prohibiting the Legislature from "substitut[ing]" for one of the Governor's items of appropriation a legislative item "for the same purpose in different [*64] form"). n9

n9 The same constitutional infirmity invalidates another condition that the Legislature attached to this item of appropriation-i.e., a condition dictating that the facility include a particular kind of common space. (See Sp. Br. at 31.) By qualifying the "when, how, or where" of the appropriation in ways different from the Governor's original proposal, this alteration too violated Article VII, Section 4. Indeed, if adding such a condition were appropriate-and it is not-the Legislature would have been free to do much more than just specify the parameters of the prison's common space. The Legislature could, for example, have changed the appropriation from $ 180 million for a 750 cell maximum security prison in Franklin County to $ 180 million for a 500 cell minimum security prison in Rockland County (because, under the Speaker's theory, that would have altered neither the dollar amount nor the purpose-i.e., prison construction-of the appropriation).

b. Veto 5 (R. at 1257.63-.71). [*65]

The Governor proposed a $ 96.8 million appropriation for the Insurance Department, with $ 9.6 million allocated to the "Administrative Program", $ 80.0 million allocated to the "Regulation Program" and $ 6.4 million allocated to the "Consumer Services Program". In addition, the Governor set forth approximately a dozen suballocations within the allocation for the "Regulation Program".

The Legislature changed the Governor's proposed allocations so as to appropriate $ 48.2 million to the "regulation of insurance organizations program" and $ 32.4 million to the "regulation of insurance product program". The Legislature then moved all the suballocations from the "Regulation Program" to the "regulation of insurance organizations program".

The Speaker again attempts to defend what the Legislature did by noting that it "did not alter the amount appropriated". (Sp. Br. at 30.) That is irrelevant. By moving the money around so as to reallocate it to other parts of the Insurance Department budget, the Legislature altered the Governor's proposed item of appropriation in violation of the "no alteration" rule of Article VII, Section 4, and the "no substitution" rule of Tremaine II.

c. [*66] **Veto 6 (R. at 1257.73-.79).**

The Governor proposed a $ 17 million lump sum appropriation for the Office of Real Property Services to be used for local administration of the STAR (state tax relief) Program.

The Legislature segregated the Governor's proposed lump sum appropriation by directing that specific funds be available only to particular recipients and for particular uses (e.g., $ 2.4 million for local governments and school districts to offset certain mailing expenses).

As a result of the Legislature's alteration, the Governor's item of appropriation no longer existed as it had been proposed. It had been segregated-just as the Legislature had improperly attempted to segregate the Governor's proposed appropriations in Tremaine I. The recipients and uses of the funds were also different, in violation of the "no alteration" rule of Article VII, Section 4. In the words of Saxton, the "when", "how" and, most particularly, the "where" of spending had been changed without striking out the item or reducing its amount.

d. Veto 452 (R. at 1257.101-.111).

The Governor proposed a $ 36.3 million lump sum appropriation for the Department of Environmental Conservation [*67] to be used for "the parks, recreation and historic preservation account" and a $ 62.4 million lump sum appropriation for the same Department to be used for projects that received funding from "the open space account". The plan for spending the appropriations was "to be approved by the director of the budget".

The Speaker acknowledges that the Legislature segregated this appropriation by "propos[ing] specific projects that should receive EPF funds". (Sp. Br. at 32 n.12.) For example, with regard to the $ 36.3 million appropriation for "the parks, recreation and historic preservation account", the Legislature specified that: (a) $ 2 million be allocated "for a tide-telemetry and coastal-flooding-warning system"; (b) $ 2.5 million be allocated "for state facility ski center improvements projects"; (c) $ 2.5 million be allocated "for waterfront revitalization and riverfront development projects within the county of Rensselaer"; and (d) $ 8.9 million be allocated "to the office of parks, recreation and historic preservation for the non-administrative costs for state park infrastructure projects".

Those alterations plainly violated the "no segregation" rule of Tremaine I and the [*68] "no alteration" rule of Article VII, Section 4.

e. Veto 453 (R. at 1257.113-.119).

The Governor proposed a $ 4 million appropriation for the Department of Environmental Conservation to be used for services and expenses related to development of the Hudson River Park.

The Legislature added a condition that prohibited disbursement of any funds unless subsequently authorized by the Legislature.

That alteration was an unconstitutional violation of the "no alteration" rule of Article VII, Section 4. It attempted to give the Legislature the same kind of control over spending that it sought to assert through the unconstitutional segregation clause in Tremaine I.

f. Veto 454 (R. at 1257.121-.129).

The Governor proposed a $ 44 million lump sum appropriation for the Department of Environmental Conservation ("DEC") to be used for clean air and clean water projects.

The Legislature segregated $ 25 million of the Governor's lump sum appropriation and "sub-allocated [it] to the Power Authority of the State of New York for clean air for schools projects". The Speaker attempts to justify this alteration on the ground that the Power Authority "is the entity legally [*69] authorized, empowered and expected to implement the clean air for schools program" and that the alteration did not change the total dollar amount of the appropriation. (Sp. Br. at 30.) But-critically-the Speaker does not dispute that the alteration constituted a segregation of the Governor's proposed item of appropriation. It broke the lump sum into pieces (e.g., the clean air for schools program) that did not appear in the item as originally proposed and specified "when, how, or where" the pieces were to be spent. As such, it violated the "no segregation" rule of Tremaine I, the "no alteration" rule of Article VII, Section 4, and the "no substitution" rule of Tremaine II. It effectively transformed the Governor's item into a legislative item.

g. Veto 456 (R. at 1257.135-.141).

The Governor proposed a $ 62.4 million appropriation for the Department of Environmental Conservation to be used to fund costs borne by the "open space account", including costs associated with acquiring a list of particular properties.

The Legislature retained the Governor's appropriation but added at least seven "other potential acquisitions" to the list. (Sp. Br. at 33 n.12.)

That [*70] alteration modified the recipients of the appropriation and thereby changed the "when, how, or where" of spending without striking out the item in its entirety or reducing its dollar amount. As a result, it violated Article VII, Section 4, and Tremaine II.

h. Veto 462 (R. at 1257.181-.186).

The Governor proposed a $ 13 million lump sum appropriation for the New York State Science and Technology Foundation to be used for matching grants to designated Centers for Advanced Technology, the money to be spent pursuant to a spending plan "submitted by the science and technology foundation" and approved by "the director of the budget".

The Legislature imposed its own spending plan on the Governor's lump sum appropriation by segregating it in a way that itemized specific amounts for particular recipients. Ignoring any plan that might be submitted by the Science and Technology Foundation or approved by the Director of the Budget, the Legislature allocated $ 1 million to each of thirteen expressly identified institutions.

The Legislature's suballocation changed the recipients of the Governor's appropriation and altered the "when, how,

or where" of spending. Thus, the alteration [*71] was unconstitutional under Article VII, Section 4, as well as both Tremaine I (as an improper itemization) and Tremaine II (as an improper substitution). n10

n10 This change highlights the potential "log rolling" evils that executive budgeting was meant to eliminate. The Legislature chose its thirteen preferred institutions; some of those institutions might have been selected solely to satisfy the individual interest of a particular legislator. Yet, under the Speaker's approach, the Governor (and the state) would have had to accept all thirtecn-the "good" with the "bad"-in order to get at least some funding for the institutions that most needed (or deserved) it.

i. Veto 463 (R. at 1257.188-.197).

The Governor proposed a $ 1.2 billion lump sum appropriation from the "Dedicated Highway and Bridge Trust Fund" for the Department of Transportation to be used in funding state highways that do not receive federal aid. The Governor also proposed a $ 10 million lump sum appropriation for the Department [*72] of Transportation to be used for "multi-modal" projects.

The Legislature segregated $ 100 million from the Governor's $ 1.2 billion lump sum highway appropriation and itemized particular uses for which the money could be spent-i.e., $ 65 million for state highway and bridge projects; $ 5 million for intercity rail passenger facilities; and $ 30 million for a long list of specifically identified "multi-modal" projects.

Those alterations not only unlawfully itemized the Governor's lump sum highway appropriation in violation of Tremaine I, but also (a) increased the Governor's "multi-modal" appropriation (from $ 10 million to $ 40 million) and (b) segregated that "multi-modal" appropriation after increasing it. The effect of the alterations was to modify the recipients and the "when, how, or where" of the appropriation without striking out the entire item or reducing its dollar amount. Thus, the Legislature violated Article VII, Section 4, and Tremaine II. n11

n11 The Speaker concedes that the Legislature has no authority to increase the dollar amount of an item of appropriation. (See Tr. of Feb. 14, 2002, hr'g, at 73 ("They [i.e., the Legislature] can't increase the amount of the appropriation") (R. at 1468).) Yet that is precisely what the "multi-modal" part of this alteration was designed to do.

[*73]

j. Veto 466 (R. at 1257.215-.220).

The Governor proposed a $ 16 million appropriation for the Urban Development Corporation to be used for services and expenses related to development of the Hudson River Park.

The Legislature's alteration was similar to the ones subject to Vetoes 3 and 453-i.e., it sought to qualify its prior approval by adding a condition that prohibited disbursement of any funds unless subsequently authorized by the Legislature-and, thus, was unconstitutional for the same reasons.

k. Veto 495 (R. at 1257.486-.494).

The Governor proposed a $ 16.8 million lump sum appropriation for the Division of Criminal Justice Services to be used for drug abuse programs, "pursuant to an allocation plan subject to the approval of the director of the budget".

The Legislature segregated the Governor's lump sum appropriation by itemizing-on a subschedule that the Legislature added-more than ninety particular programs and specifying a particular amount that would be available for

each program. None of those programs or amounts was identified in the Governor's proposed item of appropriation and none was approved by the Director of the Budget.

That alteration [*74] itemized the Governor's lump sum appropriation in violation of Tremaine I and changed the recipients of the funds and the "when, how, or where" of spending in violation of Article VII, Section 4, and Tremaine II.

l. Veto 498 (R. at 1257.524-.537).

The Governor proposed a $ 5.8 million lump sum appropriation for the Division of Probation and Correctional Alternatives to be used for "programs which serve as alternatives to incarceration" and a $ 3.5 million lump sum appropriation for the same Division to be used for programs for "prison bound, non-violent offenders".

The Legislature segregated each of the Governor's lump sum appropriations by inserting separate subschedules that specified particular funds for particular programs. For example, a subschedule added by the Legislature divided the $ 5.8 million appropriation among twenty-nine expressly identified programs, with each program receiving a specific amount of money.

Those changes violated the "no alteration" rule of Article VII, Section 4, Tremaine I's "no segregation" rule and Tremaine II's "no substitution" rule. n12

> n12 Because the thirteenth veto-i.e., Veto 494 (R. at 1257.483-.490)-was held to be moot (R. at 12-13) and that ruling has not been challenged, it is not part of this appeal. The legislative alteration that was stricken by Veto 494 purported to authorize transfer of certain land at Creedmoor Psychiatric Center to St. Francis Preparatory High School and to provide that the conveyance be for "monetary consideration not to exceed five hundred thousand dollars". This constituted an unconstitutional attempt by the Legislature to insert private legislation into a budget bill, in violation of Article III, Section 15, of the State Constitution (requiring that a private bill embrace a single subject that is set forth in the bill's title) and Article VII, Section 6 (precluding provisions in an appropriation bill that do not relate specifically to a particular item of appropriation).

[*75]

3. The Legislature Cannot Do Indirectly That Which It Is Prohibited from Doing Directly.

The Speaker has conceded that had the Legislature's amendments been placed directly in the appropriation bills that they cross-referenced, repeated verbatim and altered, those amendments would have violated Article VII, Section 4, since they "substitut[ed]" the Legislature's own items of appropriation for those proposed by the Governor. (R. at 17.) That concession reveals a critical flaw in Appellants' argument here-a flaw that was starkly exposed during oral argument in Supreme Court:

> "THE COURT: . . . [W]ould you agree, Mr. Reiss, if-can you-in all these non-appropriation bills, if you included all that material in the appropriation bill, could you do that?
>
> . . .
>
> "MR. REISS: I think that the procedures don't allow that, your Honor, but that's a point of why they are doing it in non-appropriation bills.
>
> "THE COURT: And that's why you're proving Mr. Shulman's case, you're doing indirectly [that] which you can't do directly."

(R. at 1472-75.)

The Speaker's attempt to dismiss what the Legislature did as simply a matter of "procedure" is flatly inconsistent [*76] with Bankers, which held that Article VII, Section 4, establishes a fundamental substantive limitation on the Legislature's powers. See Bankers, 81 N.Y.2d at 104-05, 595 N.Y.S.2d at 938 (Article Vll, Section 4, "is not . . . a mere procedural requirement" but a "constitutional command [that is] unambiguous"). The First Department recognized that the Legislature's actions constituted an attempt "to accomplish by indirection something which the Constitution directly forbids". (R. at 1902.) Such an attempt violates a fundamental maxim of New York constitutional jurisprudence:

> "[If the Legislature seeks to] evade the Constitution by effecting indirectly that which cannot be done directly, the act is to that extent void, because it violates the spirit of the fundamental law. Otherwise the Constitution would furnish frail protection to the citizen, for it would be at the mercy of ingenious efforts to circumvent its object and to defeat its commands."

People ex rel. Burby v. Howland, 155 N.Y. 270, 280-81 (1898) (emphasis added).

The Court of Appeals has labeled this principle a "familiar rule of statutory construction", [*77] Wein v. State, 39 N.Y.2d 136, 145, 383 N.Y.S.2d 225, 229 (1976), and has emphasized that the State Constitution "guards as effectually against insidious approaches as an open and direct attack", Forster v. Scott, 136 N.Y. 577, 584 (1893). Indeed, this Court applied the principle in two of its most significant opinions involving the Article VII budgeting process.

In Tremaine I, the Court relied upon the principle twice: first, in holding that the segregation clause that the Legislature had inserted in the Governor's appropriation bills violated the Civil Appointments Clause of the Constitution; and second, in recognizing that the Governor's veto power extends to any provision inserted by the Legislature into the Governor's budget bills. The segregation clause added by the Legislature in Tremaine I did not confer authority upon any particular "member of the Legislature", as expressly proscribed by the Civil Appointments Clause, but instead conferred authority upon a generic category of persons-i.e., "the chairman of the Senate finance committee and the chairman of the Assembly ways and means committee". 252 N.Y. at 42. [*78] In ruling that the Legislature could not evade constitutional proscriptions through that sort of indirection, the Court held:

> "Obviously the prohibition of the Constitution applies equally when a member of the Legislature receives a civil appointment ex officio, as chairman of a committee and when he is appointed by name. Otherwise it would be possible . . . for the Legislature to provide, e.g., that the chairman of the Senate finance committee should be ex officio the state superintendent of banks, and to distribute offices to their own members by description rather than by name. No such evasion of the letter and spirit of the Constitution could be tolerated."

Id. at 41-42 (emphasis added).

In concluding that the Governor could veto the segregation clause added by the Legislature, the Court also relied upon the rule that the Legislature could not accomplish indirectly what it is prohibited from doing directly:

> "Assuming, however, that [the segregation clause] was a proper item for the Legislature to insert in a budget appropriation bill, much force attaches to the contention that such a direction is one which the Governor might veto. [*79] It is an item or particular, distinct from the other items of the bill, although not an item of appropriation. The veto power may not be circumvented by any such device of the Legislature."

Id. at 49-50 (emphasis added; citations omitted).

The same principle was applied in Tremaine II. where the Legislature attempted to accomplish a prohibited end-i.e.,

altering the "when, how, or where" of spending authority-through the device of combining its power to "strike out" items proposed by the Governor with its power to "add" new items of appropriation. See Tremaine II, 281 N.Y. at 6. In rejecting that substitution tactic, this Court recognized that a contrary ruling would allow the Legislature to alter indirectly each and every one of the Governor's appropriations, thereby making the Executive Budget submission nothing more than "a mere source of information" for the Legislature and "revers[ing] to the old system [of legislative budgeting] which years of agitation and endeavor have sought to abolish". Id. at 8, 21.

The Court in Tremaine II cautioned that "an extreme exercise of power" can make it difficult [*80] to apply the strict letter of the Constitution and when that happens "[w]e expect in all these matters that the spirit of the Constitution shall be observed and that good sense in its application will govern". 281 N.Y. at 7 (emphases added). That approach is particularly apt in the present case. The "spirit" of the "no alteration" rule should govern even though the Legislature tried to exercise its power in an "extreme" way in an effort to evade the literal language of Article VII, Section 4.

Consistent with the above decisions, the First Department correctly held that the Governor's items of appropriation, including the "function", "context" and "when, how, or where" of spending, could not be indirectly altered by the Legislature through amendments to so-called "non-appropriation" bills that incorporated those items of appropriation by reference, repeated their language verbatim and then changed the "function", "context" or "when, how, or where" terms of the measures. (R. at 1902.)

4. Appellants' Other Argnments in Defense of the Constitutionality of the Legislature's Alterations Lack Merit.

The Speaker argues that the Legislature should be free [*81] to place provisions that alter items of appropriation into a "non-appropriation" bill simply because such bills are subject to the Governor's general veto. (Sp. Br. at 47, 58.) The State Constitution, however, grants the Governor authority to line-item veto items of appropriation-not just to exercise a general veto over bills in which they are contained. The Governor's line-item veto power would be circumvented if the Legislature could place provisions that effectively create new items of appropriation into a "non-appropriation" bill subject only to the general veto. See § III, infra. Likewise, Article VII, Section 4, of the State Constitution prohibits the Legislature from altering the Governor's items of appropriation except in very limited ways. If the Speaker's argument were accepted, the "no alteration" rule would become a dead letter, since it could be avoided easily and with impunity so long as the offending provisions were placed in so-called "non-appropriation" bills instead of directly in the appropriation bills that they altered. See § I.B.3, supra. The fundamental point here is that Article Vll, Section 4, restricts legislative power. Appellants cannot excuse [*82] violations of Section 4 on the ground that their unconstitutional alterations can be vetoed by the Governor. Even if true, it is the initial legislative act itself that is the problem-whether or not the problem is later correctible by a veto. n13

n13 Moreover, a gubernatorial veto can be overridden by a two-thirds vote of the Legislature. See N.Y. Const. art. VII, § 7. Under the Speaker's theory, such a legislative override could resuscitate a previous violation of Section 4-which is flatly contrary to this Court's holding in the Bankers case. See Bankers, 81 N.Y.2d at 104, 595 N.Y.S.2d at 938.

The Speaker argues that the authorities relied upon by the First Department concern alterations to appropriation bills and "are therefore inapposite" because "concerns about the Legislature's circumvention of gubernatorial review are not present in the context of the non-appropriation bills" (Sp. Br. at 49); the Senate likewise argues that there is no restriction similar to Article VII, Section [*83] 4, "with respect to the Governor's proposed non-appropriation legislation" (Sen. Br. at 9). Both those arguments miss the point. The issue is not whether the Legislature's amendments are unconstitutional because they altered so-called "non-appropriation" bills but whether they are unconstitutional because they indirectly altered items of appropriation in appropriation bills through the tactic of inserting those alterations into "non-appropriation" bills. In fact, the Legislature's amendments changed absolutely nothing in the

so-called "non-appropriation" bills; their sole effect and purpose was to alter items in the appropriation bills. As the First Department held, such an indirect assault on the Governor's appropriation bills is as much a violation of Article VII, Section 4, as a direct attack on the appropriation bills themselves. (R. at 1901-02.)

The Speaker's argument that the Governor has failed to identify a constitutional provision "specifically limiting the Legislature's actions with respect to non-appropriation bills" (Sp. Br. at 43) is off point for the same reason. It is the (indirect) alteration of the Governor's appropriation bills that is the evil-and Article VII, Section [*84] 4, is the specific limitation on that legislative action.

The Senate's related assertion-repeated throughout its brief (see, e.g.. Sen. Br. at 1, 6, 32, 34, 36)-that the courts below held that the "no alteration" rule applies to so-called "non-appropriation" bills is simply wrong as a factual matter. Neither court made such a ruling. Nor is the Senate correct in arguing that "the holdings below . . . discard the constitutional distinction between appropriation and non-appropriation bills". (Sen. Br. at 3.) Rather, it was the Legislature in this case that tried to "discard" that distinction-by purporting to incorporate items of appropriation by reference from appropriation bills into so-called "non-appropriation" bills.

The Speaker characterizes the Governor's position as "revolutionary" (Sp. Br. at 46) and as one that would confer on the Governor "revolutionary authority over policymaking" (Sp. Br. at 44). The Governor, however, claims only the authority granted by the New York Constitution. The Speaker and the Senate simply refuse to accept that with the adoption of the Executive Budget System came a sharp curtailment of the Legislature's budgetary powers. In the words of Elihu [*85] Root, president of the 1915 Constitutional Convention, the new system of executive budgeting was "a radical change in the method of providing for the necessary expenditures of the State". 1915 Constitutional Convention Doc. No. 54, "Report of Special Committee to Prepare and Report a Form of Address to the People", at 6 (emphasis added) (R. at 1603).

By the same token, however, the new system of executive budgeting also placed constraints on the Governor-and those are constraints that the Governor fully accepts (and does not seek to alter) here. For example, both the Speaker and the Senate quote from the Report of the Committee on State Finances, Revenues and Expenditures at the 1915 Constitutional Convention that the Executive Budget System "would not add one iota to the power that [the Governor] now possesses through the veto of items in the appropriation bills". (Sp. Br. at 54; Sen. Br. at 56.) We do not disagree. The Governor's veto power was not enhanced by Article VII; in fact, it was reduced because it was limited to newly added items. See supra at 10. The truly "revolutionary" change brought by Article VII did not involve the line-item veto but the grant to the Governor [*86] of the authority to propose items of appropriation and the corresponding restrictions on the Legislature's ability to alter those items.

The Speaker also quotes a passage stating that, under the Executive Budget System, "[i]t would thus be the Legislature which would have the final word". (Sp. Br. at 54.) But all that means is that the Executive Budget System transfers to the Legislature the "final word" that the Governor had under the old system of legislative budgeting. Previously, the Legislature enacted the budget and the Governor had the "final word" by approving or rejecting the Legislature's proposed items of appropriation. Now it is the Governor who proposes the budget and the Legislature who has the "final word" by approving or rejecting (or reducing) the Governor's proposed items. In that way, the Executive Budget System guarantees that the Governor cannot become "'a czar'". (Sen. Br. at 57 (quoting 1919 Report of the Reconstruction Commission to Governor Alfred E. Smith (R. at 1773)).) The rulings below are perfectly consistent with the legislative history cited by the Speaker and the Senate.

Neither Saratoga County Chamber of Commerce, Inc. v. Pataki, 100 N.Y.2d 801 (2003) [*87] ("Saratoga"), nor In re Thirty-Fourth Street Railroad Co.. 102 N.Y. 343 (1886) ("In re Thirty-Fourth")-both of which the Speaker cites repeatedly (Sp. Br. at 2, 5, 16, 46 (Saratoga). 3, 25, 27, 44, 48 (In re Thirty-Fourth))-supports Appellants' position. Those opinions deal with general legislative power-and not the specific constraints that Article VII places on that power in the area of budgeting. Saratoga concerns the Governor's authority to enter into gaming agreements with Indian tribes. See Saratoga, 100 N.Y.2d at 808. In re Thirty-Fourth addresses the Legislature's ability to impose restrictions upon

construction of street railroads. See In re Thirty-Fourth, 102 N.Y. at 348. Neither has anything to do with the budget process or would sanction a legislative end run around Article VII, Section 4.

Thus, when Saratoga says that "the separation of powers requires that the Legislature make the critical policy decisions" (Sp. Br. at 2 (quoting Saratoga. 100 N.Y.2d at 821-22 (2003) (citation omitted)), that is certainly true as a general proposition. But when functions legislative in nature [*88] were transferred to the Governor in connection with budgeting, so too was authority to make policy in that specific area.

Likewise, the Governor agrees with the general principle stated in In re Thirty-Fourth that "[n]othing is subtracted from the sum of legislative power, except that which is expressly or by necessary implication withdrawn". (Sp. Br. at 27 (quoting In re Thirty-Fourth. 102 N.Y. at 350-51). Here, however, legislative power in regard to the Governor's appropriation bills was "expressly or by necessary implication withdrawn". That was the very purpose of Article VII, Section 4.

The Speaker invents a nonexistent problem when he asserts that the decisions below would force the Legislature to "face[] 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". (Sp. Br. at 44 (emphasis added).) As Supreme Court made clear, this case is not about substantive, general legislation inserted into the Governor's appropriation bills. (R. at 24.) [*89] In addition, the Speaker fails to mention the Legislature's ability, arising from its power to reject or reduce a proposed item of appropriation, to persuade the Governor to negotiate for removal of any provision that the Legislature dislikes.

Nor did the First Department hold, or the Governor argue, that the Governor's appropriation bills may include either "changes to substantive law" unrelated to items of appropriation (Sp. Br. at 25) or "whatever policy and programmatic provision he chooses" (Sp. Br. at 42). Rather, the First Department held (and the Governor recognizes) that, consistent with Article Vll, Section 6, "all provisions within the Governor's appropriation bills [must] 'relate[] specifically to some particular appropriation in the bill, and any such provision shall be limited in its operation to such appropriation'". (R. at 1900.) Each provision proposed by the Governor and altered by the Legislature met those requirements.

Using an example to illustrate the point, Supreme Court explained that while the Governor may not propose to "alter the definition of robbery in a bill appropriating monies to construct a new prison", the Governor may include a description of [*90] "the location and type of prison to be built". (R. at 24.) And such a description, if included, could not be altered by the Legislature, although the Legislature certainly could refuse to approve the Governor's appropriation consistent with the teaching of Saxton v. Carey.

The Speaker disingenuously argues that, under the First Department's decision, "the Legislature is forever preempted from proposing policies that 'affect' the 'when, how and where' of [an] appropriation". (Sp. Br. at 44; see also Sp. Br. at 42, 45, 50 n.20.) What the Speaker means by the word "affect" in this context is unclear. After all, the operative word in the Constitution is "alter" (not "affect"). What is clear, however, is that, pursuant to Article VII, Section 3, the Governor is empowered to propose items of appropriation (including the "function", the "context" and the "when, how, or where" of spending), that those "function", "context" and "when, how, or where" measures are integral parts of the items so proposed (they are not, as the Speaker mischaracterizes them (see Sp. Br. at 45), provisions merely "affecting" the appropriations) and that once those items are proposed by the Governor, [*91] the Legislature-pursuant to Article VII, Section 4-is precluded from altering them (either directly or indirectly) except to strike them out or reduce their amount.

Apart from that restriction, the Legislature may enact whatever substantive legislation it desires, even if it might "affect" one of the Governor's proposed items. The Speaker maintains that, in the Governor's view, "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". (Sp. Br. at 46; see also Sp. Br. at 51 n.21.) Although there is nothing even

remotely like the Speaker's hypothetical in the present case, the Legislature is perfectly free to enact a new item of appropriation (subject to the Governor's line-item veto) to fund general design and safety criteria for police cars throughout the state. What it cannot do, however, is alter the Governor's item of appropriation for five hundred police cars by adding a condition that prevents money from being spent until approved by subsequent [*92] legislation or directing that the appropriation be available only for specific municipalities. n14

n14 Nor, if the appropriation was for "police cars with bullet proof glass", could the Legislature change the appropriation to "police cars without bullet proof glass" (or vice versa).

The Speaker complains that the Legislature is left with "only a narrow Hobson's choice" if it does not like "when, how, or where" aspects of an item of appropriation-i.e., it can either strike the appropriation in its entirety or accept the appropriation with its objectionable terms. (Sp. Br. at 45-46.) This, however, is not a "Hobson's choice" but part of the plan carefully established by the Executive Budget System. Moreover, the Speaker ignores the ability of the Legislature to use (or threaten to use) its power to strike as a means of commencing a negotiation with the Governor. To use one of the Speaker's hypotheticals (another hypothetical that has nothing to do with the particular appropriations in this case), if the Governor [*93] were to propose an appropriation to pay retirement benefits to state employees that conditioned receipt of those benefits on an employee's reaching the age of eighty (Sp. Br. at 46), it is true that the Legislature could not alter the appropriation by changing that age. But the Legislature could use its considerable power to strike to force a negotiation with the Governor to change the age. n15 The Speaker's position would remove the Legislature's incentive to negotiate; it would, in the Speaker's words, create a "my way or the highway" approach for the Legislature.

n15 Both Saxton and Pataki v. New York State Assembly recognize the power of the Legislature, inherent in Article VII, to induce the Governor to negotiate. As the Saxton Court stated, "'[i]f the Legislature is or should become concerned with" aspects of the Governor's items of appropriation, "'the remedy is in their hands"; they have the ability to secure "'agreement as to the limitations and conditions they [i.e., the appropriations] contain'". Saxton. 44 N.Y.2d at 551 (quoting Hidley v Rockefeller. 28 N.Y.2d at 446 (Breitel, J., dissenting). The Third Department, citing Saxton. put it this way in Pataki v. New York State Assembly. 2003 WL 23415952, at *3: "we are of the opinion that [the Legislature's] proper constitutional action was to refuse to pass [the Governor's] appropriation bills and induce negotiations".

[*94]

Finally, the Speaker argues that his interpretation of the relative power of the Legislature and Governor in the budget process is more "workable in practice" than the Executive Budget System recognized by the courts below. (Sp. Br. at 51.) This is a mistaken invitation for the Court to get involved in the political question of the causes of purported difficulties in enacting a state budget. The fact of the matter is that the Executive Budget System-if adhered to by the Governor and the Legislature-is entirely "workable in practice" because, by giving neither the Governor nor the Legislature unbridled power over budgeting, it creates the potential for constructive negotiation and political compromise. And if the process does not work adequately, "the remedy lies not in the courtroom, but in the voting booth". Saxton v. Carey, 44 N.Y.2d at 551, 406 N.Y.S.2d. at 735.

C. The Legislature's Unconstitutional Alteratious Are Void.

The courts below held that where, as here, the Legislature passes unconstitutional alterations to items of appropriation proposed by the Governor, the alterations are void ab initio. (R. at 24; see also R. at 1903.) That [*95] ruling follows directly from this Court's decision in Tremaine 1.

In Tremaine I, the Court held that the Legislature's amendments that purported to confer segregation power upon the legislative chairmen were unconstitutional and void. 252 N.Y. at 45. The Court explained the relationship between

the Governor's original appropriations and the unconstitutional conditions added by the Legislature as follows:

> "So far as the appropriations themselves are concerned, they may be separated from the unconstitutional parts of the statutes, and are therefore the law of the state. Both Legislature and Governor clearly intended that the departments should be properly maintained in any event and provided therefor. The Legislature may not attach void conditions to an appropriation bill. If it attempts to do so, the attempt and not the appropriation fails."

Id. (emphases added; citation omitted). As in Tremaine I. the appropriations at issue here became "the law of the state" when passed by the Legislature while the amendments added by the Legislature are "void" and "fail".

In Bankers, the most recent Court of Appeals decision regarding the [*96] budget process, the Court of Appeals affirmed a ruling by the Appellate Division that unconstitutional provisions in appropriation bills are "null and void" as a matter of law. 81 N.Y.2d at 100-01. Similarly, Attorney General Abrams explained in his 1982 Opinion that the Governor's "disapproval" of the Legislature's unconstitutional alterations to items of appropriation submitted by the Governor "is not subject to override", Op. Att'y Gen. 82-F5, 1982 N.Y. AG LEXIS 77, at * I (1982), a position fully consistent with the decisions finding that unconstitutional alterations are void. n16

> n16 In Pataki v. New York State Assembly, the Assembly agreed that unconstitutional alterations are "void". (See Brief for Defendant-Appellant New York State Assembly at 61, Pataki v. New York State Assembly, Index No. 4864-1 (3d Dep't) ("language that may not constitutionally be included in the Governor's appropriation bills is null and void").)

II. THE COURTS BELOW CORRECTLY DECLINED [*97] **TO DECIDE THE CONSTITUTIONALITY OF THE GOVERNOR'S LINE-ITEM VETOES.**

After affirming Supreme Court's determination that the Legislature's amendments were unconstitutional, the First Department concluded that the lower court had correctly declined to address the constitutionality of the Governor's vetoes of those amendments. The Speaker's contention that the courts below were required to decide the latter issue (Sp. Br. at 55-56) and that their decision on the former issue was therefore an advisory opinion (Sp. Br. at 1, 55) turns the record on its head. With both Supreme Court and the First Department having held the vetoed amendments to be unconstitutional and void ab initio, it would have been a purely advisory opinion if those courts had then gone on to consider the constitutionality of the Governor's vetoes.

A. The Constitutionality of the Governor's Line-Item Vetoes Was Not Part of the Governor's Ninth Affirmative Defeuse.

The Governor's Ninth Affirmative Defense states that:

> "Plaintiff's claims are barred, in whole or in part, because the items that were subject to the vetoes in question were unconstitutional and therefore void and unenforceable [*98] ab initio."

(R. at 795.)

Supreme Court expressed concern that this defense should in fact have been asserted as a counterclaim for declaratory relief. (R. at 1318-20.) At the court's suggestion-and to avoid delay that would have been caused by filing a counterclaim-the parties stipulated that "[t]he Court may fully adjudicate the issue raised in defendant's Ninth Affirmative Defense without the need for defendant to file a counterclaim seeking a declaration of unconstitutionality"

and the Speaker "waive[d] his right to assert either in [Supreme] Court or in any appellate court, that the issue raised in defendant's Ninth Affirmative Defense was not properly before [Supreme] Court on the parties' cross-motions for summary judgment or that the issue had to be raised by means of a counterclaim seeking declaratory relief rather than by means of an affirmative defense". (R. at 1394-95.) That stipulation was recognized and relied upon by Supreme Court. (R. at 10 ("While the Governor's answer did not contain a counterclaim seeking affirmative relief, the parties stipulated that, in addition to the issue as to whether the line-item vetoes were valid, there is before me a [*99] request by the Governor for a declaration that the items vetoed were unconstitutionally enacted by the legislature").)

It is clear from the above that the Governor's Ninth Affirmative Defense makes no allegation about-and requires no adjudication of-the constitutionality of the Governor's line-item vetoes. Whether the Governor should more properly have raised the issue asserted in the defense by counterclaim is purely academic-because the parties stipulated that the issue could be resolved as if it had been raised by counterclaim. When the Speaker claims that an essential element of the defense was the constitutionality of the Governor's vetoes (Sp. Br. at 42, 55-56), he ignores both the plain language of the defense and the procedural history described above (including his own stipulation). There is only one prong of the defense-i.e., the constitutionality of the Legislature's alterations-and the Speaker stipulated that that prong was properly before the court.

B. A Decision Concerning the Constitutionality of the Governor's Vetoes Would Have Been an Improper Advisory Opinion.

The lower courts declined to address the constitutionality of the Governor's vetoes [*100] because a determination on that issue would have been an improper advisory opinion. (R. at 24-25, 1902.) A court should avoid deciding questions that are not necessary to its judgment. This rule is particularly stringent in regard to constitutional issues. See Peters v. New York City Hous. Auth., 307 N.Y. 519, 527 (1954) ("It is well settled that issues of constitutionality should not be decided before they need be").

For example, in T.D. v. New York State Office of Mental Health. 91 N.Y.2d 860, 862, 668 N.Y.S.2d 153, 154 (1997), this Court stated that the Appellate Division should not have ruled that a regulation was invalid on constitutional grounds when it had already found the regulation to be beyond the statutory authority of the relevant state agency. In going on to consider the constitutional question, "the Appellate Division issued an inappropriate advisory opinion". Id at 862, 668 N.Y.S.2d at 154.

The decision of the courts below complied with these established principles. With the courts having held that the Legislature's alterations were unconstitutional (and therefore void ab initio), a decision on the constitutionality [*101] of the Governor's vetoes would have had absolutely no impact on the outcome of the case. Whether properly vetoed or not, the Legislature's alterations were a nullity-as both Supreme Court and the First Department found. (R. at 25 ("But since I have determined that the vetoed provisions were not constitutionally adopted, there is no need to determine whether the items were constitutionally vetoed"); R. at 1902 ("Finally, Supreme Court properly declined to rule on the constitutionality of the Governor's exercise of the line-item veto to strike the provisions that had been unconstitutionally enacted").) Having found the alterations a nullity on one constitutional ground, the lower courts need not (and should not) have gone on to consider whether they were also a nullity on another constitutional ground. n17

n17 Appellants suggest that by not ruling on the line-item vetoes, the courts below "implicitly" sanctioned them. (Sp. Br. at 57 ("both courts below implicitly held that the Governor may use unconstitutional means to invalidate a law"); Sen. Br. at 29 ("the court's holding . . . had precisely the effect of giving the Governor veto power under the Constitution").) But the courts did nothing of the sort. They explicitly declined to reach the issue of the vetoes. They did not sanction what the Governor did-either explicitly or implicitly. Appellants must know that, in future cases, neither lower court opinion could be cited in support of the vetoes.

[*102]

III. THE GOVERNOR'S LINE-ITEM VETOES WERE CONSTITUTIONAL.

If this Court does reach the issue, it should uphold the constitutionality of the Governor's line-item vetoes. Pursuant to the second paragraph of Article VII, Section 4, "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". Article IV, Section 7, provides that "[i]f 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".

Appellants argue that the Governor's exercise of the line-item veto was unconstitutional because it struck provisions that were not "items of appropriation". (Sp. Br. at 26-33; see Sen. Br. at 90.) There are two independent responses to that argument: (1) the alterations made by the Legislature effectively created new items of appropriation that could properly be vetoed; and (2) the line-item veto can be used to strike unconstitutional alterations to items of appropriation. Both responses share a common foundation: the Governor must be able to strike provisions such as [*103] those enacted by the Legislature or the authority granted to the Governor under Article IV, Section 7, to line-item veto items of appropriation would be nullified.

A. The Governor May Properly Veto Alterations That Effectively Create New Items of Appropriation.

The Governor's position is not, as the Speaker suggests, that "the line-item veto . . . extends to nonappropriate provisions so long as they merely relate to appropriations". (Sp. Br. at 38.) Rather, the Governor contends that by cross-referencing the Governor's proposed items of appropriation (items that the Legislature had previously approved in their entirety), incorporating those items by reference, repeating their language verbatim and then changing the items in various ways, the Legislature effectively created new, substitute items of appropriation that were subject to the line-item veto pursuant to Article IV, Section 7, which allows the Governor to veto an item of appropriation in "any bill presented to the Governor". (emphasis added). The Speaker is simply wrong when he contends that the vetoed provisions "did not appropriate money". (Sp. Br. at 41.) To the contrary, every single one of the vetoed provisions [*104] appropriated money by incorporating by reference all the particulars supplied by the Governor in his proposed items. n18

n18 Moreover, Appellants' argument ignores the fact that the segregation clause that was properly vetoed in Tremaine I did not appropriate money. See 252 N.Y. at 49-50. It could be vetoed because it was an unconstitutional alteration by the Legislature to the Governor's item of appropriation. See infra III.B. The same is true of the legislative alteration that Attorney General Lefkowitz held was properly vetoed; it too did not appropriate money. See Op. Att'y Gen. 76, 1978 WL 27523 (1978).

Although no New York case addresses this specific issue, cases from other jurisdictions directly support the constitutionality of the Governor's vetoes. The Speaker argues that courts in other states "have recognized that the line-item veto authority extends only to provisions that appropriate money-not to provisions that allocate already appropriate funds". (Sp. Br. at 23.) [*105] The Speaker is wrong-as demonstrated by two cases that are directly on point.

In Rios v. Symington, 833 P.2d 20, 21 (Ariz. 1992), the Arizona Legislature approved various items of appropriation, which the Governor had proposed to fund certain identified programs, and then enacted legislation that transferred (or re-allocated) money from those programs to the state's "general fund". The Governor line-item vetoed the fund transfers and the Arizona Supreme Court held that, under a line-item veto provision identical to New York's, "the Governor's veto of the special fund transfers is valid". Id at 23.

The court reasoned, in language particularly pertinent here, that although "[v]iewed in isolation, the fund transfers themselves are not clearly 'items of appropriation'", "we do not believe that such a narrow view reflects the proper interplay between the legislative and executive branches". Id. at 26. The court explained that the transfer clauses in

effect created new items of appropriation, and if they could not be vetoed, it "would permit the Legislature to do indirectly that which it may not do directly, and would seriously limit the [*106] Executive's constitutional role in the appropriation process". Id.

The court emphasized that its result was necessary in order to avoid precisely what the Legislature attempted to do in this case-i.e., approve an item of appropriation proposed by the Governor and then, through another bill, completely alter the item so as to evade a veto, thereby nullifying the Governor's line-item veto authority:

> "If we were to accept the argument that such transfers are not subject to the line item veto, a future Legislature eould, for example, enact an appropriation bill and, knowing the Governor's views and priorities, appropriate a sufficient amount for a given purpose so as to gain the Governor's approval, rather than a veto. The Legislature could then later direct that some or all of that fund be transferred to another fund. By placing the transfer provision within a larger transfer bill, the Legislature could evade the Governor's line item veto power notwithstanding the fact that the later transfers completely alter the original appropriation. Such procedures, if authorized, would eviscerate the line item veto power which the Constitution intended the Governor [*107] to have. Although we are urged to construe the Governor's line item veto narrowly and strictly, we hold that it should be construed in such a way as to carry out the obvious constitutional intent."

Id. at 26 (emphasis added).

The Supreme Court of Washington reached a similar result in Washington State Legislature v. Lowry, 931 P.2d 885 (Wash. 1997). There, the court considered line-item vetoes exercised pursuant to Article III, Section 12, of the Washington State Constitution, which (like New York's Constitution) "confers upon the Governor the power to veto appropriation items". Lowry. 931 P.2d at 892. Although Washington has a more expansive line-item veto provision than New York, the particular part of the provision that the court in Lowry was applying and construing-i.e., the one dealing with "appropriation items"-is virtually identical to New York's. Id. at 892-93. n19 The Governor line-item vetoed various "provisos" that the Legislature had attached to appropriations bills without vetoing the dollar amounts of the appropriations themselves. Id. at 888-89.

> n19 Washington's constitution, unlike New York's, also allows the Governor to veto "sections" of bills that contain "several sections". Id. at 888. That provision was not implicated in the part of the Lowry opinion dealing with the veto of "appropriation items". See id. at 892-96.

[*108]

The Legislature, like Appellants here, contended that this was unconstitutional-that "the Governor's line-item veto power extends only to dollar amounts contained in an appropriations bill because language in an appropriations bill conditioning expenditure of funds does not constitute an 'appropriations item'". Id. at 892 (emphasis added). The court rejected that argument, explaining that "[t]he Legislature's view of an 'appropriations item' is too narrow, and would eviscerate the Governor's line item veto power". Id. at 893 (emphasis added). The court held, in a ruling that supports each of the vetoes in the present case, that "any budget proviso with a fiscal purpose contained in an omnibus appropriations bill is an 'appropriations item' under Article III, section 12" and that "the Governor's appropriations item veto power extends to each such proviso". Id.

Significantly, a number of the provisions that were vetoed in Lowry are similar to those vetoed here. For example, one of the provisos qualified a $ 95-million appropriation for higher education by limiting to a maximum of $ 249,000 the funds available for certain scholarships; [*109] one of the provisos conditioned a $ 145 million appropriation for the Washington State Patrol by defining the officers who were eligible for assigned vehicles; and another proviso sought to set a maximum head count for the State Patrol. Id at 893-94. The court found all those provisos properly

vetoed-including ones that did not affect the dollar amount of the appropriation but instead conditioned or qualified its availability or use. As the court explained:

> "[T]hese nondollar provisos are intimately connected to the expenditure of funds by executive agencies and cannot be viewed in isolation from such expenditures . . . . Reading nondollar budget provisos in pari materia with the appropriations they reference compels the conclusion they are 'appropriations items.'"

Id. at 895 (emphases added; citations omitted). In effect, the court held, any legislative alteration to an item of appropriation should itself be considered an item of appropriation that is subject to the Governor's line-item veto. See id. at 896.

In reaching its conclusion the court in Lowry was heavily influenced by the same sort of desire to [*110] discourage the Legislature's use of artful drafting to undermine the line-item veto that, we submit, should motivate this Court's decision. The court noted that "[w]ith respect to vetoes, we have indicated the desirability of elevating substance over form". Id at 892 n.6. In particularly pertinent language, the court stated that:

> "To treat nondollar provisos as something other than appropriations items to which the line veto does not extend only encourages legislative logrolling, forestalls treatment of policy issues on their individual merits, and ultimately undercuts the benefits of the line item veto."

Id. at 895 (emphasis added). To accept the Legislature's restrictive definition of an "item", the court cautioned, would "defeat[] sound public policy", "would encourage legislators to weave substantive policy provisions and fiscal measures into appropriations bills" and would enable the Legislature "to slip substantive law provisos into appropriations bills to derive political advantage against the executive, thereby upsetting the constitutional framework of checks and balances". Id. at 895-96.

The court's analysis [*111] in Lowry resonates here. The alterations vetoed by the Governor should not be viewed narrowly and in isolation but within the broader framework of the items of appropriation that they cross-referenced, quoted verbatim and sought to change and the underlying purpose of New York's Executive Budget System. The Legislature attempted to substitute items of appropriation that, in critical respects, bore no resemblance to the items originally proposed by the Governor and to do so through a clever tactic that (it hoped) would avoid a veto. Such substitutions are properly treated as items of appropriation and are therefore susceptible to the line-item veto.

The cases from outside New York upon which the Speaker principally relies-i.e., Bengzon v. Secretary of Justice of Philippine Islands, 299 U.S. 410 (1937); Harbor v. Deukmejian, 742 P.2d 1290 (Cal. 1987); State ex rel. Akron Educ. Ass'n v. Essex. 351 N.E.2d 118 (Ohio 1976); Jessen Assocs., Inc. v. Bullock. 531 S.W.2d 593 (Tex. 1975); Commonwealth v. Dodson, 11 S.E.2d 120 (Va. 1940); and Fulmore v. Lane. 140 S.W. 405 (Tex. 1911)-do not [*112] lead to a contrary conclusion. Each of those cases, except for Fulmore, involves the question of whether vetoes could be exercised against general, substantive legislation. Fulmore involves the question of whether vetoes could be exercised against only part of an item of appropriation. Here, by contrast, the vetoed provisions were neither substantive legislation nor pieces or parts of items, but rather were entire items of appropriation in themselves.

Moreover, none of the cases cited by the Speaker concerns a constitutional restriction similar to Article VII, Section 4, that prevents the Legislature from making substantive alterations to items of appropriation proposed by the Executive or from substituting its own items for the Executive's items. Thus, the cases are irrelevant to the factual circumstances and issues involved here.

B. The Governor May Properly Veto Unconstitutional Alterations Made By the Legislature to Items of Appropriation.

Where, as here, the Legislature unconstitutionally alters the Governor's appropriation bills, those alterations are

subject to the Governor's line-item veto. That is the clear lesson of Tremaine I and the 1978 and 1982 [*113] Opinions of Attorneys General Lefkowitz and Abrams respectively and is the direct holding of case law outside New York upon which the Speaker himself relies.

In Tremaine 1. the plaintiff "assert[ed] that the Governor had no power to veto the segregation clause [added by the Legislature] without vetoing the items to which it referred". 252 N.Y. at 37. This Court first held that the segregation clause violated Article III, Section 7, and therefore "is unconstitutional and void". Id. at 45. The Court then expressed its strong view that the clause could be vetoed by the Governor even though it was not technically an item of appropriation. Any other result, the Court reasoned, would enable the Legislature, through artful drafting, to eviscerate the Governor's line-item veto authority:

> "Assuming, however, that section 11 was a proper item for the Legislature to insert in a budget appropriation bill, much force attaches to the contention that such a direction is one which the Governor might veto. It is an item or particular, distinct from the other items of the bill, although not an item of appropriation. The veto power may not be circumvented [*114] by any such device of the Legislature."

Id. at 49-50 (emphases added; citations omitted). n20

> n20 The Speaker argues that "[a]t 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" and that the "danger of unchecked legislative action is not present" here because "the Governor retains a general veto over a non-appropriation bill". (Sp. Br. at 60; emphasis in original.) The Speaker ignores the fact that the "veto power" which Tremaine I held "may not be circumvented" is the power to line-item veto granted the Governor under Article IV, Section 7-and not the Governor's general veto power. Tremaine I therefore fully supports the position that the Governor must be able to protect the power to line-item veto by striking those unconstitutional provisions inserted by the Legislature that seek to (and would) eviscerate that power.

[*115]

Attorney General Lefkowitz reached a similar conclusion in his 1978 opinion. There, as here, the Legislature approved an item of appropriation proposed by the Governor in an earlier appropriation bill and then, without changing the appropriation's dollar amount, it incorporated the appropriation into a succeeding budget bill "for the sole purpose of adding qualifying language thereto". Op. Att'y Gen. 76, 1978 WL 27523 (1978). The Attorney General, like the lower courts in this case, concluded that the Legislature's actions violated Article Vll, Section 4. Additionally, the Attorney General advised that, pursuant to Article IV, Section 7, "the Governor had the power to line item veto" the improperly added provision. Id. Likewise, Attorney General Abrams in his 1982 Opinion held that the Governor may "disapprov[e]" unconstitutional provisions inserted by the Legislature and that, in such circumstances, the Governor's vetoes are "not subject to override". Op. Att'y Gen. 82-F5, 1982 N.Y. AG LEXIS, at *1 (1982). n21

> n21 In Pataki v. New York State Assembly, the Assembly conceded the Governor's veto power in this area. The Assembly submitted that "[t]he only logical and consistent interpretation of Tremaine 1 [and] the 1982 Attorney General's opinion" is that "the Governor [is] empowered to 'undo' any ultra vires acts" by the Legislature and that "removal" of unconstitutional provisions from budget bills "is merely a permissible 'revision' of the bill to conform it to the requisites of the Constitution". (Brief for Defendant-Appellant New York State Assembly at 60-61, Pataki v. New York State Assembly. Index No. 4864-1 (3d Dep't).)

[*116]

Courts in other states have also found that a governor may veto unconstitutional alterations to appropriation bills. For example, in Dodson-a case that the Speaker himself cites-the court concluded that the Governor could line-item veto any part of a budget bill that was unconstitutional:

> "Of course, if for any reason any item may be unconstitutional it may be stricken out, for it would be futile to require the Keeper of the Rolls to transcribe it thereon."

Id. at 127 (emphasis added). The court then assessed the constitutionality of each of the vetoed provisions, explaining that even though they were not themselves "items of appropriation", the Governor's vetoes "must be sustained if they deal with matters which should not have been put in the bill at all". Id. at 131. The court held that one of the provisions, although not properly vetoed as an "item of appropriation", nevertheless "was superfluous and the veto should be sustained". Id. at 133. n22

> n22 The court in Dodson ruled that certain vetoes exercised by the Governor were improper because they struck only parts of items of appropriation rather than the items as a whole. See, e.g., 11 S.E.2d at 130. However, the court did not consider whether the vetoed provisions constituted substitute items of appropriation-which is understandable since Virginia does not have a budget system, like New York's, that prohibits the Legislature from altering the Governor's proposed items of appropriation or substituting its own items of appropriation.

[*117]

The Speaker's reliance on Colorado Gen. Assembly v. Lamm, 704 P.2d 1371 (Colo. 1985), and Harbor. 742 P.2d 1290, for the proposition that the Governor has no right to line-item veto unconstitutional provisions (Sp. Br. at 60-61) is misplaced. In Lamm, the vetoed provisions were not found to be unconstitutional. See Lamm. 704 P.2d at 1381-82. And in Harbor, the provisions added by the Legislature were found to be unconstitutional, but the issue of whether the Governor could veto them based upon their unconstitutionality was not addressed. 43 Cal.3d at 1095 & n.17 (whether "the executive" may veto legislation on the ground that it is unconstitutional has been considered "on the federal level" but was not relevant to the question of whether the Governor had standing to assert that a legislative provision was unconstitutional).

The Speaker argues that the Governor's line-item vetoes resulted in the enactment of bills never approved by the Legislature. (Sp. Br. at 3, 23.) That occurs, however, whenever the Governor uses the line-item veto. Moreover, the Speaker's argument is based upon a false premise. The Legislature [*118] passed the Governor's initial items of appropriation without condition or qualification-thereby indicating its approval of them in their original form as proposed by the Governor and giving them immediate legal effect. When the unconstitutionally altered items were stricken, the original items as approved by the Legislature remained.

Appellants' contention that the Governor's position would allow the Governor to abuse the line-item veto power by "selectively" choosing which unconstitutional provisions to strike and which ones to accept (Sp. Br. at 18, 58; Sen. Br. at 60-61) is irrelevant to the constitutionality of the vetoes. The Governor is not required to find and strike every unconstitutional provision that the Legislature inserts into the Governor's budget bills. Likewise, nothing prevents the Governor from electing not to use the general veto over substantive legislation even when he believes it to be unconstitutional. Appellants cannot seriously contend that all of the Legislature's unconstitutional alterations should remain intact because only some of them were stricken. The remedy for such alleged "selectivity" is for the Legislature not to act unconstitutionally in the first [*119] place.

Under the reasoning of Tremaine I, the opinions of Attorneys General Lefkowitz and Abrams and the holding of Dodson, any provision in a budget bill that might not technically be an item of appropriation is nevertheless properly vetoed if, as in this case, it is an unconstitutional alteration to an item of appropriation.

Conclusion

For the foregoing reasons, this Court should affirm the decision of the First Department.

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Respectfully submitted,

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