SHELDON SILVER, MEMBER AND SPEAKER, NEW YORK STATE ASSEMBLY and NEW YORK STATE SENATE, Plaintiffs-Appellants, - against - GEORGE E. PATAKI, GOVERNOR, STATE OF NEW YORK, Defendant-Respondent.

No. 171

COURT OF APPEALS OF NEW YORK

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

TEXT: PRELIMINARY STATEMENT

This case and a companion case, *Pataki v. New York State Assembly*, 190 Misc 2d 716 (Sup. Ct., Albany Co. 2002), now pending in the Appellate Division, Third Department, n1 entail questions of interpretation of Article VII of the New York State Constitution concerning the constitutional powers of the Governor and the Legislature in adopting the State budget - questions that have not been addressed since the Executive Budget Amendment was adopted seventy-five years ago. n2 In the decisions below, Supreme Court and the Appellate Division, by ignoring the plain meaning of Article VII, Section 4 of the New York State Constitution and the significant distinctions in Article VII between "appropriation" and "non-appropriation" bills, have rewritten the critical language in Section 4 so that its prohibition against legislative changes in the Governor's [*2] **appropriation** bills apply as well to his **non-appropriation** bills.

n1 The appeal was argued in the Third Department on September 3, 2003, but no decision has yet been

rendered.

n2 The Executive Budget Amendment was originally adopted as Article IV-A as part of the amendments to the Constitution in 1927 and later, with amendments, made a part of the present 1938 Constitution as Article VII.

What is more, they have given the Governor the power to apply the Article VII, Section 4 prohibition selectively and to strike only the legislative changes in his non-appropriation bills which he dislikes. Other changes which would be equally violative of Section 4 under the Governor's interpretation were not stuck by him. Under the lower courts' holdings, the Governor now is permitted to exercise what, in effect, is an unconstitutional *de facto* line-item veto power over changes in non-appropriation bills whenever he decides to invoke the Section 4 prohibition. n3

n3 In striking out various legislative changes to his non-appropriation bills of which he disapproved, the Governor repeatedly stated that "I transmit pursuant to the provisions of section 7 of Article IV and section 4 of Article VII of the Constitution, a statement of items to which I object and which I do not approve" and labeled each of the 55 statements as "line veto # ". *See, e.g.* R.1257.37; 1257.46; 1257.54. They cannot, however, be "line-item vetoes." The Governor's only power to exercise selective or line-item vetoes of legislative enactments is limited to vetoing or striking one or more "items of appropriation" from a legislative bill containing "several items of appropriation of money." N.Y. Const, art. IV, § 7. Accordingly, we will refer to the Governor's disapproval of the legislative changes as a "purported veto" or "so-called veto."

[*3]

Under the holdings below, the provisions in the Governor's non-appropriation bills which he may now, if he pleases, keep the Legislature from changing are not merely the programmatic details of his budget appropriations - what this Court described in its earlier decision in this case as "programmatic provisions * * * commonly includ[ing] 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." *Silver v. Pataki*, 96 NY2d 532, 535 n1 (2001), *modifying* 274 AD2d 57 (1st Dep't 2000), *reversing* 179 Misc 2d 315 (Sup. Ct., N.Y. Co. 1999) *(Silver I).* They go well beyond that. Indeed, as stated by Supreme Court, the legislative changes stricken as prohibited by Article VII, Section 4 "were parts of voluminous bills amending numerous substantive provisions of the Consolidated Laws." n4 For example, the Governor's non-appropriation bills which the Legislature was, according to the courts below, precluded from changing include an amendment of the Real Property Tax Law relating to school property [*4] tax exemptions for senior citizens, amendments of the Tax Law relating to child care and investment tax credits, an amendment relating to the power of the New York State Urban Development Corp. to make loans, and an amendment of the Banking Law in relation to reports of compliance with requirements for automated teller machines. McKinney's 1998 Session Laws of New York, Book 1, at pp. 115-116, 83, 212-213.

n4 *Silver v. Pataki*, 192 Misc2d 117, 123 (Sup. Ct., N.Y. Co. 2002), AD2d , 769 NYS2d 518 (1st Dep't 2003) *(Silver II).* The three non-appropriation bills submitted by the Governor, as modified and passed by the Legislature, including the provisions which the Governor purportedly vetoed, are printed as Chapters 56, 57, and 58 of McKinney's 1998 Session Laws of New York, Vol. 1, pp. 115-430. Each of these bills contain the statement that it "enacts into law major components of legislation which are necessary to implement the state fiscal plan for the 1998-1999 state fiscal year." *Id.* at 116,183,213.

[*5]

The lower courts' holdings constitute a massive enlargement, by judicial re-writing of the Constitution, of the

carefully limited grant of legislative power to the Governor over appropriations in Article VII accomplished by the Framers of the Executive Budget Amendments in 1927 and 1938. Because non-appropriation bills under the Constitution properly include programmatic, substantive details of the budget and measures amending State laws that relate to the State budget, the holdings below which discard the constitutional distinction between appropriation and non-appropriation bills, allow the Governor to use the "no-alteration" provisions of Section 4 to immunize from legislative change both appropriation and non-appropriation measures alike. The holdings have the effect of turning the Governor into a "Super Legislature" with the power to introduce, control, and enact matters of general legislation simply because they "relate" in some way to the budget. The unavoidable consequence of this judicially sanctioned expansion of the Governor's legislative powers is a radical constriction of the traditional area of authority of the Legislature and a severe weakening of the governmental power [*6] granted by the People to the Senate and the Assembly under Article III Section 1 of the Constitution, which, as this Court has long held, "is **absolute and unlimited** except as restrained by the Constitution." *People ex rel. Simon v. Bradley*, 207 NY 592, 610(1913) (emphasis added).

Almost a century ago, speaking of the tripartite form of government established in the Constitution, which is recognized as "the very foundation of the People's protection against abuse of power by the State," *New York State Bankers Ass'n v. Wetzler*, 81 NY 2d 98, 105 (1993), this Court emphasized:

> The object of a written Constitution is to regulate, define and limit the powers of government by assigning to the executive, legislative and judicial branches distinct and independent powers. The safety of free government rests upon the independence of each branch and the even balance of power between the three * * *. 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.

People ex rel. Burby v. Holland, 155 NY 270, 282 (1898).

This appeal [*7] presents constitutional issues of historic significance involving the very structure of our State government and the separation of powers between the Executive and Legislature. The 1998 legislative session is history and the validity of specific provisions of non-appropriation bills for the 1998-99 budget may be of little moment in 2004. The precedent to be established by this appeal, 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 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 power to exercise a *de facto* "line-item veto" over legislative changes to programmatic policy measures and amendments to existing laws in his non-appropriation bills by selecting the changes he does not like and declaring them unconstitutional under the "no-alteration" provision of Section 4.

The holdings of Supreme Court and the Appellate Division fly in the face of the plain language of Section 4 which clearly applies only to appropriation bills, not to non-appropriation [*8] bills. The holdings ignore the sharp distinctions between appropriation and non-appropriation bills which are apparent in several Sections of Article VII. And they dishonor the uncontradicted history of the Executive Budget Reform and the intentions of the Framers in adopting the Executive Budget Amendments of 1927 and 1938.

QUESTIONS PRESENTED FOR REVIEW

1. Were Supreme Court and the Appellate Division correct in holding that the "no-alteration" provision of Article VII, Section 4 of the State Constitution - which by its terms applies only to the Governor's appropriation bills and, except for limited and specific exceptions, prohibits the Legislature from making any changes in such appropriation bills - is intended, with equal effect, to apply to and prohibit legislative changes in the Governor's non-appropriation bills ?

2. Assuming hypothetically - adopting the mistaken analysis of the lower courts - that non-appropriation bills may

be treated as if they were appropriation bills for the purpose of enforcing the no-alteration provision of Article VII, Section 4, would the "anti-rider" provision in Article VII, Section 6 apply to such hypothetical appropriation bills submitted [*9] by the Governor to the Legislature so that the provision establishes the criteria for the measures that would properly be includable in the Governor's hypothetical Section 3 appropriation bills as "items of appropriation" thereby making the measures impervious to legislative change because of the no-alteration provision in Article VII, Section 4 ?

3. Whether - putting aside the question of the applicability of Article VII, Section 6 - there is any other provision in Article VII or any reported decision, including *Saxton v. Carey,* which constitutes authority for the inclusion of non-appropriation, programmatic policy measures and substantive law changes implementing the budget as part of the Governor's hypothetical appropriation bills ?

4. Assuming that this Court holds that the Legislature's amendments to the Governor's non-appropriation bills do not violate Article VII, Section 4, whether the Governor's purported "line-item vetoes" of any portions of the Legislature's non-appropriation bills were not constitutionally authorized under Article IV, § 7 and, therefore, these provisions remain as validly enacted legislation ?

JURISDICTION OF THE APPEAL AND PRESERVATION OF ISSUES [*10]

This Court has jurisdiction over the present appeal pursuant to CPLR 5601(b)(1). The Senate and Speaker Silver appeal as of right (R. 1886-1889) from a Decision and Order ("Order") of the Appellate Division, First Department dated and entered on December 11, 2003. R. 1890. The Appellate Division Order affirmed an Amended Judgment of Supreme Court, New York County (Lehner, J.), entered August 28, 2002, granting the Governor's motion for summary judgment. R.37. *See Silver v. Pataki,* 192 Misc2d 117 (Sup. Ct., N.Y. Co. 2002), *aff'd* AD2d , 769 NYS2d 518 (1st Dep't 2003) ("*Silver IF).*

The issues raised on appeal were preserved in Supreme Court and in the Appellate Division. R.1339-1340, 1353, 1408, 1626; *see generally Silver II,* AD2d ,769 NYS2d at 519-523.

STATEMENT OF FACTS

Article VII And The Executive Budget System

The first six Sections of Article Vll incorporate the executive budget system in New York State's Constitution and provide the procedural steps and the division of responsibilities and authority to be followed by the Governor and the Legislature in enacting the budget.

Under Article VII, the Governor [*11] 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 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 important. n5 There are limitations on what the Legislature may do with respect to appropriation bills. These limitations do not apply to the Governor's other proposed legislation, the non-appropriation bills.

n5 Although the specific term "non-appropriation bill" is not found in the Constitution, in *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." *Silver I, supra,* 96 NY2d at 535 n.l.

[*12]

Section 4 of Article VII provides that "[t]he legislature may not alter **an appropriation bill** submitted by the Governor except to strike out or reduce items therein." *Id.,* § 4 (emphasis added). Hence, this limitation on the Legislature's power is referred to as the "no alteration" provision. No such restriction exists with respect to the Governor's proposed non-appropriation legislation. In addition, the Legislature's authority to add to an appropriation bill submitted by the Governor is constrained by Article VII. The Legislature may add "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.* Again, there is no comparable restriction on the Legislature in adding measures to non-appropriation bills.

Finally, if the Legislature exercises its right under Section 4 to add separately stated single purpose items of appropriation to the Governor's appropriation bill, such added items of appropriation cannot be for whatever extra project the Legislature may desire. On the contrary, the additional separately stated items must relate "specifically to [*13] some particular appropriation in the [Governor's] bill, and any such provision shall be limited in its operation to such appropriation." *Id.,* § 6.

After the Legislature has acted on the Governor's appropriation bill *(i.e.,* by passing it either as submitted by the Governor or after the Legislature has stricken out or reduced "items therein"), the Governor's appropriation bill "shall * * * be a law immediately without further action by the governor." *Id.,* § 4. In other words, over an appropriation bill which he himself has originated - the content of which he has approved - the Governor, not surprisingly, is given no veto power. With respect to the separate items of appropriation which the Legislature may have added to the appropriation bill, however, the Governor retains his veto power. The provisions just discussed deal solely with the Governor's appropriation bills, *i.e.,* actual bills introduced by the Governor which become law instantaneously when passed as submitted by the Governor or after the Legislature has exercised its limited authority to strike out or reduce items in the appropriation bill or to add single purpose items. n6

n6 Article VII also contemplates that the Legislature may pass its own appropriation bills once the Governor's appropriation bills have been acted upon and may enact a supplemental appropriations bill. N.Y. Const. Art. VII, §§ 5-6.

[*14]

In addition to appropriation bills, Sections 2 and 3 call for other recommended "non-appropriation" legislation. 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 added). 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.

Moreover, Article VII, Section 2 describes the type of measures contemplated as being included in non-appropriation bills and, therefore, excluded from "appropriation bills" that are subject to Section 4's restriction on

legislative alteration. In addition to calling for a complete plan of expenditures, [*15] estimates of revenues, and recommended legislation to provide the revenues, Section 2 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" and "implement" 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.,* § 3.

The Historical Background of Article VII

From the first six sections of Article VII when read together 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 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 to carry it out; and (2) accomplishing this with the least possible disturbance of the delicate balance of power between [*16] 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.* general legislation containing programmatic budget measures, amendments to existing laws, and tax measures such as the measures in the non-appropriation bills at issue here.

Article VII and the reports, studies and 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." n7 Confined to this one significant area of lawmaking, the first six Sections of Article [*17] VII dovetail to achieve a coherent, sensible and workable legislative process and a limited transfer of legislative authority to the executive that preserves the delicate balance of 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 still of profound significance since they altered the structure of the State Constitution embodying the fundamental principle of checks and balances inherent in the tripartite form of government.

n7 As discussed herein, following the adoption of the 1938 Constitution Article VII, Section 3 also includes tax measures.

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, result in an appropriation of state funds. It is evident that the [*18] 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 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.

Maintaining the balance and preventing potential abuse of power by the executive 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 their objections on an entirely false foundation. We constantly hear in argument against the executive [*19] 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.

R.1741.

In 1938 several amendments were made to the executive budget system. As explained by the Report of the State Finances Committee of the Constitutional Convention of 1938 the Committee "believes that the various existing or proposed provisions of the Constitution relating to State finances should be brought together in one logically arranged article on State finances. * * * For these reasons, the provisions of Article IV-A relating to the Executive budget system are transferred to Article VII, a number of details eliminated, and the order of the substantive provisions slightly rearranged." R. 1743-1744. As relevant here, these amendments included incorporating the "anti-rider" provision of Article III, Section 22 of the 1894 Constitution in Article VII, Section 6 of the 1938 Constitution, and adding the following language to the end of Article [*20] VII, Section 3: "and the proposed legislation, if any, recommended therein." n8

> n8 As adopted in the 1938 Constitution the first paragraph of Article VII, Section 3 thus provides:
>
> > 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.**
>
> The language in bold was added in 1938 to make the Governor responsible for submitting tax legislation to pay for his proposed appropriations and other legislation necessary to carry out the budget. *See Winner v. Cuomo,* 176 AD2d 60, 65 (3d Dep't 1992); R.1745.

The 1998-99 Budget Process

In January 1998 Governor Pataki submitted his executive budget to the Legislature consisting of twelve (12) budget bills, six (6) of which were appropriation bills and six (6) of which were non-appropriation bills. The appropriation bills, which were ultimately [*21] approved by the Legislature, are not at issue on this appeal. n9

> n9 *See* McKinney's 1998 Session Laws of New York, Book 1, Chap. 50-55, at 113-115 (hereinafter referred to as "1998 McKinney's"); *Silver II, supra,* AD2d at , 769 NYS2d at 519.

1. The Governor's Non-Appropriation Bills Submitted to the Legislature Properly Contained Both Changes to Substantive Laws and Measures Implementing Appropriations

The non-appropriation bills submitted by the Governor to the Legislature contained two general types of measures. First, as pointed out by Supreme Court, they contained amendments to "substantive provisions of state law * * * " related to the budget. 192 Misc2d at 125. n10 Second, the Governor's non-appropriation bills submitted to the Legislature also contained numerous provisions transferring appropriated monies between funds and accounts, directing

the deposit of certain monies into various funds and accounts, **and modifying, itemizing and/or sub-allocating** [*22] **appropriated funds.** For example, in the Governor's proposed non-appropriation bill which became S.6095 the Governor proposed the following non-appropriation measure in § 7:

> **Notwithstanding any other provision of law to the contrary, the commission of health is authorized in the 1998-99 fiscal year to allocate up to one million four hundred thousand dollars of monies available in the priority distributions pool** established pursuant to clause (A) of subparagraph (iii) of paragraph (c) of subdivision one of section 2807-1 of the public health law **to Roswell Park Cancer Institute,** and to transfer and deposit such amount into the department of health income fund established pursuant to section 409 of the public health law.

A-11.

n10 Two examples are noted here. First, §§ 1-2 of the Governor's non-appropriation bill submitted to the Legislature which later became Chapter 56 of the Laws of 1998, amended Real Property Tax Law § 425 (the STAR property tax exemption) by changing the exemption amounts for senior citizens and other eligible persons for various school years. A-2 to A-3; 1998 McKinney's at 116-117.

Second, §§ 3-4 of the same non-appropriation bill submitted by the Governor to the Legislature amended § 1310 of the Tax Law relating to income tax returns. A-3 to A-4; 1998 McKinney's at 117-118.

References to A- are to pages in the Joint Appendix submitted by the Senate and the Speaker, which contain the 6 non-appropriation bills submitted by the Governor to the Legislature as part of the 1998-99 budget before they were amended by the Legislature.

Insofar as these bills are public documents and records, we ask the Court to take judicial notice of the Joint Appendix. *See People v. Sanchez,* 98 NY2d 373, 401 fn 13 (2002) ("We may properly take judicial notice of facts appearing in the public records of this State * * * . "); *Affronti v. Crosson,* 95 NY2d 713, 720 (2001) ("census data is a proper subject of judicial notice because it is taken from public records * * * . Moreover, because this data reflects a legislative fact, as opposed to an evidentiary fact, its absence from the record does not prevent its consideration for the first time on appeal ***.")

[*23]

A brief review of the Governor's non-appropriation bill submitted to the Legislature (S.6096) that later became Chapter 57 of the Laws of 1998 shows a nearly equal mix of measures amending substantive law provisions and measures implementing the budget by sub-allocating or itemizing appropriated monies or making the appropriations contingent on future activity. That bill contained 51 sections; section 51 set forth the effective date of the other sections. Of the other 50 sections 25 of them proposed amendments to substantive law provisions related to the budget, specifically the State Finance Law, the Executive Law, the General Business Law, the Real Property Law, the Private Housing Finance Law, and the Public Authorities Law. The remaining 25 sections of the Governor's proposed non-appropriation bill authorized the State Comptroller to loan money to certain funds and/or accounts, authorized the Comptroller to transfer up to specified dollar amounts for specified purposes from one fund and/or account to another fund and/or account (in some cases upon the request or approval of the Director of the Budget, the Commissioner of Education, or the State University Chancellor), authorized [*24] and directed the Comptroller to deposit certain monies to various funds or accounts, **and otherwise sub-allocated or itemized appropriated monies."** n11

n11 *See, e.g.,* § 9 (amendment to the State Finance Law that money may be transferred or paid out of the New York City and the locality shares of highway improvement costs accounts by the State or any agency or

officer thereof "without an appropriation by law * * * .") (A-26); § 25 (appropriations for capital projects under the various chapters of the laws of 1997 "shall be deemed to provide all costs necessary and pertinent to accomplish the intent of the appropriation * * * " and appropriations from various projects "are appropriated in accordance with the provisions of § 93 of the state finance law.") (A-30 to A-31); §§ 34 and 35 (directing that the amount of certificates of participation to be issued under the State Finance Law to finance personal property "shall not exceed" $ 195,000,000 and $ 228,000,000 for two separate purposes) (A-36).

2. [*25] *Just Like the Governor's Non-Appropriation Bills The Legislative Amendments to those Bills Also Properly Contained Both Substantive Law Amendments and Measures Implementing Appropriations*

Ultimately, the six non-appropriation bills submitted by the Governor to the Legislature were enacted as three non-appropriation bills, Chapters 56-58 of the Laws of 1998. The Legislature amended the Governor's proposed non-appropriation bills by adding two general types of measures consistent with the two types of measures contained in the Governor's proposed bills. First, as noted by both Supreme Court and the First Department, the Legislature amended the Governor's proposed non-appropriation bills by setting forth criteria to implement various appropriations, by providing that an appropriation was contingent on the enactment of subsequent legislation, and/or by sub-allocating appropriated funds without changing the amount appropriated or the purpose of the appropriation. Second, the Legislature amended the non-appropriation bills by inserting proposed amendments to substantive law provisions related to the budget.

A. Legislative Amendments Implementing the Appropriations

Illustrative of [*26] the first type of changes made by the Legislature to the Governor's proposed non-appropriation bills - the only type of measures discussed by Supreme Court and the First Department - are the legislative amendments related to the 750 cell prison in Franklin County and for local administration of the STAR program.

With respect to the prison, the Governor proposed and the Legislature agreed to appropriate $ 180,000,000 for development, design, and construction of a 750 cell maximum security facility in Franklin County in an appropriation bill not at issue here. R. 1257.35. The "expansion purpose" language contained in the Governor's proposed appropriation and the appropriation as enacted by the Legislature provided two conditions: (1) that no funds would be expended from the appropriation until the Commissioner of the Department of Correctional Services advised the Speaker of the Assembly and the Temporary President of the Senate, not earlier than January 8, 1998, that such a facility is required by reason of the number of inmates; (2) that "notwithstanding any provision of law to the contrary" the Comptroller shall make a final written determination with respect to the approval of any [*27] contract made pursuant to the appropriation within 30 days unless the Comptroller notified the State agency in question within the 30 day period of good cause for an extension. R.1257.33 - 1257.36. n12

n12 *See* Affidavit of Max Shulman, Esq., describing these documents from Exhibit B to his affidavit as taken from an appropriation bill as proposed by the Governor and later passed by the Legislature. R.1252-1253.

In passing the non-appropriation bill that became Chapter 56 the Legislature referenced the appropriation for the 750 cell maximum security facility to be located in Franklin County and repeated the two limitations contained in the "expansion purpose" of the appropriation - the Commissioner to advise of the need for the facility and the time period requirement for the Comptroller's approval of any contract. The Legislature then enacted two other programmatic policy measures relative to the prison to be built. First, it added a provision in the Governor's non-appropriation bill that the prison "shall [*28] contain indoor common space, including a separate building which is suitable for educational, vocational, recreational and other inmate activities comparable to the space contained for such purposes in other general confinement maximum security correctional facilities operated by the Department." 1998 McKinney's at 178. Second,

the Legislature added a provision providing that no funds would be available for the purpose of this appropriation "until a subsequent chapter of the laws of 1998 is enacted which allocates and authorizes the disbursement of such funds." n13 *Id.;* R.1257.37 - 1257.39. The Governor struck all four conditions stating that he did not approve of the alterations because they would "require the expenditure of funds for a separate building for recreation and other purposes * * * and would prevent the expenditure of funds except pursuant to a subsequent chapter of the laws of 1998." R.1257.37-1257.39. n14

n13 Presumably, this was to be sure that the Commissioner certified the need for the facility before appropriated monies were expended.

n14 Surprisingly, the Governor struck as legislative changes prohibited by Section 4 even the two conditions originally contained in the "expansion purpose" language of the appropriation that he proposed and was enacted into law.

[*29]

Similarly, the appropriation proposed by the Governor and agreed to by the Legislature for the local administration of the STAR program in the amount of $ 17,000,000 simply stated that it was for "state aid for local administration of the school tax relief initiative enacted by Chapter 389 of the Laws of 1997." R. 1257.74. In the Governor's proposed non-appropriation bill that became Chapter 57 of the Laws of 1998 the Legislature referenced the appropriation for local administration of the STAR program, and added programmatic policy determinations that up to various amounts of the total appropriation of $ 17,000,000 "shall be available" for various purposes, including $ 11,500,000 for local assessing units administering the local assessment rolls, $ 2,400,000 for local governments and school districts to offset the costs of mailing receipts to homeowners, $ 2,000,000 for local assessing units to notify senior citizens of the availability of the STAR exemption, and $ 1,500,000 for grants to not-for-profit community based organization who disseminated information to senior citizens eligible for the enhanced exemption. 1998 McKinney's at 187.

Again, the Legislature did not amend or [*30] alter in any way the $ 17,000,000 appropriated or the fact that it was generally appropriated for state aide for local administration of the STAR program. In striking the Legislature's provisions, again as prohibited changes under Article VII, Section 4, the Governor stated that they would "restrict the use of funds appropriated for local administration of the STAR program to maximum amounts for specified activities and add a new grant program for community groups to conduct outreach activities." R.1257.78-1275.79.

B. Legislative Amendments to Substantive Laws Related to the Budget

In addition, the Legislature amended the Governor's proposed non-appropriation bills by adding amendments related to the budget to substantive law provisions. Two examples of such changes are as follows:

1. In Chapter 56, Part B, § 1 the Legislature amended the Education Law by repealing § 409-d as added by Chapter 456 of the Laws of 1992, and adding two new §§ 409-d and 409-e establishing a Comprehensive Public School Building Safety Program, directing the Commissioner of Education to establish, develop, and monitor such program, which would include the annual inspection of all public school buildings [*31] throughout the State, and requiring the Commissioner to promulgate a uniform code of public school building inspection and safety rating and monitoring by rule and regulation (1998 McKinney's at 170-171); and

2. In Chapter 56, Part A, § 31 the Legislature amended the Public Authorities Law by adding a new § 3102-e establishing and defining emerging technology industrial classifications and requiring the New York State Science and Technology Foundation to prepare a Report analyzing the effectiveness of the tax credits created by subdivisions 12-E and 12-F of Tax Law § 210 and requiring the Department of Taxation and Finance to provide the Foundation with statistics and information for preparation of such a Report. In § 32 the Legislature amended the Tax Law by adding subdivisions 12-E and 12-F to Section 210 of the Tax Law creating a tax credit for qualified emerging technology

company employment *(id.* at 131-135). n15

n15 *See also, e.g.,* 1998 McKinney's at 394 (Chapter 58, Part E, § 37 - amending State Finance Law by adding a new § 97-qq creating a special revenue fund entitled the New York State Wireless Telephone Emergency Service Account in the custody of the State Comptroller); *id.* at 227 (Chapter 58, Part A, § 26 - amending Environmental Conservation Law by adding a new § 72-1011 establishing in the joint custody of the Commissioner of Taxation and Finance and the Comptroller a special revenue fund to be known as the "Mined Land Reclamation Program Account"); *id.* at 219-220 (Chapter 58, Part A, § 3-g - amending Urban Development Corporation Act by adding a new § 16-j establishing a Strategic Training Alliance Program to identify and address employer demands for skilled workers); *id.* at 271-272 (Chapter 58, Part C, § 46 - amending Education Law by adding a new § 3609-e establishing a program for the payment of school tax relief aid); *id.* at 258-259 (Chapter 58, Part C, § 7 - amending Education Law by adding a new § 3004-a directing the Commissioner of Education to establish a National Board for Professional Teaching Standards Certification Grant Program to defray costs incurred by an eligible teacher and his or her sponsoring school district where such eligible teacher seeks a National Board Certification from the National Board for Professional Teacher Standards); *id.* at 283 (Chapter 58, Part C, § 90 - amending Social Services Law by adding a new § 153-g requiring state reimbursement for 65% of the amount expended by Social Services districts for child protective services under certain conditions and limitations set forth in the section).

As discussed herein the Governor did not "veto" these amendments to his non-appropriation bills by the Legislature.

[*32]

3. The Governor's Purported Exercise of his "Line-Item " Veto Power

The Legislature passed the Governor's non-appropriation bills as amended and the bills were submitted to Governor Pataki, who struck 55 of the modifications by purporting to exercise his "line-item veto", power, referencing Article IV, Section 7 of the Constitution. **In purporting to exercise this "veto" power Governor Pataki expressly declared that he was striking these 55 amendments to his non-appropriation bills on the grounds that the Legislature had acted unconstitutionally in violation of Article VII, Section 4, which as discussed above only prohibits, with limited exceptions not applicable here, the Legislature from altering "an appropriation bill."** n16

n16 In striking out various legislative changes to his non-appropriation bills of which he disapproved, the Governor repeatedly stated that "I transmit pursuant to the provisions of section 7 of Article IV and section 4 of Article VII of the Constitution, a statement of items to which I object and which I do not approve" and labeled each of the 55 statements as "line veto # ". *See, e.g.* R.1257.37; 1257.46; 1257.54; *see also supra,* fn 1.

[*33]

Notably, however, Governor Pataki did not purport to "veto" every legislative amendment to his non-appropriation bills. In fact, Governor Pataki left intact and did not strike as allegedly "unconstitutional" well over 100 changes made by the Legislature to his non-appropriation bills. He thus left in place far more legislative changes, which presumably would have been just as violative of Section 4 under the Governor's stated basis for his "veto," than the 55 he disapproved of and struck. Moreover, the Governor did not consistently apply his so-called "line-item veto" power to strike only legislative changes that amended substantive law or that referenced an appropriation and implemented that appropriation in his proposed non-appropriation bills.

With respect to legislative amendments to substantive laws in his proposed non-appropriation bills the Governor did not "veto" the eight examples of legislative amendments discussed above. *See* pp. 22-23 & fn 15. On the other hand,

Governor Pataki did strike seven (7) legislative additions to his non-appropriation bills amending substantive law provisions. n17

n17 *See* 1998 McKinney's at 285 (Chapter 58, Part C, § 93 amending State Finance Law § 54[a][3]; *id.* at 378-379 (Chapter 58, Part E, § 6 amending Social Services Law § 366 by adding new subdivision [10]); *id.* at 381-381 (Chapter 58 Part E, §§ 13-15 amending Public Health Law §§ 2807-c, 2808); *id.* at 383-386 (Chapter 58 Part E, §§ 16-17 amending the laws of 1996 and the laws of 1997 amending the Education Law); *id.* at 389-390 (Chapter 58 Part E, § 23 amending Social Services Law § 131-z); *id.* at 390-391 (Chapter 58 Part E, § 25 amending Social Services Law § 364-j-l); and *id.* at 394 (Chapter 58 Part E, §§ 35-36 amending Chapter 338 of the Laws of 1994).

[*34]

In addition, the non-appropriation bills not "vetoed" and finally enacted contain numerous provisions that reference appropriations (contained in appropriation bills as enacted) and either sub-allocate or itemize or condition those appropriations on various acts or events - the very type of measures that the Governor claimed and the lower courts agreed violate Article VII, Section 4.

In fact, the three non-appropriation bills approved by the Legislature and the Governor - Chapters 56-58 of the Laws of the 1998 - contain numerous provisions that reference an appropriation by using the phase "with respect to moneys appropriated in section * * * of the chapter of the laws of 1998 which enacts the * * * budget * * * " and provisions limiting or conditioning that appropriation **that were not vetoed by Governor Pataki.** Most of these provisions also contain a standard clause that they are effective "notwithstanding any other provision of law." n18

n18 *See, e.g.,* 1998 McKinney's at 177, 184-191, 236-242.

[*35] **Commencement of this Action, Standing, and Supreme Court's Grant of Summary Judgment in Favor of The Governor**

This action was commenced by Speaker Silver against Governor Pataki on June 15, 1998 for a judgment declaring that the 55 "line-item vetoes" exercised by Governor Pataki to the Legislature's modifications to his non-appropriation bills were unconstitutional in violation of Article IV, Section 7. The Governor moved to dismiss based on a lack of standing and capacity to bring the action. After Supreme Court denied the motion and the First Department stayed the action pending appeal, and reversed and dismissed the action, this Court modified by holding that Speaker Silver had standing and affirmed as modified in July 2001. *See generally Silver I,* 96 NY2d 532.

After this Court modified the Appellate Division Order and remitted the matter to Supreme Court, Speaker Silver renewed his prior cross-motion for summary judgment, made in response to the Governor's motion to dismiss and adjourned pending service of an Answer by the Governor, and Governor Pataki cross-moved for summary judgment. n19 *Silver II, supra,* 192 Misc2d at 118-119. After Supreme [*36] Court suggested the parties reduce the number of vetoes to be considered the Speaker and the Governor stipulated that although the Complaint challenged 55 "line-item vetoes" the parties and the court need only address 13 representative examples. Moreover, the Speaker and the Governor agreed that the court need not examine the vetoes individually. *Id.* at 119. n20

n19 Although the Governor's Answer did not contain a counterclaim seeking declaratory relief, Speaker Silver and Governor Pataki stipulated that, in addition to determining the validity of the Governor's purported line-item vetoes, Supreme Court may fully adjudicate the constitutionality of the Legislature's amendments to

the non-appropriation bills as addressed in the Governor's Ninth Affirmative Defense. R.1394-1395.

n20 The Speaker asserted that "the Governor's vetoes were all unconstitutional in that they applied only to portions of 'non-appropriation' bills * * * , while the Governor maintained that all of the vetoes were valid and that all of the provisions vetoed were unconstitutional as they affected appropriations in a manner not authorized by section 4 of Article VII of the Constitution." *Id.* at 119.

[*37]

In his June 17, 2002 Decision and Order Justice Lehner noted that "[t]he first issue to be examined relates to the meaning of the term 'item of appropriation' as used in the Constitution." *Id.* at 123. In answering this question the court did not analyze or even refer to the critical language of Sections 2, 3, and 4 of Article VII. Instead, it adopted the Governor's argument that "since the vetoed provisions [even though contained in non-appropriation bills] relate to the 'when, how or where' appropriated monies may be expended, they are part of 'items of appropriation.' " *Id.* at 124, *quoting Saxton v. Carey*, 44 NY2d 545, 550 (1978), *quoting Hidley v. Rockefeller*, 28 NY2d 439, 550 (1971) (Breitel, J., dissenting). Then Justice Lehner tied the Governor's "when, how or where" argument based upon *Saxton* to the Governor's argument that Section 6 of Article Vll, rather than solely a negative prohibition against the Legislature from adding riders to appropriation bills, actually provides affirmative authority for what the Governor can include in his appropriation bills. *Id.* at 124. Thus, the court held, because [*38] "when, how, or where" provisions are "part of an item of appropriation, these provisions [although contained in non-appropriation bills] are subject to the 'no alteration' restriction of section 4 of Article VII." *Id.*

Supreme Court also briefly discussed *New York State Bankers Association, Inc. v. Wetzler*, 81 NY2d 98 (1993) *("Bankers"), People v. Tremaine*,, 252 NY 27 (1929) *("Tremaine* 7"), and *People v. Tremaine*, 281 NY 1 (1939) *("Tremaine IF),* although Justice Lehner's decision noted that at issue in all three of those cases were only legislative changes to the Governor's appropriation bills, not changes to his non-appropriation bills as in this case. *Id.* at 124-125. The court found that the Legislature's insertions in the Governor's non-appropriation bills "constituted alterations of 'items of appropriation,' which is not permitted by Article VII, Section 4 * * *." *Id.* at 126. Justice Lehner then concluded that the Legislature could not "place alterations of the Governor's appropriation related legislation stating 'when, how or where' monies may be expended in non-appropriation programmatic bills" without violating [*39] Article VII, Section 4. *Id.* at 126-127.

Having found that the Legislature's amendments to the non-appropriation bills were not constitutionally adopted the court concluded that it need not address whether the Governor had constitutionally exercised a "line-item veto" over 55 of the amendments under Article IV, Section 7. Justice Lehner wrote, however, that he found "no provision in the Constitution" granting the Governor the right to "veto" legislative additions to non-appropriation bills that effect appropriations "on the grounds that they were unconstitutionally enacted." *Id.* at 127. It is evident, however, that notwithstanding this observation the court's holding, in affirming the action of the Governor in striking out 55 legislative changes to his non-appropriation bills as violative of Article VII, Section 4, had precisely the effect of giving the Governor veto power under the Constitution.

The Senate's Motion to Intervene

Although this action involves questions pertaining to the constitutionality of measures passed by the Legislature and the validity of the Governor's exercise of line item vetoes with respect to these measures in the 1998-99 budget, the Senate [*40] was not named a party in the action. The Senate, however, was named a party defendant in *Pataki v. New York State Assembly*, commenced by the Governor on August 16, 2001, with respect to the 2001-2002 State budget. In his January 2002 decision in the Albany County action - now on appeal in the Appellate Division, Third Department - Justice Malone addressed and decided constitutional questions which are central to this appeal. It was not until the release of Justice Lehner's decision in this action, *Silver II*, 192 Misc2d at 117, that the Senate became aware that this action involved constitutional questions other than the propriety of the Governor's purported exercise of "line-item

vetoes" under Article IV, Section 7. Prior to Justice Lehner's June 17, 2002 decision, there had been three published opinions in this action all dealing with the standing issue. None of these opinions gave any indication that the action could involve any of the constitutional questions to be determined in *Pataki v. New York State Assembly.* n21

n21 *See Silver v. Pataki,* 179 Misc 2d 315 (Sup. Ct, N.Y. Co. 1999) (Lehner, J.), rev'd 274 AD2d 57 (1st Dep't 2000), *modified* 96 NY2d 532 (2001). On the contrary, all of the opinions indicated that this action involved only questions pertaining to the exercise of the Governor's line item vetoes under Article IV, Section 7. *See generally Silver v. Pataki,* 96 NY2d at 535 (summarizing proceeding).

[*41]

On July 22, 2002, the Senate moved in Supreme Court, New York County, before Justice Lehner for intervention and for reargument. R. 1665-1820. The Amended Judgment appealed from (R.37) was entered on August 28, 2002 on an Order entered on August 21, 2002, based on a Stipulation providing that the New York State Senate be added as a party plaintiff *nunc pro tunc* and is bound by the Judgment of Supreme Court dated June 25, 2002 adjudging that the provisions which Governor Pataki "vetoed" were unconstitutionally enacted by the Legislature and thus void. n22 R. 1873-1874. By the Order, the Senate's motions to intervene and reargue were withdrawn. Both the Speaker and the Senate then appealed to the Appellate Division, First Department. R.29,35.

n22 The Stipulation provided further that the papers filed in connection with the Senate's motion would remain in the Supreme Court file as part of the Record and be subject to designation on appeal and that the Governor would not object to the Senate making the arguments contained in its intervention and reargument motion papers in support of its appeal from the Judgment as amended.

[*42]

The First Department's Decision and Order

The First Department's December 11, 2003 Decision and Order affirming the Amended Judgment closely followed the analysis of Supreme Court. *See* AD2d , 769 NYS2d 518. Like Supreme Court it did analyze or discuss the key language of Article VII, Section 4 - that it applies only to "an appropriation bill" - or explain how it could possibly apply to the non-appropriation bills at issue. Nor did it discuss the language in Sections 2 and 3. Nevertheless, the court rejected as "unconvincing" the arguments of Speaker Silver and the Senate that: (1) *Tremaine I, Tremaine II,* and *Bankers* were irrelevant because here the legislative amendments were to non-appropriation, rather than appropriation, bills; and (2) that there is a critical distinction between the two types of budget bills submitted by the Governor in applying the no-alteration provision of Section 4. *Id.* at 522. n23 Instead, relying on *Saxton* and Section 6, the First Department held that substantive, programmatic measures found in non-appropriation bills are themselves "items of appropriation" subject to the no-alteration provision of Section 4 so [*43] long as they are "integrally related to" an appropriation in an actual appropriation bill, thus merging the two types of bills into one. *Id.*

n23 The court first discussed *Tremaine I, Tremaine II,* and *Bankers,* and the fact that in each case this Court wrote or held that the Legislature could not alter an "appropriation" except as allowed by Section 4 of Article VII. *Id.* at 521-522.

The court was apparently of the opinion that this case was subject to resolution by simply applying these existing precedents. It wrote that "[t]he present dispute between the executive and legislative branches is the latest in the ongoing process by which they seek to define their respective budgetary powers under the Constitution. * * * In the context of prior budget disputes, the Court of Appeals has already undertaken this definitional process." *Id.* at 521.

Having concluded that the Legislature, in effect, amended "items of appropriation" in the non-appropriation bills at issue by treating the two types of [*44] bills as one and the same, the court found a violation of Section 4 notwithstanding that the court acknowledged that the Legislature's alterations were to measures proposed by the Governor in his non-appropriation bills ("outside the appropriation bill"). *Id.* at 523.

Finally, the First Department held that Supreme Court properly did not address the constitutionality of the Governor's purported "line-item veto" of the measures in question because it had found that the legislative amendments were unconstitutionally enacted under Article VII, Section 4 and thus any ruling on the constitutionality of the vetoes would have amounted to "an improper advisory opinion." *Id.*

The Relationship Between this Action and *Pataki v. New York State Assembly*

In this case, which concerns his 1998-1999 budget bills, the Governor's proposed appropriation bills **properly** contained "appropriations" - the dollar amount and purpose of appropriations - and his proposed non-appropriation bills **properly** contained the "proposed legislation, if any, recommended [in the budget]" (N.Y. Const. Art. VII, § 3) - the programmatic policy measures implementing the budget. Thus, in the [*45] 1998-1999 budget the Governor initially, in his proposed budget bills, properly recognized and followed the separate and distinct constitutional roles of appropriation and non-appropriation bills. Where the Governor violated the Constitution was in striking 55 legislative amendments to his non-appropriation bills as allegedly violative of Section 4 because that Section only applies to changes to his appropriation bills and the legislative amendments stricken were proper legislative changes to non-appropriation bills.

In contrast, in *Pataki v. New York State Assembly* the Governor, in submitting his 2001-2002 budget bills, **actually inserted all the programmatic, non-appropriation measures implementing the budget directly in his proposed appropriation bills along with the proposed appropriations.** This was improper, the Senate and the Assembly argue, and violates Sections 2 and 3 of Article VII, which require these programmatic measures implementing the budget to be included in non-appropriation bills. In response to the Governor's proposed appropriations bills for the 2000-2001 budget, the Legislature passed 46 budget bills, which included three categories of legislation: (1) [*46] the Governor's appropriation bills submitted by him under Section 3 after it deleted programmatic non-appropriation measures included in the Governor's proposed appropriation bills in violation of Section 3; (2) non-appropriation bills containing measures pertaining to budget-related provisions in the appropriation and non-appropriation bills; and (3) 37 single purpose appropriation bills after it had acted on the Governor's budget bills pursuant to Article VII, Sections 5 and 6.

Justice Malone granted summary judgment to the Governor and declared invalid all of the 46 budget bills passed by the Legislature on the grounds that: (1) that the Governor could constitutionally include the disputed non-appropriation measures directly in his appropriation bills submitted under Section 3; and (2) that because these measures were properly included in the Governor's proposed appropriation bills, the Legislature was prohibited from deleting them by the "no legislative alteration" provision of Section 4. Supreme Court based its holding on a singular interpretation of Article VII, Section 3 which no party to the action had advanced.

Thus, the primary issue in *Pataki* and the secondary issue [*47] in *Silver II* (reached only if this Court were to agree with the lower courts that Section 4 can be applied to non-appropriation as well as appropriation bills because the two types of bills can be treated as one and the same), are the same: *i.e.*, what may constitutionally be included in actual *(Pataki)* or hypothetical *(Silver II)* appropriation bills.

With respect to this one common issue, the Senate argues in both cases that under Article VII the programmatic policy measures, substantive amendments of existing laws, and other measures implementing the executive budget are intended by the Constitution to be included in non-appropriation bills and therefore are not subject to the "no-alteration" provision imposed on the Legislature by Article VII, Section 4. The Senate also argues in both cases that the "anti-rider"

provision in Article VII, Section 6 does not apply to what the Governor may permissibly include in his actual *(Pataki)* or hypothetical *(Silver II)* appropriation bills, thus making them subject to the no-alteration provision of Section 4. Section 6 cannot be used affirmatively, as the Governor contends, for the inclusion by him of any measure in an [*48] appropriation bill in addition to "items of appropriation" so long as "it relates specifically to some particular appropriation in the bill" and is "limited in its operation to such appropriation." N.Y. Const, art. VII, § 6. n24

> n24 Notably, in his decision in *Pataki v. New York State Assembly*, Justice Malone, unlike Justice Lehner and the First Department in this action, did not accept the Governor's argument based on Article VII, Section 6 that the Governor could include virtually any measure in his appropriation bills so long as it specifically relates to some appropriation in the bill and is limited in its operation to such appropriation. On the contrary, without placing any reliance on Article VII, Section 6, Justice Malone reached virtually the same result by an entirely different approach - *i.e.*, an unprecedented and, it is submitted, erroneous interpretation of Article VII, Section 3. *See Pataki v. New York State Assembly, supra*, 190 Misc2d at 733-735.

POINT I

"NON-APPROPRIATION [*49] **BILLS" ARE NOT APPROPRIATION BILLS AND CANNOT BE TREATED AS SUCH FOR THE PURPOSE OF APPLYING THE RESTRICTIONS ON LEGISLATIVE ALTERATIONS IMPOSED BY ARTICLE VII, SECTION 4**

The rationale for the holdings below that the measures enacted by the Legislature were unconstitutional is that they were legislative alterations of the Governor's **non-appropriation** bills which did not comply with Article VII, Section 4. The necessary foundation for this holding is the assumption that the proscriptive language in Article VII, Section 4 - *i.e.*, that the "legislature may not alter an **appropriation bill** submitted by the governor * * * " (emphasis added) - applies to bills which are defined by their essential characteristic of **not being appropriation bills.** As will be seen, the assumption that non-appropriation bills may be treated as appropriation bills for the purpose of applying Article VII, Section 4 is untenable.

A. The "No-Alteration" Provisiou of Section 4 Does Not Apply to Measures Contaiued in the Goveruor's Non-Appropriation Bills.

Article VII, Section 4, provides as follows:

> The legislature may not alter **an appropriation bill snbmitted by the** [*50] **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. None of the restrictions of this section, however, shall apply to **appropriations for the legislature or judiciary.**
>
> Such an **appropriation bill** shall when passed by both houses be a law immediately without further action by the governor, except that **appropriations for the legislature and judiciary** and **separate items added to the governor's bills by the legislature** shall be subject to approval of the governor as provided in section 7 of article IV.

N.Y. Const, art. VII, § 4 (emphasis added).

The two paragraphs of Section 4 contain different but inter-related provisions, specifically designed to fit the Framers' intricate budget process. The first paragraph of Section 4 contains the "no-alteration" rule. By its terms, it applies only to "an appropriation bill submitted by the governor" and it specifically excepts from the alteration

restriction "appropriations for the legislature or judiciary. [*51] " *Id.* The second paragraph's unique provision curtails the Governor's veto power. It provides that "[s]uch an appropriation bill" (meaning an appropriation bill acted upon by the Legislature in the first paragraph) "shall when passed by both houses be a law immediately without further action by the governor." *Id.* There are two instances when the appropriation bill does not become a law immediately and the Governor retains his veto power over it. The veto curtailment does not apply to "appropriations for the legislature and judiciary" or to "separate items added to the governor's bills by the legislature" *(id.)* which the legislature is permitted to add by the first paragraph.

The language is unambiguous. The meaning is plain. **Section 4 deals entirely with "appropriation bill[s] submitted by the governor," the limited ways in which such appropriation bills may be altered by the Legislature, and what follows after the Legislature has acted on them.** Giving the words in Section 4 their ordinary meaning, there is no interpretation under which the "no legislative alteration" provision in the first paragraph or the veto curtailment provision in the second paragraph could [*52] have been intended to apply to anything other than **appropriation bills submitted by the governor.** Nothing in Section 4 suggests that either of these provisions could have been intended to apply to measures in the Governor's non-appropriation bills.

The many documents and reports comprising the constitutional history of the Executive Budget Amendment - now embodied in Article VII of the present 1938 Constitution - demonstrate conclusively that the proposers of the 1915 Executive Budget Reform and the drafters of the 1927 and 1938 Constitutional provisions could never have imagined that the unique provisions of Section 4 restricting the Legislature from altering items in appropriation bills might be thought of as applying to measures contained in the Governor's non-appropriation bills. As pointed out by the Speaker in his detailed discussion of the constitutional history (R. 1268-1277), which the Senate adopts, the Governor's proposition, if accepted, would have just the opposite effect from what the drafters intended, *i.e.,* instead of a "limited cession of power to the Governor to initiate the budget process" (R.1277), with the Legislature retaining its strong hold "on the [*53] 'purse strings' of the State" *(id.),* **as intended,** there would be "a wholesale transfer of legislative power over the terms and conditions of spending to the Governor" *(id.),* **as not intended.**

Neither the Governor nor the courts below cite any authority for the proposition that a "non-appropriation bill" may be treated as an appropriation bill for the purpose of the Section 4 "no-alteration" restrictions. All of the prior decisions addressing the application of Section 4 to legislative alterations refer only to the Governor's appropriation bills, *i.e.* actual appropriation bills submitted by him under Section 3 making appropriations of money as in *Pataki v. New York State Assembly. See Bankers, supra,* 81 NY2d 98; *Saxton, supra, AA* NY2d 545; *Hidley v. Rockefeller, supra,* 28 NY2d 439; *Tremaine II, supra,* 281 NY 1; *Tremaine I, supra,* 252 NY 27. No case suggests that a bill which by nature and content, *see infra* Point 1(B)(2), is a non-appropriation bill can be treated as an appropriation bill for the purpose of the Section 4 "no-alteration" restriction.

B. The Langnage [*54] **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**

1. Appropriation Bills Contain "Items Of Appropriation "

The wording of Article VII, Sections 2, 3 and 4, when these sections are read together, demonstrates beyond question 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. n25 As previously noted, 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 other non-appropriation measures, *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. [*55]

n25 This Court has described Article VII as a "delicately calibrated mechanism." *Cohen v. State of New York*, 94 NY2d 1,12 (1999).

Section 3, while not purporting to define an "appropriation bill," 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.* Section 4 details the only ways in which the Legislature may alter the bill or bills containing "the proposed appropriations or reappropriations." First, it may **"strike out** or **reduce items** therein." *Id.*, § 4. Second, Section 4 also provides that the Legislature "may add thereto items of appropriation provided that such additions are stated separately and distinctly from the original items of the bill." *Id.* 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, [*56] 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 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 added).

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 and 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 added).

The restricted meaning of "items of appropriation" [*57] adopted by this Court in *Tremaine Has* set forth above is logically inferable from the limited remedy given the Legislature in Section 4 of altering "appropriation bills" by striking out or reducing items therein or adding items thereto. It is a common sense conclusion that the items of appropriation must be what is amenable to those limited remedies: *i.e.*, "items" which could be stricken, reduced or to which "items" could be added. The Framers' use of the word "reduce" in Section 4 makes it even clearer that what was intended as "items of appropriation" are dollar amounts because it is impossible to conceive of anything else that could be "reduced" by the Legislature under Section 4.

Further, the plain meaning of the term "appropriation bill" as used in Section 4 and the restricted interpretation of it by this Court in *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 public moneys,** and specifying the purpose of the various items and the amount of money to be expended for each. [*58]

Webster's New Twentieth Century Dictionary, Unabridged, 2d ed., Simon & Schuster (c.1979), at 92 (emphasis added). n26

n26 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.

2. Non-Appropriation Bills Contain Programmatic Policy Measures, Changes to Existing Laws and Other Measures Implementing [*59] *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 provisions** and commonly include **sonrces, 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.**

Silver I, supra, 96 NY2d at 535, nl (emphasis supplied). Similarly, in describing the facts of the case, this Court noted that Governor Pataki submitted his executive budget to the Legislature "along with several budget bills. **Some of the bills snbmitted appropriated monies while others detailed the utilization of appropriated funds or proposed changes in the operation of certain programs."** *Id.* at 535. n27

n27 The phrase "[s]ome of the bills submitted appropriated monies" can 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."

[*60]

Supreme Court and the Appellate Division simply ignored the language used by this Court to describe "non-appropriation" bills in *Silver I.* Notably, this Court in *Silver I* did not refer to amendments to substantive law because they were not raised by the parties, but it is respectfully submitted that this Court could not have intended to exclude from its description of non-appropriation bills such quintessentially non-appropriation measures. In their holdings, the courts below treated matters which were clearly "the proposed legislation, if any, recommended" (N.Y. Const., art. VII, § 3) in the budget - *i.e.,* amending existing substantive law such as the Tax Law or referencing appropriations and adding programmatic policy determinations with respect to those appropriations - as measures which the Governor could properly strike out on "veto" as unconstitutional amendments of his non-appropriation bills in violation of the "no-alteration" provision of Section 4. n28

n28 The Appellate Division described the measures that the Legislature unconstitutionally added to the Governor's non-appropriation bills as having "had the effect of modifying some of the Governor's appropriations by *re-allocating or itemizing such appropriations, or conditioning them on subsequent legislative action.'"* AD2d at , 769 NYS2d at 519. Similarly, Supreme Court stated that the additions to the Governor's non-appropriation bills by the Legislature which he struck out as allegedly "unconstitutional" "either * * * *sub-allocated appropriated funds, * * * provided that the appropriation was contingent on the enactment of subsequent legislation, or * * * set forth criteria to implement the appropriation."* 192 Misc2d at 122. This language is directly at odds with and contradicts this Court's description of "non-appropriation" bills in *Silver I.*

[*61]

The holdings below - that legislative amendments to non-appropriation bills conditioning the expenditure of certain appropriations found in an appropriation bill upon subsequent legislative action or sub-allocating lump sum appropriations, or including programmatic policy measures violation Section 4 - are flatly contrary to the description of non-appropriation bills in *Silver I* and the history and plain text of Article VII.

It is significant that this Court's description of non-appropriation bills in *Silver I* as different from appropriation bills is fully consistent with Article VII, which specifically provides in Sections 2 and 3 for "appropriation bills" **and** also for other "recommended" non-appropriation "legislation." In relevant part, Section 3 provides:

> 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 added). From the use of the conjunctive "and" in Section 3 it is clear that the category "proposed legislation" [*62] 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. n29

> n29 In describing the budget process in his dissent in *Cohen v. State of New York, supra,* 94 NY2d at 22, Judge George Smith wrote that in addition to the budget **"the Governor must submit appropriation bills *and* proposed legislation** (N.Y. Const., art. VII, § 3)." (emphasis supplied)

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, Section 2, which - in addition to calling for a complete plan of expenditures, estimates of revenues, and [*63] 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.,* § 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 to make the Governor responsible for submitting tax legislation 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; R.1745. n30 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. Appropriation bills - *i.e.*, spending measures - are conceptually incompatible [*64] with tax measures and it would be an absurdity to suggest that tax measures could be included in appropriation bills." Moreover, tax measures, just like other non-appropriation legislation implementing the budget, are not functionally capable of being acted upon by the Legislature by the only means available to it under Article VII, Section 4 for appropriations - to "strike out or reduce items" or "add thereto items of appropriation."

> n30 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.**

R.1745 (emphasis added).

[*65]

Reading Article VII as a whole, following this amendment of Section 3 as part of the 1938 Constitution together with Section 2, makes it clear that the purpose of adding "and the proposed legislation, if any recommended herein" language to Section 3 - making the governor assume responsibility for taxing measures - has been carried out. Section 2 provides that: "the governor shall submit to the legislature a budget containing a complete plan of expenditures proposed to be made before the close of the ensuing fiscal year and **all moneys and revenues estimated to be available therefor,** together with * * * recommendations as to **proposed legislation, if any, which he may deem necessary to provide moneys and revenues sufficient to meet such proposed expenditures."** N.Y. Const, art. VII, § 2 (emphasis added). Thus, in Section 2, the governor is required **to recommend** in his budget the proposed legislation he deems necessary to provide the monies and revenues (the tax legislation), and in Section 3 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 [*66] containing the proposed appropriations and reappropriations. The phrase "the proposed legislation, if any, recommended therein" in Section 3 obviously refers, at least in part, to the tax legislation the governor recommends under Section 2 - *i.e.*, "proposed legislation, if any, which he may deem necessary to provide monies and revenues, etc."

Notably, in *Pataki v. New York State Assembly, supra*, 190 Misc2d at 733, 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 * * * ."

In sum: (1) Sections 2, 3 and 4 of Article VII, when interpreted together, establish that the restrictions on legislative alterations imposed by Section 4 are intended to apply only to the Governor's Section 3 appropriation bills, not to his Section 3 non-appropriation bills; and (2) nothing in any of the sections of Article VII, in any decision, in the history of the Executive Budget Amendment or [*67] in any other authority supports the proposition that the Section 4 restrictions on legislative alterations were intended to be applied to measures in the Governor's non-appropriation bills.

Thus, the holdings of the courts below are not only without precedent, but they constitute a judicial rewriting of the plain and unambiguous language of Section 4 that the no legislative alteration rule applies only to **"appropriation bill[s] submitted by the governor."** These holdings were reached without any analysis or even a discussion of the critical language of Section 4 or Sections 2 and 3 of Article VII, which describe appropriation and non-appropriation bills to be submitted by the Governor to the Legislature.

C. The Courts Below Have Repudiated the Plain Meaning of Section 4 and the Clear Distinction in Article VII Between "Appropriation" and "Non-Appropriation" Bills By Merging the Two Distinctly Different Types of Budget Bills Into One

What is most startling about the decisions of Supreme Court and the Appellate Division is their complete lack of analysis of Sections 2, 3 and 4 of Article VII. The decisions are nothing more than *ipse dixit* statements of the result

[*68] - the Governor may treat changes in his non-appropriation bills as though they were in his appropriation bills for the purpose of striking them out under Article VII, Section 4. Neither Court has made any attempt to explain how Section 4 and the other applicable Sections of Article VII, in particular Sections 2 and 3, can be interpreted to reach this conclusion.

And neither Court has shied away from the indisputable fact that what are involved here are "non-appropriation" bills. Indeed, Justice Lehner describes the non-appropriation bills as **"bills submitted by the Goveruor as part of his budget plan, but which did not appropriate monies."** (R.15) (emphasis added) They illustrate precisely what the Framers contemplated as being in the category of "such other recommendations" in Section 2 and in other "proposed legislation, if any, recommended [in the budget]" in Section 3. In fact, the Governor's proposed non-appropriation bills and the legislative changes to those bills both consisted of the same two types of measures - programmatic policy measures (what this Court described in *Silver I, supra,* 96 NY2d at 535 as **"detail[ing] the utilization of appropriated** [*69] **funds or proposed changes in the operation of certain programs")** and substantive law changes "related to" and designated to implement the 1998-99 budget.

The result reached by these decisions in misapplying Article VII, Section 4 by ignoring its plain language and the clear intent of other Sections in Article VII and simply assuming without analysis that non-appropriation bills can be treated as appropriation bills for the purpose of enforcing the Section 4 no-alteration provision must be seen for what it is - an unprecedented judicial rewrite of the New York Constitution to achieve a particular result with respect to the 1998 budget. The Senate respectfully urges this Court to uphold the Constitution and reject out of hand this effort to change it through judicial fiat. The comments of Judge Vann in *People ex rel. Burby v. Howland, supra,* 155 NY at 282, bear repeating here:

> The object of a written Constitution is to regulate, define and limit the powers of government by assigning to the executive, legislative and judicial branches distinct and independent powers. **The safety of free government rests upon the indepeudence of eacb branch and the even balance** [*70] **of power between the three.**

(emphasis added).

POINT II

THE DECISIONS BELOW GRANT THE GOVERNOR UNPARALLELED POWER TO SELECTIVELY "VETO" DISFAVORED LEGISLATIVE ENACTMENTS ON CONSTITUTIONAL GROUNDS AND, THUS, CONSTITUTE AN OUTRIGHT VIOLATION OF FUNDAMENTAL SEPARATION OF POWERS DOCTRINE AND A REPUDIATION OF THE CLEARLY EXPRESSED INTENT OF THE FRAMERS OF THE EXECUTIVE BUDGET AMENDMENT

A. The Holdings Below Grant the Governor Unparalleled Power

The legal precedent established by the rulings of Supreme Court and the Appellate Division is that **any legislative alteration** of a Governor's non-appropriation bill is contrary to Article VII, Section 4. This is necessarily so because the Governor's non-appropriation bills, by their very nature, cannot contain the only type of legislative measures which the Legislature may alter without violating Article VII, Section 4 -*i.e.,* "items of appropriation" which Section 4 specifically permits the Legislature to strike out, reduce or add items to. Simply stated, under these rulings, there is no way that the Legislature can amend a non-appropriation bill without violating Article VII, Section 4.

The actual holdings [*71] of Supreme Court and the Appellate Division, however, pertain solely to the 55 particular legislative alterations which the Governor selected for disapproval as unconstitutional by enforcement of the Article VII, Section 4 no-alteration provision. Other legislative alterations of the Governor's non-appropriation bills which would be equally violative of Article VII, Section 4 under the courts' rulings, but which the Governor decided to

accept and not to strike out, were left intact and became law. The extraordinary effect of the holdings below is that the courts have given the Governor the power to invoke the constitutional prohibitions of Article VII, Section 4 against changes in his non-appropriation bills which he does not like and to waive the constitutional objections to other changes which, under the Courts' rulings, would be equally violative of Article VII, Section 4. In giving the Governor the power to selectively invoke the prohibitions of Article VII, Section 4, the lower Courts, have, in effect, conferred on the Governor a power which is uniquely judicial -*i.e.*, the power to invalidate a legislative enactment as unconstitutional.

B. The Lower Courts' Holdings [*72] **Sanction the Governor's Violation of Established Separation of Powers Doctrine**

The lower courts' holdings, if allowed to stand, constitute three serious disruptions of the balance of power among the three branches of government:

First, the holding that the Governor may exercise control over general, non-appropriation legislation by invoking what amounts to a *de facto* "line-item veto" power against disfavored legislative changes in his non-appropriation bills causes a substantial transfer of the Legislature's exclusive Article III, Section 1 law-making power from the Senate and the Assembly to the Governor. The lower courts' interpretations of Article VII, Section 4 shackle the Legislature by restricting its Article III, Section 1 power to amend general legislation in non-appropriation bills and constitute an outright violation of the constitutional command which is unequivocal and unconditional: i.e., that the "legislative power of this state **shall be vested** in the senate and assembly." N.Y. Const. Art. Ill, § 1 (emphasis added). The categorical constitutional rule as restated by this Court more than 90 years ago is that this "general legislative power is **absolute** [*73] **and unlimited** except as restrained by the Constitution." *People ex rel. Simon v. Bradley, supra,* 207 NY at 610.

Second, permitting the Governor to selectively employ the prohibition in Article VII, Section 4 to strike out legislative changes as unconstitutional constitutes an unlawful delegation of judicial power to the Governor since it is the exclusive province of the judicial branch to pass on the constitutionality of a legislative enactment. The power of the courts - not the Legislature and not the Executive - to pass on the constitutionality of laws is historic and serves as a cornerstone of our democratic form of government. As this Court recently observed, citing *Marbury v. Madison,* 5 U.S. 137 (1803):

> The doctrine [of separation of powers] has deep, seminal roots in the constitutional distribution of powers among the three coordinate branches of government * * *.
>
> **The courts are vested with a unique role and review power over the constitutionality of legislation** *(see Marbury v. Madison,* 1 Cranch [5 US] 137 [1803]) which includes being the final arbiter of true separation of powers disputes * * *.

Cohen v. State of New York, supra, 94 NY2d at 11; [*74] *see also* 20 NY Jur 2d, Constitutional Law § 42.

Third, the combined effect of the lower courts' holdings and the Governor's incursion into both the legislative and judicial domains is a drastic disturbance of the balanced 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) (emphasis supplied), this Court wrote:

> Our State Constitution establishes a system in which governmental powers are distributed among three co-ordinate and coequal 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 nnion of the three fnnctions in one man,** or in one body of men. * * * " (*People ex rel. Burby v. Howland*, 155 NY 270, 282).

[*75]

In its most recent pronouncement on the separation of powers, in *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 100 NY2d 801 (2003), 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.

2003 WL 21357342 at 8, *citing* N.Y. Const, art. Ill, § 1; art. IV, § 1; art. VI, § l. n31

> n31 *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.").

[*76]

The lower courts' decisions are a clear violation of the doctrine of separation of powers because they allow the Governor to usurp outright the Legislature's "institutional" role in the passage of non-appropriation bills for the budget by granting that role to the Governor in violation of Article VII of the Constitution, including the Legislature's traditional power to make laws entrusted to it under Article III.

C. 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." R.1707. 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 of items in [*77] the appropriation bills.

R.1708. In fact, in discussing the need for an Executive Budget the 1919 Report of the Reconstruction Commission to Governor Alfred E. Smith succinctly 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."** R.1773.

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 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." R.1739. 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 about a proposal placing upon [*78] 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.

R. 1741-1742.

Thus, the holdings below are not only directly violative of established separation of powers doctrine and of the exclusive Article III, Section I 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 assured the Legislature and the public would not happen - giving "undue power to the governor" and making "the governor a czar."

D. The Holdings [*79] **Below Grant The Governor Unparalleled Power To Strike Legislative Changes To Non-Appropriations Bills Under Section 4 Without Any Consistency And Without Any Recognizable Pattern**

Whether the Governor had "vetoed" legislative changes to his non-appropriation bills with any consistency or recognizable pattern is irrelevant, of course, to the constitutional issue of whether he has the power to veto legislative changes to non-appropriation bills at all. We discuss briefly the Governor's actions in striking legislative changes to his non-appropriation bills without any consistency or pattern, however, because it points out the breadth and totally unbridled nature of the discretion that the lower courts' holdings were granted to the Governor.

The decisions below either state or imply that (1) the Governor's proposed non-appropriation bills contained only amendments to substantive law provisions and did not contain any measures referencing an appropriation and conditioning or limiting it in some way; (2) the legislative changes to the Governor's proposed non-appropriation bills only added provisions referencing an appropriation and conditioning or limiting it and that the Legislature [*80] did not add any substantive law amendments; n32 and (3) the Governor did not "veto" any legislative changes to the substantive laws. n33 As demonstrated in the Statement of Facts all three of these statements are incorrect.

> n32 *See Silver II*, 192 Misc2d at 125 ("The bottom line here is that [the] legislature has inserted several directions, segregations and limitations with respect to the spending of appropriated monies in a few voluminous bills submitted by the Governor amending numerous substantive provisions of state law * * * ."); *see Silver II, supra*, AD2d at , 769 NYS2d at 519 ("the Legislature amended three of the Governor's so-called 'non-appropriation bills' in ways that had the effect of modifying some of the Governor's appropriations by re-allocating or itemizing such appropriations, or conditioning them on subsequent legislative action. The Legislature accomplished this by inserting language in the non-appropriation bills that cross-referenced the Governor's items of appropriation in his appropriation bills, and then adding the modifying or conditional language.")

[*81]

n33 *See Silver II, supra,* 192 Misc2d at 122 ("None of the material vetoed constituted substantive provisions that would become part of the Consolidated Laws of the state.")

First, the Governor's proposed non-appropriation bills submitted to the Legislature contained both amendments to substantive provisions of state law and programmatic policy measures "detailing] the utilization of appropriated funds or proposed changes in the operation of certain programs" by transferring, sub-allocating or itemizing appropriated funds or making their expenditure contingent on a future event or approval designated to implement the 1998-99 budget. *Silver I, supra,* 96 NY2d at 535. n34

n34 Thus, in the case of the 1998-1999 executive budget at issue here the Governor properly acknowledged and complied with the constitutional distinction in Article VII, Sections 2 and 3 between appropriation and non-appropriation bills by placing his proposed "appropriations" - the amount of money and its purpose - in appropriation bills and by placing "the proposed legislation, if any, recommended [in the budget]" in his proposed non-appropriation bills.

[*82]

Second, the Legislature altered the Governor's proposed non-appropriation bills by adding the same two general types of measures that the Governor had properly proposed in his non-appropriation bills - substantive law changes and programmatic policy measures implementing the budget.

Third, contrary to Supreme Court's decision, Governor Pataki did "veto" seven (7) legislative additions to his non-appropriation bills amending substantive law provisions of the State Finance Law, Social Services Law, and Public Health Law, although he did not "veto" several legislative amendments to substantive law provisions of the State Finance Law, Environmental Conservation Law, Urban Development Law, Education Law, Social Services Law, Public Authorities Law, and the Tax Law. n35 Thus, the lower courts failed to recognize that either all of the legislative changes to substantive law provisions were unconstitutional or none of them were - the Senate asserts none of them were. The Governor obviously selected those legislative amendments to substantive law that he disliked and "vetoed" them.

n35 *See discussion supra,* pp. 23-26.

[*83]

Similarly, the Governor either proposed or did not consistently strike as unconstitutional legislative amendments to his non-appropriation bills that **reference an appropriation and add limitations or conditions that effect the appropriation** without changing the amount of the appropriation or its purpose. First, there were numerous provisions in the Governor's proposed non-appropriation bills submitted to the Legislature that reference an appropriation - by language stating "with respect to monies appropriated in section 1 of the chapter of the laws of 1998 enacting the * * * budget" -and condition, limit or sub-allocate it with the proviso that it was "notwithstanding any other provision of law to the contrary." n36 Second, as finally enacted after the Governor's selective "vetoes" the three non-appropriation bills contain a multitude of similar non-appropriation measures that reference various appropriations and then attach conditions or limitations, including sub-allocating or itemizing the appropriation. n37

n36 *See discussion supra* at pp. 16-18.

n37 The language is virtually identical to what the Legislature added regarding the Franklin County prison. *Compare* 1998 McKinney's at 177-178 *with* 1998 McKinney's at 184, which provides in Part A, § 4 as follows:

> **With respect to moneys appropriated in section 1 of the chapter of the laws of 1998 * * * all or a portion of such funds may be suballocated to the departments of law and taxation and finauce for services and expenses incurred on behalf of the crime proceeds task force pursuant to an allocation plan developed by the superintendent of banks, the attorney general and the commissioner of taxation and finance, as appropriate, subject to the approval of the director of the budget.**

See also, e.g., 1998 McKinney's at 186 (Chapter 57, Part A § 12). There are hundreds of other examples in Chapters 56-58.

[*84]

POINT III

EVEN ADOPTING FOR THE SAKE OF ARGUMENT THE GOVERNOR'S PROPOSITION THAT NON-APPROPRIATION BILLS MAY BE TREATED AS APPROPRIATION BILLS FOR THE PURPOSE OF ENFORCING THE SECTION 4 "NO ALTERATION" RESTRICTION, HIS RELIANCE ON THE "RELATES SPECIFICALLY TO" LANGUAGE IN THE "ANTI-RIDER" PROVISION IN ARTICLE VII, SECTION 6 AS THE CRITERION FOR WHAT HE COULD HAVE PERMISSIBLY INCLUDED IN HIS PURPORTED APPROPRIATION BILLS IS WITHOUT BASIS

Because Section 4's "no-alteration" restriction on legislative additions to the Governor's appropriation bills cannot be constitutionally applied to measures in the Governor's non-appropriation bills, the lower courts' holding of unconstitutionality should, without proceeding further, be reversed.

Even assuming, however, for the sake of argument, that the erroneous premise of the Governor and the lower courts were adopted - *i.e.,* that legislative changes to his non-appropriation bills at issue may be treated as if they were actually amendments to the Governor's appropriation bills for purposes of invoking the "no-alteration" rule in Section 4 - The Governor's argument would still fail because these measures could not have been constitutionally [*85] included in the Governor's Section 3 appropriation bills in the first place. This Point III, then, assumes the mistaken hypothesis adopted by the Governor and the lower courts -*i.e.,* that appropriation bills and non-appropriation bills are no different for the purposes of enforcing the Section 4 "no-alteration" rule. It proceeds to address the question whether the measures in the Governor's non-appropriation to which the lower courts and the Governor have applied the Section 4 "no-alteration" rule could have been properly included in such bills if they had actually been in appropriation, rather than non-appropriation, bills.

As their primary authority for this pivotal proposition that these measures - all of the quintessentially non-appropriation type of legislative measures which the Governor chose to include in his Section 3 non-appropriation bills, not in his appropriation bills could constitutionally have been included if they had been placed in appropriation bills, the Governor and the courts below rely on an isolated clause in the second paragraph of Article VII, Section 6 referred to herein as the "anti-rider" provision .

The "anti-rider" provision of Section 6 - as the [*86] term "anti-rider" indicates and as shown by its constitutional history - was and is intended to prohibit the legislative practice of adding "riders" to appropriation bills. n38 **Section 6 accomplishes this pnrpose by prohibiting the Legislature from adding any measnre to a Governor's appropriation bill or supplemental appropriation bill "unless it relates specifically to some particnlar appropriation in the bill" and is "limited in its operation to snch appropriation."** N.Y. Const, art. VII, § 6 (emphasis added).

n38 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'."

The Governor nevertheless argued below [*87] that "Article VII, Section 6 is perhaps the most relevant part of the State Constitution" when it comes to "what is properly part of [a Governor's] appropriation bill." R.1540. But what the Governor claimed is "most relevant" does not apply at all. Section 6 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 three significant reasons. First, every known document or other item of history pertaining to the "relates specifically to" provision in the second paragraph of Section 6 supports this position. Second, the case law and other relevant authorities support it. Third, the text of the pertinent provisions of Article VII support this position.

A. The History of the "Anti-Rider" Provision Demonstrates that it Applies Only to Legislative Changes to the Governor's Appropriation Bills

The well-documented history of the adoption of the "anti-rider" provision 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 [*88] having nothing to do with the appropriation. This was its sole purpose when the provision was originally adopted in 1894 as Article III, Section 22 and it remains the provision's sole purpose today after its incorporation into the present 1938 Constitution in the second paragraph of Article VII, Section 6. R. 1746-1747.

The 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. Indeed, because the Governor had no budgetary lawmaking power in 1894 the "anti-rider" provision could only have been intended to apply to the Legislature. 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. 1 have in my hand the last appropriation bill, which has tacked on to it not less than eleven special provisions, which are not in any manner indexed, which you cannot refer to in any manner in any of the statutes except by an examination of the supply bill or the appropriation [*89] bill, some of them going so far as to provide for misdemeanors.

R.1781.

In this Opinion, the Attorney General, referring to the "anti-rider" provisions, states:

> Their fundamental object is to forbid the incorporation in appropriation bills of general legislation, not necessarily or directly connected with the subject of appropriation, and by so doing forcing the passage of extraneous matters not germane to the basic purpose of the bill, namely in this instance, appropriation for the support of government.

R.1782. n39

n39 In the same Opinion, the Attorney General cites another significant reason for the curb on riders and

unrelated general laws being added by the Legislature in the following:

> In "Lincoln's Constitutional History of New York" (vol. 3, p. 245) there is assigned as the reason for the adoption of section 22, the desire to **prevent the insertion in appropriation bills of matter [by the Legislature] which the Governor could not veto except he veto the entire appropriation bill.**

R.1782 (emphasis added).

[*90]

Nothing in the reports and recommendations related to the initial adoption of the Executive Budget Amendment in the 1927 Constitution suggests that any thought was given to changing the original purpose of the "anti-rider" provision in Article III, Section 22 from being solely a limitation on the Legislature into a limitation on the Governor now that he was constitutionally authorized to propose the budget and appropriations to the Legislature. If the authors of the 1927 Constitution had intended to impose on the Governor's newly granted authority to submit appropriation bills the extraordinary additional limitation contained in the Section 22 "anti-rider" provision, it must be assumed that the meticulous draftsmen would have included the "anti-rider" limitation on the Governor's bills in the 1927 Constitution 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. R. 1722-1723. Certainly, if the intended purpose and scope of Article III, Section 22 had changed so radically, the authors of the 1926 State Reorganization Commission Report on the 1927 Constitution would, at least, have [*91] referred to it. They did not do so. n40

> n40 There is no reference to the 1894 anti-rider provision in Article III, Section 22 in the 1915 Stimson Report (R. 1687-1694), in any of the other documents relating to the proposed adoption of the Executive Budget Amendment in 1915 (R. 1695-1709), in the 1926 Report of the State Reorganization Commission recommending the adoption of the 1915 proposal (R. 1710-1725), or in any other document relating to the adoption of the Executive Budget Amendment in 1927 (R. 1726-1742).

That the original purpose of Article III, Section 22 remains its sole purpose today -after its incorporation in the 1938 Constitution in Article VII, Section 6 - is demonstrated in the 1938 Report of the Committee on the Proposed Constitutional Amendment, which recommended the incorporation of the Article III, Section 22 "anti-rider" provision in Article VII, Section 6, as follows:

> Section 22 of Article III was adopted in 1894 and is designed to prevent the inclusion of riders in appropriation [*92] 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.

R. 1746-1747.

In his Brief to the Appellate Division the Governor acknowledged, as he must, that the purpose of the "anti-rider" provision which was adopted as Article III, § 22 of the 1894 Constitution was "to prohibit the Legislature from inserting into appropriation bills riders that contained general legislation." Governor Pataki's Brief, at 28. But the Governor purported to temper this fact by pointing out that "it was only the Legislature (and not the Governor) that could [then] introduce appropriation bills." *Id.* (emphasis in original). And he went on to argue that in 1938 when the provision was finally inserted in Article VII, Section 6, the Governor was then empowered to submit appropriation bills and the provision could then apply to the Governor's bills. The Governor's argument, however, omits one [*93] critical fact.

The critical fact which the Governor failed to mention is that the Framers did not incorporate the "anti-rider" provision in the historic 1927 Executive Budget Amendment which, for the first time, gave the Governor limited legislative authority over appropriation bills. In 1927, when the Governor was finally granted legislative authority over appropriation bills, the "anti-rider" provision remained in Art. Ill, Section 22 in the Constitution and it continued unchanged as a limitation solely on the Legislature. In 1938, when the "anti-rider" provision was lifted from former Article III, Section 22 and placed in the present Art. VII, Section 6, nothing had changed. The Governor's limited legislative powers over appropriation bills and the Legislature's limited rights to revise them were the same.

In sum, the Governor makes no effort to explain how the "anti-rider" provision became a necessary limitation on the content of appropriation bills in 1938 when it was not necessary at all for that purpose in 1927 or for 11 years thereafter or, if it could be assumed to have been necessary in 1927, how it could have been omitted. Nor is there anything in the history of [*94] the 1938 changes to Article VII to indicate that the amendment moving Article III, Section 22 to Article VII, Section 6 was intended to remedy what the Governor would have this Court believe was a serious omission in the 1928 Constitution.

B. Reliance on the Prohibitory "Anti-Rider" Provision in Section 6 as Affirmative Authority for What the Governor May Include in His Assumed Sectiou 3 Appropriation Bills is Contrary to Existing Precedent

In order to use the "anti-rider" provision in Section 6 as affirmative authority for what the Governor may include in his assumed "appropriation" bills submitted to the Legislature, the Governor and the lower courts must misconstrue Section 6. They must interpret a provision which is solely prohibitory as affirmatively permissive. Section 6 dictates that: **"No provision shall** be embraced in * * * unless it relates specifically to * * *." N.Y. Const, art. VII, § 6 (emphasis added). As the basis for the vast reach of legislative power which they annexed to the Governor, the lower courts interpreted the negative language in Section 6 as an implied affirmative direction that everything that is not specifically prohibited by Section [*95] 6 is permitted - *i.e.,* that whatever is not excluded because it is related to some particular item in an appropriation bill, may be included. n41

> n41 In fact, both courts below clearly converted the prohibitory language on the Legislature of Section 6 to an affirmative grant of authority to the Governor. *See, e.g., Silver II, supra,* AD2d at , 769 NYS2d at 522 ("the language of Article VII, § 6 * * * provides further support that the Governor's items of appropriation include not just the appropriation itself, but also may include directory or programmatic language that it is integrally related to it.").

None of the decisions applying the "anti-rider" provision of Section 6 - of which there are three - or its predecessor in Article III, Section 22, however, interpret the provision as providing any affirmative authority. All treat the anti-rider provision as a negative provision restricting the content of legislative additions to an appropriation bill.

First, any doubt as to whether [*96] 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, supra,* 252 NY at 49, 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.

(emphasis added). n42

n42 There was no question that the "anti-rider" provision addressed in *Tremaine I*, decided in 1929, was applicable solely to legislative riders tacked on to appropriation bills since the provision was not then part of the Executive Budget Amendment adopted as Article IV-A in 1927 as an amendment to the 1894 Constitution, but remained separate from it in Article III, Section 22 where it was adopted as part of the 1894 Constitution.

[*97]

Second, in *Schuyler v. South Mall Constructors*, 32 AD2d 454 (3d Dep't 1969), erroneously cited and relied on by the courts below, **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 funds** 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;** 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 added); *see* 1915 Arty. Gen. Op. 368, 375-377.

Third, in *Rice v. Perales*, 156 Misc2d 631, [*98] (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. It 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." *Id.* 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 the governor' so as to permit the addition of the rider in question." *Tremaine I, supra*, 252 NY at 49 (emphasis added). This interpretation governs in the present action.

C. A Textual Analysis of Section 6 Demonstrates That It Does Not Apply to the Governor's Appropriation Bills Submitted Under Section 3 [*99]

1. The Governor's Interpretation of Section 6 Violates Basic Rules for the Construction of the Constitution

The Governor and the courts below have picked out and built their entire Section 6 argument on a single, isolated phrase in the second paragraph of Section 6 - **"any appropriation bill** submitted by the governor." (emphasis added) Focusing solely on that phrase and particularly on the word "any," they conclude the "anti-rider" provision is intended not just to prevent the Legislature from adding riders to appropriation bills added by the Legislature as permitted by Section 4 but to the Governor's appropriation bills as submitted by him as part of the budget under Section 3. Thus, in his submission to Justice Lehner at Supreme Court, the Governor, adopting this construction, made the sweeping argument that Section 6 affirmatively authorizes him to include virtually any measure in one of his appropriation bills so long it is related to an appropriation in the bill. n43 Both Supreme and the Appellate Division have essentially endorsed this application of Section 6. The Governor' single isolated phrase interpretation of Section 6 offends [*100] basic rules of statutory construction that:

. statutes relating to the same subject matter must be construed together unless a contrary legislative intent is expressed, and courts must harmonize the related provisions in a way that renders them compatible (McKinney's Statutes § 221);

. where "the same word or group of words is used in different parts of the same statute there is a presumption that the Legislature intended to convey the same conception each time; and in the absence of anything indicating a contrary intention, the same meaning will be attached to the similar expressions" (McKinney's Statutes § 236); and

. in construing any enactment "meaning and effect should be given to every word of a statute" (McKinney's Statutes, §§ 231, 236). n44

n43 In his submission to Justice Lehner, the Governor stated:

> 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.

R.1540.
[*101]

n44 The rules employed in interpreting words and phrases in the Constitution are the same as used in the construction of statutes. *See, e.g., Wendell v. Lavin*, 246 NY 115, 123-124 (1927); 20 N.Y. Jur.2d, Constitutional Law § 20.

2. A Construction of Section 6 in Accordance with the Basic Rules of Interpretation Requires That Appropriation Bills as Used in Both the First and Second Paragraphs of Section 6 must Refer to Legislative Additions to the Governor's Appropriation Bills.

Section 6 provides:

> **[Restrictions on content of appropriation bills]**
>
> **Except for appropriations contained in the bills submitted by the governor and in a supplemental appropriation bill for the support of government,** no appropriations shall be made except by separate bills each for a single object or purpose. **All such bills and such supplemental appropriation bill shall be subject to the governor's approval as provided in section 7 of article IV.**
>
> No provision shall be embraced in **any appropriation bill submitted by the governor or in such supplemental appropriatiou** [*102] **bill** unless it relates specifically to some particular appropriation in the bill, and any such provision shall be limited in its operation to such appropriation.

N.Y. Const. Article VII, § 6 (emphasis added).

To ascertain the intended meaning of the critical phrase **"any appropriation bill submitted by the governor"** in the second paragraph of Section 6, this Court should employ first the basic rule of construction that the two paragraphs of Section 6 must be construed so that the second paragraph is compatible with the first and so that the Section as a whole makes sense and will coordinate with the other Sections of Article VII to form the effectively functioning budget process mechanism intended by the Framers. *See Matter of Tall Trees Constr.*, 97 NY2d 86, 91 (2001) ("statutes relating to the same subject matter must be construed together unless a contrary legislative intent is expressed, and courts must harmonize the related provisions in a way that renders then compatible *[see, Matter of Dutchess County*

DSS v. Day, 96 NY2d 149, 153; *see also*, McKinney's Cons Laws of NY, Book 1, Statutes § 221]").

A second rule of construction [*103] fully applicable here is that where "the same word or group of words is used in different parts of the same statute there is a presumption that the Legislature intended to convey the same conception each time; and in the absence of anything indicating a contrary intention, the same meaning will be attached to the similar expressions." McKinney's Statutes § 236; *see, e.g., Mangam v. The City of Brooklyn*, 98 NY 585, 589 (1885). The same meanings must be attached to words or expressions used in one part of Section 6 as are given to the same or similar words or expressions in other parts of the Section.

The pivotal question is: what actions are intended to be limited by the instruction in the second paragraph of Section 6 that "no provision shall be embraced **in any appropriation bill submitted by the governor** or in such supplemental appropriation bill unless it relates specifically to * * * "? (emphasis added).

If the second paragraph of Section 6 could be read alone, isolated from the first paragraph and the balance of Article VII and without regard to its history, as the Governor contends it should be, the limitation could be **literally interpreted** as applying [*104] both to legislative additions to "any appropriation bill" submitted by the Governor and to the Governor's appropriation bills, as initially submitted by him, to the Legislature. If, however, the second paragraph of Section 6 is read so that it is compatible with the first paragraph and with the other Sections of Article VII, and so that the scheme as a whole makes sense - as the rules of interpretation require - it is clear that **the provision only imposes limits on what the Legislature may add to the Governor's appropriation bills as permitted by Section 4 and the Legislature's supplemental appropriation bills.**

In order to correctly interpret the two paragraphs of Section 6 as a whole it is necessary first to break the Section down and analyze each of its two paragraphs separately.

A. The First Paragraph of Section 6 Can Only Refer to Appropriations Added by the Legislature to the Governor's Appropriation Bills Under Section 4 or to Appropriations Contained in a Supplemental Appropriation Bill.

The first paragraph of Section 6 states:

> Except for **appropriations contained in the bills submitted by the governor** and in a supplemental appropriation bill for the [*105] support of government, no appropriations shall be made except by separate bills each for a single object or purpose. **All such bills and such supplemental appropriation bill shall be subject to the governor's approval as provided in section 7 of article IV.**

Id., § 6 (emphasis added). Adopting the Governor's contention that the phrase "appropriations contained in the bills submitted by the governor" in the first sentence of this paragraph was intended to include appropriation bills as originally submitted by the Governor under Section 3 rather than legislative additions to appropriation bills leads unavoidably to an absurdity. The absurdity results because by the mandatory language in the second sentence of paragraph one - "[a]ll such bills * * * shall be subject to the governor's [veto]" - **the Governor would be given veto power over his own appropriation bills.** A construction which results in such an anomaly could obviously not have been intended. *See, e.g.*, McKinney's Statutes, §§ 143, 145. Thus, the Framers must have intended that the phrase in the first sentence "appropriations contained in the bills submitted by the governor" would refer only to [*106] legislative actions on which the Governor could exercise his veto - *i.e.*, appropriations added by the Legislature to the Governor's appropriation bills as permitted by Article VII, Section 4.

The Governor, in a strained argument, offered below only that the mandatory veto requirement in the second sentence does not apply to "the bills submitted by the governor" in the first sentence because the "direct antecedent of the phrase 'such bills' which introduces the second sentence is clearly the Legislature's 'single purpose' bills that are mentioned at the end of the first sentence." R.1843. But it is immediately apparent that the Governor's argument omitted from his quoted portion of the first paragraph of Section 6 **the critical word "All" preceding "such bills."** Even

without the word "All" the phrase "such bills" would be interpreted naturally as encompassing, in addition to the "single purpose" bills, the legislative additions to the Governor's Section 3 appropriation bills. With the inclusion of the word "All," there can be no question about it.

B. The Second Paragraph of Section 6 Must, Therefore, Also Act Only as a Limitation on the Legislature and Not as Affirmative [*107] Authority for What the Governor May Include in His Appropriation Bills.

We have determined that the phrase "appropriations contained in the bills submitted by the governor" in first paragraph of Section 6 - because such bills must be subject to the Governor's veto - can logically refer only to actions or enactments by the Legislature, not to the Governor's appropriation bills originally submitted by him under Section 3. We now turn to the second paragraph of Section 6 where the phrase "any appropriation bills submitted by the governor" must, under applicable rules of construction, be given the same meaning as the corresponding phrase "appropriations contained in the bills submitted by the governor" in the first paragraph of Section 6.

The second paragraph of Section 6 provides:

> No provision shall be embraced in **any appropriation bill submitted by the governor or in such supplemental appropriation bill** unless it relates specifically to some particular appropriation in the bill, and any such provision shall be limited in its operation to such appropriation.

N.Y. Const, art. VII, § 6.

The second paragraph imposes the "relates specifically to" restrictions on [*108] "any appropriation bill submitted by the governor" and "such supplemental appropriation bill." These are the same two categories of appropriation bills described in almost identical wording in the first paragraph of Section 6 - *i.e.*, "appropriations contained in the bills submitted by the governor" and "a supplemental appropriation bill." The two paragraphs of Section 6 fit together logically. What the second paragraph of Section 6 does is to impose the "relates specifically to" requirement on the two categories excepted from the "separate bill" and "single purpose" requirements imposed by the first paragraph.

The phrase "**such** supplemental appropriation bill" (emphasis added) in the second paragraph can only refer to and mean the same appropriation bills described in the first paragraph as the "supplemental appropriation bill for the support of the government." It is a basic rule of statutory interpretation that in construing any enactment "meaning and effect should be given to every word of a statute." *See* McKinney's Statutes, §§ 231, 236. n45 Under this rule, meaning must be given to the word "such" preceding the words "supplemental appropriation bill." The word "such" [*109] can only refer back to the supplemental appropriation bill mentioned in the first paragraph.

> n45 "[I]t is one of the accepted canons of construction that statutes must be read so that each word will have a meaning." *Tonis v. Board of Regents*, 295 NY 286, 293 (1946); *see Albano v. Kirby*, 36 NY2d 526, 530 (1975) ("No rule of construction, however, permits the segregation of a few words from their context and from all the rest of the section or rule for purposes of construction.").

From the foregoing, it follows that the phrase "appropriation bills submitted by the governor" in the second paragraph must also refer back to and be given the same meaning as the similar phrase "appropriations contained in the bills submitted by the governor" in the first paragraph. It would be incongruous to conclude that the phrase "such supplemental appropriation bill" in both paragraphs of Section 6 was intended to refer to and have the same meaning and, at the same time, conclude, without any [*110] reason for it, that the nearly identical phrases "appropriations contained in the bills submitted by the governor" and "any appropriation bill submitted by the governor" were not intended to have the same meaning. It is a settled rule that anomalous or unreasonable constructions and those which create conflicts should be avoided. *See* McKinney's Statutes, §§ 97, 98, 141, 143, 145, 148.

3. Section 6 Must Be Construed So That it Is Compatible with Article VII.

Construing the phrase "any appropriation bill submitted by the governor" in the second paragraph of Section 6 as meaning - like the comparable phrase in the first paragraph - additions to the Governor's appropriation bills made by the Legislature under Section 4 is also compatible with the logical and orderly scheme established by Article VII. The first three Sections of Article VII n46 all prescribe procedures and duties for the Governor and the department heads in gathering the information for, developing, and presenting the executive budget and the Governor's appropriation and non-appropriation bills. As a group, Sections 1, 2, and 3 thereby comprise the enabling provisions for the Governor effectuated by the Executive [*111] Budget Reform. In contrast, the last three Sections, n47 all deal with what the Legislature may or may not do. Sections 4, 5 and 6 thus delimit and define, with respect to the State budget, the Legislature's otherwise exclusive and wide-ranging legislative powers. Sections 4, 5, and 6 do not impose any restriction or duty on the Governor.

n46 Section 1 is entitled "Estimates by departments, the legislature and the judiciary of needed appropriations; hearings;" Section 2 is entitled "Executive budget;" and Section 3 is entitled "Budget bills; appearances before legislature."

n47 Section 4 is entitled "Action on budget bills by legislature; effect thereof;" Section 5 is entitled "Restrictions on consideration of other appropriations;" and Section 6 is entitled "Restrictions on content of appropriation bills."

To construe the second paragraph of Section 6 as imposing a "relatedness" restriction on the appropriation bills which the Governor submits to the Legislature under Section 3 would not be in harmony with [*112] the systematic organization of Article VII. Such a "relatedness" restriction on what the Governor may include in his Section 3 appropriation bills - as the second paragraph of Section 6 has been read to require by the lower courts - would create the only restriction among the numerous duties and restrictions imposed on the Legislature in Sections 4, 5 and 6 which does not apply exclusively to actions by the Legislature. If the Framers had intended that the "relatedness" requirement should be "the most relevant" criterion of the Governor's authority to include measures to his initial appropriation bills as the Governor contends, and the lower courts apparently agree, they certainly would have inserted it within one of the first three Sections of Article VII, which comprehensively delineate the powers and duties accorded to the Governor in creating the State's annual budget. And they certainly would have made the "anti-rider" provision part of the new Executive Budget Amendment when it was first adopted in 1927 as Article IV-A of the 1894 Constitution instead of leaving it a part of Article III, Section 22 where it could have no bearing on bills initiated by the Governor and, what's [*113] more, leaving it there for 11 years until it was incorporated in Article VII in 1938.

In summary, the Senate respectfully submits that the lower courts' acceptance of the Governor's argument that the "anti-rider provision" in Section 6 is the "most relevant" criteria of what measures the Governor can properly include in his assumed appropriation bills (actually non-appropriation bills here) and any measure may be included so long as it relates to the appropriation and is limited in effect to that appropriation, thereby making the measure impervious to legislative change except as permitted by Section 4, is wrong for the following reasons:

(1) the holdings are directly contrary to the intention of Article VII, Section 6 as shown by the history of the Executive Budget Reform in 1915 and the 1927 and 1938 Executive Budget Amendments and the history specifically relating to the "anti-rider" provision and its adoption as part of the 1938 Amendment;

(2) it requires interpreting the prohibitory "anti-rider" provision in Section 6 as a source of affirmative authority contrary to all of the existing case law, starting with this Court's decision in *Tremaine I;*

(3) it is contrary to the [*114] plain meaning of the "anti-rider" provision in Article VII, Section 6 as demonstrated by reading the provision with the balance of Section 6 and with the other provisions of Article VII as part of an

effectively functioning budget process; and

(4) the result of the courts' acceptance of the Governor's Section 6 "anti-rider" argument is the exact antithesis of the circumscribed and limited grant of legislative power to the Governor intended by the Framers - *i.e.,* a destruction of the carefully balanced distribution of power between the legislative and executive branches established in the Constitution and a drastic curtailment of the absolute and virtually unlimited grant of legislative power to the Senate and the Assembly mandated by Article III, Section 1.

POINT IV

NEITHER *SAXTON V. CAREY NOR* ANY OTHER CONTROLLING AUTHORITY PROVIDES ANY SUPPORT FOR THE GOVERNOR'S CONTORTED CONSTRUCTION OF ARTICLE VII, SECTIONS 2, 3, AND 4

A. *Saxton* Provides No Authority for the Holdings Below

As stated earlier, a central proposition of the Governor's case is that he can include any programmatic measures and substantive law changes in his non-appropriation bills [*115] and thus safeguard them from the possibility of any change by the Legislature under the "no-alteration" prohibition of Section 4 so long as they "relate to" appropriation bills. For this proposition and his assertion that Article VII was intended to effect "a broad and unprecedented transfer [of power from the legislature to the governor] by the people" (R.1197), the Governor offers, and the lower courts accepted, as primary authority - in addition to his flawed interpretation of the "anti-rider" of Section 6 - one decision, *Saxton v. Carey, supra,* 44 NY2d 545. *Saxton* in no way supports the Governor's contentions and the holdings of the courts below.

Saxton is easily distinguished. 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. *Id.* at 548. The plaintiffs, who sued both the Governor and the Legislature, were three citizen taxpayers. Their claim in *Saxton* was that "the challenged budget [was] insufficiently [*116] 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.* This Court, while noting that, "[i]t is, of course, beyond question that the Constitution does require itemization" in an appropriation bill *(id.,* citing *Tremaine II),* 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 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 euvisioned 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 [*117] 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 added).

This action does not involve a political question about the degree of itemization 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* where the Governor and the Legislature have agreed on the legislation 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 and non-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 [*118] 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. n48

> n48 Of course, as demonstrated in Point I, the Senate asserts that programmatic policy measures, substantive law changes related to the budget, and measures implementing the budget and appropriations may only be properly included in non-appropriation bills, which are not subject to the no-alteration provision of Section 4.

Further, the *Saxton* Court dismissed the challenge to the intra-program transfer provisions - which allowed the transfer of funds within particular 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 [*119] for the courts. In view of this 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.* For this reason, the Court dismissed the challenge from outside the government by the citizen taxpayers as to what the two branches of government had agreed was in the best interests of the State. *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 constitutional invalidity involved so long as ultimately, however done, the Executive proposed the appropriations and there is agreemeut as to the limitations and conditions they contain.'**

Saxton, supra, 44 NY2d at 551 (citation omitted; emphasis added).

The Governor and the courts below have seized on one phrase contained in [*120] *Saxton* - "when, how, or where" - as a sort of talisman which, in combination with the "anti-rider" clause in Section 6, will open the door to inclusion in the Governor's appropriation bills - or in his non-appropriation bills if it be assumed (incorrectly the Senate contends) that these measures are subject to the no-alteration provision of Section 4 - of all manner of general legislation, even amendments of existing laws, provided only that the legislation "relate 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. [*121] 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 constitute measures appropriate for inclusion in an appropriation bill. That conclusion simply does not follow.

As noted, the holding in *Saxton* pertained only to the justicability 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 prescription for the measures to be properly included in an appropriation 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 sort of measures - the degree of itemization of 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 justicable [*122] 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 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 overwhelming evidence presented in Point I, *supra*, of what may properly, under Article 7, be included in an appropriation bill.

B. There is No Other Controlling Authority on the Constitutionally Required Contents of Appropriation and Non-Appropriation Bills.

As additional support for its holding that the programmatic policy measures and substantive law changes related to the budget and measures implementing the budget and appropriations that the Legislature added to the Governor's non-appropriation bills constitute "items of appropriation" that are subject to the no-alteration provision of Section 4 the First Department stated that in addition to *Saxton* "[o]ther New York decisions have also recognized that [*123] 'items of appropriation' are not limited to dollar amounts and purpose * * * ." *Silver II*, *supra*, AD2d at , 769 NYS2d at 522. The court cited, without any analysis or discussion but only a parenthetical, *Schuyler v. South Mall Constructors*, *supra*, 32 AD2d at 454, and *Rice v. Perales*, *supra*, 156 Misc2d at 631. Neither provides support for the lower courts' holdings.

As noted above the legal issue presented and resolved in both cases was whether legislative changes to the Governor's budget bills violated the "anti-rider" provision of Article VII, Section 6. Neither decision pertains to the question of what measures the Governor might permissibly include in his Section 3 budget bills as "items of appropriation" so as to put them beyond the reach of legislative change because of the no-alteration provision of Section 4. And neither decision pertains to whether the legislative change to the budget bills constituted "items of appropriation" or even mentioned that term. The holding in each case was solely with respect to the anti-rider provision of Section 6 and that the legislative changes were not prohibited by it. Accordingly, [*124] neither case stands for the proposition for which they were cited by the First Department that "[o]ther New York decisions have also recognized that 'items of appropriation' are not limited to dollar amounts and purpose * * * ." *Silver II*, *supra*, AD2d at , 769 NYS2d at 522.

POINT V

THE GOVERNOR'S PURPORTED EXERCISE OF A "LINE-ITEM VETO" OVER THE LEGISLATURE'S AMENDMENTS TO HIS NON-APPROPRIATION BILLS WAS UNCONSTITUTIONAL UNDER ARTICLE IV, SECTION 7

The Senate submits that this Court should conclude (for the reasons set forth in Point I, or alternatively in Point II and Point III) that the Legislature's additions to the non-appropriation bills submitted by the Governor did not violate Article VII, Section 4. The Legislature's non-appropriation bills would, therefore, be entirely valid. It would necessarily follow for all of the reasons set forth in the Brief submitted on behalf of Speaker Silver that the Governor's purported exercise of his "line-item veto" power over these non-appropriation bills was unconstitutional under Article IV, Section 7. For the convenience of the Court and to avoid duplicative arguments the Senate adopts the arguments [*125] on this point made on behalf of Speaker Silver.

CONCLUSION

For all the foregoing reasons, the Order of the Appellate Division should be reversed and Judgment should be granted to Speaker Silver and the New York State Senate declaring that the Legislature's amendments to the Governor's non-appropriation bills in the 1998-1999 budget were, in all respects, constitutional and further declaring that the

Governor's purported exercise of his "line-item veto" power over any such amendments to his non-appropriation bills was unconstitutional and of no force or effect, together with such other and further relief as this Court deems to be appropriate.

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Respectfully Submitted,

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