George E. Pataki, as Governor of the State of New York, Respondent, v. New York State Assembly et al., Appellants.

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SUPREME COURT OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

7 A.D.3d 74; 774 N.Y.S.2d 891; 2004 N.Y. App. Div. LEXIS 4746

April 22, 2004, Decided
April 22, 2004, Entered

SUBSEQUENT HISTORY: [***1]
Affirmed by *Pataki v. N.Y. State Assembly*, 4 N.Y.3d 75, 824 N.E.2d 898, 791 N.Y.S.2d 458, 2004 N.Y. LEXIS 3796 (2004)

PRIOR HISTORY: Appeal (transferred to the Appellate Division of the Supreme Court in the Third Judicial Department by order of the Court of Appeals) from an order of the Supreme Court, Albany County (Bernard J. Malone, Jr., J.), entered January 18, 2002. The order declared unconstitutional the procedure used regarding 46 budget bills passed by the Legislature and signed into law by the Governor in August 2001.

Pataki v New York State Assembly, 190 Misc. 2d 716, 738 N.Y.S.2d 512, affirmed.
Pataki v. N.Y. State Assembly, 190 Misc. 2d 716, 738 N.Y.S.2d 512, 2002 N.Y. Misc. LEXIS 51 (N.Y. Sup. Ct., 2002)

DISPOSITION: Order affirmed.

HEADNOTES

Parties -- Standing -- Power of Legislature to Alter Governor's Budget Bills

1. Plaintiff Governor possessed standing to challenge the constitutionality of the actions of the Legislature in amending and altering nine of the budget bills submitted by plaintiff in 2001 allegedly in violation of NY Constitution, art VII, § 4. Plaintiff's failure to have vetoed the 46 budget bills enacted by the Legislature did not deprive him of standing or effect a waiver of his right to challenge the constitutionality of defendants' actions. Plaintiff was injured for standing purposes when defendants altered his budget bills in an allegedly unconstitutional manner. Plaintiff was not obligated to exercise his veto power and thereby further prolong an already stagnant and fractious budget process in order to create judicially cognizable standing.

State -- Budget -- Power of Legislature to Alter Governor's Budget Bills

2. The New York State Assembly and Senate acted unconstitutionally in amending nine of the budget bills submitted by plaintiff Governor in 2001, and introducing and passing 37 single-purpose appropriation bills in violation of NY Constitution, art VII, § 4. Defendants lacked the power to strike the substantive modifiers inserted by plaintiff within his appropriation bills. Such substantive modifiers were part of a gubernatorial appropriation bill and were thus subject to constitutional protection from being altered by the Legislature. Defendants' proper constitutional action was to refuse to pass plaintiff's appropriation bills and induce

negotiations, not to alter and amend them and then substitute their own spending plans in the form of 37 single purpose bills.

COUNSEL: *Weil, Gotshal & Manges L.L.P.*, New York City (*Steven Alan Reiss* of counsel), for New York State Assembly, appellant.

Hancock & Estabrook L.L.P., Syracuse (*Stewart F. Hancock Jr.* of counsel), for New York State Senate, appellant.

Stillman & Friedman P.C., New York City (*Paul Shechtman* of counsel), for respondent.

JUDGES: Before: Crew III, J.P., Peters, Spain, Carpinello and Lahtinen, JJ. Crew III, J.P. and Spain, J., concur. Peters, J. (dissenting). Carpinello, J., concurs.

OPINION BY: Lahtinen

OPINION

[*75] [**892] Lahtinen, J.

This appeal involves "[t]he budget process [which] has been the subject of prior legal skirmishes between [plaintiff] and [defendants]" (*Silver v Pataki*, 96 N.Y.2d 532, 536, 755 N.E.2d 842, 730 N.Y.S.2d 482 [2001]; *see* [***2] *New York State Bankers Assn. v Wetzler*, 81 N.Y.2d 98, 612 N.E.2d 294, 595 N.Y.S.2d 936 [1993]; *People v Tremaine*, 281 N.Y. 1, 21 N.E.2d 891 [1939]; *People v Tremaine*, 252 N.Y. 27, 168 N.E. 817 [1929]; *Silver v Pataki*, 3 A.D.3d 101, 769 N.Y.S.2d 518 [2003]). Plaintiff commenced this action in his official capacity as Governor in 2001, alleging that subsequent to his constitutionally-mandated annual submission of the executive budget (*see* NY Const, art VII, §§ 2, 3), defendants, the New York State Assembly and the New York State Senate, [1] unconstitutionally (1) amended and altered nine of the 11 budget bills that he had submitted and (2) introduced and passed 37 appropriation bills in an improper attempt to disregard plaintiff's executive budget and substitute their own. Plaintiff contends that such conduct ran afoul of the restriction on altering appropriation bills contained in NY Constitution, article VII, § 4. [*76] [2] Plaintiff also alleges that defendants violated [**893] the requirements of NY Constitution, article VII, § 5 by considering their own single-purpose bills before taking final action on the budget bills he submitted. Instead of exercising his power of veto (*see* NY Const, art IV, § 7; *cf.* [***3] *Silver v Pataki*, 96 N.Y.2d 532, 755 N.E.2d 842, 730 N.Y.S.2d 482 [2001], *supra*), plaintiff, within 24 hours after signing the last of these bills into law, commenced this action. For this reason, the Assembly asserted that plaintiff lacks standing to bring this action or has waived his right to mount this challenge. Defendants also raised several counterclaims, and thereby sought a declaratory judgment that their actions were constitutional.

1 Although the Comptroller was originally a defendant, his motion to dismiss was granted and he is no longer a party.

2 NY Constitution, article VII, § 4 provides, in relevant part:

> "The legislature may not alter an appropriation bill submitted by the governor except to strike out or reduce items therein, but it may add thereto items of appropriation provided that such additions are stated separately and distinctly from the original items of the bill and refer each to a single object or purpose."

There being no facts in dispute, all parties moved for summary judgment. After concluding that plaintiff had standing to sue, Supreme [***4] Court determined that defendants' actions violated NY Constitution, article VII, § 4 and that plaintiff was constitutionally authorized to include both items of appropriation and their substantive modifiers within the same proposed legislation (190 Misc. 2d 716, 735-737, 738 N.Y.S.2d 512 [2002]). Defendants' appeal, originally filed in the Court of Appeals, was transferred to this Court (98 N.Y.2d 644, 771 N.E.2d 832, 744 N.Y.S.2d 759 [2002]).

[1] We affirm. Initially, we are unpersuaded by the Assembly's argument that plaintiff's failure to veto the 46 bills enacted by defendants deprives him of standing or, alternatively, effected a waiver of his right to challenge the constitutionality of defendants' actions. It is well settled that "the budgetary process is not always beyond the realm of judicial consideration and . . . the 'courts will always be available to resolve disputes concerning the *scope of that authority which is granted by the Constitution to the other two branches of the government*'" (*New York State Bankers Assn. v Wetzler*, *supra* at 102 [emphasis in original], quoting *Saxton v Carey*, 44 N.Y.2d 545, 551, 378 N.E.2d 95, 406 N.Y.S.2d 732 [1978]; *see* [***5] *Silver v Pataki*, 96 N.Y.2d 532, 542, 755 N.E.2d 842, 730 N.Y.S.2d 482

[2001], *supra*). Here, when defendants altered plaintiff's appropriation bills in an allegedly unconstitutional manner, plaintiff was injured. Such a purported usurpation of power is a classic case for which standing is recognized (*see Silver v Pataki*, 96 N.Y.2d 532, 539 [2001], *supra*; [*77] *see also New York State Bankers Assn. v Wetzler*, *supra* at 102-103). Plaintiff was not obligated to exercise his veto power and thereby further prolong an already stagnant and fractious budget process in order to create judicially cognizable standing. "The existence of other possible political remedies . . . does not negate the injury in fact" (*Silver v Pataki*, 96 N.Y.2d 532, 541, 755 N.E.2d 842, 730 N.Y.S.2d 482 [2001], *supra*). We thus find plaintiff's claims to be justiciable (*see Winner v Cuomo*, 176 A.D.2d 60, 63-64, 580 N.Y.S.2d 103 [1992]; *see generally* Weinstein-Korn-Miller, NY Civ. Prac P 3001.03; 82 NY Jur 2d, Parties § 12).

[2] Turning to the merits, we agree with Supreme Court that defendants' actions in amending nine of the budget bills submitted by plaintiff and introducing and passing 37 single-purpose appropriation [***6] bills violated NY Constitution, article VII, § 4. A key component of such conclusion rests upon the historical change in this state during the first half of the twentieth century from a legislative to an executive budget. That change and the reasons therefor were fully set forth by Supreme Court (190 Misc. 2d 716, 717-722, 738 N.Y.S.2d 512 [2002], *supra*; *see Silver v Pataki*, 3 A.D.3d 101, 769 N.Y.S.2d 518 [2003], [**894] *supra*). In this appeal, a critical issue is the extent of a governor's constitutional authority to include substantive modifiers in a gubernatorial appropriation bill. Defendants contend that plaintiff's numerous insertions of substantive modifiers within his appropriation bills amount to an unconstitutional attempt to legislate by appropriation and that defendants had the power to strike such measures from plaintiff's proposed budget. 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. 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 [***7] NY Constitution, article VII, § 4 (*see Silver v Pataki*, 3 A.D.3d 101, 769 N.Y.S.2d 518 [2003], *supra*).

The Court of Appeals, in *Saxton v Carey* (44 N.Y.2d 545, 378 N.E.2d 95, 406 N.Y.S.2d 732 [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. There, the Court held:

> "'There is no judicial definition of itemization and no inflexible definition is possible. Itemization is an accordion word. An item is little more than a "thing" [*78] in a list of things . . . . The specificness or generality of itemization depends upon its function and the context in which it is used. In one context of a budget or appropriation bill the description of 1,000 police officers within a flexible salary range would be specific and particular; in another it would leave the appointing power with almost unlimited control. In one context an "item" of $ 5,000,000 for construction of a particular expressway might seem specific; in another, void of indication when, how, or where the expressway or segments of [***8] it would be constructed. This suggests that there is something of a battle over words in debating the need for items, rather than a grappling with a functional concept' . . . [T]he 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 delineated by a court" (*id.* at 550, quoting *Hidley v Rockefeller*, 28 N.Y.2d 439, 444, 271 N.E.2d 530, 322 N.Y.S.2d 687 [1971] [Breitel, J., dissenting]).

This Court should not and will not immerse itself into the very heart of the "political process" upon which the formulation of the state budget depends. However prolonged and contentious the budget process becomes, we are of the opinion that defendants' proper constitutional action was to refuse to pass plaintiff's appropriation bills and induce negotiations (*see Saxton v Carey*, *supra* at 550), not to alter and amend them and

then substitute their own spending plans in the form of 37 single-purpose bills in violation of NY Constitution, article VII, § 4. Alternatively, [***9] "the remedy is to amend the Constitution to prescribe new standards for budget-making and appropriations" (*Hidley v Rockefeller*, *supra* at 446 [Breitel, J., dissenting]). The parties' remaining contentions are either academic or unpersuasive (*see Silver v Pataki*, 3 A.D.3d 101, 769 N.Y.S.2d 518 [2003], *supra*; 190 Misc. 2d 716, 738 N.Y.S.2d 512 [2002], *supra*).

DISSENT BY: Peters

DISSENT

[**895] Peters, J. (dissenting).

We respectfully dissent. In our view, because plaintiff affirmatively approved the subject legislation, he lacks standing and, thus, this Court is precluded from reaching the merits of his constitutional claims. Had plaintiff vetoed the subject legislation, he would have had standing to challenge it if his veto had been overridden by the Legislature.

We begin our legal analysis with the well-established precept [*79] that one claiming standing must demonstrate an injury in fact, that is, "an actual legal stake in the matter being adjudicated [which] ensures that the party . . . has some concrete interest in prosecuting the action which casts the dispute 'in a form traditionally [***10] capable of judicial resolution'" (*Society of Plastics Indus. v County of Suffolk*, 77 N.Y.2d 761, 772, 573 N.E.2d 1034, 570 N.Y.S.2d 778 [1991], quoting *Schlesinger v Reservists Comm. to Stop the War*, 418 U.S. 208, 220-221, 41 L. Ed. 2d 706, 94 S. Ct. 2925 [1974]; *see New York State Assn. of Nurse Anesthetists v Novello*, 2 N.Y.3d 207, 211-212, 810 N.E.2d 405, 778 N.Y.S.2d 123 [2004]). Consideration of this essential principle advances the policy of judicial self-restraint, particularly when dealing with constitutional separation of powers. The requirement of injury in fact forecloses an adjudication of grievances that are best resolved by the legislative and executive branches of government, it supports the prohibition on advisory opinions (*see Community Bd. 7 of Borough of Manhattan v Schaffer*, 84 N.Y.2d 148, 155, 639 N.E.2d 1, 615 N.Y.S.2d 644 [1994]) and it cautions that even matters of "vital public concern" (*Society of Plastics Indus. v County of Suffolk*, *supra* at 769) will not alone confer standing (*see Saratoga County Chamber of Commerce v Pataki*, 100 N.Y.2d 801, 812-815, 798 N.E.2d 1047, 766 N.Y.S.2d 654 [2003], *cert denied* 157 L. Ed. 2d 430, 540 U.S. 1017, 124 S. Ct. 570 [2003]; [***11] *Society of Plastics Indus. v County of Suffolk*, *supra* at 773; *Rudder v Pataki*, 246 A.D.2d 183, 186, 675 N.Y.S.2d 653 [1998], *affd* 93 N.Y.2d 273, 711 N.E.2d 978, 689 N.Y.S.2d 701 [1999]). While standing must not be denied where to do so would erect an "impenetrable barrier" (*Boryszewski v Brydges*, 37 N.Y.2d 361, 364, 334 N.E.2d 579, 372 N.Y.S.2d 623 [1975]) to judicial review (*see Saratoga County Chamber of Commerce v Pataki*, *supra* at 814), we find no such barrier under the particular facts of this case.

The historical complexion of standing was changed by the United States Supreme Court in its landmark decision of (*Raines v Byrd*, 521 U.S. 811, 138 L. Ed. 2d 849, 117 S. Ct. 2312 [1997]). [1] In addressing the standing question, the Supreme Court emphasized that the standing inquiry must be "especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of . . . [g]overnment was unconstitutional" (*id.* at 819-820). In *Raines*, the plaintiffs' alleged injury was found to constitute only an abstract institutional harm rather than the loss of a private right to which they were personally [***12] entitled (*id.* at 820-822). Specifically, the Supreme Court [*80] found the institutional [**896] harm alleged to be "wholly abstract and widely dispersed" (*id.* at 829). The Supreme Court did, however, reaffirm that the injury articulated in (*Coleman v Miller*, 307 U.S. 433, 83 L. Ed. 1385, 59 S. Ct. 972 [1939]), where the legislator-plaintiffs' votes had been "completely nullified" (*Raines v Byrd*, *supra* at 823), [2] was sufficient to confer standing.

1 In *Raines*, standing was denied to a group of federal legislators who alleged injury from Congress's passage, over their objection, of the Line Item Veto Act. At issue was the plaintiffs' claim that the Act unconstitutionally expanded the President's power and diminished that of Congress by authorizing the President to cancel or repeal provisions that had already been signed into law (*see Raines v Byrd*, *supra* at 818-820).

2 Unlike *Coleman v Miller* (*supra*), the *Raines* court found that no nullification had occurred since the plaintiffs were unable to demonstrate that their votes against the Line Item Veto Act would have been sufficient to defeat its passage (*see Raines v Byrd*, *supra* at 826, 829-830).

[***13] This heightened approach toward standing, signifying the Judiciary's increased reluctance to "meddle in the internal affairs of the [executive and] legislative branches" (*Moore v United States House of Representatives*, 236 U.S. App. D.C. 115, 733 F.2d 946, 956 [1984], *cert denied* 469 U.S. 1106, 83 L. Ed. 2d 775, 105 S. Ct. 779 [1985]), is widely followed by the federal courts. [3] Moreover, application of the *Raines* precepts is not limited to the legislative branch (*see Gutierrez v Pangelinan*, 276 F.3d 539, 545-546 [2002], *cert denied* 537 U.S. 825, 154 L. Ed. 2d 36, 123 S. Ct. 113 [2002] [challenge to a governor's standing]; *Walker v Cheney*, 230 F. Supp. 2d 51, 63-66 [2002] [challenge to the comptroller general's standing]). Indeed, federal courts have not hesitated to apply *Raines* to challenges concerning the standing of private parties (*see e.g. Schmier v United States Court of Appeals for Ninth Circuit*, 279 F.3d 817, 820-821 [2002]; *Hoffman v Jeffords*, 175 F. Supp. 2d 49, 55 [2001], *affd* 2002 U.S. App. LEXIS 12495, 2002 WL 1364311 [2002], *cert denied* [***14] 537 U.S. 1108, 154 L. Ed. 2d 778, 123 S. Ct. 883 [2003]; *Keen v United States*, 981 F. Supp. 679, 686-687 [1997]).

> 3 (*See Baird v Norton*, 266 F.3d 408, 411-413 [2001]; *Campbell v Clinton*, 340 U.S. App. D.C. 149, 203 F.3d 19, 22-23 [2000], *cert denied* 531 U.S. 815, 148 L. Ed. 2d 19, 121 S. Ct. 50 [2000]; *Chenoweth v Clinton*, 337 U.S. App. D.C. 1, 181 F.3d 112, 115-116 [1999], *cert denied* 529 U.S. 1012, 146 L. Ed. 2d 233, 120 S. Ct. 1286 [2000]; *Planned Parenthood of Mid-Missouri & E. Kansas v Ehlmann*, 137 F.3d 573, 577-578 [1998]; *Kucinich v Bush*, 236 F. Supp. 2d 1, 4-11 [2002]; *see generally* Note, *New Law of Legislative Standing*, 54 Stan L Rev 205 [2001].)

Our own Court of Appeals embraced the *Raines* precepts in (*Silver v Patak*, 96 N.Y.2d 532, 755 N.E.2d 842, 730 N.Y.S.2d 482 [2001]). In matters involving legislator standing, the Court found that the issues fall within one of three categories, namely, [***15] "lost political battles, nullification of votes [or] usurpation of power" (*id.* at 539). Only the latter two categories, if sufficiently demonstrated, will confer standing (*see id.*). We believe that the *Raines*/*Silver* analysis must be applied here and that the injury alleged fails to fall in either of those two categories.

In short, plaintiff's affirmative approval of the subject legislation prevents him from establishing that defendants' conduct [*81] nullified an action taken by him, precluded him from discharging his duties or otherwise deprived him of the ability to "enforce a constitutional obligation integral to his . . . duties" (*id.* at 545 [Graffeo, J., dissenting]). On these facts, his role in the budgetary process was neither "stripped of its validity" (*Raines v Byrd*, 521 U.S. 811, 824 n 7, 138 L. Ed. 2d 849 [1997], *supra*; *cf. Gutierrez v Pangelinan*, 276 F.3d 539, 545-546 [2002], *supra*; *Romer v Colorado Gen. Assembly*, 810 P.2d 215, 218-220 [1991]) nor "'virtually held for naught'" (*Raines v Byrd*, *supra* at 822-823, quoting [**897] [***16] *Coleman v Miller*, 307 U.S. 433, 438, 59 S. Ct. 972, 83 [**897] L. Ed. 1385 [1939], *supra*). Rather, plaintiff's approval of the budget has been given "full effect" (*Raines v Byrd*, *supra* at 824). His signing of these bills into law was not a trivial or irrelevant act, but an affirmation of his role as Governor (*see* NY Const, art IV, § 7; *Matter of Moran v La Guardia*, 270 N.Y. 450, 453, 1 N.E.2d 961 [1936]; *Matter of Doyle v Hofstader*, 257 N.Y. 244, 261, 177 N.E. 489 [1931]; *Matter of Koenig v Flynn*, 234 A.D. 139, 140-141, 254 N.Y.S. 339 [1931], *affd* 258 N.Y. 292, 179 N.E. 705 [1932], *affd* 285 U.S. 375, 76 L. Ed. 805, 52 S. Ct. 403 [1932]). As noted in *Matter of Koenig v Flynn* (*supra* at 141, 254 N.Y.S. 339): "The Governor has power to act in respect to legislation. In reviewing an act passed by both houses, when presented to him, he has before him the questions of the constitutionality, the expediency of, and the necessity for the act. If he disapproves, he must state his objections thereto."

Moreover, plaintiff was not without effective countermeasures (*see Kucinich v Bush*, 236 F. Supp. 2d 1, 9 [2002]; *see also Raines v Byrd*, *supra* at 829; [***17] *Saratoga County Chamber of Commerce v Pataki*, 275 A.D.2d 145, 156, 712 N.Y.S.2d 687 [2000]). He could have, for example, exercised his veto or negotiated his desired result in the legislative arena. Instead, he approved the bills and thereafter commenced this action (*see Chenoweth v Clinton*, 337 U.S. App. D.C. 1, 181 F.3d 112, 116 [1999]; *Kucinich v Bush*, *supra* at 9-11; *Silver v Pataki*, 96 N.Y.2d 532, 540, 755 N.E.2d 842, 730 N.Y.S.2d 482 [2001], *supra*). While the majority relies on *Winner v Cuomo* (176 A.D.2d 60, 580 N.Y.S.2d 103 [1992]) for the proposition that plaintiff did not have to reject the legislation before resorting to the Judiciary, we believe that this reliance is misplaced, particularly since *Winner* predated *Raines*. The plaintiffs in *Winner* were challenging the timeliness, not substance, of the budget

legislation; thus, we believe that its holding that it was unnecessary for the Legislature to first reject the Governor's submissions before resorting to the Judiciary is easily distinguished. [4]

4 Plaintiff's similar reliance on *People v Tremaine* (281 N.Y. 1, 21 N.E.2d 891 [1939]) for the proposition that there was no need to veto the legislation is also misplaced. The constitutional challenge in that case, which did not discuss standing, was brought by the State Comptroller, not the Governor. Moreover, the Governor had not signed or otherwise acted on the legislation in dispute, but had passively allowed it to become law.

Additionally, we do not disagree with the majority's assertion that the courts are not always foreclosed from considering the merits of interbranch constitutional disputes. We note, however, that the cases upon which the majority relies for that proposition were not concerned with standing but, rather, the applicability of the political question doctrine--a concept that is distinctly different from standing (*see New York State Bankers Ass'n. v Wetzler*, 81 N.Y.2d 98 [1993]; *Saxton v Carey*, 44 N.Y.2d 545, 378 N.E.2d 95, 406 N.Y.S.2d 732 [1978]).

[***18] [*82] By affirmatively approving the legislation, plaintiff deprived himself of standing to challenge the constitutionality of the acts of the Legislature. As a result, we believe that this Court is precluded from addressing the merits of this dispute.

Crew III, J.P., and Spain, J., concur with Lahtine, J.; Peters and Carpinello, JJ., dissent in a separate opinion by Peters, J.

Ordered that the order is affirmed, without costs.