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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Reply Brief: Appellant-Petitioner

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

TEXT: PRELIMINARY STATEMENT

The Governor's brief confirms two things: First, this case and its companion, Pataki v. New York State Assembly, represent an attempted gubernatorial arrogation of legislative power breathtaking in its audacity and unprecedented in this state. Second, the Governor's position so directly conflicts with the plain constitutional text, and is so utterly bereft of structural, historical or jurisprudential support, that to advance it, the Governor must create from whole cloth an entirely new category of legislation - legislation that "effectively creates new items of appropriation" - found nowhere in the Constitution or caselaw of New York or any other state.

The Governor openly acknowledges the revolutionary breadth of the legislative power he seeks. He confirms that it is his **[*2]** position that he may attach far-reaching policy provisions to his proposed "items of appropriation" because, in his view, such provisions simply constitute the "when, how, or where" of the appropriation; and that once he attaches

such provisions to an item of appropriation, the Legislature is completely preempted from altering them at all, either directly or by proposing subsequent legislation in nonappropriation bills. n1 Addressing a hypothetical from the Speaker's opening brief, the Governor asserts that he may include in an appropriation for the payment of retirement benefits to state employees a provision that changes the retirement age to eighty; and that once he does so, the Legislature may not, in any mariner whatsoever, propose its own legislation changing that retirement age from eighty. The Governor cannot prevail unless the Court accepts this extraordinary proposition. If it does, then Article III, Section 1 of the Constitution - "the legislative power of this state [is] vested in the senate and assembly", N.Y. Const. art. III, § 1 - means nothing, and New York has a new form of government found in no other state in the nation.

n1 In fact, the Governor's theory is that even if he does not propose the condition, but simply proposes funding for the state employee retirement fund, that proposal preempts the Legislature from proposing in nonappropriation bills provisions relating to the retirement age for state employees. See Brief for Defendant-Respondent, George E. Pataki, Governor, State of New York ("Governor's Brief or "Gov. Br.") at 53-54 (acknowledging that his position bars the Legislature from imposing a condition on a government appropriation for 500 police cars requiring bullet-proof glass or audio-visual recording devices on the cars even if his item of appropriation makes no mention of those issues). And the Governor's position applies regardless of whether the Legislature accepts or strikes the proposed item of appropriation. The mere proposing of the item of appropriation displaces the Legislature's ability to propose in nonappropriation bills any policies affecting the "when, how, or where" of the program the Governor proposed to fund.

[*3]

The Governor cites no authority for his astonishingly expansive view of gubernatorial power. That view, and the Governor's actions at issue in this case, are in direct conflict with the plain text of the Constitution. The fifty-five provisions struck by the Governor satisfy neither of the textual requirements of Article IV, Section 7 that they be "items of appropriation of money" and contained in appropriation bills, to which the Governor's general veto power does not apply. To avoid these dispositive strictures, the Governor asserts, with nothing more than an ipse dixit, that his line-item veto authority also extends to any provision "that effectively creates new items of appropriation." There is no such category of legislation; the Governor simply concocts it. Were this Court to recognize it, a completely new - and judicially unmanageable - genre of constitutional litigation would be spawned: constitutional challenges to legislation on the ground that the legislation "altered" some item of appropriation in the Governor's proposed budget. Such challenges could be brought against virtually any law; for it is the rare law that does not have some connection to some appropriation. **[*4]**

The Governor's position is grounded completely in his assertion that Article VII, Section 4 "constituted a broad and unprecedented transfer . . . of powers legislative in nature from the Legislature to the Governor," and worked "sweeping limitations on the Legislature's power." Gov. Br. at 6, 8. Yet Article VII, Section 4 does nothing of the sort. It does not purport to address the Legislature's basic power over policy, let alone shift that fundamental power to the Governor. It simply cabins the Legislature's ability to alter the amounts of the Governor's proposed expenditures; and, as explained in the Speaker's opening brief, it does so consistently with the Legislature's authority to "make the critical policy decisions" granted by Article III, Section 1, Saratoga County Chamber of Commerce, Inc. v. Pataki, 100 N.Y.2d 801, 821-22, (N.Y. 2003), and the Governor's express veto powers under Article IV, Section 7.

The Governor has no answer - and does not even attempt an answer - to the Speaker's arguments from the text of the Constitution. He also completely ignores the structural reason why Article VII, Section 4 is limited to appropriation bills - because, as that **[*5]** provision itself expressly provides, those bills "when passed by both houses [become] a law immediately without further action by the governor." His effort to find shards of support from the history of Article VII ignores the fact that the Governor had absolutely no power to propose substantive legislation until 1938 - eleven years after the adoption of the Executive Budget amendments that became Article VII. Like the text and structure of the

Constitution, the history of Article VII confirms that the executive budget provisions do "not deprive the Legislature of any of its prerogatives." R. 1773 n2 (Report of Reconstruction Comm'n to Governor Alfred E. Smith on Retrenchment and Reorganization in the State Gov't (Oct. 19, 1919)).

n2 References to the record on appeal are denoted as "R. " with numerical reference to the page of the number of the bound volume of the Record on Appeal to this Court submitted by Appellants.

ARGUMENT

I. THE GOVERNOR MAY LINE-ITEM VETO "ITEMS OF APPROPRIATION [*6] OF MONEY" IN "BILLS THAT CONTAIN SEVERAL ITEMS OF APPROPRIATION" - NOT ANY PROVISION IN ANY BILL THAT HE BELIEVES "EFFECTIVELY CREATES NEW ITEMS OF APPROPRIATION"

A. The Governor's Attempt to Expand the Line-Item Veto Power to Include Provisions That "Effectively Create New Items of Appropriation" Violates the Plain Text and Structure of the Constitution

When the Governor finally attempts to defend his line-item vetoes that are at the center of this lawsuit - on page 59 of his brief - he does not argue that the struck provisions were "items of appropriation of money" in "bill[s] presented to the governor [that] contain[ed] several items of appropriation of money" within the express language of Article IV, Section 7. N.Y. Const. art. IV, § 7. Instead, he argues that the line-item veto extends to provisions that "effectively create new items of appropriation." Gov. Br. at 60. According to the Governor, the Legislature's amendments to nonappropriation bills that the Governor struck "effectively created new" items of appropriation because the amendments "cross-referenc[ed] the Governor's proposed items of appropriation." Id.

Neither the Constitution nor this **[*7]** Court has ever recognized the amorphous category of legislation the Governor conjures in order to make his case: provisions that "effectively create new items of appropriation." The text of the Constitution's line-item veto provision plainly bars the Governor's patently strained attempt to expand the line-item veto power to this unprecedented - and wholly undefined - category of legislation. First, Article IV, Section 7 limits the line-item veto power to the striking of "items of appropriation of money" - not to provisions that "effectively create new items of appropriation." Second, the line-item veto power extends only to "items of appropriation of money" contained in appropriation bills. See N.Y. Const. art. IV, § 7 (authorizing the line-item veto only for "bill[s] presented to the governor ["that] contain several items of appropriation of money.") (emphasis added). Thus, even if the Governor could strike items that "effectively create new items of appropriation" he could do so only in bills that appropriate money; and it is undisputed that the bills containing the fifty-five provisions struck by the Governor did not appropriate funds.

Third, the fourth **[*8]** to last sentence of Article IV, Section 7 provides: "In such case [when the Governor objects to an item of appropriation of money] the governor shall append to the bill, at the time of signing it, a statement of the items to which he or she objects; and the appropriation so objected to shall not take effect." Id (emphasis added). The Governor's view that a provision referencing a prior appropriation and proposing terms and conditions related to that appropriation is subject to the line item veto is flatly incompatible with this plain language that the consequence of a line-item veto is that "the appropriation so objected to shall not take effect." This text reiterates the earlier language in Section 7 to ensure there is no doubt that only an "appropriation" itself- not a provision "effectively creating a new item of appropriation"- is subject to the line-item veto.

It is also reveals a critical flaw in the Governor's theory. If the Governor is correct that he may veto in nonappropriation bills provisions that "alter" items of appropriation he proposed in his appropriation bills, then Section 7 dictates that it is the underlying "appropriation" - the item of appropriation **[*9]** of money the Governor proposed in his appropriation bill - that "shall not take effect." Thus, under the Governor's theory, a veto of a provision in one bill

would nullify an appropriation already enacted in a prior bill. The absurdity of this result highlights the unconstitutionality of the Governor's attempt to obtain a new line-item veto power over any provision that "alters" a prior appropriation.

There is no reason for the judiciary to create the additional line-item veto power the Governor seeks. The textual limitations reflect the structure and history of the line-item veto. The Governor concedes that the "items of appropriation" subject to the line-item veto in Article IV, Section 7, are those "items of appropriation" the Legislature adds to appropriation bills pursuant to Article VII, Section 4, which otherwise "be[come] law" upon passage by the Legislature without further gubernatorial review. Gov. Br. at 10 (the "line-item veto is limited to 'appropriations for the legislature and judiciary and separate items added to the governor's bills by the legislature'") (internal citations omitted). The fifty-five provisions the Governor struck were in bills subject to his general **[*10]** veto power, so there is no need to create an additional check. Nor does the Governor dispute that the line-item veto was instituted because the general veto had proven an ineffective check on government spending, an area in which logrolling was especially problematic. Brief for Plaintiff-Appellant Sheldon Silver, Member and Speaker, New York State Assembly ("Speaker's Brief or "Speaker's Br.") at 38-41. The fifty-five provisions the Governor struck did not increase government spending by one dime, and thus do not implicate the historical justification for the line-item veto.

B. The Governor's Position Would Spawn a Raft of Constitutional Litigation and Require the Judiciary to Perpetually Interpret His Vague "Effectively Creates a New Item of Appropriation" Standard

The "effectively creates a new item of appropriation" standard the Governor seeks lacks any cabining principle and would leave a host of laws proposed by the Legislature vulnerable to constitutional attack. Extending the line-item veto power beyond its clear constitutional limit to appropriation bills would lead to frequent lawsuits between the Governor and Legislature, requiring the judiciary to determine **[*11]** whether policies proposed by the Legislature in nonappropriation bills "effectively create a new item of appropriation" and are thus subject to this new line-item veto power.

This is not an academic concern but an inevitable result. There is little legislation that does not have some connection to some appropriation. Whether a legislative proposal setting new testing standards for public school teachers "effectively creates a new item of appropriation" because it will determine who may receive the appropriation paying teacher salaries is the type of determination the courts will constantly be called upon to make if the Governor's view is adopted.

Worse, these disputes will not be confined to the Governor and the Legislature. Because the Governor's view, discussed infra Section II, is not only that he may line-item veto legislation "effectively creating a new item of appropriation," but also that such legislation is unconstitutional and thus void even absent his veto, anyone opposed to legislation that arguably "effectively creates a new item of appropriation" may file a lawsuit challenging the law on constitutional grounds. The standard the Governor proposes would thus spawn **[*12]** a whole new genre of constitutional attack, leaving the judiciary with the task of sorting out which laws "effectively create new items of appropriation" and which do not. This Court should not saddle the judiciary with this unadministrable task - one that the Constitution clearly does not require.

C. Authority From Other States Rejects the Expansive Line-Item Veto Powers the Governor Seeks in this Case

A recent decision by the Supreme Court of Iowa rejects the Governor's position that he may line-item veto provisions in nonappropriation bills as one that "lacks support of any type[] and presents a significant threat to the separation of powers." Rants v. Vilsack, No. 03-1948, 2004 WL 1344996, at *11 (Iowa June 16, 2004). The line-item veto power of the Iowa Governor is more expansive than that of the New York Governor. It is not limited to "items of appropriation of money" but allows a partial veto over any "items" in appropriation bills (see Iowa Const. art. III, § 16). Yet the Iowa Supreme Court still rejected the argument of the Iowa Governor that he could line-item veto provisions in

a bill that did not appropriate money because the provisions **[*13]** contained references to appropriations in another bill. See Rants, 2004 WL 1344996, at *11.

The Iowa court began its analysis with two fundamental principles equally applicable here. First, because the line-item veto is a "significant deviation from the traditional separation of powers between the three branches of government[,] .. . the item veto power is to be construed narrowly, and any doubt over the extent of the power 'should be resolved in favor of the traditional separation of governmental powers and the restricted nature of the veto.'" Id. at *6 (quoting Wood v. State Admin. Bd., 238 N.W. 16, 18 (Mich. 1931) and citing Colorado Gen-Assembly v. Lamm, 704 P.2d 1371, 1385-86 (Colo. 1985); State ex rel. Cason v. Bond, 495 S.W.2d 385, 392 (Mo. 1973); Drummond v. Beasley. 503 S.E.2d 455, 457 (S.C. 1998)). Second, the "fundamental prerequisite for the proper exercise of the item veto power is that the bill to be item vetoed is an appropriation bill" Id. at *7.

At issue in Rants were the Iowa Governor's line-item vetoes of provisions in House Bill 692 "creat[ing] the framework for **[*14]** the Values Fund," a state economic development program. Id. at * 12. The provisions in Bill 692 set the interest rate and repayment schedules for loans provided by the Values Fund and "altered the method by which funds leftover in the Values Fund would 'revert' at the end of the fiscal year." Id. House Bill 692 did not, however, "contain any appropriations." Id. A separate bill approved by the Governor, House Bill 683, funded the Values Fund. Id. at *1-2, * 12. The Iowa Governor sought to justify his line-item veto of provisions in the nonappropriating Bill 692 by arguing - just as Governor Pataki does in this case n3 - that "a simple reference to HF 683 . . . reveals that that HF 692 is an appropriation bill." Rants, 2004 WL 1344996, at *11. The Iowa Supreme Court emphatically rejected the Governor's attempt to line-item veto the provisions in Bill 692 that he argued "affect[ed] [his] budgeting responsibility" and the appropriation provisions in Bill 683 (id.):

> Clearly, HF 683 and HF 692 are related in numerous ways. Yet, none of these ways is relevant for the constitutional analysis of whether the item veto power has been properly exercised **[*15]** in relation to HF 692. In fact, the Governor has failed to cite any true authority in support of an approach that looks to another pending bill to determine whether the bill sought to be item vetoed is an appropriation bill, offering only general statements on separation of powers principles in support of his approach. Yet we believe his approach poses the graver threat to the separation of powers.

Id. at *12. The "grave threat" to the separation of powers that concerned the Iowa Supreme Court was that acceptance of the Governor's argument "would be condoning a vast expansion of the scope and reach of the governor's item veto power" because "[f]easibly, every bill that is somehow linked to another bill that contains a related appropriation - which HF 683 undoubtedly does - could be reached by the governor's item veto power." Id. The Iowa Supreme Court thus adhered to the plain language of the Iowa Constitution allowing a line-item veto only for appropriation bills and reached the commonsense conclusion that "[w]ithout an appropriation on its face, HF 692 is not an appropriation bill. For this reason, HF 692 was subject only to the Governor's general or pocket veto **[*16]** power and, accordingly, could not be item vetoed but only approved or disapproved as a whole." Id. at *14.

> n3 "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 . . . . " Gov. Br. at 64.

Iowa is not the only State to reject the Governor's position. The Rants decision cited the California Supreme Court's comment in rejecting the argument that courts can look to other related bills to determine whether a bill is an appropriation bill subject to the line-item veto that "'[w]e are aware of no authority which even remotely supports the attempted exercise of the veto in this matter.'" Id. at *12 n.4 (quoting Harbor v. Deukmejian, 43 Cal. 3d 1078, 1091, 742 P.2d 1290, 1296-97 (Cal. 1987) and citing Julie F. Pottorff, Political Stew: Item Veto Issues Bubbling to the Top in State Court Jurisdictions, 1 Emerging Issues in St. Const. L. 121, 125 (1988) (explaining **[*17]** that "Deukmejian

suggests the bill may not be defined to extend beyond its four corners to include" pieces of other legislation)). The Ohio Supreme Court has also determined that a Governor's line-item veto was unconstitutional solely because the bill containing the struck provisions was "not an appropriation bill, for it simply does not anywhere by its terms appropriate money." State ex. rel Akron Educ. Ass'n v. Essex, 47 Ohio St. 2d 47, 50 351 N.E.2d 118, 120 (Ohio 1976).

Even when faced with appropriation bills, courts in other states have limited the line-item veto to "items of appropriation" found in those bills. See Jessen Assocs., Inc. v. Bullock, 531 S.W.2d 593, 599 (Tex. 1975) (holding that provision in appropriation bill detailing specific construction projects from a lump sum appropriation general, substantive legislation that was "not subject to [the line-item] veto"); Commonwealth v. Dodson, 176 Va. 281, 288-89, 296, 11 S.E.2d 120, 123, 127 (Va. 1940). n4 The fifty-five provisions struck by Governor Pataki were unconstitutional under both of these series of cases from other states because (1) they were not contained **[*18]** in appropriation bills but rather in bills to which the general veto applied and (2) the provisions were not items of appropriation of money.

n4 The Governor confuses his two asserted justifications for exercising the line-item veto power in arguing that Jessen and Dodson are not relevant because they did not involve a "constitutional restriction similar to Article VII, Section 4." Gov. Br. at 65. Whether a violation of Article VII, Section 4 would provide an independent basis for exercise of the line-item veto authority is addressed in Section II, infra. But that is an entirely distinct issue from whether the struck items were "items of appropriations" or, as the Governor is forced to argue, "effectively" items of appropriation. Compare Gov. Br. at 60 with Gov. Br. at 65.

Unable to rely on the text or history of the New York Constitution's line-item veto provision, the Governor attempts to support his theory that the line-item veto extends to provisions that "effectively create new items **[*19]** of appropriation" by erroneously relying on two cases from other jurisdictions. Those cases, however, implicated the historical justification for the line-item veto and thus do not support the line-item vetoes at issue in this case.

The struck provisions in Washington State Legislature v. Lowry, 131 Wash. 2d 309, 328, 931 P.2d 885, 895 (Wash. 1997), were contained in appropriation bills and the general veto was thus an ineffective check. In addition, Washington State has the most expansive line-item veto provision in the nation, extending to "one or more sections or appropriation items" in a bill. Id. at 315, 931 P.2d at 889 (quoting Wash. Const. art. III, § 12 (amend. 62) (emphasis added)). Even the term "appropriation items" is more expansive than the New York term "item of appropriation of money." See Richard Briffault, The Item Veto in State Courts, 66 TEMP. L. REV. 1171, 1175-76, 1178-79 (1993) (noting that Washington is the only state that does not limit the line-item veto to appropriation bills). Finally, in determining the proper balance between the Governor and the Legislature, Lowry was influenced by Washington's **[*20]** constitutional requirement that bills pertain to a single subject, a provision that greatly increases gubernatorial power. See Lowry, 131 Wash. 2d at 328, 931 P.2d at 895. New York has not restricted the Legislature's power through enactment of a general single-purpose requirement. See Speaker's Br. at 6-7.

Rios v. Symington, 172 Ariz. 3, 833 P.2d 20 (Ariz. 1992), is also distinguishable. In that case, the Governor struck provisions that added money to the state's general fund. Id. at 4-5, 833 P.2d at 21-22. Rios involved special self-funding programs, such as one that provided that all club license fees would go to the "department of mental retardation for buildings, equipment or other capital investments." Id. at 7, 833 P.2d at 24. The Arizona Legislature submitted a bill containing sixty-one provisions appropriating money previously designated for these special funds to the state's general fund. Id at 6, 833 P.2d at 23. For example, instead of the club license fees funding the department of mental retardation outside the general budget, the Legislature appropriated those fees to the general budget **[*21]** fund where they could be used to pay teachers, build prisons, or repair roads. See id. at 6-8, 833 P.2d at 23-25. The Supreme Court of Arizona held that the line-item veto extended to these provisions that increased the amount of money in the state's general funds and resulted in a "subsequent reduction or elimination of [the special fund] appropriation." Id. at 9, 833 P.2d at 26. In contrast, the provisions struck in this case did not add money to the state's general fund or change the purpose of

previously designated funds.

D. The Governor's Premise That the Fifty-Five Provisions He Struck "Effectively Created New Items of Appropriation" Is Incorrect

Even if the Governor had the power to line-item veto provisions that "effectively create new items of appropriation," the vetoed provisions at issue in this case did not "effectively constitute new items of appropriation." This Court has previously rejected the Governor's position that provisions that further itemize the Governor's lump sum appropriations are themselves items of appropriation. People v. Tremaine, 252 N.Y. 27 (N.Y. 1929) ("Tremaine I") held that segregation **[*22]** provisions delineating the positions, salaries, programs, and other elements funded by moneys already appropriated are "not an item of appropriation." Tremaine I, 252 N.Y. at 49-50. Thus, none of the vetoed provisions that the Governor characterizes as "[l]egislative attempts to segregate or itemize lump sum appropriations," Gov. Br. at 36, could "effectively create new items of appropriation." For example, the provision struck in veto 498, which directed a previously enacted $ 5.8 million lump sum appropriation for "programs which serve as alternatives to incarceration" to "twenty-nine expressly identified programs, with each program receiving a specific amount" of the $ 5.8 million, Gov. Br. at 43, did not "effectively create a new item of appropriation." Nor did the provision struck in veto 495, which directed a previously enacted $ 16.8 million lump sum appropriation for drug abuse programs in the Division of Criminal Justice Services to "ninety particular programs." Id.

II. THE GOVERNOR OFFERS NO SUPPORT FOR HIS AFFIRMATIVE DEFENSE THAT HE POSSESSED ROVING AUTHORITY TO LINE-ITEM VETO THE FIFTY-FIVE PROVISIONS BECAUSE THOSE PROVISIONS WERE UNCONSTITUTIONAL [*23]

The Governor's argument that his line-item vetoes were authorized because the provisions he struck were allegedly unconstitutional, Gov. Br. at 65-69, equally ignores the text, structure, and history of the Constitution. The provisions were constitutional, for nothing prevents the Legislature from exercising its plenary authority over policymaking by freely amending nonappropriation bills. Moreover, even if the Legislature's amendments to the nonappropriation bills were unconstitutional, nothing authorizes the Governor to use the line-item veto, rather than the general veto, over such bills.

A. The Legislature's Amendments to the Nouappropriatiou Bills Were Constitutioual

1. The Governor's Revolutionary View of his Preemptive Power Over Legislation and Policy Is Contrary to the Text of the Constitution

Although the Governor does not articulate any standard for when a provision "effectively create[s] new items of appropriation," his view of that vague concept is astonishingly expansive - and clearly wrong. The Governor's position is that "the Governor is empowered to propose items of appropriation (including the 'function', the 'context' and the 'when, how, or **[*24]** where' of spending), that those 'function', 'context,' and the 'when, how, or where' measures are integral parts of the items so proposed . . . and that once those items are proposed by the Governor, 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." Gov. Br. at 53 (emphasis in original); see also id. at 33 (stating that once the Governor proposes an item of appropriation, the Legislature may not propose provisions that "alter[] the 'function', the 'context' or the 'when, how, or where' of spending of the Governor's items of appropriation"). Thus, according to the Governor, his mere proposal of an item of appropriation for state employee retirement benefits or for police cars bars the Legislature from proposing any policies related to state employee retirement benefits - such as the eligibility age - or police cars - such as requiring state police cars to have audio-visual devices to record roadside stops. Id at 53-54. The Governor would leave the Legislature with only the following Hobson's Choice: "it can either strike the **[*25]** appropriation in its entirety or accept the appropriation with its objectionable terms." Id. at 54. n5 The Governor's scheme would, in the words of the State Affairs Committee of the New York City Bar Association, make him "all-powerful . . . in the budget process." Association of the Bar of the State of New York, Report of the Committee on State Affairs, The New York

State Budget Process and the Constitution: Defining and Protecting the "Delicate Balance" of Power ("Bar Report"') n6 at 1-2.

n5 The Governor attempts to defend this Hobson's choice by arguing that the "Legislature could use its considerable power to strike to force a negotiation with the Governor." Id at 54. But this Court has previously rejected this view that the Constitution forces the Legislature to engage in negotiations where, deprived of any ability to submit legislative proposals of its own, it would lack any meaningful leverage: the Constitution does not leave the Legislature with the sole "alternative [of] striking out the items of appropriation thus qualified in toto [resulting in] possible deadlock over details on a political question outside the field of judicial review." Tremaine 1, 252 N.Y. at 50 (emphasis added).

[*26]

n6 The Bar Report is located at http://www.abcny.org/pdf/report/Budget%20Report%209-11.pdf.

Not surprisingly, the Governor is unable to cite any authority supporting this revolutionary view. Indeed, this Court rejected the Governor's view shortly after the enactment of the executive budget amendments, explaining that the Governor "may not insist that the Legislature accept his propositions in regard to segregations without amendment, while denying to it the power to alter them" because that would leave the Legislature with the dracoman "alternative [of] striking out the items of appropriation thus qualified in toto [resulting in] possible deadlock over details on a political question outside the field of judicial review." Tremaine I, 252 N.Y. at 50.

The Governor's brief reveals the vast gulf between the plain language of Section 4 and the Governor's view that the Legislature may not make any proposals that affect the "context," "function," or "when, how, or where" of an item of appropriation. The Governor quotes the language of Section 4 that the "'legislature **[*27]** may not alter an appropriation bill submitted by the governor,'" Gov. Br. at 7 (emphasis added), "except to strike out or reduce items therein," N.Y. Const. art. VII, § 4. See Gov. Br. at 7. The Governor then expansively concludes, without citing any support, that "Section 4 clearly bars the Legislature from making any substantive change to the terms and conditions of items of appropriation proposed by the Governor." Gov. Br. at 7 (emphasis in original).

That conclusion is a complete non sequitur. The text of Section 4 confirms that. It says nothing about "terms and conditions;" and it limits alterations only to an appropriation bill, which becomes "law immediately without further action by the governor" - not alterations to "items of appropriation." N.Y. Const. art. VII, § 4. Apparently hoping that repetition will cure illogic, the Governor repeats this self-serving mischaracterization of Section 4 throughout his brief. See, e.g., Gov. Br. at 29 ("Section 4 forbids the Legislature from altering any other aspect of an item of appropriation"); id. at 34 ("Section 4, however, prohibits the Legislature from making any alteration whatsoever to **[*28]** the Governor's items of appropriation . . . . ") (emphasis in original). Yet the Governor never offers a compelling reason to judicially extend the textual limitation on alterations to appropriation bills to provisions contained in any bill that "alters" the context, function or when, how, or where of an item of appropriation proposed by the Governor. Worse, the Governor's attempt to impose a limitation on the Legislature not found in the text of Section 4 contravenes the longstanding principle that because "the legislative power is untrammeled and supreme . . . a constitutional provision which withdraws from the cognizance of the legislature a particular subject, or which qualifies or regulates the exercise of legislative power in respect to a particular incident of that subject, leaves all other matters and incidents under its control." In re Thirty-Fourth St. R.R. Co., 102 N.Y. 343, 350-51 (N.Y. 1886).

2. The Governor's Arguments in Support of His Preemptive Power Over Legislation Are Unsupported and Wrong

In attempting to bridge the expansive gulf between the constitutional text of Section 4 and the revolutionary

limitations he seeks to impose on the **[*29]** Legislature's core legislative and policy-making powers, the Governor relies on three erroneous propositions. First, the Governor argues that legislative alterations to nonapprporiation bills accomplish "indirectly" what Section 4 directly prohibits - an argument that ignores the structural purpose of Section 4. Second, he converts his supposed authority to propose the "when, how, or where" of items of appropriation into exclusive authority to make such proposals that preempts the Legislature's ability to make its own proposals on those policy questions - a bold ipse dixit breathtaking in both its lack of support and profound infringement of the Legislature's lawmaking power. Third, the Governor discerns in Article VII "sweeping limitations on the Legislature's power," Gov Br. at 8 - limitations at odds with the clear intent of the framers of the executive budget to preserve the Legislature's supremacy in matters of policy. All of the Governor's arguments are wrong.

a. The Governor's Argument That Legislative Alterations to Nonappropriation Bills "Do Indirectly That Which It Is Prohibited From Doing Directly" Ignores the Structural Purpose of Section 4

The Governor's mantra **[*30]** that the Legislature tried to "do indirectly what it could not do directly," see, e.g., Gov. Br. at 1, 44, 46,47, concedes that nothing in the text of the Constitution "directly" prohibits the Legislature from freely amending bills that do not appropriate money. n7 Nor do proposed amendments to nonappropriate bills result in an "indirect" violation of Section 4; for they do not implicate the evil that Section 4 is designed to prevent.

n7 In a transparent effort to gloss over this major structural difference between appropriation bills and nonappropriation bills, the Governor repeatedly asserts that this case involves "budget bills" - a term he uses to include both appropriation and nonappropriation bills. For example, he compares the "budget bills" at issue here with the "budget bills" to which New York State Bankers Ass'n v. Wetzler, 81 N.Y.2d 98, 100-01 (N.Y. 1993) ("Bankers"), held the Legislature could not add provisions under Section 4. Gov. Br. at 11. As discussed in the Speaker's opening brief, however, the Constitution expressly recognizes two distinct types of budget bill: (1) "bills containing all the proposed appropriations and reappropriations" - appropriation bills, and (2) other "proposed legislation, if any" - nonappropriation bills. N.Y. Const. art. VII, §§ 2, 3; see also Speaker's Br. at 9.

[*31]

The textual limitation that Section 4 applies only to "appropriation bills" is tied to the provision's structural purpose: it prevents the Legislature from adding provisions to appropriation bills because those bills "shall when passed by both houses be a law immediately without further action by the governor." N.Y. Const. art. VII, § 4. Allowing the Legislature to add provisions to appropriation bills would thus violate the fundamental constitutional principle that no branch should go unchecked and, as the Governor acknowledges, result in the Legislature "unilaterally alter[ing] a proposed item of appropriation." Gov. Br. at 9. But in proposing amendments to nonappropriation bills the Legislature cannot act unilaterally n8 because those bills are subject to gubernatorial review via the general veto power. Therefore, legislative alterations to nonappropriation bills do not even "indirectly" implicate Section 4 because the structural reason for Section 4 is absent. The Speaker's position that Section 4 should apply when it says it does - to limit legislative alterations to appropriation bills - does not render the provision a "dead letter," Gov. Br. at 47-48, because it fully **[*32]** prevents the evil Section 4 is aimed at: barring legislative additions to appropriation bills that would escape gubernatorial review in violation of the fundamental principle of republican government that no branch should act unchecked. n9

n8 Unless the Legislature overrides the Governor's general veto power, in which case the Constitution expressly authorizes unilateral legislative enactment of laws.

n9 The Governor's glossing over the key fact that he has the general veto power over amendments to his nonappropriation bills also leads him to charge that the Legislature is seeking unilateral power to alter his items

of appropriation. This is not a unilateral power because it is subject to the Governor's general veto power.

Every authority the Governor cites that applies Section 4 confirms that the provision applies to legislative additions to appropriation bills, which would otherwise escape gubernatorial review. See Tremaine I, 252 N.Y. at 49-50 (stating in dicta that the Legislature's **[*33]** addition of a segregation clause to an appropriation bill violated Section 4); People v. Tremaine, 281 N.Y. 1,10 (N.Y. 1939) ("Tremaine II") (holding that a lump sum appropriation bill the Legislature submitted to the Governor violated Section 4); Bankers, 81 N.Y.2d at 104-05 (holding that the Legislature's addition of an assessment to an appropriation bill violated Section 4); 1978 N.Y. Op. Att'y Gen. 76, 1978 WL 27523 ("[T]here is no authority for the Legislature to add the item to a succeeding appropriation bill . . . " (emphasis added)); 82-F5 Op. Att'y Gen. (1982) at 1-2 (describing the Legislature's authority to alter the Governor's proposed appropriation bills). The Governor does not even attempt to distinguish two of these authorities - Tremaine I and the 1982 Attorney General Opinion - that expressly state the Legislature is allowed to make additions to nonappropriation bills. See Speaker's Br. at 50 (citing Tremaine I, 252 N.Y. at 49 (observing that '"[n]othing . .. prevents' the Legislature from . .. 'providing how . . . items of appropriation should be segregated' **[*34]** in nonappropriation bills, which are 'subject to the veto power'"); 82-F5 Op. Att'y Gen. (1982) at 2 (concluding that the Legislature "can accomplish its objective to restrict or allocate the expenditure of appropriated funds by enacting separate bills")).

Nor does the Governor answer - at all - the Speaker's argument concerning the structural purpose of Section 4. The Governor's only response is a complete ipse dixit: "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." Gov. Br. at 47. In other words, the Governor assumes as a given the very issue in this lawsuit - whether the line-item veto applies to provisions in nonappropriations bills - and then asserts that because the line-item veto does apply, the general veto is insufficient. But the entire point of the Speaker's structural argument is that the line-item veto does not apply to provisions in nonappropriation bills precisely because the Governor may exercise his general veto against them.

The Legislature fully accepts Section's 4 restriction **[*35]** on its ability to make additions to appropriation bills, but there is simply no basis in the text, structure, or case law to extend Section 4 to nonappropriation bills. To do so would eviscerate the fundamental precept of republican government and command of Article III, Section 1 of the Constitution that the "legislative power of this state [is] vested in the senate and assembly." N.Y. Const. art. III, § 1.

b. The Governor Converts Isolated Dicta Implying That He May Propose the "When, How, or Where" of Items of Appropriation into Exclusive Power to Make Such Proposals

The Governor also relies on a single paragraph of dicta in Saxton v. Carey, 44 N.Y.2d 545 (N.Y. 1978), for his revolutionary theory that the Governor's mere proposal of an item of appropriation permanently displaces the Legislature's ability to make proposals that direct "when, how, or where" those funds will be spent. Gov. Br. at 8, 16. Saxton did not involve a dispute over the line-item veto. It did not involve a dispute over the breadth of Article VII, Section 4. It did not even involve a dispute between the Governor and the Legislature - let alone a dispute over the fundamental allocation **[*36]** of responsibility for policy-making between the Governor and the Legislature. It did not - and could not - decide anything about any of these issues.

Saxton simply concerned the "degree of itemization" - how specific or general the Governor's proposed appropriations had to be. It held that the "degree of itemization" is "to be determined by the Governor and the Legislature, not by judicial fiat." 44 N.Y.2d at 551. That is an entirely commonsense conclusion in the context of Saxton, where the Legislature had no difficulty exercising its constitutional responsibilities over the Governor's proposed appropriations, and did so.

In discussing the difficulty the judiciary would face in determining whether something is sufficiently itemized, this Court made the following observation: "In one context an 'item' of $ 5,000,000 for construction of a particular

expressway might seem specific; in another, void of indication when, how, or where the expressway or segments of it would be constructed." Id. at 550 (citations omitted). The Governor transforms this unremarkable suggestion as to what the Governor may include in appropriation bills into a wholly **[*37]** remarkable prohibition on what the Legislature may propose in nonappropriation bills. The revolutionary view that the Legislature is deprived of all power to initiate any policy that affects the "when, how and where" of appropriated funds requires more support than this logic-leaping reading of the Saxton dicta. n10

n10 The Governor asserts that "[t]he 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." Gov. Br. at 20. That is not true. The Speaker has consistently taken the position that, contrary to the decisions of the lower courts, the Governor has no power to include whatever policy provisions he wishes in appropriation bills. See Speaker's Br. at Point II.A.2. Furthermore, in the Pataki case, the New York State Assembly, of which Plaintiff-Appellant Silver is a Member and the Speaker, has consistently argued that the Governor exceeded constitutional limits on what he may include in his appropriation bills. See Pataki v. New York State Assembly, et al., 190 Misc. 2d 716, 732, 738 N.Y.S.2d 512, 524 (N.Y. Sup. Ct. N.Y. Cty. 2002), aff'd, 7 A.D.3d 74, 774 N.Y.S.2d 891 (3d Dep't 2003). appeal pending.

[*38]

c. The History of the Executive Budget Rejects the Governor's My-Way-or-the-Highway View

Lacking any support in the text of the Constitution or this Court's precedents, the Governor attempts to support his astonishingly expansive view of executive authority with a principle he gleans from the constitutional history of Section 4. According to the Governor, that history demonstrates that Section 4 was "a strict limitation on the Legislature's former plenary power to alter or otherwise amend budget bills" i.e., both appropriation and nonappropriation bills. Gov. Br. at 8; see also id. at 6 (stating, without any citation, that Section 4 was a "broad and unprecedented limitation on the powers of the Legislature in relation to budgetary matters.").

It is simply impossible that the framers of Section 4 intended it to limit the Legislature's amendments to nonappropriation bills. The language now embodied in Section 4 was enacted in 1927 - a time when the Governor only possessed the power to propose appropriation bills. It was not until the 1938 amendments to the Constitution that the Governor gained the power to include "other proposed legislation" in his budget submission - the **[*39]** "nonappropriation bills" at issue here. See Silver v. Pataki, 96 N.Y.2d 532, 535 n. 1 (N.Y. 2001)); see also Bar Report at 7.

The Governor cites no support for his view that the framers of Section 4 intended it as a wholesale withdrawal of the Legislature's policymaking role for all matters touching on appropriations. The Governor quotes a single statement from the 1915 Constitutional Convention that the executive budget would be '"a radical change in the method of providing for the necessary expenditures of the state."' Gov. Br. at 2 (internal citations omitted); see also id. at 49. But this quotation concerns only the shift between branches with respect to the amount of expenditures. It says nothing about a revolutionary change in legislative or executive powers with respect to policy and lawmaking. It defies the fundamental republican principle of legislative supremacy over policymaking to infer from this statement about a new process for proposing and approving expenditures in appropriation bills a far-reaching prohibition on the Legislature's ability to propose in nonappropriation bills such core policies as the retirement age for state employees, **[*40]** the certification requirements for teachers, and the eligibility rules for welfare.

A complete reading of the constitutional history shows that the enactment of executive budgeting did not reduce legislative power, but actually sought to preserve the Legislature's primacy in lawmaking. Framers of the executive budget believed that under the pre-1927 system, the "Legislature ha[d] been gradually surrendering its most vital power

in financial legislation to the executive veto," which had "very nearly resulted in an abandonment to the Executive of the priceless legislative function of holding the purse." Bar Report at 3 (quoting Journal of the Constitutional Convention of the State of New York at 394, 401 (1915) ("1915 Journal")). It was hoped that the "proposed system would restore that [legislative] power and make it final" by giving the Legislature the power to strike or reduce n11 the Governor's proposed appropriations. Bar Report at 3 (quoting 1915 Journal at 401).

n11 The power to "reduce" an item of appropriation gave the Legislature a power for reducing spending short of complete elimination of an appropriation that - contrary to the Governor's suggestion (Gov. Br. at 9) - was not part of the Governor's line-item veto power. See N.Y. Const. art. IV, § 7.

[*41]

The executive budget was intended to improve the efficiency of the budget process by having the Governor review the expenditure estimates of his agencies and then propose a "single, centralized budget" by a specified date. See Bar Report at 3-4. It did not have the general purpose of reducing legislative power. The Governor's attempt to infer from the enactment of the "no alteration" provision in 1927 a limitation on the Legislature's ability to amend nonappropriation bills that the Governor could not even propose until 1938 violates the framer's understanding that the change to an executive budget "does not deprive the Legislature of any of its prerogatives. It does not, as it [sic] sometimes said, make the Governor a czar." R. 1773 (Report of Reconstruction Comm'n to Governor Alfred E. Smith on Retrenchment and Reorganization in the State Gov't (Oct. 19, 1919)).

B. Even if the Struck Provisions Were Unconstitutional, the Governor's Exclusive Constitutional Remedy Was the General Veto

Even were this Court to hold that Section 4 extends beyond its textual, structural, and historical reach and prohibits the Legislature's amendments to nonappropriation bills, the Court **[*42]** must still address whether that justified the Governor's exercise of the line-item veto. Granting the Governor a line-item veto power to strike parts of nonappropriation bills based merely on his purported belief in their unconstitutionality would dangerously transform the allocation of power between the three branches of government.

1. The Court Must Address the Central Issue in This Case: Whether the Governor's Line-Item Vetoes Were Constitutional

Most of the Governor's brief argues in a vacuum that the Legislature's amendments to the nonappropriation bills were unconstitutional, improperly divorcing that issue from the issue whether the Governor had the constitutional authority to line-item veto those amendments. In asking the Court to follow the decision below and decline to decide whether the Governor's vetoes were constitutional, Gov. Br. at 56-59, the Governor asks the Court to ignore the only conduct at issue in this case that had any legal effect - the Governor's vetoes. The Legislature's fifty-five contested amendments to the nonappropriation bills never became effective because the Governor line-item vetoed them.

The ultimate issue before the Court is whether the **[*43]** Governor had authority to exercise the line-item veto as he did. It was the Speaker's claim that the Governor's line-item vetoes were unconstitutional that allowed the Governor to assert as a defense that the struck provisions were themselves unconstitutional. The Governor does not dispute that in the trial court he recognized that his defense required that he establish both that: 1) the "Legislature's Attempt to Alter the Governor's Budget Bills Are Unconstitutional," and 2) "The Governor Can Veto Unconstitutional Alterations Made By The Legislature to Items of Appropriation." R. 1212, 1236. The Governor now attempts to avoid his earlier position on the ground that the Speaker stipulated that the Governor did not have to formally raise this argument "by means of a counterclaim seeking declaratory relief and agreed that it could "be resolved as if it had been raised by counterclaim." Gov. Br. at 57-58 (emphasis in original). But the fact that the Speaker had the professional courtesy not to require that

the Governor jump through procedural hoops to raise his defense is irrelevant to whether the judiciary must decide the issue. Indeed, the Governor's acknowledgement that **[*44]** his "defense" is essentially a counterclaim confirms that resolution of the constitutionality of the Legislature's amendments did not obviate the need to reach the question whether the line-item vetoes were authorized. Resolution of a defendant's counterclaim does not excuse a court's duty to decide the plaintiff's claim.

The Governor erroneously relies on "constitutional avoidance" cases, which hold that courts should avoid a constitutional ruling when a matter can be resolved on a nonconstitutional basis. Id. at 58-59 (citing T.D. v. New York State Office of Mental Health. 91 N.Y.2d 860, 862, 668 N.Y.S.2d 153, 154 (1997)). Here, however, all parties agree that the line-item veto question is a constitutional issue. The "constitutional avoidance" doctrine does not allow courts to avoid their duty to rule on a constitutional issue when a constitutional determination is the only way to resolve it.

The Governor's position that a ruling holding unconstitutional the Legislature's amendments precludes any inquiry into the lawfulness of the line-item vetoes is especially meritless given his position that only those legislative amendments struck by the Governor are rendered **[*45]** void. See Gov. Br. at 68. If, as the Governor contends, all legislative amendments to nonappropriation bills that alter the "when, how, or where" of items of appropriations are void ab initio, then all such amendments to the 1998 nonappropriation bills were void - not just the fifty-five amendments struck by the Governor. Yet - completely inconsistently - the Governor also contends that he can choose which void provisions to strike. See id. The Governor cannot have it both ways. He cannot contend that the line-item veto need not be adjudicated because the challenged provisions were void ab initio, and also take the position that only those "void" provisions he struck were prevented from going into effect. If, as he asserts, the Governor's line-item vetoes determined which fifty-five of the host of allegedly unconstitutional amendments did not go into effect, then it is indisputable that his selective exercise of the contested veto power had a justiciable impact. It is, therefore, essential that this Court decide the constitutionality of those gubernatorial acts.

2. The Governor Does Not Have Authority to Line-Item Veto Provisions Merely Because He Believes They Are Unconstitutional **[*46]**

As is true of the other new powers the Governor seeks in this lawsuit, the sole support cited by the Governor for the power to strike isolated provisions in any bill based on his assertion that they are unconstitutional are authorities that address the distinct structural context of appropriation bills. Both Tremaine I and the Attorney General opinions the Governor cites addressed whether the Governor could line-item veto provisions unconstitutionally added to appropriation bills. The Tremaine I dicta suggested that a line-item veto to strike unconstitutional provisions added to appropriation bills was needed because, without that power, the Legislature's additions would "circumvent[]" gubernatorial review altogether as the Governor does not have the opportunity to veto appropriation bills in toto. 252 N.Y. at 49-50. Dodson's statement that the Virginia Governor could line-item veto unconstitutional provisions in an appropriation bill is consistent with the historical justification for the line-item veto: in bills appropriating money, the Governor should not be forced to a Hobson's choice that would shut down government departments if he wanted **[*47]** to prevent a particular provision in an appropriation bill from becoming law. See Commonwealth v. Barnett, 199 Pa. 191, 189, 48 A. 976, 984 (Pa. 1901) (recognizing that many States implemented the line item veto because multi-item appropriation bills "frequently led to the executive being coerced to approve many unwise and improper appropriations, as public necessity would not permit him to disapprove of the whole bill").

Neither the structural nor historical purpose of the line-item veto is implicated when the allegedly unconstitutional provisions exist in nonappropriation bills. For that reason, the only authorities addressing the issue have held that a governor does not have extraconstitutional authority to line-item veto provisions in nonappropriation bills that he believes are unconstitutional. See Harbor v. Deukmejian, 43 Cal. 3d 1078, 1084, 1103, 742 P.2d 1290, 1292, 1305 (Cal. 1987): n12 Colorado Gen. Assembly v. Lamm, 704 P.2d 1371, 1385-86 (Colo. 1985).

n12 The Governor's attempt to distinguish Harbor misreads that opinion. In the footnote on which the Governor relies, Gov. Br. at 68 (citing 43 Cal. 3d at 1095 & n. 17), the Supreme Court of California recognized that some courts have held that an assertion of unconstitutionality is an insufficient ground for the exercise of any veto power, be it general or line-item, but there was no need to decide that issue in the case. (The Speaker does not argue that unconstitutionality is an insufficient basis for the Governor's exercise of a constitutionally authorized veto.) Harbor, in awarding attorney's fees to plaintiffs challenging the Governor's exercise of the line-item veto, unambiguously held that "the Governor's power to veto legislation cannot be exercised to invalidate part of a bill which is not part of an appropriation bill." 43 Cal. 3d at 1103, 742 P.2d at 1305.

[*48]

The Governor does not dispute that this new blanket line-item veto power would (1) lack the political accountability that guards against abuses of the general veto power; (2) fundamentally alter the role of the judiciary by forcing it to rule on the constitutionality of laws that never went into effect; and (3) result in the enactment of laws that did not pass the Legislature. Speaker's Br. at 58-59. Accordingly, even if the Court were to conclude that the Legislature's proposals were unconstitutional, it should nevertheless hold that the Governor's exercise of the line-item veto to strike them was unconstitutional.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Speaker's Brief, dated March 26, 2004, this Court should reverse the decisions of the courts below and grant Plaintiff-Appellant Sheldon Silver's cross-motion for summary judgment.

Dated: New York, New York
August 20, 2004

Respectfully submitted,

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STATE OF NEW YORK

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