GEORGE E. PATAKI, in his Official Capacity as THE GOVERNOR OF THE STATE OF NEW YORK, Plaintiff-Respondent, - against - THE NEW YORK STATE ASSEMBLY and THE NEW YORK STATE SENATE, Defendants-Appellants. -and- H. CARL McCALL, in his Official Capacity as THE COMPTROLLER OF THE STATE OF NEW YORK, Defendant.

No. 171

COURT OF APPEALS OF NEW YORK

2004 NY App. Ct. Briefs 171; 2004 NY App. Ct. Briefs LEXIS 268

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Initial Brief: Appellant-Petitioner

COUNSEL: [*1] To be Argued by: Stewart F. Hancock, Jr.

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TITLE: Brief on Behalf of Plaintiff-Appellant New York State Senate

TEXT: PRELIMINARY STATEMENT

This appeal presents constitutional questions involving separation of powers no less important than that decided by this Court in *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 100 NY2d 801, *cert. denied,* U.S. , 124 S Ct 570 (2003) - holding that Governor Cuomo and Governor Pataki lacked constitutional authority to enter into gaming contracts with an Indian tribe without legislative approval. In *Saratoga County,* the Court reaffirmed New York's "commitment to the separation of powers and constitutional government" in finding with "no difficulty" that the "challenged gubernatorial action" involved "fundamental policy choices that epitomize 'legislative power' " entrusted to the Legislature and were, therefore, *"ultra vires." Id.* at 822-824.

The Court on this appeal must decide this **[*2]** central question: **Does Article VII of the Constitution empower the Governor to attach to his appropriation bills general, policy- related, nou-appropriation measures including, in some cases, measures amending existing state laws and thereafter preveut the Legislature from making any**

changes in these measures so that they become law without approval or any participation by the Legislature? In two extraordinary and perplexing decisions, involving the 2001-2002 budget bills now before this Court, Supreme Court and the Appellate Division have held - without any analysis or interpretation of the relevant provisions of Article VII - that the Governor has this power. These decisions legitimize an extensive extra-legal encroachment on the legislative domain by the executive and, if approved, will constitute an historic and dramatic judicially ordained restructuring of our state government.

Supreme Court and the Appellate Division have sanctioned this executive expropriation of legislative authority by adopting two separate assumptions, each of which is clearly contrary to the plain wording of the relevant sections of Article VII and destructive of the intricately balanced budget process **[*3]** established by its Framers. First, the lower courts have held that general legislation affecting policy matters and, in some cases, amending existing state statutes may constitute "items of appropriation." Second, because such policy and general legislative measures have been judicially ordained as "items of appropriation," the Legislature is prohibited by the terms of the "no-alteration" provision of Article VII, Section 4 from striking them out. *See Pataki v. New York State Assembly*, 190 Misc2d 716 (Sup.Ct, Albany Co. 2002), *aff'd* 7 AD3d 74, 774 NYS2d 891 (3d Dep't April 22, 2004) (*"Pataki").*

If the lower courts' decisions stand, New York's Governor has suddenly been granted the power of a "Super-Legislature" with respect to the State budget. No longer is the Governor limited to proposing and submitting "money" bills ("appropriation" bills containing "items of appropriation" for specific projects, purposes and recipients) which the Legislature may alter only as permitted by Article VII, Section 4 as the Framers intended. **Instead, the Governor may now submit general legislation ameuding existing laws as part of an appropriation bill and force [*4] the Legislature to choose between accepting tbe general legislation or incurring the political cousequences of striking out the entire appropriation and potentially shutting dowu substantial State operations.**

This appeal does not turn on the exercise of judgment as to what may be brought within some flexible definition of an "item of appropriation," nor, as the majority at the Appellate Division concluded, does it in anyway involve the degree of "itemization" required in an appropriation bill. The measures which the Governor made part of his appropriation bills in the 2001-2002 budget plainly constitute general legislation, which by mandate of Article III of the Constitution is within the exclusive province of the Legislature. *See Saratoga County, supra.* The measures involve important policy matters tacked on to the Governor's appropriation bills, including one of the more politically sensitive and contentious issues of the times - proposed revisions of the formulae for the distribution of state aid to local school districts. n1 They effect substantial changes in existing State statutes. This Court must determine whether the Framers of the Executive Budget Amendment and of **[*5]** the current Article VII ever intended such a radical departure from accepted separation of powers doctrine - the unavoidable consequence of authorizing the Governor to enact such general legislation by including it in his appropriation bills and thereafter preventing the Legislature from amending or deleting it by invoking Article VII, Section 4.

n1 *See Campaign for Fiscal Equity v. State of New York,* 100 NY2d 893 (2003); *Paynter v. State of New York,* 100 NY2d 434 (2003); *New York Civil Liberties Union v. State of New York,* 3 AD3d 811 (3d Dep't 2004) (appeal to Court of Appeals taken and jurisdictional statement filed by plaintiff, February 2004); *see also* Al Baker, "Albany Deals with a Budget By Ignoring It," NY Times, August 8, 2004 at 25, in which the author, commenting on the 2004 budget and referring to the issue of state aid wrote:

> They have already agreed on how much more aid schools will get, about $ 740 million more than in the last fiscal year, though they have not decided how to split it up among districts - or how to meet a Court of Appeals order to stop short-changing New York City students.
>
> Fiscal analysts say the patchwork nature of this year's budget has really been a by-product of that court order, which would necessitate a wholesale rewriting of how to divide education aid among suburbs, cities and rural areas. The issue was so volatile it caused lawmakers to stumble, though

very few people predicted it would lead to failure and inaction of this scale, paving the way for the latest budge in state history.

[*6]

The few examples which follow illustrate the nature of the general laws incorporated in the Governor's appropriation bills and the amendments enacted by the bills:

. an amendment of the formulae established under Education Law § 3602 by which the distribution of approximately $ 13.5 billion in funds appropriated for state aid to school districts would be distributed *(see* S.905/A.1305, A168-A203); n2

. an amendment to Education Law § 701(6) reducing the textbook factor from $ 63.18 to $ 42.30 in calculating the amount of money schools were to receive for textbooks in the 2001-2002 school year *(see id.,* A181, lines 47-53);

. an amendment of Public Health Law § 2808 and its regulations altering the computation of Medicaid rates for residential health care facilities by removing the cost of non-medicaid patients *(see* S. 904/A.1304, A153, lines 15-28);

. an amendment of Public Health Law § 2808(9) eliminating for the one-year period commencing on April 1, 2001 the statutory requirement that trend factors (reflecting the effect of inflation) be considered in computing reimbursable costs of Medicaid providers *(see id.,* A155, lines 12-29);

. an amendment of Public **[*7]** Health Law § 2808 and its regulations altering the computation of Medicaid rates for residential health care facilities by eliminating the enhanced rate provided to facilities with over 300 beds *(see id.,* A153, lines 57-61; A155, lines 1-11.

n2 References to A are to the Appellants' Joint Appendix insofar as this appeal is being perfected on the Appendix method. *See* 22 NYCRR § 500.5(a)(2). Thus, one (1) copy of the reproduced Record in the Appellate Division, Third Department, has been submitted to the Court along with the requisite copies of the Appendix. In some instances, the Senate will cite to the Record rather than the Appendix as follows (R) where the documents in question are only generally relevant and, therefore, were not reproduced in the Appendix.

Under the edicts of the courts below the Legislature was compelled to choose between accepting the Governor's unconstitutional revisions of the existing statutes or striking out the appropriations, leaving the object of the appropriation **[*8]** with no funding, *e.g.,* **schools would receive no money for text-books notwithstanding Education Law § 701(6).**

Significantly, in his 2001-2002 appropriation bills the Governor also fundamentally altered existing laws creating and defining the powers of state agencies. For example, in one appropriation bill the Governor moved the State Library and State Museum from the control of the Department of Education and Board of Regents and transferred the administrative functions of these agencies to the Governor's newly-created "Office of Cultural Resources" within the Council on the Arts. **This not only amended sectious 232 and 202 of the New York Education Law, it violated Article XI, § 2 of the Constitution.** n3 According to the courts below, the Legislature was compelled to choose between accepting this manifestly unconstitutional exercise of legislative power by the executive or shutting down the State Library and Museum by striking the entire "appropriation."

n3 *See* N.Y. Educ. Law § 232 **(State library and museum are departments of University of the State of New York)** and § 202(1) **(University of the State of New York is governed by Board of Regents);** N.Y.

Const. art. XI, § 2 **(powers of Board of Regents may be modified *"by the legislature");*** A164, line 39 - A167, line 15; A204, line 12 - A209, line 21 (S. 905/A.1305).

[*9]

To find constitutional support for upholding the Governor's usurpation of legislative power by allowing him to couple general legislation with appropriation bills, Supreme Court contrived the curious theory that Article VII, Section 3 permits the Governor, at his option, to put all of his appropriation and non-appropriation measures together in a single appropriation bill and that because the Governor has done that his appropriation bills are constitutional. This singular interpretation of Section 3 was not advanced by the Governor in either Supreme Court or the Appellate Division. There is no need to discuss it further here.

Remarkably, the Appellate Division majority n4 accepted the Governor's sweeping declaration that what are clearly general laws amending existing statutes are not that at all, but are "items of appropriation" by operation of the talisman phrase "when, how, or where" in *Saxton v. Carey*, 44 NY2d 545, 551 (1978). In a labored effort to force this case into the *Saxton* mold, the Appellate Division majority, without any analysis or explanation, simply changed the dispute in this appeal, which has nothing at all to do with the itemization of appropriations, **[*10]** into one involving the "degree of itemization" of the budget. With this convenient conceit, the majority could then apply *Saxton's* holding - that the Constitution does not prescribe any particular degree of itemization and that all that is required is whatever degree of itemization is necessary for legislative review - to conclude that measures attached to the Governor's appropriation bills were sufficiently itemized and therefore constitutional.

n4 Justices Peters and Carpinello dissented solely on the grounds that the Governor lacked standing because he did not veto the Legislature's enacted budget bills, an issue not raised or argued by the Senate below or to be argued in this Court.

The general legislative measures and the amending legislation at issue here, despite the Governor's efforts to transform them into something else by labeling them "items of appropriation" remain what they are - general legislation, some of which contain important amendments to existing law. To say that the Governor may insert **[*11]** such measures into his appropriation bills and preclude the Legislature from changing them constitutes a usurpation of the Legislature's Article III prerogatives in plain violation of the established doctrine of separation of powers which "requires that the Legislature make the critical policy decisions, while the executive branch's responsibility is to implement those policies." *Matter of New York State Health Facilities Ass'n v. Axelrod*, 77 NY2d 340, 349 (1991); *Saratoga County*, 100 NY3d at 821-822; *Bourquin v. Cuomo*, 85 NY2d 781, 784 (1995).

Silver v. Pataki, 192 Misc2d 117 (Sup. Ct., N.Y. Co. 2002), *aff'd* 3 AD3d 101 (1st Dep't 2003) *("Silver II")*, now pending in this Court and to be argued with this appeal, presents the constitutional companion and counterpart to this appeal. Through two different budget processes at issue in *Silver II* and in this case, both of which contradict the plain meaning and undo the very structure of Article VII, the lower courts have thus far allowed the Governor to enact general, policy-laden legislation changing existing State law without the Legislature's **[*12]** input or involvement and in direct derogation of the Legislature's Article III powers.

In contrast with the 2001-2002 budget bills at issue here, the Governor, in *Silver II*, involving the 1998-1999 budget, put programmatic policy measures, including changes to existing State law, in his "non-appropriation" bills rather than attaching them to his "appropriation" bills as in the 2001-2002 budget. Remarkably, the Governor was permitted to accomplish the same result in 1998 as in 2001 - again by invoking Article VII, Section 4 and exercising what amounted to a selective *de facto* line-item "veto" over disfavored legislative changes because the changes were not additions to or the striking or reducing of items of appropriation as permitted under Section 4. n5

n5 Just as the lower courts did in *Pataki*, the lower courts in *Silver II* sanctioned the Governor's unconstitutional action - the exercise of a *de facto* line-item veto of the Legislature's alterations of his proposed non-appropriation bills - by rewriting the critical language in Section 4. In *Silver II*, the lower courts rewrote Section 4 so that its prohibition against legislative changes in the Governor's "appropriation" bills applies as well to his "non-appropriation" bills.

[*13]

This appeal and the companion appeal in *Silver II* present constitutional issues of historic significance involving the very structure of our State government and the separation of powers between the Executive and Legislature. Both the 1998 and 2001 legislative sessions at issue in *Silver II* and on this appeal are history and the validity of specific provisions of appropriation bills for the 2001-2002 budget and non-appropriation bills for the 1998-99 budget may be of little moment in 2004. The precedents to be established by these appeals, however, will be of monumental importance to the citizens of the State.

An approval of the lower courts' judicial rewriting of Article VII of the Constitution here and in *Silver II* would necessarily mean that the Framers of the Executive Budget Amendment, in giving the Governor certain limited legislative authority over appropriations, intended to confer on him the extraordinary power to establish State policy and change State law during the budget process without the Legislature's involvement by two alternative methods. The Governor may either: (1) as in *Pataki*, insert general legislation changing existing laws in his appropriation **[*14]** bills which the Legislature is precluded from changing under the "no-alteration" provision of Section 4 because they are not "items of appropriation" which cannot be "stricken out," "reduced" or "added to"; or (2) as in *Silver II*, selectively exercise a *de facto* line-item "veto" of undesired legislative changes in the important policy-based legislation contained in non-appropriation bills by asserting that the reach of Article VII, Section 4 should be extended to cover non-appropriation bills as well as appropriation bills and claiming that the changes he dislikes do not comply with the "no-alteration" provisions of Section 4.

Thus, the lower courts in these two cases have done exactly what the Framers of the Executive Budget Amendment categorically stated was not intended: **"The executive budget does not deprive the Legislature of any of its prerogatives. It does not, as it [is] sometimes said, make the Governor a czar."** A393.

QUESTIONS PRESENTED FOR REVIEW

1. Given the plain meaning, structure, and scheme of Article VII of the State Constitution did the lower courts err in holding that the Governor may insert programmatic policy measures amending existing **[*15]** State laws as well as other general legislative matters in his proposed Article VII, Section 3 "appropriation bills" and then by invoking Article VII, Section 4, which applies only to "items of appropriation," prohibit the Legislature from striking out or altering these general legislation and policy measures?

2. Does *Saxton v. Carey*, 44 NY2d 545 (1978) support the Governor's attachment of non-appropriation, programmatic policy measures, including changes to existing State law, to his Section 3 appropriation bills which the Legislature is prohibited from changing pursuant to Article VII, Section 4?

3. Is there any justifiable rationale for the Governor's contention that the Legislature's general legislative powers under Article III to enact single-purpose bills and non-appropriation bills are limited by the "no-alteration" restrictions of Article VII, Section 4?

4. Does the "anti-rider" provision in Article VII, Section 6 constitute authority for the Governor to include in an appropriation bill any measure so long as it "relates specifically to some particular appropriation in the bill" and is "limited in its operation to such appropriation?"

5. Was the Legislature's **[*16]** enactment of its single-purpose bills after the Governor's appropriation bills had

been formally acted on by both houses in compliance with Article VII, Section 5?

JURISDICTION OF THE APPEAL AND PRESERVATION OF ISSUES

This Court has jurisdiction over the present appeal pursuant to CPLR 5601(b)(1). The Senate and the Assembly appeal as of right (A13-A16) from an Opinion and Order ("Order") of the Appellate Division, Third Department dated and entered on April 22, 2004. A3-A12. The Appellate Division Order affirmed a Decision, Order and Judgment of Supreme Court, Albany County (Malone, J.), entered August 28, 2002, granting the Governor's motion for summary judgment. A22-A55. *See Pataki v. New York State Assembly,* 190 Misc2d 716 (Sup. Ct., Albany Co. 2002), *aff'd* 7 AD3d 74, 774 NYS2d 891(3d Dep't 2004).

The issues raised on appeal were preserved in Supreme Court and in the Appellate Division. A3-A12, A22-A55, A106-A126, A570-A639.

STATEMENT OF FACTS

The 2001-2002 Budget Process

On January 16 and 17, 2001, Governor Pataki submitted his proposed "executive budget" to the Legislature, which consisted of three distinct components: **[*17]** (1) the budget; (2) "appropriation" bills; and (3) "non-appropriation" bills. A272.

The first component, the budget, consisted of a narrative description of the Governor's budgetary proposals, including an overall plan of expenditures and explanations for the basis and availability of funds to pay for the expenditures. A272.

The second component consisted of six (6) proposed appropriation bills submitted by the Governor. n6 In addition to setting forth the amount of the proposed appropriation and a brief description of the item being funded, which is the proper content of an "appropriation" bill, *see* N.Y. Const. art. VII, § 3; *People v. Tremaine,* 281 NY2d 1, 5 (1939) *(Tremaine II),* the Governor's proposed appropriation bills included general legislation and/or provisions amending or repealing existing State law. n7 As to the latter, the Governor's proposed appropriation bills contained, for example, the following amendments to State law:

. amendments of the formulae established under Education Law § 3602 by which the distribution of approximately $ 13.5 billion in funds appropriated for state aid to school districts would be distributed, including changing **[*18]** specific provisions in Education Law § 3602 and establishing the formulae for aid to school districts for kindergarten teachers, for calculating incentive operating aid for reorganized districts, and establishing entitlement to flex aid and the formulae therefor *(see* S.905/A.1305, A168-A203);

. an amendment to Education Law § 701(6) reducing the textbook factor from $ 63.18 to $ 42.30 in calculating the amount of money schools were to receive for textbooks in the 2001-2002 school year *(see id.,* A181, lines 47-53);

. an amendment of Public Health Law § 2808 and its regulations altering the computation of Medicaid rates for residential health care facilities by removing the cost of non-medicaid patients *(see* S.904/A.1304, A153, lines 15-28);

. an amendment of Public Health Law § 2808(9) eliminating for the one-year period commencing on April 1, 2001 the statutory requirement that trend factors (reflecting the effect of inflation) be considered in computing reimbursable costs of Medicaid providers *(see id.,* A155, lines 12-29);

. an amendment of Public Health Law § 2808 and its regulations altering the computation of Medicaid rates for residential health care facilities **[*19]** by eliminating the enhanced rate provided to facilities with over 300 beds *(see id.,* A153, lines 57-61; A155, lines 1-11;

. effectively amending Education Law §§ 232 (State library and museum are departments of University of the State of New York) and 202(1) (University of the State of New York is governed by Board of Regents) by removing the State Library and State Museum from the control of the Department of Education and Board of Regents and transferring the administrative functions of these agencies to the Governor's newly-created "Office of Cultural Resources" under the Council on the Arts (see S.905/A.1305, A164, line 39 - A167, line 15; and A204, line 12 - A209, line 21).

n6 S.900/A.1300 (Legislature and Judiciary Budget Bill); S.901/A.1301 (Debt Service Budget Bill); S.902/A.1302 (Public Protection and General Governmental Budget Bill); S.903/A.1303 (Transportation and Economic Development Budget Bill); S.904/A.1304 (Health, Mental Hygiene and Environmental Conservation Budget Bill); and S.905/A.1305 (Education, Labor and Family Assistance Budget Bill). R113-1386.

n7 The general legislation measures included certification and interchange provisions. "Certification" provisions are general provisions inserted at the top of each appropriation bill purporting to affect each and every item of appropriation. They provide that appropriated monies will not be available until the Director of the Budget issues a certificate of approval to: (1) the Department of Audit and Control, (2) the chairperson of the Senate Finance Committee, and (3) the chairperson of the Assembly Ways and Means Committee. "Interchange" provisions allow the transfer of funds among items of appropriation at the discretion of executive branch officials without legislative approval. They vest authority in the Director of the Budget to transfer or re-allocate appropriated funds, unrestrained for the specific purposes for which those funds were appropriated pursuant to Article VII, Section 6.

[*20]

The third component of the Governor's budget submission consisted of five (5) non-appropriation bills. n8 All of the Governor's proposed appropriation and non-appropriation bills were printed and referred to the Senate Finance Committee on January 16 and 17, 2001. On February 13, 2001, the Governor submitted 30 day amendments to his proposed bills, as authorized by Article VII, Section 3. A273. Thereafter, the amendments were printed and referred to the Senate Finance Committee. R1947-2220.

n8 S.1145/A.1997; S.1146/A.1998; S.1147/A.1999; S.I148/A.2000; S.1149/A.2001. R69, 1387-1946.

On March 29, 2001, the Legislature passed S.901, the Debt Service Bill, as amended on March 26, 2001. The Governor signed that appropriation bill into law on March 30, 2001. On July 30, 2001, after completion of the Senate Finance Committee's review of the Governor's submitted appropriation bills, the Legislature took action with respect to the remaining submitted appropriation bills. A273.

As relevant here, the Legislature made **[*21]** two types of changes common to all of the Governor's proposed appropriation bills. n9 In addition to making alterations authorized by Section 4 - "striking out," "reducing" or "adding" items of appropriation - the Legislature deleted as unconstitutional and therefore void both (1) general legislation improperly included at the beginning of each appropriation bill requiring, among other things, that the Director of the Budget, in addition to the Comptroller, certify all appropriations prior to payment; n10 and (2) purported amendments to existing State law contained in the Governor's proposed appropriation bills, including:

. his numerous proposed measures allowing for the transfer or interchange of funds to other agency programs in violation of the State Finance Law (A274);

. his amendment of the formulae established under Education Law § 3602 for the distribution of approximately $ 13.5 billion in funds for state aid to local school districts (A159-A161, A168-A203);

. his amendment of Education Law § 701(6) reducing the textbook factor from $ 63.18 to $ 42.30 in calculating the amount of money schools were to receive for textbooks in the 2001-2002 school year (A181, lines 47-53); **[*22]**

. his amendment of Public Health Law § 2808 and its regulations altering the computation of Medicaid rates for residential health care facilities by removing the cost of non-medicaid patients (A153, lines 15-28);

. his amendment of Public Health Law § 2808(9) eliminating for one year commencing on April 1, 2001 the statutory requirement that trend factors (reflecting the effect of inflation) be considered in computing reimbursable costs of Medicaid providers (A155, lines 12-29);

. his amendment of Public Health Law § 2808 and its regulations altering the computation of Medicaid rates for residential health care facilities by eliminating the enhanced rate provided to facilities with over 300 beds (A153, lines 57-61; A155, lines 1-11);

. his improper inclusion in the appropriation to the medical assistance program, provisions which substantively changed and contravened existing law with respect to medicaid reimbursements at the state and federal level (A157-A158);

. his amendment of Education Law §§ 202 and 232 by transferring the State Library and State Museum from the control of the Department of Education and Board of Regents to the newly created "Office of Cultural Resources" **[*23]** under the Council on the

Arts (A164-A167, A204-A209). n11

n9 In addition, the Legislature completely struck out. all reappropriations and capital reappropriations included in each of the appropriation bills. *See* S.902, pp.29-36 (RI41-142, 170-177); S.903, pp.20-27 (R352-353, 372-379); S.904, pp.I87-210 (R555-556, 742-765); S.905, pp.19-33 (R9I3-914, 932-946).

n10 *See* S.902, p.2, ln. 39-43 (R143); S.903, p.2, ln. 41-45 (R354); S.904, p.2, ln. 39-43(R557); S.905, p.2, ln. 37-41 (R915).

n11 As noted previously, this not only amended the Education Law, but it violated Article XI, § 2 of the Constitution. See N.Y. Const. art. XI, § 2 **(powers of Board of Regents may be modified *"by the legislature"* [emphasis supplied]);** *see also Saratoga County, supra,* 100 NY2d at 823 ("The choice of *which* agency shall regulate an activity can be as fundamental a policy decision as choosing the substance of those regulations. For that reason, and because agencies are creatures of the Legislature, the Constitution requires that agencies carry out only those duties assigned them by the Legislature expressly or by necessary implication * * *.").

[*24]

On July 30, 2001, after completion of the Senate Finance Committee's review of the Governor's submitted non-appropriation bills, the Legislature took action with respect to the submitted non-appropriations bill, pursuant to its Article III powers. A277.

On July 30 and 31, 2001, independent of its actions with respect to the Governor's proposed appropriation and non-appropriation bills, and pursuant to its Article VII, Section 5 power, the Legislature referred to committee thirty-seven (37) single-purpose appropriation bills each for a different purpose than the items included in the Governor's proposed appropriation bills in compliance with Article VII, Section 5. A279.

All of the Governor's appropriation and non-appropriation bills were reprinted as amended and passed by the Legislature on August 2, 2001. Also on August 2, 2001, after passing the Governor's appropriation and

non-appropriation bills as amended, the Legislature called the 37 single-purpose appropriation bills to the floor for consideration and passage. The Legislature passed its 37 single-purpose bills on August 2 and 3, 2001. On August 13, 2001, the Governor signed into law appropriation bill S.900/A.1300 as amended **[*25]** by the Legislature, and on August 14, 2001 the Governor signed into law the remainder of his proposed appropriation and non-appropriation bills as amended by the Legislature. The 37 single-purpose bills were signed into law by the Governor on August 15, 2001. A280.

Commencement of this Action and Supreme Conrt's Grant of Summary Judgment in Favor of The Governor

Immediately after signing all of the disputed legislation into law, the Governor commenced this action on August 16, 2001 by filing a Complaint seeking a declaratory judgment that the Senate and the Assembly violated the New York Constitution in taking various actions with respect to the Governor's appropriation and non-appropriation bills, including striking provisions from his proposed appropriation bills that the Legislature found to be constitutionally void, enacting several non-appropriation bills, n12 and passing the single-purpose appropriation bills without finally acting upon the Governor's appropriation bills. A85-A105. n13

n12 Although the Governor's Complaint challenges legislative changes to his proposed non-appropriation bills in the 2001 -2002 budget process, non-appropriation bills have not been specifically addressed by the lower courts and have not been a significant issue for the parties here in *Pataki*, in contrast to *Silver II.* However, in P26 of the Complaint the Governor disputes four (4) non-appropriation bills enacted by the Legislature. A91. In P36 he asserts that the Legislature "[t]hrough the use of provisions it placed in **other budget bills** * * * unconstitutionally altered items of appropriation proposed by the Governor by modifying both the purposes for which appropriations may be spent and the terms and conditions of spending authorized by such appropriations"(A95) (emphasis supplied), the same argument he makes in *Silver II.*

[*26]

n13 The Governor also sought to enjoin the Comptroller of the State of New York, H. Carl McCall, from approving vouchers pursuant to the allegedly unconstitutional appropriation bills, but that portion of the Governor's suit was dismissed upon the Comptroller's motion by an Order of Supreme Court dated November 7, 2001. A99, R3634.

Both the Senate and the Assembly served separate Answers and Counterclaims on October 4, 2001 denying the Governor's allegations in their entirety. In their counterclaims the Senate and the Assembly sought declarations that (1) the Governor's inclusion of amendments to existing State law and general legislation in his proposed appropriation bills violates the New York Constitution and impermissibly usurps the Legislature's authority to enact general legislation, and (2) the Legislature's actions with respect to the 2001 budget bills were constitutional. n14 A106-A126.

n14 The Assembly's Answer also contained a number of affirmative defenses not addressed to the merits that were not raised by the Senate. A120-A12I.

[*27]

The Governor moved for summary judgment on his Complaint on October 22, 2001. A56. The Senate opposed the Governor's motion and cross-moved for summary judgment. A269. The Senate sought declarations on the merits that (1) the Governor's actions in attaching general legislative provisions to his proposed appropriation bills were unconstitutional and void; and (2) the Legislature acted lawfully in removing such improperly included and constitutionally void general legislation measures from the Governor's proposed appropriation bills, in passing the

appropriation and non-appropriation bills as amended, and in enacting its own 37 single-purpose bills. A269-A270.

The Assembly also opposed the Governor's motion and cross-moved for summary judgment seeking a declaration that the Legislature had acted lawfully and that it was the Governor's conduct that was unconstitutional. A429. The Assembly also argued that the Complaint should be dismissed based upon certain affirmative defenses not addressed to the merits. It contended that the Assembly was immune from suit for voting upon and enacting legislation. It also maintained that the Governor lacked standing to bring this action because he **[*28]** signed the 46 budget bills at issue into law rather than vetoing them. A39-A41; R3657-3663.

In a Decision, Order and Judgment entered on January 18, 2002, Supreme Court granted the Governor's motion for summary judgment and denied both the Senate's and the Assembly's cross-motions for summary judgment. 190 Misc2d 716. A22-A55. n15 Supreme Court concluded that: (1) the Governor properly included as part of his appropriation bills submitted under Section 3 various programmatic policy measures, including changes to existing State law, *e.g.*, I6 1/2 pages of state education aid formulae; (2) because these non-appropriation measures **were part of the Governor's appropriation bills** the Legislature, by virtue of the restrictions on legislative alterations under Article VII, Section 4, could not alter them "except to strike out or reduce specific items of appropriation or add new appropriations" *(id.* at 736); and (3) the Legislature's actions in deleting certain programmatic policy measures and amendments to existing law did not constitute the striking out, reduction or addition of "items of appropriation" as permitted by Section 4 and were, therefore, **[*29]** "unconstitutional." *Id.*

> n15 Although no party to this action made the argument adopted by Supreme Court, we describe the court's analysis in somewhat more detail than normal for an unpreserved argument that will not be presented on this appeal so that the Court can avoid reading the lengthy Decision if it chooses and because certain aspects of the decision are helpful in addressing the issues that the parties have raised below and will present to this Court.

Supreme Court did not directly reject or address the Senate's argument that the Governor's inclusion of general legislative provisions amending existing laws as part of his appropriation bills violated Section 3 and other provisions of Article VII because such measures could not in any way be considered items of appropriation for inclusion in an appropriation bill. The court found an entirely different way to uphold the constitutionality of the Governor's inclusion of these measures. It conceived the novel approach that Article VII, Section 3 **specifically [*30] permits** the inclusion of general legislative measures amending existing laws in the Governor's appropriation bills and that because they are general legislative measures (and not "items of appropriation") the Legislature cannot strike them out in view of the prohibitions of Article VII, Section 4. Supreme Court's conclusion is based entirely on an extraordinary and unprecedented interpretation of Section 3, which provides in relevant part as follows: "At the time of submitting the budget to the legislature the governor shall submit a bill or bills containing all the proposed appropriations and reappropriations included in the budget **and the proposed legislation, if any, recommended therein."** N.Y. Const. art. VII, § 3 (emphasis supplied).

Section 3, Supreme Court held, specifically permits the Governor **to choose** between placing his programmatic policy measures, including amendments to existing State law - the "proposed legislation * * * recommended [in the budget] (N.Y. Const. art. VII, § 2)" - together with the Governor's appropriations in appropriation bills **or** submitting the appropriation bills and the other "proposed legislation" in separate bills. As Supreme **[*31]** Court put it,

> **The choice of a single bill or mnltiple bills** to submit all appropriations, reappropriations *and proposed legislation* (ostensibly the 'substantive, programmatic provisions' necessary to alter existing law so as to implement the Governor's 'complete plan' of income and expenditures) **is given entirely to the Governor.**

190 Misc2d at 733 (bold emphasis supplied). The result of this interpretation is that the Governor is empowered to make

his non-appropriation measures impervious to legislative alteration under Section 4 by simply exercising his so-called "option" to put these measures in his appropriation bills. And since the only description in Section 3 of what the Governor, according to Supreme Court, has the option of putting in his appropriation bills is "the proposed legislation, if any, recommended [in the budget]," the Governor, Supreme Court concluded, may properly include virtually any measure. And whatever measures the Governor chooses to include as part of his appropriation bills - because they would not be "items of appropriation" subject to the limited actions that the Legislature may perform under Section 4, **[*32]** *i.e.* to "strike out," "reduce" or "add thereto" - are not subject to legislative amendment. Moreover, Supreme Court concluded, unless the Legislature rejects the entire bill, the measures, by operation of Section 4, become "law immediately without further action by the governor." N.Y. Const. art. VII, § 4.

The Senate and Assembly appealed directly to this Court from the Decision, Order and Judgment pursuant to CPLR 5601(b)(2). A17-A21. By Order entered May 2, 2002, however, this Court transferred the appeals, *sua sponte*, to the Appellate Division, Third Department on grounds that a direct appeal did not lie when questions other than the constitutional validity of a statutory provision are involved.

The Third Department's Opinion and Order

In its actual holding on this matter, the majority concluded that the Legislature's "actions in amending nine of the budget bills submitted by [the Governor] and introducing and passing 37 single-purpose appropriation bills violated N.Y. Constitution, article VII, § 4." 7 AD3d at, 774 NYS2d at 893. n16 The majority rejected the Legislature's argument that the Governor's inclusion of changes in existing State law, **[*33]** which it characterized as "substantive modifiers" in his proposed appropriation bills, amounted to "an unconstitutional attempt to legislate by appropriation." *Id.* at 894. Relying almost exclusively upon *Saxton v. Carey*, 44 NY2d 545, the majority stated:

> We decline defendants' invitation to establish a bright-line rule **defining the degree of itemization that may properly be included iu a governor's budget submissions.** We find sufficient authority to support plaintiff's argument that such substantive modifiers are part of a gubernatorial appropriation bill and subject to the protection of N.Y. Constitution, article VII, § 4 *(see Silver v. Pataki*, 3 AD3d 101 [2003], *supra).*
>
> The Court of Appeals, in *Saxton v. Carey* (44 NY2d 545 [1978]), instructed that the N.Y. Constitution does not require any particular degree of itemization and only the legislative and executive branches were in a proper position to determine what level of itemization was necessary for the Legislature to effectively review and enact a budget.

Id. (emphasis supplied).

> n16 The majority first concluded that the Governor had standing to sue, rejecting the Assembly's argument that because the Governor signed the disputed bills into law rather than vetoing them he lacked standing. The two dissenters agreed with the Assembly's standing argument and never addressed the merits of the constitutional issues presented. 774 NYS2d at 893, 895-897.

[*34]

Finally, the majority stated that it would not "immerse itself into the very heart of the 'political process' upon which the formulation of the state budget process depends" and that the Legislature's only options are to refuse to pass the Governor's proposed budget bills or to amend the Constitution. *Id.*

Notably, although the majority found that the Legislature's enactment of the 37 single-purpose appropriation bills was unconstitutional, its decision does not contain any discussion or offer any explanation of how the Legislature's

enactment of single-purpose appropriation bills pursuant to Section 5 could violate Section 4, which applies solely to the Governor's appropriation bills submitted pursuant to Article VII, Section 3 . By their very terms, the restrictions in Section 4 apply only to legislative alterations of appropriation bills "submitted by the governor" and cannot apply to Section 5 single-purpose appropriation bills, which legislative bills separate and distinct from the Governor's proposed Section 3 appropriation bills and initiated by the Legislature only after "all the appropriation bills submitted by the governor shall have been finally acted on by both houses. **[*35]** " N.Y. Const. art. VII, § 5. Similarly, the majority did not discuss or explain how Section 4 could apply to the Governor's proposed "non-appropriation" bills, which the Court held were also unconstitutionally altered by the Legislature in violation of Section 4.

Both the Senate and the Assembly have appealed the Third Department's Order to this Court as of right under CPLR 5601(b)(1). A13-A16.

ARGUMENT

POINT I

THE APPELLATE DIVISION HOLDING THAT THE GOVERNOR MAY INCORPORATE AMENDMENTS TO EXISTING LAWS, PROGRAMMATIC POLICY MEASURES AND OTHER GENERAL LEGISLATIVE MATTERS IN HIS PROPOSED ARTICLE VII, SECTION 3 "APPROPRIATION" BILLS AND THEN BY INVOKING ARTICLE VII, SECTION 4 PROHIBIT THE LEGISLATURE FROM STRIKING OUT OR ALTERING THESE UNCONSTITUTIONALLY INCLUDED PROVISIONS IGNORES THE PLAIN MEANING AND DESTROYS THE INTENDED STRUCTURE AND SCHEME OF ARTICLE VII

A. The Historical Background of Article VII

From reading the first six sections of Article VII as a whole it is evident that the Framers carefully designed Article VII to achieve the two principal aims of the Executive Budget Reform:

(1) making the Governor, not the Legislature, responsible in the **[*36]** first instance for preparing and presenting a complete and thoroughly reviewed and revised budget for the proposed expenditures along with the appropriation bills and recommended non-appropriation bills, including revenue measures, to carry it out; and

(2) accomplishing this with the least possible disturbance of the delicate balance of power between the executive and legislative branches and without doing offense to the basic principle of the democratic form of government, *i.e.,* that it is the Legislature, not the executive branch, which controls the purse strings and has the ultimate authority over spending the public's money.

One aspect of the undisputed history of the Executive Budget Amendment must be emphasized. It is clear that the limited legislative authority which the Framers intended to transfer to the Governor extended only to actual "appropriation" bills. The Framers did not intend to give the Governor any power to enact other legislation - *i.e.* amendments to existing laws and general legislation containing programmatic budget measures such as Governor Pataki included in his proposed "appropriation" bills at issue here.

Article VII and the reports, studies and **[*37]** other documents explaining the purpose of the Executive Budget Reform are concerned solely with **financial legislation** - *i.e.,* spending bills, the appropriation of state funds, and tax measures as indicated in Article VII's very title, "ARTICLE VII - STATE FINANCES." Confined to this one significant area of lawmaking, the first six Sections of Article VII dovetail to achieve a coherent, sensible and workable legislative process and a **limited transfer of legislative authority to the executive** that preserves the basic apportionment of governmental power between the two branches, as intended by the reformers. Even though limited to the state budget, the changes brought about by the Article VII reforms were nevertheless of historic significance since they constituted the first alteration of the basic structure of the tripartite form of government established in the State Constitution.

For the first time since the adoption of the State Constitution in 1777, authority which had traditionally been in the exclusive province of the legislative branch was given to the chief executive: the authority to introduce actual legislation - *i.e.*, appropriation bills which, when enacted, **[*38]** result in an appropriation of state funds. It is evident that the drafters of the 1927 Executive Budget Amendment were acutely aware of the importance of preserving the balance of power between the executive and legislative branches and of preventing possible domination of the budget process by the executive. Thus, they inserted in what is now Article VII, Section 4 a provision giving the Legislature greater control over spending legislation and additional power to amend the Governor's appropriation bills than had been recommended in the original 1915 Report - the power to add "items of appropriation provided that such additions are stated separately and distinctly from the original items of the bill * * * ." *Id.*, § 4. A310, A320-A321.

Maintaining the balance and preventing the potential loss of power by the legislative branch were of genuine concern not only to the drafters of the Executive Budget Amendment in 1926, but to the proponents of the reform as evidenced by the following statements of the reform's chief sponsor, Governor Alfred E. Smith, in his Annual Message to the Legislature in 1925:

> * * * the forces of reaction which have opposed this important reform rest **[*39]** their objections on an entirely false foundation. We constantly hear in argument against the executive budget, that it will deprive the direct representatives of the people of a proper control over the purse strings of the State. This argument is not based on fact. **The executive budget does not in the slightest degree decrease the power of the Legislature.** It provides only for a more responsible method for the exercise of that power.

A402 (emphasis supplied).

B. The Language of Article VII Confirms That Appropriation and Non-Appropriation Bills Were Intended to Be Treated as Separate and Distinct Types of Legislative Measures Serving Different Purposes and Having Different Contents

Under Article VII, the Governor has the responsibility for collecting, consolidating, reviewing and revising all of the estimates of the government departments and for presenting to the Legislature a complete detailed budget setting forth expenditures and revenues, together with recommended legislation necessary to implement the plan. *See* N.Y. Const. art. VII, §§ 1,2. Along with the "executive budget," presented in narrative form, the Governor submits two types of recommended **[*40]** legislation: (1) **appropriation bills** - *i.e.*, actual "bills containing all the proposed appropriations and re-appropriations included in the budget" *(id.,* § 3); and (2) **non-appropriation bills** - *i.e.,* other "proposed legislation, if any, recommended [in the budget]." *Id.* The distinction is critical, as this case and *Silver II* demonstrate, in maintaining the limited transfer of legislative power to the executive under the Executive Budget Amendment. n17

> n17 It is through this critical distinction between "appropriation" bills and other legislation *(i.e.,* "non-appropriation" bills) and the different functions and powers of the Governor and Legislature with respect to each that **the Framers intended to carefully limit the extent of the transfer of legislative power to the Governor, to make certain that - as Governor Smith put it - the Governor would not become a "czar."** A393.
>
> Although the specific term "non-appropriation bill" is not found in the Constitution, in *Silver v. Pataki,* 96 NY2d 532 (2001), *modifying* 274 AD2d 57 (1st Dep't 2000), *reversing* 179 Misc 2d 315 (Sup. Ct., N.Y. Co. 1999) *(Silver I)* this Court recognized both types of legislation, explaining that, "[t]hese [non-appropriation] bills contain programmatic provisions and commonly include sources, schedules and sub-allocations for funding provided by appropriation bills, along with provisions authorizing the disbursement of certain budgeted funds pursuant to subsequent legislative enactment." 96 NY2d at 535 n.1.

[*41]

1. Appropriation Bills Are to Contain "Items Of Appropriation "

The wording of Article VII, Sections 2, 3 and 4 read together makes clear that the drafters intended the term "appropriation bill" to be understood in its ordinary and accepted sense and meaning - *i.e.*, as a bill containing "what money is to be expended and for what purpose." *Tremaine II, supra,* 281 NY at 5. n18 Article VII distinguishes between **appropriation bills,** *i.e.*, bills specifically described as "containing all the proposed appropriations and reappropriations included in the budget" (N.Y. Const. art. VII, § 3), and **non-appropriation bills,** *i.e.*, the other "proposed legislation, if any, recommended [in the budget]." *Id.* When Sections 2 and 3 of Article VII are read together with Section 4, what the Framers intended to be included within each of these two categories of legislation becomes apparent.

n18 This Court has described Article VII as a "delicately calibrated mechanism." *Cohen v. State of New York,* 94 NY2d 1, 12 (1999).

[*42]

Section 3 contains the following:

> At the time of submitting the budget to the legislature the governor shall submit a bill or bills containing all the proposed appropriations and reappropriations included in the budget **and the proposed legislation, if any, recommended therein.**

N.Y. Const. art. VII, § 3 (emphasis supplied). While not purporting to define an "appropriation bill," Section 3 tells us precisely what an "appropriation bill" is to contain in the phrase "a bill or bills containing all the proposed appropriations and reappropriations included in the budget." *Id.* In addition to appropriation bills, Section 3 calls for other "recommended" non-appropriation "legislation." The use of the conjunctive "and" in Section 3 demonstrates that the category "proposed legislation" is different from and does not include "the proposed appropriations and reappropriations included in the budget," the subject matter reserved exclusively for "appropriation bills." Rather, the use of the word "and" indicates that Section 3 contemplates two distinct types of proposed legislation: appropriation bills and non-appropriation bills. n19

n19 In addition to this Court's decision in *Silver I,* this interpretation was apparently adopted previously by Judge George Bundy Smith who, in describing the budget process in his dissent in *Cohen v. State of New York, supra,* 94 NY2d at 22, wrote that in addition to the budget **"the Governor must submit appropriation bills *and* proposed legislation** (N.Y. Const., art. VII, § 3)." (emphasis supplied)

[*43]

Section 4 of Article VII details the only ways in which the Legislature may alter a bill or bills containing "the proposed appropriations or reappropriations" *(Id.* § 3) by providing that "[t]he legislature may not alter **an appropriation bill** submitted by the Governor except to **strike out** or **reduce** items therein * * * [or] **add thereto** items of appropriation provided that such additions are stated separately and distinctly from the original items of the bill and refer each to a single object or purpose." *Id.*, § 4 (emphasis supplied). Hence, this limitation on the Legislature's power to alter an "appropriation" bill is referred to as the "no-alteration" provision. No such restriction exists with respect to the Governor's proposed "non-appropriation" legislation. The simple and logical proposition - that under the plain language of Section 4 an "appropriation bill" is supposed to contain what the Legislature can strike "items" from, reduce "items" in, or add "items to" - was articulated by Chief Judge Crane in *Tremaine II* in the following succinct statement:

> When, therefore, we are told that the Legislature may not alter an appropriation **[*44]** bill submitted by the Governor, except to strike out or reduce items therein, **we expect the appropriation bill to contain items.**

Tremaine II, supra, 281 NY at 5 (emphasis supplied).

Although Article VII contains no specific definition of "items of appropriation," in *Tremaine II* this Court read the term narrowly, as encompassing only **the amount of the appropriation aud its purpose.** As this Court explained:

> The Governor's budget is to be itemized so as to show of what the estimates consist. The information necessarily consists of items. The Constitution means that the budget, and the **appropriation bills** accompanying it, shall be broken down into items sufficient to **show what money is to be expended, and for what purpose.** It is information the Governor must give, and **it is the items giving this information which is embodied in his appropriation bills.**

Id. (emphasis supplied).

Moreover, in *People v. Tremaine*, 252 NY 27 (1929) (*Tremaine I),* this Court has given a clear indication that the "when, how or where" type of provisions which the Governor claims are items of appropriations *(see* **[*45]** Point II, *infra)* are, in fact, not "items of appropriation." In disapproving of the Legislature's addition of Section 11 to appropriation bills giving the Chairs of the Senate Finance and Assembly Ways and Means Committees co-authority for the approval of segregations of monies, this Court wrote:

> 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.**

252 NY at 49-50 (emphasis supplied).

The plain meaning of the term "appropriation bill" as used in Section 4 and the restricted interpretation of it by this Court in *Tremaine I* and *Tremaine II* is consistent with the generally accepted meaning of the term. As Webster's Dictionary, for example, defines it, an "appropriation bill" is:

> A measure to be approved by a legislative body, **authorizing the disbursement of pnblic moneys,** and specifying the purpose of the various items and the amount of money to be expended **[*46]** for each.

Webster's New Twentieth Century Dictionary, Unabridged, 2d ed., Simon & Schuster (c).1979), at 92 (emphasis supplied). n20

> n20 The American Heritage Dictionary gives the following definition of "appropriation:" "3. A legislative act authorizing the expenditure of a designated amount of public funds for a specific purpose." The American Heritage Dictionary, Houghton Mifflin Co., 1976. It is settled that a dictionary definition may be accepted as the sense in which a term is used when the term, as here, is not defined in the particular enactment. *See Village of Chestnut v. Howard,* 92 NY2d 718, 723 (1999) (where the Court relied on dictionary definitions for "bridge" and "culvert," rather than on the alternative definitions given in a section in the statute at issue); *see also Quotron Systems v. Gallman,* 39 NY2d 428, 431 (1976); McKinney's Statutes § 234.

Sections 2, 3 and 4 of Article VII, in addition to showing what an "appropriation bill" was intended to include **[*47]**

- *i.e.,* items of appropriation - also show what it was not intended to include. Article VII, it is noted, specifically provides in Sections 2 and 3 for "appropriation bills" and also for "other recommend[ed]" non-appropriation measures. It makes only "appropriation bills" subject to the unusual and significant provisions in Section 4 (*e.g.*, "when passed by both houses [becoming] a law immediately"). One may logically conclude that the Framers' careful limitation of this novel aspect of Section 4 in giving immediate law status to "appropriation bills" had a purpose - being certain that Section 4 would not apply to the other type of legislation, the non-appropriation measures.

2. Non-Appropriation Bills Contain Changes to Existing Laws, Programmatic Policy Measures, and Other Measures Implementing the "Items of Appropriations " Contained in Appropriation Bills

Although this Court was not called upon to decide the constitutional limits of appropriation and non-appropriation bills in *Silver I,* after noting that "[t]he term 'non-appropriation bill' is not found in the Constitution," this Court specifically wrote that non-appropriation bills

> contain **programmatic [*48] provisions** and commonly include **sources, schednles, and sub-allocations for funding** provided by appropriation bills, along with **provisions authorizing the disbursement of certain budgeted funds pursnant to subsequent legislative enactment.**

Silver I, supra, 96 NY2d at 535, n1 (emphasis supplied). Similarly, in describing the facts of *Silver I,* tbis Court noted that Governor Pataki submitted his executive budget to the Legislature "along with several budget bills. **Some of the bills submitted appropriated monies while others detailed the utilization of appropriated funds or proposed changes in the operation of certain programs."** *Id.* at 535 (emphasis supplied). The phrase "[s]ome of the bills submitted appropriated monies" can logically only be a reference to "appropriation bills" and the phrase "while others detailed the utilization of appropriated funds or proposed changes in the operation of certain programs" can only logically be a reference to "non-appropriation bills." Moreover, it seems clear that this Court's reference to "proposed changes in the operation of certain programs" is a reference to amendments to existing **[*49]** State laws as being part of "non-appropriation" bills since they constitute "the proposed legislation, if any, recommended" (N.Y. Const. art. VII, § 3) in the budget.

This Court's description of "non-appropriation" bills in *Silver I as* different from "appropriation" bills is fully consistent with Article VII. What sort of measures does Article VII contemplate as being included in non-appropriation bills and, therefore, excluded from "appropriation bills" that are subject to Section 4's restrictions on legislative alteration? The answer is found in Article VII, Sections 2 and 3. Section 2, in addition to calling for a complete plan of expenditures, estimates of revenues, and recommended legislation to provide the revenues, also requires the Governor's budget to contain "such other recommendations and information as the governor may deem proper * * *." N.Y. Const. art. VII, § 2. It is these "other recommendations" which relate to the budget and the appropriation bills, but are not themselves "items of appropriation," which constitute the non-appropriation measures referred to in Article VII, Section 3 as "the proposed legislation, if any, recommended [in the budget]." *Id.* **[*50]** , § 3.

Significantly, the language "and the proposed legislation, if any, recommended therein" was added when Article VII, Section 3 was adopted in the 1938 Constitution for the principal purpose of **making the Governor responsible for actually submitting tax legislation - rather than just recommending it as provided for in Section 2** - to pay for his proposed appropriations as well as other legislation necessary to carry out the budget. *See Winner v. Cuomo,* supra, 176 AD2d at 65. n21 Thus, in Section 2, the Governor is required **to recommend** in his budget the proposed legislation he deems appropriate to provide the necessary monies and revenues (the tax legislation), and in Section 3 (as adopted in the 1938 Constitution) the Governor is required actually **to submit** this proposed legislation (including the revenue-producing legislation) at the same time that he submits his appropriation bills containing the proposed appropriations and reappropriations. This is further proof that the Framers necessarily considered "the proposed legislation * * * recommended [in the budget]" as a type of legislation separate and distinct from appropriations. Tax measures **[*51]** enacted for the purpose of raising public money and appropriation bills passed for the purpose of spending it are in a sense opposites. No one would suggest that the Framers intended that these two conceptually

incompatible types of legislation should be combined in one bill. Assuming that such a combination of non-appropriation bills, including tax measures, could be included in the Governor's proposed appropriation bills, the Governor's tax measures would become law with no possibility of legislative alteration or other action by reducing it or adding items to it as permitted by Article VII, Section 4. Surely the Framers could not have intended such an anomaly. n22

n21 The history of the amendment adopting the added phrase shows that the term "the proposed legislation" is intended to refer, at least in part, to the proposed tax legislation which the Governor deems necessary to provide the revenues to pay for the appropriations submitted in the appropriation bills. The 1938 Report of the Committee on State Finances and Revenues explains:

> Believing that the revenue side of the budget is of equal importance with the expenditure side, the committee feels that any bills to carry into effect legislation affecting the revenues of the State which the Governor may propose should have the same dignity and importance as his appropriation bills, and all should be submitted directly by the Governor and treated as budget bills.

A334 (emphasis supplied).

[*52]

n22 There is nothing in the legislative history pertaining to the amendments to the budget process at the time of the adoption of Article VII in the 1938 Constitution suggesting that the Governor's tax measures should be included as part of his appropriation bills thereby making them immune to legislative change under Section 4 and having the effect of giving the Governor sole power to levy taxes. On the contrary, the history makes it clear that tax bills and appropriation bills were understood to be separate and different measures. *See* Report of Joint Legislative Committee on State Fiscal Policies, pp. 24, 25. A365.

Notably, Justice Malone recognized the distinction between "appropriation" and "non-appropriation" bills in Sections 2 and 3 when he described the "proposed legislation" referred to in Section 3 as "ostensibly the 'substantive, programmatic provisions' necessary to alter existing law so as to implement the Governor's 'complete plan' of income and expenditures * * * ." *Pataki, supra,* 190 Misc2d at 733.

C. The Courts Below Have Repudiated the Plain Meaning [*53] of Article VII and the Clear Distiuctiou Between "Appropriation" and "Non-Appropriatiou" Bills By Merging the Two Distinctly Differeut Types of Budget Bills Into One

What is most puzzling about the decision of the Third Department majority, perhaps even more so than the First Department's decision in *Silver II*, is its lack of any analysis of the language and structure of Sections 2, 3 and 4 of Article VII. The Third Department's decision in *Pataki* relies almost exclusively on a mistaken and clearly erroneous application of *Saxton v. Carey* (addressed in Point II, *infra)* to reach the conclusion that the Governor may include general legislation amending existing laws in his appropriation bills which the Legislature, under the no-alteration provision of Section 4, is precluded from changing or striking out. The Third Department made no attempt to even discuss, let alone explain, how Sections 2, 3, and 4 of Article VII could be interpreted to reach a result so contrary to what the Framers intended.

The decisions below, by misapplying Article VII, Sections 2, 3, and 4, by ignoring the plain language of the

provisions and by repudiating the intent of the Framers as clearly **[*54]** reflected in Article VII as a whole, have brought about an unprecedented judicial rewriting of the New York Constitution. The Senate respectfully urges this Court to uphold the Constitution and reject out of hand this effort to change it through judicial fiat.

As this Court stated in *King v. Cuomo*, 81 NY2d 247, 253 (1993):

> When language of a constitutional provision is plain and unambiguous, full effect should be given to "the intention of the framers * * * as indicated by the language employed" and approved by the People (*Settle v. Van Evrea*, 49 NY 280, 281 [1872]; *see also, People v. Rathbone*, 145 NY 434, 438). In a related governance contest, this Court found "no justification * * * for departing from the literal language of the constitutional provision" *(Anderson v. Regan*, 53 NY2d 356, 362 [emphasis supplied]). * * *
>
> Thus, the State's argument that the recall method, in practical effect and accommodation, merely fosters the underlying purpose of article IV, § 7 is unavailing *(see, New York State Bankers Assn. v. Wetzler*, 81 NY2d 98, 104, supra).

This Court further wrote in **[*55]** *King* that

> Courts do not have the leeway to construe their way around a self-evident constitutional provision by validating an inconsistent "practice and usage of those charged with implementing the laws" *(Anderson v. Regan*, 53 NY2d 356, 362; *see also, People ex rel. Burby v. Howland*, [81 NY2d 254]; *People ex rel. Crowell v. Lawrence*, 36 Barb. 177, aff'd. 41 NY 137; *People ex rel. Bolton v. Albertson*, 55 NY 50, 55, supra).

As this Court stated in *Settle v. Van Evrea*, 49 NY 280, 281 (1872):

> [I]t would be dangerous in the extreme to extend the operation and effect of a written Constitution by construction beyond the fair scope of its terms, merely because a restricted and more literal interpretation might be inconvenient or impolitic, or because a case may be supposed to be, to some extent, within the reasons which led to the introduction of some particular provision plain and precise in its terms.
>
> That would *be pro tanto* to establish a new Constitution and do for the people what they have not done for themselves.

The Governor has offered no textual interpretation **[*56]** of Article VII to support his casual but critical assumption that an appropriation bill may include - in addition to the "items" themselves, *i.e.*, the sums being appropriated, their purpose, and the recipients - "the manner in which funds are apportioned among recipients and other essential terms and conditions relating to the expenditure of funds." A226. Nothing in the history of the Executive Budget Reform suggests that the Framers ever intended to grant the Governor any law-making power over substantive "non-appropriation" matters. The Governor can point to nothing and, indeed, such an intent would have amounted to a rejection of the fundamental concept of separation of powers. From the historical documents quoted and cited herein and from the full historical account of the amendment's adoption, this Court will see that the Record flatly belies the Governor's pronouncement that:

> **[a]t the heart of Article VII is a broad and unprecedented transfer by the people of the State of New York of budgetary powers that are legislative in nature from the Legislature to the Governor, and a concomitant broad and unprecedented limitation on the powers of the Legislature in relation [*57] to budgetary legislation.**

A221.

There can be no clearer illustration of what the Framers contemplated as being included in the category of non-appropriation legislation as distinguished from Section 3 appropriation bills - *i.e.*, "such other recommendations" in Section 2 and the other "proposed legislation" in Section 3 - than the substantive, programmatic non-appropriation measures which the Governor took the liberty of appending to his six appropriation bills submitted with the 2001 budget. It is to be expected that non-appropriation measures, since they are intended to be submitted as part of the Governor's budget along with his Section 3 appropriations bills, will often contain provisions "relating to" particular "items of appropriation" in the appropriation bills. **But that a particular piece of non-appropriation legislation proposed under Section 3 "relates to" one of the Governor's appropriation bills *(e.g.,* just as the 16 1/2 pages of state aid formulae can be said to "relate to" the appropriation for state aid to education) does not somehow turn these non-appropriation measures into "items of appropriation" which can constitutionally be included as part [*58] of the Governor's proposed appropriation bill itself.**

Let there be no misunderstanding. The lower courts have concluded that substantive, non-appropriation, general legislation in appropriation bills can be treated as "items of appropriation" and thereby made immune from any alteration by Article VII, Section 4. To achieve this result with the dramatic transfer of power to the Governor that is its inevitable consequence, they have not only ignored the drafters' precise language and simply rewritten the provisions of Article VII, they have dismantled the Framers' carefully balanced structure and scheme and replaced it with a lopsided arrangement which is just the opposite of what the Framers intended. The Governor seeks to have this Court ratify the lower courts' rewriting of the plain language of Article VII of the Constitution and their drastic remake of its very structure and scheme.

D. To Support the Governor's Contention and the Lower Courts' Holdings that the Legislature Cannot Strike Unconstitutional Provisions from the Governor's Proposed Appropriatiou Bills Reqnires Two Different and Contradictory Definitions of the Term "Items of Appropriation" in Article VII - [*59] One for the Governor and Another for the Legislature

To prevail on this appeal, the Governor must convince the Court to accept his two irreconcilable, self-serving interpretations of the critical term "items of appropriations": (1) a broad, expansive definition - contrary to the plain wording and logical interpretation of Sections 2 and 3 - which permits him to include in an appropriation bill virtually any substantive, non-appropriation measure so long as it "relates to" an appropriation in the budget, and (2) a strict, literal interpretation of the term "items of appropriation" which he invokes to prevent the Legislature from striking out or altering the substantive, non-appropriation measures he has included in his proposed appropriation bills precisely because **they are not "items of appropriation"** and the Legislature cannot modify an "appropriation bill" in any way except to "strike out," "reduce" or "add thereto **items of appropriation."**

Under the Governor's bold "I can put in what you can't take out" interpretation and application of Article VII, Section 4 the very restrictions on what may go in an "appropriation bill," which the Governor would have this Court **[*60]** ignore, are the same restrictions which, he contends, preclude the Legislature from striking out or altering what he has put in. Section 2, 3 and 4 of Article VII do not impose constitutional restrictions on him, he insists, but they do impose such restrictions on the Legislature. Exactly this sort of "do as I say but not as I do" interpretation of the Budget Amendment was rejected by this Court in *Tremaine I* with respect to segregation provisions in the following passage:

> If the Legislature may not add segregation provisions to a budget bill proposed by the Governor without altering the appropriation bill, contrary to the provisions of article IV-A, section 3, it would necessarily follow that the Governor ought not to insert such provisions in his bill. He may not insist that the Legislature accept his propositions in regard to segregations without amendment, while denying to it the power to alter them.

252 NY at 50.

Yet the Governor firmly advances this position, stating: "Thus, it is clear from the plain language of section 4 that

the Legislature may only strike out items of appropriation proposed by the Governor in their entirety." A233. According **[*61]** to the Governor:

> If the Legislature disagrees with the purpose of an appropriation or its terms and conditions (the 'when, how [and] where' of spending), the Legislature now faces the sometimes difficult choice whether to approve a particular item of appropriation, strike out the item of appropriation or attempt to negotiate amendments to the appropriation with the Governor.

A236.

The Governor's contention necessarily comes to this: if the Legislature does not reject entirely a Governor's appropriation bill containing unconstitutionally included substantive measures, these unconstitutional provisions stand as law of the State. The Governor's hypothesis - that the Legislature may not strike unconstitutional provisions from the Governor's appropriation bill and that these provisions must stand as law of the state - conflicts directly with his position in *Silver II* and the holding of this Court in *Tremaine I.* n23 After holding unconstitutional a provision in an appropriation bill designating the chairs of the Legislature's two financial committees to approve segregations, this Court held that the unconstitutionally included provision was void and could be deleted **[*62]** from the appropriation bill while the remainder of the bill remained as law of the State. As the *Tremaine I* Court put it:

> **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.** * * * The Legislature may not attach void conditions to an appropriation bill. **If it attempts to do so, the attempt aud not the appropriation fails.**

Id. at 45 (emphasis supplied).

> n23 **With apparently no concern about the conspicuous inconsistency, the Governor unhesitatingly makes the very same argument that unconstitntional provisious inserted in proposed legislation are void and must be stricken - when it suits his purpose.** Indeed, the Governor relies on the very same language which we have quoted above from *Tremaine I to* support his argument in his Brief to this Court in *Silver II* (at p. 55) that he should be permitted to exercise a line-item veto, which is limited to striking one or more "items of appropriation" from a legislative bill containing "several items of appropriation of money," N.Y. Const. art. IV, § 7, over allegedly unconstitutional legislative changes to his proposed non-appropriation bills.
>
> The Senate's position is clear and uniform: provisions inserted in appropriation or non-appropriation bills by either the Governor or the Legislature which are unconstitutional are void *ab initio.* In *Silver II,* the Legislature's additions and changes to the Governor's non-appropriation bills were constitutional. In *Pataki,* the Governor's inclusion of general legislation, including amendments to existing State laws, were unconstitutional and therefore properly stricken by the Legislature.

[*63]

The rule of *Tremaine I*- that the unconstitutionally included provision is void and must fail while the appropriation stands - was applied to an invalid provision added by the Legislature. But there is no reason why the rule should not apply with equal force to an unconstitutional provision included by the Governor in a Section 3 appropriation bill. n24

> n24 The rule in *Tremaine I* is the application of basic constitutional law doctrine. *See, e.g.,* 20 N.Y. Jur. 2d, Constitutional Law § 86 ("It is a fundamental rule that a statute may be constitutional in one part and unconstitutional in another part, and that if the invalid part is severable from the rest, the portion that is

constitutional may stand while that which is unconstitutional is struck out and rejected.").

Justice Malone - because he based his decision on his unique interpretation of Article VII, Section 3 - did not decide what he framed as the second question in the case, "may the Legislature strike out what it finds to be extraneous non-appropriation **[*64]** measures from the Governor's proposed budget?" *Pataki, supra*, 190 Misc2d at 733. Nevertheless, Justice Malone recognized the irreconcilable contradictions in the Governor's contentions that he should be permitted to **include** menasures in his appropriation bills in violation of Article VII which the Legislature is **precluded** from striking out under the "no-alteration" rule imposed on the Legislature under Section 4. Referring to and quoting the identical passage from *Tremaine I* (quoted *supra* at p. 44) that the Governor may not "insert what the Legislature cannot alter," Justice Malone concluded

> It appears to this Court that by this statement the Court of Appeals said that the Governor should not insert segregation provisions in his appropriation bill because the Legislature lacked the authority to simply strike the unconstitutional language but, instead, could only address the appropriation itself.

Id. at 735-736 (emphasis supplied). n25 Justice Malone alludes *(id.* at 736) to this Court's decision in *New York State Bankers Ass'n v. Wetzler*, 81 NY2d 98 (1993) *("Bankers")* as apparently **[*65]** diluting this Court's statement in *Tremaine I.* But the *Bankers* decision has no bearing on the *Tremaine I* dictum. *Bankers* does not apply to **what the governor may include in his proposed appropriation bills.** It holds only that Article VII, Section 4 prohibited the Legislature from adding a measure to an appropriation bill which was clearly not an item of appropriation - the audit fee provision - and that the "no-alteration" provision of Section 4 should be enforced even though the Governor and the Legislature were in agreement on the inclusion of the provision. *Id.* at 103-105.

> n25 Justice Malone was troubled by the opinion in *Tremaine I*, as indicated in the following statement: "While recognizing that the above quoted statement is dictum which is not binding authority upon lower courts, it is language that **gives this lower court some pause."** *Id.* at 736 (emphasis supplied).

No one would suggest that Governor Alfred E. Smith and the dedicated citizens who drafted **[*66]** and sponsored the Executive Budget Reform were anything but forthright in their statements that the executive budget would "not deprive the Legislature of any of its prerogatives" or "make the Governor a czar." A393. One can only imagine their reaction if they knew of Governor Pataki's all-consuming interpretation of the Executive Budget Amendment, which would destroy the delicate balance of power they strove so hard to preserve.

E. The Lower Courts' Holdings Make the Governor a Budget "Czar," the Result the Framers of the Executive Budget Amendment Were Intent on Avoiding

In 1915, Mr. Stimson's Committee recommended adoption of the Executive Budget Amendment (subsequently defeated by the voters) which provided that the Legislature in acting on the Governor's appropriations could "reduce or strike out but not raise the items therein." A299. Even though under the 1915 proposal the Legislature was not given the power to raise or add new appropriations, the Committee Report stated:

> Nor is there the slightest force to the claim that the proposed system would give undue power to the Governor. It would add not one iota to the power that he now possesses through the veto **[*67]** of items in the appropriation bills.

A300. In fact, in discussing the need for an Executive Budget the 1919 Report of the Reconstruction Commission to Governor Smith unequivocally stated, **"[t]he executive budget does not deprive the Legislature of any of its prerogatives. It does not, as it [is] sometimes said, make the Governor a czar."** A393 (emphasis supplied).

In 1926, the Report of the State Reorganization Commission recommended adoption by constitutional amendment of the Executive Budget Reform defeated in 1915 with certain amendments to the 1915 proposal, including that the "right of the Legislature to initiate new items of appropriations should not be limited to new bills after the disposition of the budget bill but should include the right to add separate items to the bill itself in such form, however, as to be subject to the Governor's veto." A320-A321. In his 1925 Annual Message to the Legislature Governor Smith assured all citizens that:

> **The executive budget does not in the slightest degree decrease the power of the Legislature.** It provides only for a more responsible method for the exercise of that power. There is nothing new or revolutionary **[*68]** about a proposal placing upon the Executive himself the duty in the first instance of certifying to the Legislature the amount required for the fixed and definite expenses of maintenance of the various departments of the government. * * *
>
> * * *
>
> **Opposition to the executive budget upon the theory that it lessens the power of the Legislature is nothing but misrepresentation for political purposes.** Every proposal for its establishment, so far made, has left the Legislature absolutely free to pass any appropriations it will and to increase or decrease any appropriations it may desire to after provision has been made for the support of government as comprehended in the bill proposed and supported by the governor.

A402-A403 (emphasis supplied).

Thus, the holdings below are not only directly violative of established separation of powers doctrine and of the exclusive Article III, Section 1 legislative authority of the Senate and the Assembly; they make a present day reality of the very consequences that the members of the 1915 Stimson Committee and Governor Smith in 1926 promised the Legislature and the public would never ensue - **giving "undue power to the governor" and [*69] making "the governor a czar."** A393.

F. The Lower Courts' Holdings Sauction the Governor's Violation of Established Separation of Powers Doctrine

The lower courts' holdings, if allowed to stand, constitute two serious subversions of the apportionment of power among the executive and legislative branches of government.

First, the holding that the Governor may exercise control over general, non-appropriation legislation by attaching it to his proposed appropriation bills and by doing so make these changes to existing State law impervious to legislative action results in an extraordinary transfer of their exclusive Article III, Section 1 law-making power from the Senate and the Assembly to the Governor. The lower courts' interpretations of Article VII, Sections 2, 3, and 4 shackle the Legislature by restricting its Article III, Section 1 power to enact general legislation. This constitutes an outright repudiation of the unequivocal and unconditional constitutional command: *i.e.*, that the "legislative power of this state **shall be** vested in the senate and assembly." N.Y. Const. art. III, § 1 (emphasis supplied). The categorical constitutional rule as restated by **[*70]** this Court more than 90 years ago is mat this "general legislative power is **absolute and unlimited** except as restrained by the Constitution." *People ex rel. Simon v. Bradley*, 207 NY 592, 610(1913).

Second, the combined effect of the lower courts' holdings and the Governor's incursion into the Legislature's province results in severe disarrangement of the equal distribution of power in our triparte form of government and a further violation of the separation of powers. In *Oneida County v. Berle*, 49 NY2d 515, 522 (1980), this Court wrote:

> Our State Constitution establishes a system in which governmental powers are distributed among three co-ordinate and co-equal branches * * * . Extended analysis is not needed to detail the dangers of upsetting the delicate balance of power existing among the three, for history teaches that a foundation of

> **free government is imperiled when any one of the co-ordinate branches absorbs or interferes with another.** "It is not merely for convenience in the transaction of business that they are kept separate by the constitution, but for the **preservation of liberty itself, which is ended by the union [*71] of the three functious in one man,** or in one body of men. * * * " (*People ex rel. Burby v. Howland*, 155 NY 270, 282) (emphasis supplied).

In its most recent pronouncement on the separation of powers in *Saratoga County, supra*, this Court summarized the doctrine thus:

> Article III of the State Constitution vests the Senate and the Assembly with the legislative power of the State, while article IV vests the executive power in the Governor and article VI vests the court system with the judicial power * * *. We have recognized that these "separate grants of power to each of the coordinate branches of government" imply that each branch is to exercise power within a given sphere of authority * * *. Stated succinctly, the separation of powers "requires that the Legislature make the critical policy decisions, which the executive branch's responsibility is to implement those policies" * * *.

100 NY2d at 821-822. n26

> n26 *See Cohen, supra*, 94 NY2d at 13 ("The balance wheels of the system are delicate, since the ultimate goal is to avoid the *'whole* power of one department [being] exercised by the same hands which possess the *whole* power of another' (The Federalist, No. 47 [Madison] (emphasis in original * * *); *Clark v. Cuomo*, 66 NY2d 185, 189 (1985) ("when the Executive acts inconsistently with the Legislature, or usurps its prerogatives, * * * the doctrine of separation is violated.").

[*72]

In sum, the lower courts' holdings have deprived the Legislature of its traditional constitutional power to approve and enact substantive, non-appropriation legislation "relating to" the budget and they have given that power to the Governor exclusively. These holdings are in clear violation of Article VII and constitute an outright repudiation of the Legislature's traditional power to make laws entrusted to it under Article III, Section 1. An affirmance of these holdings would mean that this Court had abandoned or seriously eroded the fundamental concept underlying our tripartite form of government, the separation of powers doctrine as pronounced in the major decisions of this Court. *See, e.g., Saratoga County; Cohen; Clark v. Cuomo; Oneida County v. Berle.*

POINT II

***SAXTON V. CAREY DOES* NOT SUPPORT THE DISTORTED APPLICATION OF ARTICLE VII, SECTIONS 2, 3, AND 4 URGED BY THE GOVERNOR AND ADOPTED BY THE APPELLATE DIVISION MAJORITY**

As noted above, the Governor makes no effort to support his confident pronouncement of a "a **broad and unprecedented transfer** [of legislative power from the legislature to the governor] by the people" on any interpretative analysis **[*73]** of Sections 2, 3 and 4 of Article VII. A221-A229, A582-A591. Other than on his erroneous interpretation of the "anti-rider" provision in Section 6 *(see* Point III, *infra)*, the Governor bases his asserted authority to attach general legislation and amendments to existing State laws to his appropriation bills solely on one decision - *Saxton v. Carey, supra*, 44 NY2d 545. The Appellate Division majority endorsed the Governor's reliance on *Saxton* and characterized the dispute here as one involving the "degree of itemization" of the budget. 774 NYS2d at 894. It found that the Governor's changes to existing law - what it called "substantive modifiers" - may be included in a Governor's proposed appropriation bill which would be immune to legislative change by virtue of the no-alteration restriction in Article VII, Section 4. *Id.* n27 The reliance on *Saxton* by both the Governor and the Appellate Division majority is

entirely misplaced, as will be seen.

n27 Relying on *Saxton* the majority wrote:

> We decline defendants' invitation to establish a bright-line rule **defining the degree of itemization that may properly be included in a governor's budget submissions. * * ***
>
> The Court of Appeals, in *Saxton v. Carey* (44 NY2d 545 [1978]), instructed that the NY Constitution does not require any particular degree of itemization and only the legislative and executive branches were in a proper position to determine what level of itemization was necessary for the Legislature to effectively review and enact a budget.

Id.

[*74]

The Governor was faced with a major hurdle in his effort to use *Saxton* to counter the argument that, under *Tremaine I* and *Tremaine II* and under any reasonable textual analysis of Article VII, Sections 2, 3 and 4, the Governor is not authorized to incorporate programmatic and substantive non-appropriation measures in his Section 3 appropriation bills. The Governor's problem? *Saxton* does not answer or respond to the Senate's argument, nor does it purport to overrule or modify *Tremaine I* or *Tremaine II*. The Governor's solution? Simply transform the Senate's argument to fit *Saxton.* Make it appear that the argument turns not on the Governor's constitutional power under Sections 2, 3 and 4 of Article VII to include substantive, programmatic matters in his appropriation bills. Rather, make the argument seem to turn on something else - the degree of "itemization" in appropriation bills, an issue involved in *Saxton*, but having nothing to do with the case here. Unbelievably, this seems to have worked in the Third Department.

Unlike the case here where the Governor and the Legislature are in a major conflict over the interpretation of various sections of Article **[*75]** VII of the Constitution, in *Saxton* there was no dispute between the Governor and the Legislature over the interpretation of Article VII, Sections 1-4, over the Governor's appropriation bills or over anything else. The appropriation bills had been approved by the Legislature and enacted into law. 44 NY2d at 548. The plaintiffs, who sued both the Governor and the Legislature, were three citizen taxpayers. As Governor Pataki recognizes (A584), the citizen taxpayers' claim in *Saxton* was that "the challenged budget [was] insufficiently itemized to provide the Legislature with the information necessary for that body to properly perform its constitutional role as the ultimate guardian of the public fisc." *Id.* at 548. This Court, while noting that, "[i]t is, of course, beyond question that the Constitution does require itemization" *(id.*, citing *Tremaine* 77), simply held that

> **the degree of itemization necessary in a particular budget is whatever degree of itemization is necessary for the Legislature to effectively review that budget. This is a decision which is best left to the Legislature, for it is not something which can be accurately [*76] delineated by a court. It is, rather, a function of the political process,** and that interplay between the various elected representatives of the people which was certainly envisioned by the draftsmen of the Constitution. Should the Legislature determine that a particular budget is so lacking in specificity as to preclude meaningful review, then it will be the duty of that Legislature to refuse to approve such a budget. **If, however, as here, the Legislature is satisfied with the budget as submitted by the Governor, then it is not for the courts to intervene and declare such a budget invalid because of a failure to measure up to some mythical budget specifically delineating the exact fate of every penny of the public funds.**

Id. at 550 (emphasis supplied).

This action does not involve a political question about the degree of itemization of the budget and whether it is sufficient for the Legislature's effective review, a non-justiciable question best left to the judgment of the Legislature. Nor does it involve a situation as in *Saxton* and in *Bankers, supra,* 81 NY2d 98, where the Governor and the Legislature have agreed on the legislation **[*77]** and the claimed unconstitutionality under Article VII is only asserted by a third party. Here, the Governor and the Legislature are in flat disagreement over the interpretation of Article VII. What is involved is a controversy which will seriously affect the balance of power among the three branches of our government - *i.e.,* what the Governor may constitutionally incorporate in his Section 3 appropriation bills so as to make them impervious to legislative change by invoking the "no-alteration" provision of Article VII, Section 4. The claim here is about substance, not form. The question is: what measures may properly be included in appropriation and non-appropriation bills, not, as in *Saxton,* how detailed the appropriation measures must be.

In *Saxton,* because the two branches of government were in complete accord that the Governor's bills were sufficiently itemized to meet the requirements of Article VII, Sections 1-4, this Court rejected the plaintiffs' insufficient itemization contention as not justiciable. Further, the *Saxton* Court rejected as non-justiciable the challenge to the intra-program transfer provisions - which allowed the transfer of funds within particular **[*78]** programs and departments after passage of the budget - since the Legislature and the Governor were in agreement "that the demands of government require[d] a certain flexibility in the use of appropriated funds within a particular program or department." *Id.* at 551. It was a political question for the Governor and the Legislature, not a legal issue for the courts. In view of the agreement between the executive and legislative branches that this flexibility was required, this Court concluded that "the Constitution [was] satisfied, and the courts [would] not disturb that result." *Id.* Quoting Judge Breitel's dissent in *Hidley v. 'Rockefeller, supra,* 28 NY2d at 446, the *Saxton* Court concluded:

> If the Legislature is or should become concerned that the transfer provisions give the Executive too much leeway and deprives them of the supervisory power they have and wish to exercise, the remedy is in their hands. **The point is that there is no constitutioual invalidity involved so long as ultimately, however done, the Executive proposed the appropriations and there is agreement as to the limitations and conditions they contain.**

Saxton, supra, 44 NY2d at 551 **[*79]** (citation omitted; emphasis supplied).

As noted, *Saxton* cannot be an answer to the Senate's argument in this case since *Saxton* held that the matter was non-justiciable where there was no dispute between the Governor and the Legislature, as there is here, and they were in agreement on the extent of itemization. And moreover, as already seen, *Saxton* cannot apply for another reason. The Senate's claim is not about itemization. It is about the substantive, programmatic non-appropriation measures which the Governor unconstitutionally included in his Section 3 appropriation bills and which the Legislature properly treated as void and struck out. Nevertheless, the Governor in his undaunted efforts to find a way to make *Saxton* apply has come forth with perhaps his most perplexing argument of all. He has finally come around to contending that the Senate's argument is not only about itemization but that under *Saxton* the **"claim is [not] justiciable."** A584 (emphasis supplied). n28

> n28 The Governor's position on justiciability is not only impossible to follow, it contradicts the very foundation of his lawsuit against the Senate and the Assembly. In commencing this action for a declaratory judgment under CPLR Section 3001, which provides, in part, that "supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal **relations of the parties to a justiciable controversy,"** (emphasis supplied) the Governor necessarily claimed the issues in the case were justiciable. As noted in the text, however, before Supreme Court the Governor asserted that "neither claim is justiciable." A584. The only logical explanation for the Governor's extraordinary and belated change of position on justiciability is that he had to make it in order to argue that *Saxton* controls here since *Saxton* held that the dispute in that case was not justiciable.

[*80]

Apparently anticipating that his *Saxton* non-justiciability argument fails, the Governor nevertheless tries to find some solace in *Saxton.* In this final effort, the Governor adheres to the mistaken premise that the Senate's counterclaim is no more than a quibble about itemization and quoting from *Saxton,* argues that if the Legislature does not agree with the Governor's itemization, "then it will be the duty of that Legislature to refuse to approve such a budget." A581, *quoting Saxton, supra,* 44 NY2d at 550. Based on this quotation from *Saxton,* the Governor concludes that because the Legislature did not refuse to accept his Section 3 appropriation bills in their entirety, the Legislature is bound to accept them, including the programmatic, substantive "when, how, or where" measures which it claims have been unconstitutionally included.

Aside from the obvious distinction that *Saxton* is about itemization and this case is not, *Saxton* is concerned with process and methodology - *i.e.*, "the extent to which the courts of **this State may intervene in the budgetary process in order to eusure that the methodology prescribed by the Constitution is [*81] properly utilized"** *(id.* at 548) (emphasis supplied) and whether **"it is a proper fnnction of the courts to police the degree of itemization necessary in the State budget."** *Id.* at 549 (emphasis supplied). Further, the holding of *Saxton* on which the Governor relies - *i.e.*, that if the Legislature disapproves of substantive measures in an appropriation bill "then it will be the duty of that Legislature to refuse to approve [it]" *(id.* **at** 550) - **refers not to constitutional objections to the substance of the appropriation bills but to matters of legislative process** such as "the degree of itemization necessary in a particular budget * * * for the Legislature to effectively review that budget" and the degree of "flexibility in the use of appropriated funds within a particular program or department" *Id.* This case is about substance, not process - about what the Governor included in his proposed appropriation bills, not about how they were presented.

Finally, the Governor and the courts below have seized on one phrase contained in *Saxton* - "when, how, or where" - as a sort of talisman which, in combination **[*82]** with the "anti-rider" clause in Section 6, will open the door to inclusion in the Governor's appropriation bills of all manner of general legislation, even amendments of existing laws, provided only that the legislation "relate[s] to" some appropriation in the Governor's budget. The "when, how, or where" phrase in *Saxton* is part of a lengthy quotation taken from Judge Breitel's dissent regarding the constitutional mandate to itemize the budget in *Hidley.* Judge Breitel, in his dissent, noted that "[t]he specificness or generality of itemization depends upon its function and the context in which it is used," and further stated that "[i]n 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." *Saxton, supra,* 44 NY2d at 550, *quoting Hidley, supra,* 28 NY2d at 444 (emphasis supplied). The lower courts and Governor Pataki assert, based on this one phrase in this one paragraph, that this Court somehow held in *Saxton* that statements as to "when, how or where" an expressway would be constructed **[*83]** constitute the criteria for measures appropriate for inclusion in an appropriation bill. That conclusion simply does not follow.

As noted, the holding in *Saxton* pertained only to the justiciability issue and to the Court's refusal to insert itself into the political process. In neither *Saxton* nor *Hidley* did the holding involve an analysis of the constitutional limits on or the prescription for the measures to be properly included in an appropriation bill so as to make them subject to the Section 4 no-alteration provision. The isolated phrase "when, how or where" on which the Governor and the lower courts rely is in a discussion of the degree of itemization and the amount of detail with respect to the appropriations in the budget that the Governor and the Legislature might agree upon which would be beyond the Court's power to review. While the "when, how or where" language was relevant to the Court's holding that the degree of itemization required in the budget was a political question not justiciable by the Court, it is at best *dicta* with respect to what constitutionally may be included in appropriation bills.

Insofar as this Court never undertook any constitutional **[*84]** analysis of what constitutes an appropriation bill in either *Hidley* or *Saxton,* the isolated language relied on by the courts below and Governor Pataki is not dispositive of the constitutional questions presented in this case and reliance on this isolated phrase is contrary to the uncontradicted interpretative analysis presented in Point I, *supra,* of what may properly, under Article VII, be included in an

appropriation bill.

Finally, for the Governor to be correct that *Saxton* holds that "when, how or where" provisions constitute "items of appropriation", the *Saxton* Court would necessarily have had to overrule *Tremaine I and Tremaine II.* As noted above (*see* pp. 32-33, *supra)* in *Tremaine I this* Court wrote that a provision inserted in an appropriation bill giving co-authority for the Chairs of the Senate Finance and Assembly Ways and Means Committees to approve segregations of monies "is an item or particular, distinct from the other items of the bill, **although uot an item of appropriation."** 252 NY at 49-50 (emphasis supplied). And in *Tremaine II (see* pp. 31-32, *supra)* this Court stated that "we expect the appropriation bill **[*85]** to contain items" and that items should "show what money is to be expended, and for what purpose." 281 NY at 5. This Court in *Saxton* gave no suggestion that it was overruling or modifying *Tremaine I* or *Tremaine II* and there is no indication in *Saxton* or *Bankers, supra,* 81 NY2d 98, that *Tremaine I* and *Tremaine II* do not remain good law.

POINT III

THERE IS NO BASIS FOR THE GOVERNOR'S CONTENTION THAT THE LEGISLATURE'S GENERAL LEGISLATIVE POWERS UNDER ARTICLE III TO ENACT SINGLE-PURPOSE BILLS AND NON-APPROPRIATION BILLS ARE LIMITED BY THE "NO-ALTERATION" RESTRICTION OF ARTICLE VII, SECTION 4

In holding that the Legislature's actions in "introducing and passing 37 single-purpose appropriation bills violated N.Y. Constitution, article VII, § 4" (774 NYS2d at 893) the Appellate Division majority has, without any discussion or explanation, misapplied Article VII, Section 4 - which is limited in its application to alterations of the Governor's proposed Section 3 appropriation bills ("[t]he legislature may not alter **an appropriation bill submitted by the governor** except * * * ." N.Y. Const., art. VII, **[*86]** § 4) (emphasis supplied) - **as an instrument which restricts the substance of what the Legislature may enact in its single-purpose bills and in its non-appropriation bills under its Article III general legislative powers and pursuant to Article VII, Sections 5 and 3, respectively.**

The extent of the transfer of legislative power to the Governor that this misapplication entails is not fully appreciated until it is realized that the Governor has the power of veto over both single-purpose bills and non-appropriation bills enacted by the Legislature. Rather than exercise his veto in 2001 the Governor signed the bills into law and then commenced a declaratory judgment action to have the legislation declared unconstitutional as violative of the "no-alteration" rule in Section 4. The result of an affirmance would be to give the Governor overwhelming leverage over the Legislature, never contemplated by the Framers - the option of exercising his veto over bills he does not like or, after signing them into law, seeking to have them declared unconstitutional under Section 4. A299-A300, A321. As will be shown, unless the Constitution is rewritten, Section 4 cannot be used for this purpose. **[*87]**

A. The Governor's Attempt to Apply the Section 4 Restrictions to the Legislature's Single-Purpose Bills

The original purpose of the Framers in giving the Legislature the right to enact so-called "single-purpose" appropriation bills after the Governor's appropriation bills have been passed was to maintain the balance of power between the legislative and executive branches and to meet the objection that the Governor might misuse his power. This purpose is carried out in Article VII. While single-purpose bills must be made "by separate bills each for a single object or purpose" (N.Y. Const. art. VII, § 3) and may not be considered "until all the appropriation bills submitted by the governor shall have been finally acted on by both houses" *(id.* § 5), there is no restriction on the subject matter of the bills or on their object or purpose. In this respect, they differ from legislative additions to the Governor's appropriation bills under Section 4 which, as has been discussed *(see* Point II(B), *supra),* are subject to the "anti-rider" clause in Section 6 and must relate to some appropriation in the Governor's appropriation bills. And since single-purpose appropriation **[*88]** bills are new legislative measures **and not changes to the Governor's appropriation bills,** they are, by the unambiguous terms of Section 4, not subject to the restrictions which that Section imposes on legislative

alterations to the Governor's bills. However, as with legislative additions to the Governor's bills under Section 4, **the Governor is expressly given the power of veto over legislative single-purpose bills nnder the first paragraph of Section 6** and thus retains a "check" over the content of single-purpose bills.

Faced with the stark fact that under its unambiguous language, Section 4, by its very terms, cannot apply to the Legislature's own single-purpose appropriation bills enacted pursuant to Article VII, Section 5, the Governor - without any discussion or analysis - simply makes this proclamation:

> **it follows that the other checks and balances of Article VII, including the no-alteration rule of section 4, are equally applicable to [the Legislature's single purpose bills].**

A253 (emphasis supplied).

There is no effort to explain this abrupt change in the limited purpose of Section 4 (preventing unauthorized changes in the Governor's appropriation **[*89]** bills) and the dramatic extension of its reach so that it applies to a totally different and distinct kind of legislation - *i.e.*, single-purpose appropriation bills initiated not by the Governor but by the Legislature under Section 5 after the Governor's appropriation bills have been acted on.

Although there can be no rationale which could justify the drastic encroachment on the Legislature's Article III prerogatives that the Governor's application of Section 4 would entail, at Supreme Court the Governor relied on *Tremaine II* and two opinions of the Attorney General, 1978 N.Y. Op. Atty. Gen. 76 and 1982 N.Y. Op. Arty. Gen. 82-F5. Neither *Tremaine II nor* the Attorney General opinions, which deal solely with the application of Section 4 to the Governor's Section 3 appropriation bills, are in any way germane to the Governor's contention that the Section 4 restriction should apply to the Legislature's single-purpose bills. n29

> n29 The Court's holding in *Tremaine II*- applying solely to the Legislature's attempted alteration of a Governor's appropriation bill - is stated in the following sentences:
>
> > Is this substitution [of a lump sum appropriation for detailed items of appropriation in the Governor's bill] to be considered the striking out or reducing of an item? When it refers to striking out an item, we cannot conceive it as meaning striking out the entire appropriation for a department **[sic]** all the items, and putting in a lump sum.
>
> 281 NY at 10.
>
> Contrary to the Governor's contention (A240), Attorney General Lefkowitz' opinion, 1978 N.Y. Op. Atty. Gen. 76, pertains solely to the attempted addition of language by the Legislature under Section 4 to **an appropriation bill submitted by the Governor.**

[*90]

B. The Governor's Attempt to Apply the Section 4 Restrictions to the Legislature's Non-Appropriation Bills

What has been said with respect to the Governor's effort to restrict the content of the Legislature's Section 5 single-purpose appropriation bills applies equally to his effort to impose the Section 4 restrictions on the Legislature's non-appropriation bills. Section 3 contemplates that the Governor is to initiate both appropriation bills, containing items of appropriation, and non-appropriation bills, containing other "proposed legislation." As demonstrated in detail in the Senate's Brief in *Silver* //(Point I at pp. 36-51), by its express terms Article VII limits the Legislature only with respect to its ability to act on the Governor's proposed appropriation bills. N.Y. Const. art. VII, § 4. Article VII provides no such limitation on the type of action the Legislature may take with respect to non-appropriation bills initiated by the

Governor. Under its Article III law-making powers, the Legislature may take a wide variety of actions with respect to any proposed legislation, including the Governor's non-appropriations bills. The Governor's remedy for such legislative **[*91]** actions of which he does not approve is to exercise his general veto, and not attempt to exercise a line-item veto, which is restricted to legislative changes to appropriation bills. *See* N.Y. Const. art. IV, § 7.

The 2001 legislative action with respect to the Governor's proposed non-appropriation bills was constitutionally proper under both Articles III and VII. The actions taken by the Legislature with respect to the Governor's proposed non-appropriation bills included the addition of provisions ensuring that the Governor's appropriation bills would not violate the State Finance Law, the addition of provisions that were not appropriations at all but merely authorized the transfer of funds among appropriations, and the addition of provisions limiting or expanding the manner in which some of the Governor's appropriations could be used. A277-A279. All the actions taken by the Legislature were proper because Article III vests in the Legislature the power to add provisions to or otherwise alter proposed non-appropriations bills - regardless of the impact the provisions may have on previously enacted legislation. The Governor's only remedy for such legislative action of which he **[*92]** does not approve is to exercise his executive veto. Here, the Governor declined to exercise this option.

In addressing the Governor's attempted leapfrogging of Section 4 from the Governor's Section 3 appropriation bills (to which it applies) to the Legislature's non-appropriation bills and its Section 5 single-purpose appropriation bills (to which it does not apply), we respectfully reiterate that it is the words of the Constitution and what they plainly mean which govern, not what someone might like them to say or mean. This truism could not be more pertinent than in a case where, as here, the Governor seeks a vast expansion of the restrictive legislative power delegated to him under Article VII and a reciprocal shrinkage of the total and unqualified legislative power granted to the Senate and the Assembly under Article III, Section 1. n30

n30 In support of his argument that Section 4 restricts both the Legislature's single-purpose appropriation bills and its action on the Governor's non-appropriation bills at Supreme Court, the Governor turned to a quotation from *People ex rel. Burby v. Howland*, 155 NY 270 (1898) - *i.e.*, that the Legislature may not "evade the Constitution by effecting indirectly that which cannot be done directly." *Id.* at 280. But the principle applied in *Burby* - where there was an established constitutional office which the Legislature in a transparent maneuver sought to partially abolish - does not apply to non-appropriation bills and makes no sense with respect to single-purpose appropriation bills.

In *Burby*, what the Legislature could not do directly and tried to do indirectly was something it was clearly prohibited by the Constitution from doing - abolishing a constitutionally created office. Here, there is no provision restricting the content of legislative single-purpose appropriation bills analogous to the constitutional mandate in *Burby* which this Court held could not be directly or indirectly violated. Moreover, the Governor's "you can't do indirectly what can't be done directly" argument is no more than an exercise in bootstrapping with respect to non-appropriation bills. He starts with the assumption that general legislative measures constitute "items of appropriation" under *Saxton* and/or Article VII, Section 6 and then argues that because the Legislature cannot alter "items of appropriation" in violation of Section 4 directly, it cannot do so indirectly in non-appropriation bills. The problem is with the assumption. General legislation measures do not constitute "items of appropriation" and Section 4 does not apply to non-appropriation bills.

[*93]

POINT IV

THE "RELATES SPECIFICALLY TO" LANGUAGE IN THE "ANTI-RIDER" PROVISION IN ARTICLE VII, SECTION 6 IS NOT THE CRITERION FOR WHAT THE GOVERNOR MAY PERMISSIBLY INCLUDE IN HIS APPROPRIATION BILLS

Although the Governor argued in his Brief to the Third Department that he has never urged that the "anti-rider" provision in Article VII, Section 6 should be used as a source of affirmative authority for the inclusion of general legislation in his appropriation bills, that is exactly what he has urged in the courts below in both *Pataki* and *Silver II.* n31

n31 In his Brief to the Third Department the Governor wrote: "Repeatedly in its brief, the Senate contends that the Governor 'use[s] Section 6 as a source of authority for inclusion of measures in appropriation bills.' (S. Br. 24; see also id. 23, 39-40, 43). **That has never been the Governor's position."** Governor's Brief at 3I, n. 23 (emphasis supplied).

While maintaining in the courts below that Section 6 is to be construed only **[*94]** as a limitation (not as a source of affirmative authority) on what he may include in an appropriation bill, the Governor made it clear to the Third Department that in his view Section 6 is the **"sole constitutional limitation"on** what may be included. Governor's Brief at 31, n. 23. Despite his disclaimer, the rule which the Governor asked the Third Department to adopt is that **whatever measure is not excluded** by the "sole constitutional limitation" in Section 6-*i.e.,* a measure which does "relate specifically to" an appropriation in the bill and which is limited in its operation to that appropriation - **may be included.** n32

n32 In his submission to Justice Lehner in *Silver II* the Governor was more forthright and left no doubt that he relied on Article VII, **Section 6 as a source of affirmative authority** for including general legislative, non-appropriation measures in appropriation bills. **The Governor stated: "Yet Article VII, § 6 is perhaps the most relevant part of the State Constitution when it comes to that issue.** Under Article VII, § 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." *Silver II* Record at 1540 (emphasis supplied).

[*95]

Thus, under the virtually endless reach of his application of Section 6, the Governor can go so far as to contend that the general legislation amending the existing formulae for distributing billions of dollars of state aid to local school districts in the Education Law and changes in the Medicaid reimbursement provisions in the Public Health Law were properly part of his appropriation bills since they are measures directly "relating to" the appropriations. In his submission to Justice Malone the Governor stated, for example, that the State Education Aid provisions "dealt with the manner in which such aid would be distributed to eligible school districts and, thus, related specifically to the appropriations of education aid in which each provision was included." A598. n33

n33 It is immediately apparent that the two criteria on which the Governor relies for what he may include in his appropriation bills - *i.e.*, the "when, how or where" test of "items of appropriation" in *Saxton* and the "anything that relates specifically to" test of the "anti-rider" provision in Article VII, Section 6 are different and in conflict. The "anything that relates specifically to" test in Section 6 is dramatically more inclusive than the *Saxton* test since under it a measure may be attached to a Governor's appropriation bill even though the measure can, in no way, qualify as an "item of appropriation." In other words, the measure could fail the Governor's "when, how or where" *Saxton* test but pass the "anything specifically related to" test of the Section 6 "anti-rider" provision.

The Governor makes no effort to reconcile these differences or to explain how the Framers could have intended that the Section 6 "anti-rider" provision (which was not even part of the original Executive Budget Amendment adopted in 1927) could now be used in a way that would virtually obliterate their careful drafting of Sections 2,3, and 4 and their intended distinctions set forth between matters to be properly part of the Governor's

Section 3 appropriation bills and those other non-appropriation measures to be placed in his other non-appropriation budget bills. *See* Point I (A)-(D), *supra* (discussion of history and analysis of Sections 2, 3 and 4).

[*96]

As demonstrated in detail in the Senate's Brief in *Silver II*, n34 the "anti-rider" provision of Section 6 was and is intended solely to prohibit **the legislative practice** of adding "riders" to appropriation bills. n35 **Section 6 accomplishes this purpose by prohibiting the Legislature from adding auy measure to a Governor's appropriation bill or supplemental appropriation bill "unless it relates specifically to some particular appropriation in the bill" and is "limited iu its operation to such appropriation."** N.Y. Const. art. VII, § 6 (emphasis supplied).

n34 The Senate refers the Court to its main Brief in *Silver II* (Point III, at pp. 62-82) for a detailed discussion of the "anti-rider" provision, which will only be summarized here to avoid duplication since the two appeals will be argued together.

n35 Webster's New Twentieth Dictionary (Unabridged) contains this definition of "rider:" "a clause, usually dealing with some unrelated matter, added to a legislative bill when it is being considered for passage."

Black's Law Dictionary (Fifth Edition) in defining "rider," states, in part: "Thus, in passing bills through a legislature, when a new clause or law is added after the bill has passed through committee, such new law or clause is termed a 'rider'."

[*97]

Contrary to the Governor's arguments n36 Article VII, Section 6 has nothing to do with the Governor's appropriation bills. It does not serve either as a limitation on or a source of affirmative authority for what **the Governor may include** in an appropriation bill for the three reasons discussed in the Senate's Brief to this Court in *Silver II:* (1) the history of the "anti-rider" provision demonstrates that it applies only to legislative changes to the Governor's appropriation bills; (2) reliance on the prohibitory "anti-rider" provision in Section 6 as affirmative authority for what the Governor may include in his proposed appropriation bills is contrary to the rule established by this Court in *Tremaine I;* and (3) a textual analysis of Section 6 demonstrates that the "anti-rider" provision cannot logically apply to the Governor's appropriation bills submitted under Section 3.

n36 Section 6 is neither the "sole constitutional limitation" on what the Governor may include in his proposed appropriation bills *(Pataki)* nor is it "the most relevant part of the State Constitution" when it comes to "what is properly part of [a Governor's] appropriation bill" *(Silver II).*

[*98]

The history of the adoption of the "anti-rider" clause in the second paragraph of Section 6 shows that it was never intended to be anything other than a provision to prevent the Legislature from tacking on to appropriation bills provisions known as "riders" - unrelated general legislation having nothing to do with the appropriation. One incontrovertible fact demonstrates that the "anti-rider" provision could never have been intended to operate either as a source of affirmative authority for or a limitation on what the Governor may include in appropriation bills - **the Framers did not incorporate the "anti-rider" provision (the "sole constitutional limitation"on what the Governor may include in his proposed appropriation bills according to Governor Pataki) in the historic 1927 Executive Budget Amendment which, for the first time, gave the Governor limited legislative anthority over appropriation bills.**

The "anti-rider" provision, which has been found in Article VII, Section 6 since the adoption of the 1938 Constitution, was originally enacted as part of the 1894 Constitution in Article III, Section 22 as a provision to prevent the Legislature from adding "riders" to appropriation **[*99]** bills. n37 Indeed, when the provision was adopted in 1894 as Article III, Section 22 it could only apply to the Legislature since the Governor had not yet been granted any legislative power with respect to the budget. n38 Thus, it could not have been intended to operate as a limitation on legislation to be submitted by the Governor. In 1927, when the Governor was finally granted limited legislative authority over budget bills, **the "anti-rider" provision in Article III, Section 22 remained in the Constitution as a limitation solely on the Legislature.** It is inconceivable that the Framers - after years of study and discussion about the proposed Executive Budget Reform - could have intended to grant to the Governor what was then the novel and controversial authority under the proposed Executive Budget Amendment to submit appropriation bills **without including the one provision which the Governor now claims be the "sole constitutional limitation" on the measures which may be contained in such bills.** n39

n37 Section 22 of Art III of the 1894 Constitution provided:

> No provision or enactment shall be embraced in the annual appropriation or supply bill, unless it relates specifically to some particular appropriation in the bill; and any such provision or enactment shall be limited in its operation to such appropriation.

[*100]

n38 A 1915 Attorney General's Opinion demonstrates that it was only the Legislature which Article III, Section 22 was intended to limit when it was adopted in 1894. The Opinion quotes the object of the amendment as stated by Mr. McMillan, who proposed it in 1894, as " 'to prevent many abuses which have obtained in the Legislature, of tacking on to the annual appropriation and supply bill various provisions which otherwise would not be enacted.' " A344.

n39 If the authors of the 1927 amendments adopting the Executive Budget Amendment had intended to impose on the Governor's newly granted authority to submit budget bills the extraordinary additional limitation contained in the Section 22 "anti-rider" provision, the meticulous draftsmen would have included the "anti-rider" limitation on the Governor's appropriation bills and added it to the five amendments which they proposed to the 1915 Executive Budget Amendment when they recommended its adoption in 1927. They did not do so. A320-A321.

In fact, there is no reference to the 1894 anti-rider provision in Article III, Section 22 in the 1915 Stimson Report (A302-A309), in any of the other documents relating to the proposed adoption of the Executive Budget Amendment in 1915 (A286-A301), in the 1926 Report of the State Reorganization Commission recommending the adoption of the 1915 proposal (A310-A323), or in any other document relating to the adoption of the Executive Budget Amendment in 1927 (A324-A403).

[*101]

From 1927 until 1938, the "anti-rider" provision remained in the Constitution as a limitation on the Legislature, not on the Governor's authority to submit appropriation bills. In 1938, when the "anti-rider" provision was lifted from former Article III, Section 22 and placed in the present Article VII, Section 6, nothing had changed. The Governor's limited legislative powers over appropriation bills and the Legislature's limited rights to change them were the same. No reason has been suggested for why the limitation on the Governor's appropriation bills now claimed by Governor Pataki to be imposed by the "anti-rider" provision in Article VII, Section 6 - which had been thought unnecessary in 1927 and apparently for eleven years thereafter - somehow became necessary as the "sole constitutional limitation" in 1938.

Indeed, the history of Article VII, Section 6 in Constitutional Convention 1938 Document, No. 3 demonstrates that the "anti-rider" provision when incorporated in Article VII, Section 6 in 1938 was intended to remain as it was in 1927, a provision not intended to apply to the Governor but solely to prevent the Legislature from adding extraneous provisions to appropriation **[*102]** bills. The 1938 Report states:

> Section 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 operation to include not only the Governor's budget bills but any **supplemental appropriation bill.**

A335-A336 (emphasis supplied). n40

> n40 The fact that the provision was still considered to be an "anti-rider" clause and that it was being extended to supplemental appropriation bills - bills which can only be originated in the Legislature - further supports the conclusion that the limitations in Article VII, Section 6 were intended, after its adoption in Article VII, Section 6, to still apply only to legislative actions - additions to the Governor's appropriation bills.

Moreover, Section **[*103]** 6 dictates that: **"No provision shall** be embraced in * * * unless it relates specifically to * * *." N.Y. Const. art. VII, § 6 (emphasis supplied). In order to use the "anti-rider" provision in Section 6 as affirmative authority for what the Governor may include in his appropriation bills submitted to the Legislature, the Governor must interpret a provision which is solely prohibitory as affirmatively permissive - *i.e.*, that whatever is not excluded because it is related to some particular item in an appropriation bill, may be included. But this interpretation is flatly contrary to established precedent.

Any doubt as to whether the "anti-rider" provision in Section 6 could be impliedly read as creating affirmative authority for what may be included is removed by one decision. In *Tremaine I*, Judge Pound, writing for this Court, stated:

> 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.

[*104]

252 NY at 49 (emphasis supplied).

Like *Tremaine I*, neither of the other two decisions applying the "anti-rider" provision of Section 6 interprets the provision as providing any affirmative authority. Both treat the anti-rider provision as a negative provision restricting the content of legislative additions to an appropriation bill.

In *Schuyler v. South Mall Constructors*, 32 AD2d 454 (3d Dep't 1969), **the court applied Article VII, Section 6 in its prohibitory sense - i.e., to determine what the Legislature was precluded from adding to a Governor's bill appropriating fuuds** for the construction of buildings on the Albany South Mall. The court held that the Legislature's addition of a negotiating requirement was not precluded by the "anti-rider" provision of Section 6 because "the provision relates specifically to some particular appropriation in the bill within the meaning of Section 6." *Id.* at 456. Significantly, the court noted that the purpose of the "anti-rider" provision in Section 6 was

> **to eliminate the legislative practice of tacking on to budget bills propositions which had nothing to**

> **do with money matters; [*105]** that is, to prevent the inclusion of general legislation in appropriation bills.

Id. at 455-456, *citing Tremaine I, supra,* 252 NY at 48 (emphasis supplied).

Finally, in *Rice v. Perales,* 156 Misc2d 631 (Sup. Ct., Monroe Co. 1993), *mod. on other grounds,* 193 AD2d 1135, 1136 (4th Dep't 1993), the court concluded that a **legislative addition** to an Aid to Localities Budget Bill, which authorized the Commissioner of Social Services to contain welfare costs by revising budget methodologies, did not violate the "anti-rider" provision of Article VII, Section 6. The court stated that by "no means was the direction to contain welfare costs 'general legislation' that had nothing to do with money matters that were the focus of the Aid to Localities Budget." 156 Misc2d at 640. The court concluded that the "provision violated neither the purpose nor the spirit of the Constitution (*see, Schuyler v. South Mall Constructors, supra).*" *Id.*

In short, the consistent case law provides that the "anti-rider" provision "**has no affirmative application** to 'an appropriation bill submitted by **[*106]** the governor' so as to permit the addition of the rider in question." *Tremaine I, supra,* 252 NY at 49 (emphasis supplied). n41

> n41 In addition, for all the reasons set forth in detail in the Senate's Brief in *Silver II* (Point III, Section C, at pp. 72-82), a textual analysis of Section 6 demonstrates that the Governor's interpretation of Section 6 violates basic rules for the construction of the Constitution.

POINT V

THE LEGISLATURE'S SINGLE-PURPOSE APPROPRIATION BILLS WERE PROPERLY ENACTED IN FULL COMPLIANCE WITH ARTICLE VII, SECTION 5

Concededly, the Legislature enacted the 37 single-purpose bills after it had taken its final action on August 2, 2001 on all of the Governor's appropriation and non-appropriation bills. The Legislature finally acted upon the Governor's proposed appropriation bills and non-appropriation bills on August 2, 2001 by passing them with their amendments. After acting upon the Governor's submitted appropriation and non-appropriation bills on August 2, **[*107]** then and only then did the Legislature pass, on August 2 and into the early morning hours of August 3, 2001, the 37 single-purpose appropriation bills that had been previously printed and placed upon the desks of the members of the Assembly and the Senate on July 30 and 31, 2001, three or more days before they were considered and passed by the Legislature. A279-A280.

Article VII, Section 5 of the Constitution provides:

> Neither house of the legislature shall **consider** any other bill making an appropriation until all the appropriation bills submitted by the Governor shall have been finally acted on by both houses, except on message from the Governor certifying to the necessity of the immediate passage of such a bill.

N.Y. Const. art. VII, § 5 (emphasis supplied).

Whether the Legislature complied with Article VII, Section 5, as it contends it did, in not considering the single-purpose bills until after final action on the appropriation bills or violated it, as the Governor alleges, turns squarely on the intended meaning of the word "consider" in Section 5. We believe, respectfully, that this Court - employing standard techniques of interpretation and relying on **[*108]** a common sense analysis - will see that the Governor's confusing definition(s) of "consider" must be rejected.

The Governor's proposed interpretations are various, vague, conflicting and, in some cases, nonsensical. None

would be a workable definition that a Legislature could follow or that a court could apply. All would frustrate the intent of the Framers.

For example, the Governor cites dictionary definitions of the word "consider," e.g., "to reflect on" or "ponder over" (A260), which, if applied would require some sort of "thought police" to determine whether or when the legislators began "thinking about" or "pondering on" single-purpose bills. The Governor's proposed definition of "consider" as an isolated act of reflection with no definite object of consideration makes Section 5 meaningless. How could the first inkling of a thought or a consideration be detected among the 61 Senators and 150 Assemblymen? Ascertaining the precise moment when "reflection" or "pondering" began in the minds of the legislators poses epistemological problems beyond the abilities of any mortal. **The Senate's interpretation, in contrast, defines the meaning of the word "consider" with respect to the [*109] definite, determinable object of the consideration: passage of the single-purpose appropriation bills.**

He also appears to suggest alternatively that the time of "consideration" should be either (1) the moment of one of the following events: the legislation's (a) "origination," (b) "introduction," (c) "printing," (d) "placement on the members' desks," or (e) "referral to legislative committees," or (2) the time when all of these events have taken place. *Id.* The Governor would presumably leave it to the Court to pick one or more from this "menu" of alternative choices. A259-260.

The Governor's argument is confusing to say the least. Given that it is difficult, at best, to discern, adoption of the Governor's Section 5 argument would make the Legislature's enactment of single-purpose bills virtually impossible, and would thereby defeat the Framer's intentions in leaving, by means of the single-purpose bills, "the power of initiation of financial legislation * * * with the Legislature" (A299) and keeping the budget system "free from executive abuse." *Id.*

The Governor's also argues that the Legislature must comply with "Article VII, § 14 [, which requires] that bills age **[*110]** on the desks of the members for three days [so] * * * that members have the opportunity to 'consider' the merits of the proposal before voting." A264. **One thing is clear here: the Legislature complied with Section 14 insofar as the 37 single-purpose appropriation bills did "age" on the desks of the legislators for three days before they were passed - from July 30 and 31 to Angust 2 and 3, respectively. A279-280, A554, A568-A569.**

This is not all. The Governor wants to push the time of permissible enactment of the Legislature's single-purpose bills even farther out of reach and beyond the time when the Legislature may well have adjourned. This he would do by having the Court hold that the Legislature cannot have "finally acted on" (N.Y. Const. art VII, § 5) the Governor's appropriation bills **"until such bills have received the approval or veto of the Governor and, if required by veto, the subsequent reconsideration of appropriations by the Legislature pursnant to its anthority to override the Executive's veto."** A266. The Governor would apparently have the Court ignore the obvious fallacy in his argument - *i.e.*, that under Article VII, Section 4, **the Governor has [*111] no veto power over actions of the Legislature in "striking out" or "reducing" items in appropriation bills.** Thus, these measures could not be returned to the Legislature for "reconsideration." The bills in which items are stricken or reduced become "law immediately without further action by the governor." N.Y. Const. art. VII, § 4. Only separately stated additional items of appropriation are subject to the Governor's veto. *Id.* n42

> n42 In 2001 the Legislature added to the Governor's appropriation bills only one item of appropriation for the limited purpose of paying for ongoing capital projects. A274 (Lackman Affidavit, P 12[c]).

Moreover, the plain words of Section 5 contradict this final effort of the Governor to nullify the Legislature's rights to introduce its own appropriations. Section 5 allows for legislative consideration of other appropriation bills after final action on the Governor's bills **"by both houses."** (emphasis supplied). If the drafters had intended that the Legislature **[*112]** should not act on Section 5 single-purpose bills until further action by the executive and "subsequent

reconsideration" (A266) by the Legislature, they would assuredly have said so. The words "reconsider" and "reconsideration" - like the word "consider" - are words of art having special and specific meanings when applied to legislative actions. The Framers were familiar with the terms "consider," "reconsider" and "reconsideration," understood them, and used them when appropriate to convey their intended meaning. Indeed, they used the words "reconsider" and "reconsideration" in Article IV, Section 7. That they did not use the word "reconsider" in Article VII, Section 5 is obviously significant.

In addition, the Governor suggests no reason why the Framers would have intended a rule that would be so imprecise and flexible as to be incapable of application and one which would thwart the Framers' very purpose of keeping some final control of appropriations in the hands of the Legislature by granting the Legislature power to initiate financial legislation after the Governor's appropriation bills had been acted on. A299-A300.

The Senate's interpretation of the word "consider" in Section [*113] 5 - *i.e.* as the time when the Legislature's single-purpose appropriation bills are enacted - is simple and clear cut. n43 It provides a rule that can be understood and easily followed by Governors, Legislatures and courts. By putting off any action by the Legislature on financial bills until after the Governor's appropriation bills have been acted upon, the rule proposed by the Senate accomplishes exactly what the Framers intended - *i.e.*, postponing such action until the revenues are known, as the Committee noted in the following:

> By postponing such additional legislation until after the budget has been acted on both the State and its representatives in the Legislature will have the opportunity to fully know all the revenue available, if any, beyond the regular departmental expenses.

Id.

> n43 Again, it is undisputed that the Legislature did not "enact" or "pass" its single-purpose appropriation bills until after it passed the Governor's appropriation bills.

The word "consider" when **[*114]** applied to a legislative bill is a word of art. In Section 5, "consider" refers to, and is inextricably bound with, the act of passing an appropriation bill. Webster's Dictionary uses the word in this exact sense in its definition of the word "rider" as a clause added to "a legislative bill when it is **being considered for passage"** (emphasis supplied). Further support for the logical conclusion that "consider," as used in Section 5, has a close nexus with actually passing a bill, can be found in the text of Article IV, Section 7, discussing the reconsideration of bills by the Legislature following an executive veto:

> if [a bill is not approved, the Governor] shall return it with his objections to the house in which it shall have originated, which shall * * * proceed to reconsider it. If after such reconsideration, two-thirds of the members elected to that house shall agree to pass the bill, it shall be sent together with the objections, to the other house, **by which it shall likewise be reconsidered; and if approved by two-thirds of the members elected to that house, it shall become a law** notwithstanding the objections of the governor.

N.Y. Const. art. IV, **[*115]** § 7 (emphasis supplied). As seen above, "reconsideration" is clearly the act which immediately precedes, and is conceptually tied to, the approval or passage of the bill.

The Governor's final fallback argument that the Legislature never "acted upon" the Governor's bills at all and, therefore, could never have constitutionally submitted single-purpose bills under Section 5 requires only one brief observation. The major premise for this fallback argument is the Governor's false assumption that the Legislature "flagrantly, pervasively and unconstitutionally [altered] the Governor's appropriation bills" and, that, therefore, its actions should be considered nullities. A265. As demonstrated in Point I the Legislature's actions with respect to the

Governor's proposed appropriation bills were entirely constitutional and proper. Indeed, as detailed in Point I, it is the appropriation bills submitted by the Governor which were unconstitutional.

CONCLUSION

For all the foregoing reasons, the Order of the Appellate Division should be reversed, the Governor's motion for summary judgment denied, and the cross-motions for summary judgment of the Senate and the Assembly granted, and this **[*116]** Court should declare that the actions of the Legislature in enacting all of the 2001 budget legislation on August 2 and August 3, 2001, consisting of forty-six budget bills, were in all respects constitutional and valid, together with such other and further relief as to this Court seems just and equitable.

Dated: August 13, 2004

Respectfully Submitted,

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