No. 12-

IN THE

Supreme Court of the United States

AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC.,

Petitioner,

v.

ANDREW P. SIDAMON-ERISTOFF, AS TREASURER OF THE STATE OF NEW JERSEY, AND STEVEN R. HARRIS, AS ADMINISTRATOR OF UNCLAIMED PROPERTY OF THE STATE OF NEW JERSEY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A recent amendment to New Jersey's abandoned-property law shortened from 15 years to three the period after which not-yet-used travelers cheques are presumed "abandoned" and subject to escheat to the State, and applied that shortened period retroactively to travelers cheques that had been issued but not yet used before the amendment's enactment. The undisputed facts show that 90 percent of travelers cheques that are presumed "abandoned" under the amended law have not been abandoned at all, but in fact will be used within 15 years after purchase. It is further undisputed that, after escheat, the State makes no effort to reunite the purportedly "abandoned" property with its owner.

The questions presented are:

1. Whether a State violates due process by using its abandoned-property laws to confiscate the proceeds of private enterprise under an arbitrary and unreasonable presumption of "abandonment" that is shown to be false and serves none of the traditional purposes of escheat.

2. Whether retroactive application of a shortened abandonment period, requiring immediate transfer to the State of the proceeds of transactions entered into years ago, effects an unconstitutional taking.

PARTIES TO THE PROCEEDING

Petitioner American Express Travel Related Services Company, Inc. was the plaintiff in the district court and appellant in the court of appeals.

Respondents were defendants in the district court and appellees in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

The parent corporation of petitioner American Express Travel Related Services Company, Inc. is American Express Company. Berkshire Hathaway, Inc., a publicly traded company, together with its subsidiaries and affiliates, owns approximately 13 percent of the stock of American Express Company.

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American Express Travel Related Services Company, Inc. ("AmEx") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The court of appeals' opinion is reported at 669 F.3d 359. App. 1a-22a. The district court's opinion is reported at 755 F. Supp. 2d 556. App. 23a-152a.

JURISDICTION

The court of appeals entered its judgment on January 5, 2012, and denied AmEx's petition for rehearing on February 24, 2012, App. 153a-154a. On May 15, 2012, Justice Alito extended the time to file a petition for certiorari to July 23, 2012. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part:

> [N]or shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> [N]or shall any State deprive any person of … property, without due process of law.

U.S. Const. amend. XIV, § 1.

The relevant portions of 2010 N.J. Laws ch. 25 are set forth in the Appendix to this petition. App. 191a-213a.

STATEMENT

From an early time, this Court has recognized States' "undoubted" power to take custody of abandoned property in order to protect the absent property owner by safeguarding his property and, if possible, returning it to him. *Provident Inst.* v. *Malone*, 221 U.S. 660, 664 (1911). States have exercised that authority, commonly known as "escheat," by enacting abandoned-

property laws governing the disposition of a broad range of lost or abandoned property, including not only real property and tangible personal property, but also bank deposits, uncashed checks and dividends, stocks, bonds, utility deposits, and insurance drafts. Application of abandoned-property laws to these financial instruments and other forms of intangible property generates billions of dollars of non-tax revenue for public treasuries.

As this Court has also made clear, however, States may exercise this authority only "when there is substantial ground for belief" that the property has, indeed, been "inactive so long as to be presumptively abandoned." *Anderson Nat'l Bank* v. *Luckett*, 321 U.S. 233, 240, 241 (1944). Without a reasonable basis to believe the property has been abandoned, the State's confiscation under the guise of "escheat" is nothing more than "a classical 'taking,'" in which "the Government acquire[s] for itself the property in question." *United States* v. *Security Indus. Bank*, 459 U.S. 70, 77 (1982). The Court has accordingly recognized that "the creation by a state law of an arbitrary and unreasonable presumption of [abandonment] … would be a want of due process of law, and therefore repugnant to the Fourteenth Amendment." *Cunnius* v. *Reading Sch. Dist.*, 198 U.S. 458, 476-477 (1905); *see also Texaco Inc.* v. *Short*, 454 U.S. 516, 542 (1982) (Brennan, J., dissenting) ("If [the State] were by simple fiat … to transfer [property] interests to itself … that action would surely be unconstitutional and unenforceable—at least absent just compensation.").

This Court has not revisited these settled principles in decades. At the same time, however, States have steadily, and in some instances dramatically, reduced the period of time after which property is

deemed "abandoned." Laws that once required 20 or 30 years to elapse before property would be deemed abandoned have given way to laws that deem property abandoned after only two or three years. In many of these cases, rather than acting to safeguard property that has truly been abandoned, States have used their abandoned-property laws as a pretext to enrich state coffers—in effect, avoiding the obligation to pay just compensation by characterizing property as "abandoned" even where the facts do not support that presumption.

Here, the court of appeals upheld just such a law. The court deferred to the New Jersey Legislature's determination, made without factual inquiry or support amid a severe budget shortfall, that any travelers cheques that have not yet been used within the first three years after purchase should be deemed "abandoned." That determination reduced by 12 years the abandonment period that had applied for decades under the laws of every State, including New Jersey, and ignored undisputed evidence that *90 percent* of the travelers cheques to which the law applies have not been abandoned at all, but will be used within 15 years after purchase. Nor could this radically shortened abandonment period serve the purposes of escheat, since the State makes no effort to reunite this purportedly "abandoned" property with its owner. The court further approved the law's retroactive application to travelers cheques that had been issued but not yet used at the time of the statute's enactment, even though that retroactive application alters the consequences of past transactions and confiscates the investment income that AmEx would have earned on those instruments—all to facilitate a "one-time collection[]" from AmEx to

the State of more than $30 million. App. 190a; 179a-180a.

The court of appeals' decision is irreconcilable with this Court's Due Process and Takings Clause precedents and permits an irrational and retroactive confiscatory measure to be insulated from constitutional scrutiny simply because it purports to operate as an "abandoned-property" law. This Court's review is warranted.

1. *Legal Background.* "States as sovereigns may take custody of or assume title to abandoned personal property as *bona vacantia*, a process commonly (though somewhat erroneously) called escheat." *Delaware* v. *New York*, 507 U.S. 490, 497 (1993); *Standard Oil Co.* v. *New Jersey*, 341 U.S. 428, 435 n.5 (1951).[1] An incident of the police power, this authority derives from the fact that "the absentee [owner] … is a person occupying a peculiar legal status." *Cunnius*, 198 U.S. at 470. By taking custody of property where the owner, or his whereabouts, is unknown, the State protects the missing owner by safeguarding the property and, if

[1] At common law, "escheat" referred to the reversion of real property to the Crown when its owner died intestate, while the taking of personal property by the Crown when the property had no apparent owner was known as "*bona vacantia*." The American States adopted these doctrines to address problems associated with all forms of ownerless property. By the late nineteenth century, several States had enacted laws providing for the "escheat" of abandoned property, including both real and personal property. *See* 1 Epstein et al., *Unclaimed Property Law and Reporting Forms* § 1.04 (Bender, rev. ed. 2000). Because the distinction between "escheat" and "*bona vacantia*" has thus largely collapsed in modern usage, this petition uses "escheat" to refer to the State's taking of abandoned property generally, both real and personal.

possible, identifying the owner and restoring his property to him. *See Provident Inst.*, 221 U.S. at 664-665. States thus become "conservator[s]" of a missing person's property, *Connecticut Mut. Life Ins. Co.* v. *Moore*, 333 U.S. 541, 547 (1948), preventing "seizure by would-be possessors" and, if the property is not claimed, using it "for the general good," *Standard Oil*, 341 U.S. at 436.

Pursuant to this authority, all 50 States and the District of Columbia have enacted abandoned-property laws that require holders of property to report and deliver the property to the State after a prescribed period of non-use by the owner has elapsed. Such laws apply to many forms of tangible and intangible property. Most States, including New Jersey, have adopted a version of the Uniform Disposition of Unclaimed Property Act ("Uniform Act"), a model "custodial escheat" statute promulgated by the National Conference of Commissioners on Uniform State Laws in 1955 and revised since on several occasions. *See* 1989 N.J. Laws ch. 58; N.J.S.A. §§ 46:30B-1 *et seq.*[2]

In principle, the Uniform Act provides a mechanism to safeguard abandoned property while attempting to facilitate the property's return to its owner. As adopted in New Jersey, the stated "goal" of this regime

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[2] *See* 1955 Uniform Act, in 9A U.L.A. 412 (1965); 1966 Uniform Act, in 9A U.L.A. 82 (1967) (pocket part); 1981 Uniform Act, in 8C U.L.A. 151 (2001); 1995 Uniform Act, in 8C U.L.A. 87 (2001). Twenty-three States and the District of Columbia have adopted the 1981 Uniform Act or a variation of it. 8C U.L.A. 47 (2011) (pocket part). Thirteen States have adopted the 1995 Uniform Act or a variation of it. *Id.* at 20. The remaining States have either adopted a version of the 1954 or 1966 Uniform Acts or independently developed their own laws.

is thus to "recover, record and reunite … property with [its] rightful owner and/or heirs." New Jersey Department of Treasury, *available at* http://www.unclaimedproperty.nj.gov/defined.shtml (updated Apr. 4, 2012). To that end, New Jersey law, following the Uniform Act, provides that covered property is presumed "abandoned" after a prescribed period of nonuse. After that period elapses, the holder of the property must attempt to return it by contacting "the apparent owner at [his] last known address." N.J.S.A. § 46:30B-50. If unsuccessful, the holder must transfer the property to the State, along with (for most forms of property) the owner's name and last known address. *Id.* §§ 46:30B-46, -47, -57, -59.

Under these "custodial escheat" statutes, the State takes only custody of the property, not title, thereby allowing the property's owner to reclaim it. In New Jersey, after escheat, the State accordingly attempts to notify the owner by publishing information about the property online, and in "a newspaper of general circulation" once a week for two consecutive weeks, N.J.S.A. § 46:30B-51. Owners who discover that the State has taken custody of their property may recover it by submitting a verified claim on a prescribed form, *id.* § 46:30B-77, or through an online database, http://www.missingmoney.com.

While abandoned-property laws thus serve to protect the rights of absentee owners, they also provide a boon to the State. By taking custody of abandoned property, the State obtains the right to enjoy the "'use of the property until the owner claims it'"—including, for example, by earning income from the property's investment—as well as the resulting "'windfall if the owner never claims it.'" *Clymer* v. *Summit Bancorp.*, 792 A.2d 396, 400 (N.J. 2002); *see Twiss* v. *N.J. Dep't of*

Treasury, 591 A.2d 913, 914 (N.J. 1991) (unclaimed bank accounts "net[] the State … some twenty-five million dollars" per year). And because the property has been deemed abandoned, the State is not required to compensate the owner or the previous holder for the value of this right. *See, e.g.*, *Turnacliff* v. *Westly*, 546 F.3d 1113, 1118-1120 (9th Cir. 2008); *Commonwealth Edison Co.* v. *Vega*, 174 F.3d 870, 872 (7th Cir. 1999).

2. *Factual Background.* For more than a century, AmEx has issued travelers cheques ("TCs") to consumers as a safe alternative to cash. *See* Hawkland, *American Travelers Checks*, 84 Banking L.J. 377, 377 (1967). TCs are preprinted "checks" in fixed amounts ranging from $20 to $500, with features that permit the TC to function akin to currency, but make it safer to carry. For example, each TC bears a unique serial number allowing the cheque to be replaced if lost or stolen. The owner must sign the TC both at the time of purchase and at the point of use; if the two signatures do not match, the TC cannot be redeemed. When the TC owner countersigns a TC to exchange it for cash or pay for a purchase, the TC becomes a negotiable instrument. The bank or merchant that accepts the TC presents it, usually through the banking system, to AmEx, which makes payment. App. 168a-169a; 178a-179a. Between 2007 and 2009, AmEx sold over $200 million in TCs in New Jersey. App. 167a.

AmEx TCs do not expire and may be redeemed at any time for full face value. App. 134a. This feature "encourages purchasers to hold travelers checks for substantial periods of time." Hawkland, at 408. Accordingly, while most TC owners use their TCs within the first year after purchase, a significant minority of TC owners intentionally retain unused TCs for many

years for use on later travels or as a convenient source of emergency funds. App. 165a; 170a-171a.

AmEx does not charge fees to purchase or use a TC. App. 168a.[3] Rather, AmEx's TC business is funded almost entirely by the income AmEx earns from investing the proceeds of these TC sales during the period between issuance and redemption—subject only to the application of state abandoned-property laws. App. 170a. Without that investment income, AmEx would not be able to cover its costs. App. 170a; 174a. AmEx has accordingly structured its business to obtain the highest possible yield from the investment of TC proceeds, using sophisticated projections of customers' TC usage based on historical patterns. App. 164a; 174a. AmEx invests the funds in secure "permissible investments," as required by state money transmitter laws. App. 184a; *see* N.J.S.A. §§ 17:15C-1 *et seq*.

Consistent with the Uniform Act, TCs have long been subject to escheat under New Jersey law. Until recently, every State, including New Jersey, set the abandonment period for TCs at 15 years. That period has been widely in effect since the 1966 revision to the Uniform Act, *see* 9A U.L.A. 87 (1967) (pocket part), and repeatedly reenacted based on empirical evidence of patterns of TC usage. Thus, in 1981, the National Conference of Commissioners explained that the 15-year period should remain in place under the Uniform Act because "[s]tatistical evidence indicates that … [a] majority of travelers checks will ultimately be presented for payment within the 15-year period." 1981 Uniform

[3] Some third parties that sell TCs might charge a modest purchase fee, App. 168a, which is retained by the seller, not AmEx.

Act § 2 cmt., in 8C U.L.A. 186 (2001). In 1995, the Commissioners again affirmed that "statistical evidence indicates that a period of 15 years continues to be appropriate." 1995 Uniform Act § 2 cmt., in *id.* at 105. And even when New Jersey substantively amended its abandoned-property laws in 2002, shortening the abandonment periods for several other financial instruments to three years, it left the period applicable to TCs untouched. *See* 2002 N.J. Laws ch. 35. AmEx has thus structured its TC business model around this longstanding and uniform 15-year period, investing the proceeds of its TC sales until either the TC owner uses the TC or the 15-year escheat period elapses.

Because AmEx TCs do not expire, AmEx continues to honor them even after transferring the underlying funds to the State. Where that occurs, AmEx must then seek reimbursement. N.J.S.A. § 46:30B-62; App. 179a. In New Jersey, it can take a year to process reimbursement claims. App. 180a. No one would buy TCs, however, if AmEx dishonored them after escheatment, because no merchant or bank presented with a TC would accept it if obtaining payment might require tracing the funds to a state treasury, filing a claim, and waiting—often up to a year—for reimbursement.

The absence of any expiration date on AmEx TCs is significant for another reason: Even after escheat, the TC owner has no way to reclaim the TC funds except by using the TC for payment or reporting it to AmEx as lost or stolen. Unlike most other forms of property, there is no process by which TC owners can reclaim their property from the State; the notification procedures discussed above, *supra* p. 7, do not apply. That is because, consistent with more than a century of business practice, TC issuers do not collect and main-

tain the names or addresses of purchasers, and New Jersey law exempts TCs from its notice and publication requirements. N.J.S.A. §§ 46:30B-47, -50, -56.[4] Accordingly, when AmEx escheats TC funds to New Jersey after presumptive "abandonment," the State has no way to reunite that property with its owner. Instead, the State simply uses or invests the funds unless and until AmEx honors the TC and seeks reimbursement. Although AmEx may reclaim the face value of those TCs it honors after escheating the funds to the State, AmEx can never reclaim the investment income it would have earned on those proceeds. That income—which otherwise constitutes the revenue of AmEx's TC business—instead becomes permanent revenue for the State.[5]

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[4] This practice is consistent with the judgment of Congress and the National Conference of Commissioners regarding the utility of such information. *See* 1966 Uniform Act § 12 cmt., in 9A U.L.A. 96 (1967) (pocket part) (amending Uniform Act "to exclude traveler's checks and money orders from the requirements for a report and a list because of the inability of the issuer to know who the holder is in most cases"); Disposition of Abandoned Money Orders and Traveler's Checks, Pub. L. No. 93-495, tit. VI, § 601(5), 88 Stat. 1525 (1974), codified at 12 U.S.C. § 2501 ("[T]he cost of maintaining and retrieving addresses of purchasers of money orders and traveler's checks is a[] … burden on interstate commerce.").

[5] Although New Jersey law provides for the payment of interest on abandoned property in some circumstances, *see* N.J.S.A. § 46:30B-79, the Attorney General has taken the position that holders like AmEx are "entitled to reimbursement [only], not payment of interest." Resp. C.A. Br. 5 n.4; *see* N.J.S.A. §§ 46:30B-62, -79, -80. On those occasions when New Jersey has paid interest to AmEx, it has done so at a rate far less than AmEx would have earned investing the funds itself. App. 173a; 181a.

3. *Chapter 25*. On June 29, 2010, amid negotiations to close a projected $11 billion budget deficit, the New Jersey Legislature hastily passed the law at issue in this case, 2010 N.J. Laws ch. 25 ("Chapter 25"). App. 191a-200a; *see* Perez-Pena, *Beneath Budget Noise in New Jersey, Some Consensus*, N.Y. Times, June 9, 2010, at A17. Enacted and signed with no public debate less than one week after its introduction in the Legislature, Chapter 25 amended New Jersey's abandoned-property laws to shorten the abandonment period for TCs from 15 years to three, and applied that shortened period retroactively to all outstanding TCs that had been sold but not yet used or escheated before the statute's enactment. N.J.S.A. § 46:30B-11; Assembly Bill No. 3002, L. 2010, ch. 25 § 9 (App. 200a). If permitted to take effect, Chapter 25 would require AmEx, on pain of substantial penalties, *see* N.J.S.A. §§ 46:30B-103, -104, -105, immediately to transfer more than $30 million to the New Jersey Treasury, representing the proceeds of nearly one million TCs AmEx sold in the State between three and 15 years ago that have not yet been redeemed. App. 179a-180a. Going forward, AmEx would be forced either to undertake a costly restructuring of its TC business or to continue to transfer the entire economic value of that business to the State—amounting to millions of dollars on an annualized basis. App. 173a-174a; 180a.

These provisions were part of a broader effort to use abandoned-property laws as a source of non-tax revenue. For example, Chapter 25 also extended the abandoned-property laws to apply for the first time to stored-value cards ("SVCs"), popularly known as gift cards. Chapter 25 set an unprecedented two-year abandonment period for SVCs and applied it retroactively to SVCs that had been sold but not yet used be-

fore Chapter 25's enactment. App. 197a; 200a. To maximize the State's SVC revenue, Chapter 25 further established a rebuttable presumption that any SVC sold in New Jersey belonged to a resident of New Jersey and was therefore subject to escheat in New Jersey, even when federal common law would accord another State a higher priority right to the funds. App. 197a.[6] Similarly, New Jersey recently joined with other States in attempting to use their abandoned-property laws to take custody of the proceeds of matured but unredeemed United States savings bonds. *Treasurer of N.J.* v. *U.S. Dep't of Treasury*, 2012 WL 2426760, at *1 (3d Cir. June 27, 2012). Recognizing the States' revenue-raising motive, *id.* at *3, the court of appeals held that the States' efforts were preempted by federal law and violated principles of intergovernmental immunity, *id.* at *18-22.

In enacting Chapter 25, the Legislature claimed the TC provisions would "modernize the State's unclaimed property laws." App. 211a. No evidence was offered,

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[6] An AmEx affiliate and other SVC issuers challenged the SVC provisions of Chapter 25, and the district court decided those cases together with AmEx's challenge to the TC provisions. *See* App. 75a-133a. Although it declined to enjoin Chapter 25's prospective application to SVCs, the district court preliminarily enjoined the retroactive application of the two-year abandonment period to SVCs and the Act's "place-of-purchase" presumption. App. 133a. The court of appeals affirmed the SVC decision in a separate opinion from the TC case. *N.J. Retail Merchs. Ass'n* v. *Sidamon-Eristoff*, 669 F.3d 374 (3d Cir. 2012). On June 29, 2012, New Jersey amended the SVC provisions of Chapter 25 by extending the abandonment period to five years, reducing the portion of SVC funds subject to escheat, and repealing the "place-of-purchase" presumption. 2012 N.J. Laws ch. 14. Those amendments did not affect the TC provisions.

however, as to the reasonableness of reducing by 12 years the presumptive abandonment period for TCs. The statement accompanying the bill instead featured the law's revenue-raising effect—including that the State anticipated a "one-time collection[]" of nearly $80 million that would occur once the law took effect as a result of its retroactive application to TCs, SVCs, and other forms of property. App. 189a-190a; *see also* Senate Budget and Appropriations Committee Hearing, 2:24:18-2:24:50 (June 24, 2010) (Sen. Sarlo) ("I know the administration feels strongly about this $80 million to help balance their budget."), *available at* http://www.njleg.state.nj.us/media/archive_audio2.asp?KEY=SBA&SESSION=2010. And the State publicly touted Chapter 25 as a "non-recurring" "[r]evenue-[r]elated initiative[]." *Fiscal 2011 Citizens' Guide to the Budget* 14 (Sept. 2010), *available at* http://www.state.nj.us/treasury/omb/publications/11citizensguide/pdf/citguide.pdf.

4. *Proceedings Below.* AmEx sued and sought preliminary injunctive relief, challenging the TC provisions of Chapter 25 under the Due Process, Takings, Contract, and Commerce Clauses. There were no contested factual issues, including as to the unreasonableness of the statutory presumption of abandonment. AmEx demonstrated without dispute that nine out of ten TCs that have not been used within three years after purchase—and are thus deemed "abandoned" under Chapter 25—are in fact used by the owner within 15 years. App. 165a; 170a-171a; 180a. It was also uncontested that the State does nothing to reunite TCs with their owners once it takes the proceeds of "abandoned" TCs from AmEx. *See* Resp. C.A. Br. 18. The district court nonetheless denied injunctive relief, holding that AmEx was unlikely to succeed on the merits of its

claims. App. 57a-75a. On February 8, 2011, the court of appeals enjoined Chapter 25's enforcement pending appeal. App. 157a-159a.

On January 5, 2012, the court of appeals affirmed the order denying the preliminary injunction. Notwithstanding that the undisputed record refuted the legislative presumption that TCs not used within three years have been "abandoned," the court rejected AmEx's due process claim on the ground that the Due Process Clause "does not require mathematical precision in the legislature's decisions." App. 8a. Although AmEx had focused particular attention on the statute's retroactive application, the court failed to address that concern. App. 6a-10a.

The court also rejected AmEx's takings claim. In doing so, it initially recited (App. 15a) the three-part standard this Court articulated in *Penn Cent. Transp. Co.* v. *City of N.Y.*, 438 U.S. 104 (1978), but focused its analysis on only one prong of that test—whether Chapter 25 had interfered with AmEx's "investment-backed expectations." App. 16a; *see* App. 14a-18a. Ignoring the other elements of the *Penn Central* inquiry—including the extraordinary character of the government action—the court held that Chapter 25 did not violate the Takings Clause because "AmEx's TC business has long been subject to regulation," and AmEx therefore could not reasonably have expected that those regulations would not be amended "to achieve the legislative end of assuming custody of abandoned prop-

erty." App. 16a. The court rejected AmEx's Contract Clause argument for similar reasons. App. 10a-14a.[7]

The court denied AmEx's petition for rehearing, App. 153a-154a, but stayed the mandate pending the filing and disposition of a petition for certiorari, App. 155a, thereby leaving in place the injunction pending appeal it had previously entered, App. 157a-159a.

REASONS FOR GRANTING THE PETITION

Whether analyzed as a violation of due process or an impermissible uncompensated taking, this Court has been appropriately suspicious of laws that irrationally confiscate private property or alter the legal and financial consequences of past transactions. Chapter 25 does both, and the court of appeals' endorsement of that measure contravenes this Court's decisions. With respect to AmEx's due process claim, the court of appeals' analysis conflicts with this Court's holdings that escheat laws are valid only where the property has in fact been "inactive so long as to be presumptively abandoned." *Anderson Nat'l Bank* v. *Luckett*, 321 U.S. 233, 241 (1944). Where that presumption is *not* reasonable, the State's appropriation of property cannot be justified as a traditional exercise of the escheat power—it is simply a taking of private property for the government's own use. By according unquestioning deference to a legislative presumption of abandonment that was proven false on an undisputed record, the court of appeals all but erased that boundary between a permissible regulation of abandoned property and a

[7] The court also rejected AmEx's arguments under the Interstate Commerce Clause. App. 18a-20a. AmEx does not seek review as to that issue.

covert confiscation of the economic value of private enterprise.

As to AmEx's regulatory takings claim, the court of appeals' exclusive focus on whether Chapter 25 interfered with AmEx's investment-backed expectations conflicts with this Court's holdings that a regulatory takings analysis must entail a "'careful examination and weighing of *all* the relevant circumstances.'" *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302, 326 n.23 (2002) (emphasis added); *see Palazzolo* v. *Rhode Island*, 533 U.S. 606, 634 (2001) (O'Connor, J., concurring). In particular, the court ignored the factor that most clearly demonstrates a taking—the extraordinary character of the government action, which is all but dispositive of Chapter 25's invalidity. Moreover, the court of appeals' dismissive analysis of AmEx's investment-backed expectations leaves any private property that is subject to regulation virtually unprotected from legislative revenue-grabs. That concern is particularly acute in light of Chapter 25's retroactive application. Entire sectors of the financial-services industry are structured around opportunities to hold and invest funds for as long as they are not reclaimed or escheated. Retroactive appropriation of those funds based on an arbitrary presumption of "abandonment" injects uncertainty into investment decisions and robs the holder of its very means of earning income from its business model.

While this case concerns the application of Chapter 25 to AmEx's TC business, the implications of the court of appeals' holding thus extend far beyond that context and signal a significant drift in the law on nationally important questions that this Court has not addressed for decades. The recent shift by States to use their abandoned-property laws to confiscate property with-

out just compensation and with no rational nexus to the traditional justifications for escheat, as well as the irreconcilability of the decision below with this Court's decisions, underscores the compelling need for this Court's review.

I. CONFISCATION OF THE PROCEEDS OF AMEX'S TRAVELERS CHEQUE BUSINESS BASED ON AN ARBITRARY AND IRRATIONAL PRESUMPTION OF "ABANDONMENT" IS UNCONSTITUTIONAL

The State's authority to take possession of abandoned property is undoubted, so long as there is "substantial ground for belief that [the property] ha[s] been … forgotten." *Luckett*, 321 U.S. at 240; *see Provident Inst.* v. *Malone*, 221 U.S. 660, 664-665 (1911); *Cunnius* v. *Reading Sch. Dist.*, 198 U.S. 458, 476-477 (1905). But it is equally unquestioned that "a State, by *ipse dixit*, may not transform private property into public property without compensation, even for [a] limited duration." *Webb's Fabulous Pharm. Inc.* v. *Beckwith*, 449 U.S. 155, 164 (1980). As this Court has explained, "it [must] be conceded" that if an abandoned-property law "amounted … simply to authorizing the transfer of the property of the absentee to others, that … law would be repugnant to the Fourteenth Amendment." *Cunnius*, 198 U.S. at 477. "Arbitrary" or "unreasonable" presumptions of abandonment therefore cannot be sustained, *id.* at 476-477, because the only thing that distinguishes a proper exercise of the State's authority to regulate the disposition of abandoned property from an outright taking without just compensation is that the owner has *in fact* "so long failed to exercise any act of ownership as to raise the presumption that he has abandoned his property," *Provident Inst.*, 221 U.S. at 664. Where that condition holds, escheat is generally

valid. But "a very different question would be presented" by an abandoned-property law that required escheat merely because "the owner, after a short absence, could not be found, or if the account remained inactive for [only] a brief period." *Id.*

This Court has not yet addressed that "very different question." *Provident Inst.*, 221 U.S. at 664. Like the 15-year abandonment period that long applied to TCs in every State, the abandonment periods at issue in this Court's prior escheat cases were consistent with the conclusion that the property to which they applied had in fact been "inactive so long as to be presumptively abandoned." *Luckett*, 321 U.S. at 241 (10- and 25-year abandonment periods); *see, e.g.*, *Provident Inst.*, 221 U.S. at 664 (30 years); *Security Sav. Bank* v. *California*, 263 U.S. 282, 284 (1923) (20 years); *cf. First Nat'l Bank* v. *California*, 262 U.S. 366, 366 (1923) (20 years). Here, in contrast, Chapter 25 imposes a mere three-year period in the face of an undisputed record confirming that TCs cannot reasonably be presumed abandoned after that short time. This case accordingly called for judicial enforcement of the boundary between a valid exercise of the escheat power, where the presumption of abandonment is reasonable, and an invalid uncompensated taking, where it is not. The court of appeals, however, applied a version of rationality review that was so inadequate to that task that, if uncorrected, it all but invites States to devise new ways to use their abandoned-property laws to enrich the public fisc.

The court of appeals' principal error was in discounting the undisputed evidence, based on concrete historical data, that nine out of ten TCs that Chapter 25 treats as "abandoned" are in fact not abandoned at all, but will be used by their owners within the 15-year pe-

riod that previously applied. App. 165a; 170a-171a; 180a. The court dismissed that evidence on the theory that rationality review does not require "mathematical precision." App. 8a (citing *Heller* v. *Doe*, 509 U.S. 312, 321 (1993)). But the evidence did not show imprecision. It showed—without dispute—that the presumption underlying Chapter 25 is *actually false* 90 percent of the time. *See New York State Club Ass'n* v. *City of N.Y.*, 487 U.S. 1, 17 (1988) (no rational basis for classification where "asserted grounds for the legislative classification lack any reasonable support in fact"); *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981) ("[P]arties challenging legislation … may introduce evidence supporting their claim that [the law] is irrational."); *USDA* v. *Murry*, 413 U.S. 508, 514 (1973) (statutory presumption cannot stand if "often contrary to fact"). New Jersey would do far better sorting abandoned TCs from not-yet-used TCs simply by flipping a coin and taking possession of TC funds every time the coin came up tails. This Court would "reverse th[at] policy in an instant" as "arbitrary," *Judulang* v. *Holder*, 132 S. Ct. 476, 485 (2011); the court of appeals approved a manifestly less accurate policy with little more attention.[8]

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[8] The court of appeals credited the State's claim that 96 percent of all TCs sold are used within three years. App. 8a. That statistic is irrelevant. The statute does not apply to TCs that are used within the first three years. It applies to TCs *not* used within three years, and the relevant question is whether *those* TCs may reasonably be presumed abandoned. By analogy, suppose that 89 percent of iPad owners use them every day. This statistic would not justify the assumption that any iPad untouched for two days has been abandoned—particularly if evidence showed that 9 out of 10 owners who did not use their iPads every day would use them later in the week.

Nor can Chapter 25's accelerated abandonment period be justified as serving to reunite property with its owner. *See Provident Inst.*, 221 U.S. at 664-665. As discussed, neither AmEx nor the State has any way to locate the TC owner. After escheat, the State can do no more than wait for the owner to use the TC—indeed, it concedes that it will do no more than that. Resp. C.A. Br. 18. And when the owner does use the TC, it is AmEx, not New Jersey, that returns the funds to the owner by reimbursing the bank or merchant that accepted the TC. *Supra* pp. 10-11. Escheating TC proceeds to New Jersey after only three years thus serves *no* purpose other than to appropriate to the State the TC proceeds—and associated investment income—that constitute AmEx's means of earning revenue from its TC business. If anything, the traditional objective of returning abandoned property to its owner thus weighs against the rationality of Chapter 25 as a valid abandoned-property law. *See Connecticut Mut. Life Ins. Co.* v. *Moore*, 333 U.S. 541, 563 (1948) (Jackson, J., dissenting) (it is "naïve … to assume that this lately manifest concern of the states over abandoned [property] reflects only solicitude for the unknown claimants"—"escheat of these interests is a newly exploited, if not newly discovered, source of state revenue").

Where a State uses its laws only for self-enrichment, and seeks to do so without providing just compensation, rationality review must, at a minimum, ensure the existence of a genuine, non-acquisitive rationale for the seizure of private property. *Cf. United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 26 (1977) ("complete deference to a legislative assessment of reasonableness and necessity is not appropriate" where law serves to generate revenue for the State). But the level of "mathematical [im]precision," App. 8a, the

court of appeals tolerated here amounts to no review at all. Not only was there uncontested proof that the property at issue was not abandoned, but the law plainly achieves no other purpose but to tap a free source of non-tax revenue. The State's authority to regulate the disposition of abandoned property does not include the authority to declare without basis that property has been "abandoned." Rather, if private property is to receive the protection contemplated by the Due Process and Takings Clauses and decades of this Court's jurisprudence, the constitutionality of state laws appropriating even the temporary use of such property to the State itself must be reviewed with something more than the illogic and passing scrutiny of the decision below.

Finally, the court of appeals erred in ignoring Chapter 25's harsh retroactive effect. Where retroactive laws "change the legal consequences of transactions long closed, the change can destroy the reasonable certainty and security which are the very objects of property ownership." *Eastern Enters.* v. *Apfel*, 524 U.S. 498, 548 (1998) (opinion of Kennedy, J.). Here, retroactive application of the shortened abandonment period will arbitrarily prevent AmEx from receiving the benefit of its bargain with respect to approximately $30 million worth of issued but not-yet-used TCs. Yet that retroactivity serves no legitimate purpose: It takes property that has not been abandoned, does nothing to reunite that property with its owner, and deprives AmEx of the benefit of its bargain. Indeed, its only identifiable result is to plug a hole in the state budget using the value of the business AmEx built in reliance on preexisting law. Due process precludes such an "unfair allocation of public burdens through … specially

arbitrary retroactive means." *Id.* at 558 (Breyer, J., dissenting).

II. CHAPTER 25'S RETROACTIVE APPLICATION EFFECTS AN UNCONSTITUTIONAL TAKING

In reaching years into the past to seize more than $30 million in proceeds from TCs that AmEx sold in reliance on the 15-year abandonment period long in effect in all 50 states, Chapter 25 effects a taking, even apart from the irrationality of the presumption of "abandonment." *See* Story, *Commentaries on the Constitution of the United States* § 1392 ("Retrospective laws are … generally unjust[.]"). The court of appeals dismissed this argument on the theory that the TC business is a "regulated field." App. 16a. That decision conflicts with this Court's precedent in two critical respects. First, the court erroneously elevated Chapter 25's interference with AmEx's investment-backed expectation to a dispositive, single-factor test, failing to consider "'all the relevant circumstances'" under the *Penn Central* standard. *Tahoe-Sierra*, 535 U.S. at 326 n.23. That error was significant. By focusing exclusively on AmEx's investment-backed expectations, the court overlooked "the character of the governmental action" at issue, *Penn Cent. Transp. Co.* v. *City of N.Y.*, 438 U.S. 104, 124 (1978): an appropriation by the State, for the State's own benefit. Second, the court's analysis of AmEx's investment-backed expectations improperly discounted AmEx's reasonable reliance on long-settled law solely because AmEx occupies a regulated industry. In committing these errors, the court blessed a seizure of the value of AmEx's TC business as a mere "moderniz[ation]" of New Jersey's abandoned-property laws and gave almost no protection to private property. Ultimately, the court's reasoning proves too much, and,

indeed, would justify virtually any retroactive shortening of any existing abandonment period for any purpose.

1. This Court has repeatedly emphasized that the proper analysis of most takings claims turns on an "essentially ad hoc, factual inquir[y]" that balances three factors—the economic impact of the legislation, the degree to which it disturbs reasonable investment-backed expectations, and the nature of the government action. *Penn Cent.*, 438 U.S. at 124; *see also Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528, 538-539 (2005). Where that test applies, it requires "'careful examination and weighing of *all* the relevant circumstances.'" *Tahoe-Sierra*, 535 U.S. at 326 n.23 (emphasis added); *see Palazzolo*, 533 U.S. at 634 (O'Connor, J., concurring).

In considering only AmEx's investment-backed expectations, the court of appeals obscured the factor that most clearly demonstrates the existence of a taking—the character of the government action. That factor is "not only … important … in resolving whether the action works a taking," but may indeed be "determinative." *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). Even where evidence of investment-backed expectations was "dubious," *Hodel* v. *Irving*, 481 U.S. 704, 715 (1987), this Court has found a taking based on the character of the challenged government action, *id.* at 716-717.

In this case, the character of the government action is extraordinary. Chapter 25 appropriates to the State the income AmEx otherwise would have earned by investing TC proceeds. In doing so, it advances none of the traditional purposes of an abandoned-property law and retroactively deprives AmEx of the benefit of transactions it entered into as long as 15 years ago.

"When ... [a legislative] solution singles out [a] certain [entity] to bear a burden that is substantial in amount, based on … conduct far in the past, and unrelated to any commitment [it] made or to any injury [it] caused, the governmental action implicates fundamental principles of fairness underlying the Takings Clause." *Eastern Enters.*, 524 U.S. at 537 (plurality). Chapter 25's confiscation of the value of AmEx's business does not merely "adjust[] the benefits and burdens of economic life to promote the common good," *Penn Cent.*, 438 U.S. at 124, but instead constitutes "the kind of expense-shifting to a few persons that amounts to a taking," *Cienega Gardens* v. *United States*, 331 F.3d 1319, 1338-1339 (Fed. Cir. 2003). *See also Armstrong* v. *United States*, 364 U.S. 40, 49 (1960).

Indeed, in practical effect, Chapter 25 constitutes the functional equivalent of "a classical 'taking,'" in which "the Government acquire[s] for itself the property in question." *United States* v. *Security Indus. Bank*, 459 U.S. 70, 77 (1982). "[D]irect government appropriation … of private property" is a "paradigmatic taking," *Lingle*, 544 U.S. at 537, and appropriating private funds to the public fisc "even for [a] limited duration"—in the form of $30 million in discrete, identifiable funds from past TC transactions—requires compensation or injunction, *Webb's Fabulous Pharm.*, 449 U.S. at 164; *see also Eastern Enters.*, 524 U.S. at 544 (opinion of Kennedy, J.) ("[T]he Government's self-enrichment may make it all the more evident a taking has occurred.").

Here, AmEx developed a business model predicated on longstanding laws that permitted it to earn a return by investing the proceeds of its TC sales for up to 15 years. Through Chapter 25, New Jersey has essentially sought to reap for itself the fruits of that busi-

ness. Just as in *United States* v. *Pewee Coal Co.*, 341 U.S. 114, 117 (1951), in which this Court identified a taking when the government took "temporary possession of a business enterprise"—there, a coal-mining operation—Chapter 25 permits the State to take possession of the very means by which AmEx earns revenue on its TC business. *See id.* at 115-117; *United States* v. *General Motors Corp.*, 323 U.S. 373 (1945). And that takeover is all the more egregious in light of the fact that New Jersey can do nothing, and does nothing, to "reunite" the owner of the TC with the underlying funds. It is AmEx that continues to bear the burdens of the TC business after escheat, including redeeming TCs that are used (and then waiting up to a year for reimbursement from the State) or replacing those that are reported lost or stolen.

The court of appeals thus erred in relying on this Court's decision in *Delaware* v. *New York*, 507 U.S. 490 (1993), for the proposition that AmEx, as debtor to the TC owner, has "'no interest in the funds.'" App. 17a (quoting *Delaware*, 507 U.S. at 502). That reasoning ignores Chapter 25's retroactive consequences for AmEx's business model. Consistent with the principle that a *reasonable* presumption of abandonment marks the boundary between permissible custodial escheat and an impermissible uncompensated taking, *supra* pp. 18-23, this Court in *Delaware* simply cited the State's sovereign authority to "'dispos[e] of *abandoned* property'" as a limit on the holder's right to possess and use property. 507 U.S. at 502 (emphasis added); *see id.* ("Charters, bylaws, and contracts of deposit do not give a bank the right to retain *abandoned* deposits." (emphasis added)). That decision does not support the State's attempt here to eliminate AmEx's interest in its TC proceeds and resulting investment income by retro-

actively recharacterizing as "abandoned" not-yet-used TCs, which AmEx indisputably *does* have a right to possess and invest. This is particularly so because the presumption of "abandonment" is contradicted by undisputed evidence.

The court of appeals' narrow focus on investment-backed expectations also caused it to overlook Chapter 25's economic impact. *See Penn Cent.*, 438 U.S. at 124. The uncontested record shows that retroactive application of Chapter 25 deprives AmEx of the sole benefit for which it bargained—the opportunity to invest the TC proceeds for up to 15 years—while leaving costly obligations in place. *See supra* pp. 10-11. Depriving AmEx of the revenues it expected to receive from its TC business, including interest on over $30 million from transactions that closed between three and 15 years ago, would have a substantial economic effect that cannot be justified by any of the traditional purposes of escheat or by AmEx's own conduct. *See Connolly* v. *PBGC*, 475 U.S. 211, 225-226 (1986). And without the investment income to cover its operating expenses, enforcement of Chapter 25 will render AmEx's TC business either marginal or unprofitable in New Jersey, and AmEx may well be forced to shut down its TC business in the State completely. App. 174a.

Moreover, the State's appropriation of AmEx's business enterprise, including the right to earn interest on the more than $30 million AmEx must immediately forfeit to the State, was essentially "made in a vacuum," untethered to the traditional purposes of escheat or AmEx's experience with abandoned property. *Connolly*, 475 U.S. at 225-226; *cf. Eastern Enters.*, 524 U.S. at 528-529 (plurality). It is thus a classic example of "forcing some people alone to bear public burdens

which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49.

2. Even focusing only on AmEx's investment-backed expectations, as the court of appeals did, the decision below dangerously undermines the protection of private property. The court rested its decision solely on the proposition that "Amex's TC business has long been subject to regulation by New Jersey." App. 16a. But that history of regulation alone cannot foreclose a takings claim. The mere fact that a business is regulated cannot authorize retroactive application of new regulations to transactions entered into more than a decade ago in reliance on the laws then in effect. Governments engage in heavy regulation of coal mines, *see Pewee Coal*, 341 U.S. 114; pesticides, *see Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986 (1984); intellectual property, *see id.*; liens, *see Armstrong*, 364 U.S. 40; lawyer trust accounts, *see Phillips* v. *Washington Legal Found.*, 524 U.S. 156 (1998); landlord-tenant relations, *see Loretto*, 458 U.S. 419; insurance contracts, *see Lynch* v. *United States*, 292 U.S. 571 (1934); descent and devise, *see Hodel*, 481 U.S. 704; and land-use planning, *see Nollan* v. *California Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994). Yet this Court has found a taking in every one of these regulated fields and many others. If one accepted the court of appeals' contrary assumption—that the mere existence of prior regulation precludes the regulated party from ever holding reasonable investment-backed expectations—then property that is subject to regulation (which is to say, virtually all forms of property) would always be subject to confiscation without constitutional protection.

Indeed, regulation itself can not only *create* a party's settled, investment-backed expectation, *see*

Monsanto, 467 U.S. at 1010-1012, but potentially "dispos[e] of the taking question," *id.* at 1005. In *Monsanto*, this Court recognized that a taking may occur when a party acts in reliance on preexisting law providing for particular treatment of property and a retroactive change in that law deprives the party of its property by removing or altering the guarantee on which it relied. *Id.* at 1013-1014 & n.17. That is precisely what happened here. AmEx built its TC business and entered into specific TC transactions in reliance on a constitutionally circumscribed legal regime, predicated on a *reasonable* 15-year presumption of abandonment that the State could not shorten arbitrarily. AmEx reasonably expected to earn a return by investing those funds for as long as the 15-year abandonment period and customers' TC usage permitted. Indeed, it is precisely because of that dependable "expect[ation]" of revenue that New Jersey wants to substitute itself for AmEx as the custodian of TC funds.

Thus, the fact that TCs are already regulated adds little to the analysis—the question is how they are regulated and the impact and foreseeability of changes to the regulatory regime. The court of appeals' reliance on *Connolly* is therefore misplaced. There, this Court held that "[t]hose who do business in … [a] regulated field cannot object if the legislative scheme is buttressed by subsequent amendments *to achieve the legislative end*." 475 U.S. at 227 (emphasis added). Here, in contrast, nothing about Chapter 25 "buttresse[s]" any legitimate legislative end. The State's authority to modify its abandoned-property laws is limited by the requirement that a presumption of "abandonment" must be reasonable in light of the facts. *See Luckett*, 321 U.S. at 241; *Cunnius*, 198 U.S. at 477. That New Jersey might depart from decades of stability and uni-

formity in the law by adopting a completely arbitrary presumption of "abandonment" in the face of undisputed contrary evidence, and retroactively apply that presumption to the proceeds of transactions entered into up to 15 years ago, was decidedly not a reasonably foreseeable modification to the law.

III. THE QUESTIONS PRESENTED ARE EXCEEDINGLY IMPORTANT TO THE PROTECTION OF PRIVATE PROPERTY RIGHTS

Under the abandoned-property laws in place in all 50 States, state treasurers and other agencies currently hold in their custody approximately $33 billion in abandoned property.[9] Much of that consists of intangible personal property—including bank deposits, uncashed checks and dividends, stocks, bonds, and insurance drafts—that represent the primary means of earning revenue for entire sectors of the financial-services industry. This Court long ago upheld abandoned-property laws against constitutional challenge, notwithstanding their potential to infringe on private property rights, because of the State's legitimate authority to safeguard property that is truly lost or abandoned and reunite it with its owner—or, if the owner is never found, to "use[] [the proceeds] for the general good." *Standard Oil Co.* v. *New Jersey*, 341 U.S. 428, 436 (1951); *Provident Inst.*, 221 U.S. at 664-666. In the press of budget shortages and economic hardship, however, States have increasingly turned to those laws not to serve these traditional purposes, but purely as a

[9] *See* National Association of Unclaimed Property Administrators, *What is Unclaimed Property?*, http://www.unclaimed.org/what/ (visited July 22, 2012).

mechanism for raising revenue. Diamond, *Unwrapping Escheat*, 60 Emory L.J. 972, 973 (2011).

In particular, several States have recently amended their abandoned-property laws to shorten the abandonment periods applicable to a broad range of financial instruments. Earlier abandoned-property laws required long periods—often decades—to elapse before property would be deemed abandoned. *See supra* p. 19. However, as States increasingly competed to escheat intangible property, *see Moore*, 333 U.S. at 552 (Frankfurter, J., dissenting), and as they sought "to avoid losing property that [they] could not escheat under the … statute of limitations," *Pennsylvania* v. *Kervick*, 274 A.2d 626, 630 (N.J. Super. Ct. 1971), they began to drastically shorten abandonment periods in a "race" to escheat. *See* 1 Epstein et al., *Unclaimed Property Law and Reporting Forms* § 2.03[2][d] (Bender, rev. ed. 2000); Prefatory Note, 1955 Uniform Act, in 9A U.L.A. 413 (1965) (acknowledging the "'race of diligence' between states … to reach the funds first"). By 1955, several States had reduced abandonment periods for many types of financial instruments and other intangible property to seven years, 1 Epstein § 2.03[2][d], and today, many States have shortened that period to just three years—including three States (New York, Texas, and South Dakota) that have done so within the last 18 months.[10] Others will almost certainly follow in light of the court of appeals' decision.

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[10] *See* Ala. Code § 35-12-72(a)(3); Ariz. Rev. Stat. § 44-302(A)(5); Cal. Civ. Proc. Code § 1513(a)(1)(A); Conn. Gen. Stat. § 3-57a(a)(1); D.C. Code § 41-106(a); Ind. Code 32-34-1-20(c)(12); Iowa Code § 556.2(1); Ky. Rev. Stat. § 393.060(1); Me. Rev. Stat. tit. 33, § 1953(1)(E); Md. Code, Com. Law § 17-301(a)(1); Mass. Gen. Laws ch. 200A, § 3; Mich. Comp. Laws § 567.227(1); Minn.

This trend is particularly troubling with respect to instruments like TCs because of both the degree of infringement on the holder's rights and the absence of any legitimate countervailing purpose. Because "a significant portion of the consideration to the [TC] holder comes from the 'float' which results from the holder's continued possession of the underlying fund," "an appreciable shortening of the dormancy period" to allow the State to capture that "'float'" for itself has a significant economic impact on the holder and thus "would be very questionable." 1 Epstein § 1.06[3][c]. At the same time, the procedures that otherwise protect holders of property from having to pay the abandoned property twice (by escheating the funds to the State and paying the funds back to the owner) do not apply to TCs.

Absent any check or guidance by this Court, the court of appeals' permissive opinion will encourage a proliferation of legislation similar to Chapter 25, as States continue recent trends by using their abandoned-property laws to obtain for themselves the

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Stat. § 345.32(a); Nev. Rev. Stat. § 120A.500(1)(e); N.J. Stat. § 46:30B-18; N.Y. Aband. Prop. Law § 300(1)(a) (amended March 2011); Or. Rev. Stat. § 98.308(1); R.I. Gen. Laws § 33-21.1-6(a); S.D. Codified Laws § 43-41B-6(a) (amended March 2012); Tex. Prop. Code § 73.101(c) (amended June 2011); Utah Code § 67-4a-204(1)(a); Vt. Stat. tit. 27, § 1242(a)(6); Wash. Rev. Code § 63.29.060(1).

After Kentucky shortened its abandonment period for TCs to seven years, AmEx sued. The court of appeals rejected AmEx's prospective due process challenge, but remanded for consideration whether the Kentucky statute violates the Takings or Contract Clauses and whether its retroactive application violates due process. *American Express Travel Related Servs. Co.* v. *Kentucky*, 641 F.3d 685, 694 (6th Cir. 2011). The district court has not ruled on these issues.

"float" on which the TC and other financial-services businesses rely. So far as we have determined, this Court has not decided the validity under the Due Process Clause of a law requiring escheat of property to the State in some 60 years. *See Standard Oil*, 341 U.S. 428; *Moore*, 333 U.S. 541; *Luckett*, 321 U.S. 233; *Security Sav. Bank*, 263 U.S. 282; *Provident Inst.*, 221 U.S. 660; *Cunnius*, 198 U.S. 458. The Court considered—and upheld—challenges to escheat provisions under the Takings Clause more recently, but only in the particular circumstance of escheat of Indian lands to tribal governments. *See Babbitt* v. *Youpee*, 519 U.S. 234 (1997); *Hodel*, 481 U.S. 704.[11] And the Court has never reviewed an escheat law, like Chapter 25, that alters the consequences of past transactions by retroactively applying a shortened abandonment period. This Court should intervene now to protect constitutionally guaranteed property rights against the creeping transformation of abandoned-property laws from benign consumer-protection measures into confiscatory devices that, without cause, compensation, or limiting principle, serve only to siphon the proceeds of private enterprise.

[11] The Court has considered other issues of escheat law apart from validity *vel non*, mainly in cases involving the federal common-law rules of priority among States' competing claims to abandoned property, whether States may impose reasonable conditions on the retention of property rights, or issues of jurisdiction and preemption.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 2012

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 10-4328

AMERICAN EXPRESS TRAVEL RELATED SERVICES, INC.
Appellant,

v.

ANDREW P. SIDAMON-ERISTOFF,
AS TREASURER OF THE STATE OF NEW JERSEY;
STEVEN R. HARRIS, AS ADMINISTRATOR OF
UNCLAIMED PROPERTY OF THE STATE OF NEW JERSEY

Argued: September 12, 2011
Filed: January 5, 2012

[669 F.3d 359]

* * *

[364] Before: SCIRICA, SMITH and FISHER, Circuit Judges.

OPINION OF THE COURT

FISHER, Circuit Judge.

American Express Travel Related Services ("Amex") challenges the constitutionality of 2010 N.J. Laws Chapter 25 ("Chapter 25"), which amended New Jersey's unclaimed property statute, N.J. Stat. Ann. § 46:30B (2002), and retroactively reduced the period

after which travelers checks are presumed abandoned from fifteen years to three years.[1] Amex filed a motion for preliminary injunction against New Jersey Treasurer Andrew P. Sidamon-Eristoff ("Treasurer") and New Jersey Unclaimed Property Administrator Steven R. Harris (collectively, "New Jersey" or "State") in the District Court on the grounds that Chapter 25's provision reducing the abandonment period for travelers checks violates the Due Process Clause, the Contract Clause, the Takings Clause, and the Commerce Clause of the United States Constitution. The District Court denied Amex's motion, holding that Amex failed to show a likelihood of success on the merits of its claims. Amex filed a timely appeal. For the reasons discussed below, we will affirm the District Court's order.

I. Background and Procedural History

Amex Travelers Cheques ("TCs")[2] are preprinted checks for amounts ranging from $20 to $100. Each one is identifiable based on a unique serial number. Amex maintains that the TCs never expire, so they are contractually obligated to honor the TCs once they are issued. Amex sells TCs for the face value amount, normally through a third party bank or travel service. The third party can charge a small fee, which it retains, but

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[1] This opinion addresses the challenge brought against 2010 N.J. Laws Chapter 25 ("Chapter 25") with respect to travelers checks. We discuss the appeal filed by New Jersey Retail Merchants Association, New Jersey Food Council, and American Express Prepaid Card Management Corporation, seeking to enjoin Chapter 25 with respect to stored value cards ("SVCs"), in a separate opinion.

[2] We use "TCs" to refer to Amex Travelers Cheques specifically, as opposed to travelers checks generally.

Amex does not charge a fee beyond the face value of the TCs. Amex claims that it can sell TCs without charging a fee because its contractual relationship with TC owners gives Amex the right to retain, use, and invest funds from the sale of TCs from the date of sale until the date the TCs are cashed or used. Amex asserts that this right to invest the funds is integral to the contract between TC owners and Amex, and that it relies on these invested funds to remain profitable in the TC business.

When a TC is sold, the third party seller transmits the funds to Amex and provides Amex with the TC's serial number, its amount, and the date and place of sale. Generally, the seller does not provide the purchaser's name, address, or any other **[365]** identifying information. When Amex sells TCs directly to consumers, it retains only the same information that it receives from third party sellers.

All fifty states, and the District of Columbia, have a set of unclaimed property laws (often called escheat laws), most of which are based on a version of the Uniform Unclaimed Property Act ("UUPA"). These laws require that once property has been deemed abandoned, the holder turn it over to the state while the original property owner still maintains the right to the property. The purpose of unclaimed property laws is to provide for the safekeeping of abandoned property and then to reunite the abandoned property with its owner. Usually, before turning over abandoned property to the state, the holder must attempt to return the property by contacting the owner, using the owner's name and last known address. If the holder is unable to return the property to the owner and turns it over to the state, the holder provides the state with the name and last known address of the owner. The holder is no

longer liable to the property owner once it turns over the property to the state. The state then makes an effort to reunite the owner with the property. Under New Jersey's custodial escheat statute, the rightful owner may file a claim to recover the property at any time after the property is turned over to the State.

However, travelers checks operate differently because issuers like Amex generally do not obtain the names or addresses of the purchasers. Thus, the requirement that holders send notice to the owner at the last known address before turning over such property to the State does not apply to travelers checks. Travelers check issuers are also exempted from the requirement to include the owner's name and last known address on unclaimed property reports. N.J. Stat. Ann. § 46:30B-47 (2002). Amex sends only the serial number, amount, and date of sale when TCs are sent to the State as unclaimed property. If Amex determines that a cashed TC has a serial number indicating that it has been paid to a state as unclaimed property, Amex seeks to reclaim those funds from that state. In New Jersey, when such claims are filed, the Treasurer returns the funds with interest.

Until recently, all fifty states had a fifteen-year abandonment period for travelers checks.[3] But on June

[3] Recently, Kentucky also shortened its abandonment period for travelers checks from fifteen years to seven years. Although Amex successfully challenged Kentucky's statute in federal district court on substantive due process grounds, *Am. Express Travel Related Serv. v. Kentucky*, 597 F. Supp. 2d 717 (E.D. Ky. 2009), the United States Court of Appeals for the Sixth Circuit reversed and remanded, holding that the statute withstood rational basis scrutiny. *Am. Express Travel Related Servs. v. Kentucky*, 641 F.3d 685 (6th Cir. 2011).

24, 2010, the New Jersey Legislature passed Chapter 25, which shortened the abandonment period for travelers checks from fifteen years to three years. N.J. Stat. Ann. § 46:30B-11 (2010). The purpose of the statute was to "protect New Jersey consumers from certain commercial dormancy fee practices and to modernize New Jersey's unclaimed property laws." State of N.J. Assemb. Budget Comm., Statement to Assembly, No. 3002, 214th Leg., at 1 (June 24, 2010). Under the State's unclaimed property law, after an issuer transfers the presumed abandoned property to the State, the property is then administered through New Jersey's unclaimed property system. The State preserves the property in perpetuity for the owner, N.J. Stat. Ann. § 46:30B-9 (2002), or for another state that can prove **[366]** a superior right of escheat. N.J. Stat. Ann. § 46:30B-81 (2002).

On September 23, 2010, Amex filed a complaint in the United States District Court for the District of New Jersey, alleging that Chapter 25 violated the Due Process Clause, the Contract Clause, the Takings Clause, and the Commerce Clause of the Constitution. Amex also filed a motion for preliminary injunction, seeking to enjoin the State from enforcing Chapter 25. On November 13, 2010, the District Court denied Amex's motion for preliminary injunction with respect to travelers checks. Amex filed a timely appeal.

II. Standard of Review

"We generally review a district court's [grant or] denial of a preliminary injunction for abuse of discretion[,] but review the underlying factual findings for clear error and examine legal conclusions de novo." *Brown v. City of Pittsburgh*, 586 F.3d 263, 268 (3d Cir. 2009) (citation omitted). "We have jurisdiction to re-

view the order [granting or] denying a preliminary injunction under 28 U.S.C. § 1292(a)(1)." *Id.* at 268 n.6.

III. Discussion

A court must consider four factors when ruling on a motion for preliminary injunction: "(1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably injured by denial of the relief; (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and (4) whether granting preliminary relief will be in the public interest." *Crissman v. Dover Downs Entm't Inc.*, 239 F.3d 357, 364 (3d Cir. 2001). The moving party's failure to show a likelihood of success on the merits "must necessarily result in the denial of a preliminary injunction." *In re Arthur Treacher's Franchisee Litig.*, 689 F.2d 1137, 1143 (3d Cir. 1982). We evaluate the likelihood of success on the merits of Amex's four constitutional claims accordingly.

A. Substantive Due Process Clause

The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, § 1. It is well established that the Due Process Clause contains both a procedural and substantive component. *Nicholas v. Pa. State Univ.*, 227 F.3d 133, 139 (3d Cir. 2000) (citing *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 846-47 (1992)). Substantive due process contains two lines of inquiry: one that applies when a party challenges the validity of a legislative act, and one that applies to the challenge of a non-legislative action. *Id.* In a case challenging a legislative act, as here, the act must withstand rational basis review. *Id.* To do so, the defendant must demonstrate (1) the existence of a le-

gitimate state interest that (2) could be rationally furthered by the statute. *Id.* (citation omitted). The rational basis test, although "not a toothless one," *Mathews v. Lucas*, 427 U.S. 495, 510 (1976), requires significant deference to the legislature's decision-making and assumptions. *Sammon v. N.J. Bd. of Med. Exam'rs*, 66 F.3d 639, 645 (3d Cir. 1995). "[T]hose attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it[.]'" *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993) (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

[367] Amex argues that the sole purpose behind enacting Chapter 25 was to raise revenue for the State, which is not a legitimate state interest. But under rational basis scrutiny, a court's inquiry is limited to whether the law "rationally furthers *any* legitimate state objective." *Malmed v. Thornburgh*, 621 F.2d 565, 569 (3d Cir. 1980) (emphasis added). It is enough that the State offers a conceivable rational basis for its action, and "[t]he court may even hypothesize the motivations of the state legislature to find a legitimate objective promoted by the provision under attack." *Id.* (citation omitted). It is "constitutionally irrelevant whether this reasoning in fact underlay the legislative decision …." *Flemming v. Nestor*, 363 U.S. 603, 612 (1960).

The State submits that Chapter 25 was enacted to modernize the State's unclaimed property laws by making the abandonment period for travelers checks more consistent with that of other property. The State also argues that Chapter 25 provides greater protection for property owners. They reason that shortening the abandonment period will facilitate the transfer of the property from a private company to the State at an earlier time; this would provide greater protection for

property owners because private companies are subject to greater economic instability compared to a perpetually solvent government entity. In general, taking custody of abandoned property is a legitimate state interest. *See Delaware v. New York*, 507 U.S. 490, 497 (1993) ("States as sovereigns may take custody of or assume title to abandoned personal property…."). We agree that, as a corollary, the State has a legitimate interest in protecting its property owners and modernizing its unclaimed property laws to promote consistency. Accordingly, we reject Amex's contention that Chapter 25 lacks a legitimate state interest.

Amex contests that even if there are legitimate state interests, Chapter 25 fails to rationally further these goals. Because Amex has the burden of rebutting every conceivable rational basis, *see Beach Commc'ns*, 508 U.S. at 315, we examine each of Amex's arguments in turn.

Amex first argues that shortening the abandonment period has no rational relationship to increasing property protection because 90% of travelers checks not used after three years are used within fifteen years. Thus, Amex contends, it is irrational to conclude that travelers checks can be presumed abandoned after three years. But the statistics also show that over 96% of all travelers checks are redeemed within three years. Decl. of Susan Helms at 3, *Am. Express Travel Related Servs.*, 755 F. Supp. 2d 556 (D.N.J. 2010) (No. 10-4328). Even if Amex disagrees with the State Legislature's presumption that travelers checks unredeemed after three years are abandoned, the rational basis test does not require mathematical precision in the legislature's decisions. *See Heller v. Doe*, 509 U.S. 312, 321 (1993). "[L]egislative choice … may be based on rational speculation unsupported by evidence or empirical data."

Beach Commc'ns, 508 U.S. at 315. Thus, Amex's argument is insufficient to overcome rational basis scrutiny.

Amex next argues that shortening the abandonment period for travelers checks does not further Chapter 25's stated purpose of modernizing the State's unclaimed property laws. But the State has a conceivable legitimate interest in making its unclaimed property laws more consistent for ease of administration. Chapter **[368]** 25 accomplishes this by making the abandonment period for travelers checks the same as checks, drafts, and other similar negotiable instruments. *See* N.J. Stat. Ann. § 46:30B-16 (2002). Amex responds that unclaimed property laws require establishing different time periods based upon the nature of the property, so consistency is not a rational basis for selecting an abandonment period. But state laws cannot be invalidated based on mere policy disagreements. *See Casey*, 505 U.S. at 849 (holding that under rational basis scrutiny, courts are not free to invalidate state law because they disagree with the underlying policy decisions). Because modernizing unclaimed property laws through consistent abandonment periods is a conceivable rational basis for enacting Chapter 25, Amex fails to overcome rational basis scrutiny.[4]

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[4] Amex also contends that changing the abandonment period does not rationally further the statute's purpose of reuniting property with its owners because the State does not have the names and addresses of travelers check purchasers. But, as discussed above, changing the abandonment period conceivably furthers other rational bases, which is sufficient for Chapter 25 to survive rational basis scrutiny.

In addition, the State Legislature could have rationally believed that the shorter abandonment period better protected customers by giving custody of the property to the State at an earlier time. Conceivably, there are benefits to having property safeguarded by a perpetually-solvent sovereign instead of a private entity with a greater risk of insolvency. In addition, the State can hold the travelers check funds in perpetuity and must invest unclaimed property funds more conservatively than Amex is required to invest its TC funds. *Compare* N.J. Stat. Ann. § 17:15C-2 (2000) (permitting investment in "any investment which is rated in one of the three highest rating categories by a nationally recognized statistical rating organization") *with* N.J. Stat. Ann. § 46:30B-75 (2000) (restricting investments of funds of Unclaimed Property Trust Fund to government bonds or interest-bearing notes or obligations). The State has offered several legitimate interests that justify shortening the abandonment period for travelers checks from fifteen years to three years. Chapter 25 rationally furthers these interests, and Amex does not meet its burden of defeating every conceivable basis that might support Chapter 25's enactment. *See Beach Commc'ns*, 508 U.S. at 315. Therefore, Amex fails to show a likelihood of success on the merits of its substantive due process claim.

B. Contract Clause

The Contract Clause under Article I, Section 10, Clause 1 of the U.S. Constitution provides that "[n]o State shall … pass any … Law impairing the Obligation of Contracts." To ascertain whether there has been a Contract Clause violation, a court must first inquire whether the change in State law has "operated as a substantial impairment of a contractual relationship." *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992)

(citations omitted); *Nieves v. Hess Oil Virgin Islands Corp.*, 819 F.2d 1237, 1243 (3d Cir. 1987) (citations omitted). If this threshold inquiry is met, the court must then determine "whether the law at issue has a legitimate and important public purpose." *Transport Workers Union of Am., Local 290 v. S.E. Pa. Transp. Auth.*, 145 F.3d 619, 621 (3d Cir. 1998). If so, the court must ascertain "whether the adjustment of the rights of the parties to the contractual relationship was reasonable and appropriate in light of that purpose." *Id.* Where the contract is **[369]** between private parties, courts may "defer to legislative judgment as to the necessity and reasonableness of a particular measure." *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 23 (1977). But this review of legislative judgment is more exacting than the rational basis standard applied in the due process analysis. *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 733 (1984).

Amex fails to show that Chapter 25 imposes a substantial impairment on Amex's contractual relationships with TC owners. While Amex has the right to use and invest TC funds until the date the TC is cashed or sold, the duration of use is further subject to the lawful abandonment period set by unclaimed property laws. The Supreme Court has long established that

> the contract of deposit does not give the banks a tontine right to retain the money in the event that it is not called for by the depositor. It gives the bank merely the right to use the depositor's money until called for by him or some other person duly authorized. If the deposit is turned over to the state in obedience to a valid law, the obligation of the bank to the depositor is discharged.

Sec. Sav. Bank v. California, 263 U.S. 282, 286 (1923) (citation omitted). In *Anderson National Bank v. Luckett*, the Supreme Court again stated that "[s]ince the bank is a debtor to its depositors, it can interpose no due process or contract clause objection to payment of the claimed deposits to the state, if the state is lawfully entitled to demand payment …." 321 U.S. 233, 242-43 (1944) (citation omitted). Like banks, Amex, as a debtor to the TC purchasers, only has the right to use the funds received from issuing a TC until either the owner or the State, under a valid law, claims the funds. Accordingly, a state's ability to claim abandoned property in the travelers check context does not ordinarily substantially impair travelers check issuers' contractual relationships or otherwise violate the Contract Clause.[5] *See Sec. Sav. Bank*, 263 U.S. at 285-86.

In assessing substantial impairment under the Contract Clause, we look to "the legitimate expectations of the contracting parties," *U.S. Trust Co. of N.Y.*, 431 U.S. at 19 n.17 (1977), and whether the modification imposes an obligation or liability that was unexpected at the time the parties entered into the contract and relied on its terms. *See Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 247 (1978). An important factor in determining the substantiality of any contractual impairment is whether the parties were operating in a regulated industry. *See Energy Reserves Grp., Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 411 (1983)

[5] This analysis differs from the analysis with respect to issuers of SVCs because, unlike travelers checks or bank deposits, SVCs are not redeemable for cash. Thus, the relationship between SVC purchasers and their issuers is distinguishable from the relationship between depositors and banks, which are required to turn over the value of the deposit in cash upon the depositor's demand.

(citing *Allied Structural Steel Co.*, 438 U.S. at 242 n.13). When a party enters an industry that is regulated in a particular manner, it is entering subject to further legislation in the area, and changes in the regulation that may affect its contractual relationships are foreseeable. *See id.* New Jersey has consistently regulated travelers checks, both **[370]** generally under the Money Transmitter Law, N.J. Stat. Ann. § 17:15C (2000), and as abandoned property under the unclaimed property statute, N.J. Stat. Ann. § 46:30B-11 (2010). Given such consistent regulation, Chapter 25's amendment of the abandonment period did not upset Amex's legitimate expectations as the contracting party or impose an unexpected change in its contractual obligations. *U.S. Trust*, 431 U.S. at 19 n.17 (stating "a reasonable modification of statutes … is much less likely to upset expectations than a law adjusting the express terms of an agreement").

Amex next claims that the fifteen-year abandonment period was an implied term of the contract for TCs that were sold prior to the enactment of Chapter 25. It is true that the terms of a contract often include the state law relating to the contract. *See Farmers' & Merchs. Bank of Monroe v. Fed. Reserve Bank of Richmond*, 262 U.S. 649, 660 (1923). But not all "state regulations are implied terms of every contract entered into while they are effective, especially when the regulations themselves cannot be fairly interpreted to require such incorporation." *Gen. Motors*, 503 U.S. at 189. And "state laws are implied into private contracts regardless of the assent of the parties only when those laws affect the validity, construction, and enforcement of contracts." *Id.* (citation omitted). Critically, the adjustment of the abandonment period merely shortens the time during which Amex can invest the TC funds,

without affecting the validity, construction, and enforcement of the contract between Amex and its customers. Amex also fails to show how New Jersey law pertaining to unclaimed property can be interpreted to require incorporation into Amex's contract with its customer.[6] Because Amex has not shown that Chapter 25 constitutes a substantial impairment on this contractual relationship, it did not succeed in showing a likelihood of success on its Contract Clause claim.

C. Takings Clause

The Takings Clause of the Fifth Amendment prohibits the federal government from taking private property for public use without providing just compensation. U.S. Const. Amend. V. The Takings Clause applies to state action through the Fourteenth Amendment. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160 (1980) (citing *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 239 (1897) and *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 122 (1978)). When a state directly appropriates private property, it is considered a *per se* taking, and the state has a duty to compensate the owner. *Tahoe-Sierra Pres. Council v.*

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[6] Amex's reliance on *Nieves v. Hess Oil Virgin Is. Corp.*, 819 F.2d 1237 (3d Cir. 1987) is misplaced. In *Nieves*, a 1986 amendment to the Virgin Island's Workmen's Compensation Act retroactively eliminated an employer's immunity from tort actions. 819 F.2d at 1248. Because the employer had immunity under the law at the time of the contract, this amendment exposed the employer to significant additional tort liability that was unexpected. *Id.* Chapter 25, however, does not impose an unexpected *liability* on Amex that would "completely destroy[] its contractual expectations." *Id.* at 1248. It only seeks to retroactively claim abandoned travelers checks that ultimately belong to the purchasers, not Amex.

Tahoe Reg'l Planning Agency, 535 U.S. 302, 322 (2002). Where, as here, a party asserts a regulatory taking, there is no set formula. Rather, courts must en- **[371]** gage in a factual inquiry to determine whether a taking has been effected. *New Jersey v. United States*, 91 F.3d 463, 468 (3d Cir. 1996) (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992)).

To succeed on a takings claim, Amex must show that the State's action affected a "legally cognizable property interest." *Prometheus Radio Project v. FCC*, 373 F.3d 372, 428 (3d Cir. 2004) (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985) and *Webb's*, 449 U.S. at 160-61 (1980)). "Relevant considerations include '[t]he economic impact of the regulation on the claimant and … the extent to which the regulation has interfered with distinct investment-backed expectations.'" *New Jersey v. United States*, 91 F.3d at 463 (quoting *Penn Cent.*, 438 U.S. at 124).

The character of the state action is also relevant: unlike "a physical invasion of land[,] … a public program adjusting the benefits and burdens of economic life to promote the common good … ordinarily will not be compensable." *Id.* (internal quotation marks and citation omitted). Thus, that a regulation "adversely affect[s] recognized economic values" is not enough to constitute a taking. *Id.* Even a regulation that prohibits the most beneficial use of property, or prevents an individual from operating an otherwise lawful business, does not necessarily violate the Takings Clause. *Penn Cent.*, 438 U.S. at 125-26.

We agree with the District Court that Amex failed to show a likelihood of success on the merits of its takings claim. Amex maintains that it has both a right to invest the proceeds from the sale of TCs and a property

interest in the income generated. Amex argues that the retroactive application of Chapter 25 constitutes a taking because it interferes with Amex's investment-backed expectation that TCs already sold would have an abandonment period of fifteen years, which would have allowed Amex to invest the proceeds for fifteen years unless the owner redeemed the check.[7] However, Amex's claim that Chapter 25 interferes with its investment-backed expectations cannot stand because Amex's TC business has long been subject to regulation by New Jersey. The Supreme Court has established that "'[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end.'" *Connolly v. Pension Ben. Guar. Corp.*, 475 U.S. 211, 227 (1986) (quoting *FHA v. The Darlington, Inc.*, 358 U.S. 84, 91 (1958)). Since Chapter 25 is a subsequent amendment to achieve the legislative end of assuming custody of abandoned property, Amex has no ground to claim interference with its investment-backed expectations.

Lastly, the fact that Amex has a contractual right to invest TC funds does not necessarily render Chapter 25 an unconstitutional taking. The State has considerable authority to enact legislation, including "the power to affect contractual commit- **[372]** ments between pri-

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[7] Contrary to Amex's contention, *E. Enterp. v. Apfel*, 524 U.S. 498 (1998), is distinguishable from this case. In *E. Enterp.*, the Supreme Court held that the Coal Industry Retiree Health Benefit Act was an unconstitutional taking because it imposed on the employer retroactive pension liability for retired miners. *Id.* at 532. But here, Chapter 25 does not impose any further liability on Amex. It only requires that issuers like Amex turn over property owned by the *travelers check owners* to State custody.

vate parties." *See E. Enterp.*, 524 U.S. 498, 528 (1998). Amex's ability to utilize TC funds is constrained by the owner's ability to redeem a TC on demand and by the terms of the State's unclaimed property laws. *See Security Sav. Bank*, 263 U.S. at 286. In *Delaware v. New York*, the Supreme Court delineated the property right of debtors with regard to state escheat laws:

> Funds held by a debtor become subject to escheat because the debtor has no interest in the funds—precisely the opposite of having "a claim to the funds as an asset." We have recognized as much in cases upholding a State's power to escheat neglected bank deposits. Charters, bylaws, and contracts of deposit do not give a bank the right to retain abandoned deposits, and a law requiring the delivery of such deposits to the State affects no property interest belonging to the bank. [*Sec. Sav. Bank*, 263 U.S. at 285-86]; *Provident Institution for Sav. v. Malone*, 221 U.S. 660, 665-66 (1911). Thus, "deposits are *debtor obligations* of the bank," and a State may "protect the interests of depositors" as creditors by assuming custody over accounts "inactive so long as to be presumptively abandoned." [*Anderson Nat. Bank*, 321 U.S. at 241] (emphasis added). Such "disposition of abandoned property is a function of the state," a sovereign "exercise of a regulatory power" over property and the private legal obligations inherent in property. [*Standard Oil Co. v. New Jersey*, 341 U.S. 428, 436 (1951)].

507 U.S. 490, 502 (1993). Thus, Amex, as debtor to TC owners, has no right to retain the funds once they are deemed abandoned under the State's unclaimed property laws. Accordingly, the District Court did not err

in finding that Amex failed to show a reasonable probability of success on its Takings Clause claim.

D. Commerce Clause

Under the Commerce Clause, Congress has the power to "regulate Commerce … among the several States." U.S. Const. Art. I, § 8, cl. 3. "This clause also has an implied requirement (often called the 'negative' or 'dormant' aspect of the clause) that the states not 'mandate differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" *Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd.*, 462 F.3d 249, 261 (3d Cir. 2006) (citing *Granholm v. Heald*, 544 U.S. 460, 472 (2005)). Our inquiry as to whether a state law violates the dormant Commerce Clause is twofold: first, we determine whether heightened scrutiny applies, and, if not, then we determine whether the law is invalid under the *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), balancing test. *Cloverland-Green*, 462 F.3d at 261 (citation omitted). We apply heightened scrutiny when a law "discriminates against interstate commerce" in purpose or effect. *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994). Because Amex has not alleged that heightened scrutiny applies, we look to the *Pike* balancing test. Under this test, courts will uphold nondiscriminatory regulations that only incidentally affect interstate commerce unless "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142.

Amex contends that Chapter 25, if implemented, will violate the dormant Com- **[373]** merce Clause because its effects will be projected into other states. Specifically, Amex claims that it will be forced to

choose between: (a) selling TCs in New Jersey at a marginal profit or at a loss; (b) not selling TCs in New Jersey; (c) charging a fee for selling TCs in New Jersey; or (d) charging a fee to sell TCs throughout the country so that it can maintain uniform conditions. If it chooses to charge a fee to sell TCs throughout the country, Amex argues, then Chapter 25 will have dictated commercial activity in other states.

Amex compares such a result to laws the Supreme Court struck down on dormant Commerce Clause grounds in *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 582 (1986) and *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 336 (1989). In *Brown-Forman*, the Supreme Court found that New York had "project[ed] its legislation into [other States]" by requiring distillers to seek the approval of the New York State Liquor Authority before lowering prices in other states. 476 U.S. at 583-84 (internal quotation marks and citation omitted) (second alteration in original). Similarly, in *Healy*, the Supreme Court struck down a Connecticut statute that "require[d] out-of-state shippers of beer to affirm that their posted prices for products sold to Connecticut wholesalers [were] … no higher than the prices at which those products are sold in [neighboring states.]" 491 U.S. at 326. The Court held both statutes to be unconstitutional because "States may not deprive businesses and consumers in other States of 'whatever competitive advantages they may possess based on the conditions of the local market.'" *Healy*, 491 U.S. at 339 (quoting *Brown-Forman*, 476 U.S. at 580).

Unlike these statutes, Chapter 25 does not directly regulate travelers checks sold in other states or force Amex to conform its out-of-state practices to less favorable in-state conditions. Nothing prevents other

states from regulating travelers checks differently from the way New Jersey has chosen to do in Chapter 25. And by Amex's own admission, the costs of compliance could be passed on to New Jersey travelers check customers or be absorbed by issuers like Amex.[8] Under the *Pike* balancing test, when the costs of a regulation may be born solely by those in the state enacting it, the burden imposed on interstate commerce is minimal, and not excessive in relation to the putative local benefits articulated by the State. *See United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 345 (2007) (holding when "the very people who voted for the laws" bear the costs attributable to those laws, the costs of the regulation do not fall outside the state). **[374]** Therefore, Amex failed to show a reasonable probability of success on the merits of its Commerce Clause claim.

E. Remaining preliminary injunction factors

Because Amex was unable to show a likelihood of success on the merits of its claims, we need not address

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[8] Amex argues that requiring it to change its TC business so that it operates differently in New Jersey than it does in other jurisdictions (*e.g.*, charging a fee in New Jersey) would substantially burden interstate commerce based on the Supreme Court's decision in *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 529-30 (1959). But the Supreme Court acknowledged that *Bibb* was an exceptional case because the state law obstructed the literal movement of goods between states by requiring trucks to alter their safety equipment upon entering Illinois. *Id.* at 529. The Court maintained that states have "great leeway in providing safety regulations for all vehicles—interstate as well as local[,]" but in that case, the burden on the interstate movement of trucks passed "the permissible limits even for safety regulations." *Id.* at 530. Amex has not shown that Chapter 25 imposes a similarly heavy burden for this to be considered an exceptional case.

the remaining preliminary injunction factors, *see Crissman*, 239 F.3d at 364 (listing preliminary injunction factors), and the District Court's denial of Amex's motion for preliminary injunction must be affirmed. *See In re Arthur Treacher's Franchisee Litig.*, 689 F.2d at 1143.

IV. Conclusion

We hold that Amex failed to show a likelihood of success on the merits of its Due Process Clause, Contract Clause, Takings Clause, and Commerce Clause claims. Thus, the motion for preliminary injunction of Chapter 25 must be denied. For the foregoing reasons, we will affirm the order of the District Court.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Nos. 10-4890 (FLW), 10-5059(FLW),
10-5123(FLW), 10-5206(FLW)

AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC., *Plaintiff*,

v.

SIDAMON-ERISTOFF, ET AL., *Defendants*.

NEW JERSEY RET. MERCH. ASSN., *Plaintiff*,

v.

SIDAMON-ERISTOFF, ET AL., *Defendants.Aff.*

NEW JERSEY FOOD COUNCIL, *Plaintiff*,

v.

STATE OF NEW JERSEY, ET AL., *Defendants*.

AMER. EXP. PREPAID CARD MGMT. CORP., *Plaintiff*,

v.

SIDAMON-ERISTOFF, ET AL., *Defendants*.

November 13, 2010

[755 F. Supp. 2d 556]

* * *

OPINION AND JANUARY 14, 2011, OPINION CLARIFYING PRIOR OPINION OF NOVEMBER 13, 2010

FREDA L. WOLFSON, District Judge.

On November 15, 2010,[1] New Jersey's recent amendment to its Unclaimed Property Law, 2010 N.J. Laws Chapter 25 ("Chapter 25" or "the Act"), will take effect. Chapter 25, inter alia, amends New Jersey's unclaimed property statute, N.J. S.A. 46:30B-1, *et seq.* ("Unclaimed Property Act"), modifying the presumptive abandonment period for travelers checks from fifteen years to three years, and, for the first time, Chapter 25 provides for the custodial escheat of stored value cards. *See* Chapter 25, §§ 2, 5. Plaintiffs American Express Travel Related Services Company, Inc. ("Amex"), New Jersey Retail Merchants Association ("Retail Merchants"), New Jersey Food Council ("Food Council"), and American Express Prepaid Card Management Corporation ("AMEX Prepaid") (collectively, "Plaintiffs")[2], bring **[563]** this action to enjoin Defendants Andrew P. Sidamon-Eristoff ("the Treasurer"), Treasurer of the State of New Jersey, Steven R. Harris, Administrator of Unclaimed Property of the State of New Jersey, and the State of New Jersey (collectively, "Defendants," "State of New Jersey" or "State") from enforcing Chapter 25.[3] In their respective com-

[1] The amendment was enacted on June 30, 2010, with an initial effective date of July 1, 2010. The effective date was subsequently extended to November 1, 2010. To accommodate the proceedings in this case, the State Treasurer extended the implementation date to November 15, 2010.

[2] Plaintiffs Retail Merchants, Food Council, and AMEX Prepaid, when referred to collectively as issuers of stored value cards ("SVCs") will hereinafter be referred to as "SVC Plaintiffs."

[3] Several of the Plaintiffs' Complaints initially named the State of New Jersey as a defendant. The State has subsequently been dismissed by consent of the parties.

plaints, Plaintiffs raise several constitutional challenges under the doctrines of federal preemption, the Contract Clause, the Takings Clause, Substantive Due Process, the Commerce Clause, and the Full Faith & Credit Clause.

In the instant matter, Plaintiffs move to preliminarily enjoin Defendants from implementing Chapter 25 during the pendency of these cases.[4] In response, Defendants oppose the motion and move to dismiss the complaints on the grounds of immunity and abstention.[5] Because the issues raised by the parties involve similar legal and factual analysis, the Court will address them in this Consolidated Opinion. For the reasons stated herein, the Court grants in part and denies in part Plaintiffs' requests for a preliminary injunction. Specifically, the Court enjoins the State of New Jersey from enforcing the place-of-purchase presumption found in Chapter 25 and Guidances issued by the Treasurer. The Court further enjoins the State from enforcing Chapter 25 retroactively against issuers of stored value cards with existing stored value card con-

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[4] Plaintiff Memo Money Order Company, Inc. ("Memo"), by way Verified Complaint in Civil Action No. 10-5406(FLW), challenges Chapter 25, which changes the presumptive abandonment period for money orders from seven years to three years. *See* Chapter 25, § 3. Memo also moves for a preliminary injunction. However, because Memo did not file its Complaint until the day of the Court's hearing on the parties' motions, and did not participate in that hearing, the Court will render a separate opinion on Memo's motion.

[5] Defendants also moved to dismiss Plaintiffs' complaints for failure to state a claim. However, Defendant has requested the Court to hold that motion in abeyance pending the outcome of Plaintiffs' motions for a preliminary injunction.

tracts that obligate the issuers to redeem the cards solely for merchandise or services.

BACKGROUND AND PROCEDURAL HISTORY

Since the parties' motions raise constitutional challenges to Chapter 25, the Court will only recount uncontroverted facts of this case insofar as they provide an understanding of the instant disputes.

I. Travelers Cheques by Amex

Amex's Travelers Cheques ("TCs") are preprinted "checks," each bearing a serial number, in fixed amounts, ranging from $20-$100. Amex is the sole issuer of travelers checks. On its face, a TC states that it will never expire, and therefore, it is not subject to dormancy charges and, until cashed or used, always retains its full face value. Amex sells TCs for the face amount without charging any fee. *See* Campbell Decl. at ¶¶ 13–16. When a TC is sold, the seller transmits the funds to Amex, and provides Amex with the serial number of the TC, its amount, and the date and place of the sale, but does not provide the name, address, or any other identifying information about the purchaser. When Amex sells TCs directly to consumers, it retains only the same information that it receives from third party sellers. *Id.* at ¶ 20.

According to Amex, it has been able to sell TCs without charging a fee based on its contractual relationship with TC own- **[564]** ers, which gives Amex the right to retain, use and invest funds from the sale of TCs from the date of sale until the date the TCs are cashed or used. Amex submits that it invests the funds in instruments with varying maturities to obtain the highest yield. *Id.* at ¶ 21. Amex further asserts that it relies on these invested funds, which are integral to the

contract between TC and Amex, to remain profitable in the TC business. *Id.* at ¶ 21.

Because TCs never expire, Amex maintains that it cannot be relieved of its contractual obligation to honor TCs presented for payment after the amount has been paid as "presumed abandoned" to a state. In other words, when used, a TC becomes a negotiable instrument, which Amex pays upon presentation regardless of whether it has been paid to the state as unclaimed property.

II. Stored Value Cards

SVCs are a relatively recent form of electronic payments. SVCs come in two varieties: "closed loop" and "open loop" cards.[6] Closed loop cards may be redeemed only for merchandise or services at and by the retailer who issued the card. An example of such a card would be a gift card issued by a bookstore and redeemable only at that bookstore for books or other merchandise. These sorts of cards are issued by members of Plaintiff New Jersey Retail Merchants Association and Plaintiff New Jersey Food Council. Open loop cards, also referred to as gift cards, may be redeemed at a host of brick-and-mortar and internet-based locations not affiliated with the issuer of the card. "In the current economic climate, stored-value products are particularly important, as they enable the unbanked and

[6] There is a third type of SVC—the bank-based prepaid card—which is a prepaid card linked to an account at a depository institution and covered by FDIC insurance. Sarah Jane Hughes, *Federal Payroll, Gift, and Prepaid Card Developments: FDIC Deposit Insurance Eligibility and the Credit Card Act of 2009*, 65 Bus. Law. 261, 264 (2009). None of the Plaintiffs here issue this type of SVC.

underbanked to have access to the payment system and thus to have access to internet transactions." Juliet M. Moringiello, *Survey of the Law of Cyberspace*, 65 Bus. Law. 227, 227-28 (2009). These sort of cards are issued by Plaintiff American Express Prepaid Card Management Corporation. Happ Decl. at ¶¶ 3–4. While some open loop cards are redeemable for cash, most of the open loop cards issued by AMEX Prepaid are redeemable solely for goods or services. *Id.* at ¶ 6.

> Under New Jersey law, gift cards are defined as
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> a tangible device, whereon is embedded or encoded in an electronic or other format a value issued in exchange for payment, *which promises to provide to the bearer merchandise of equal value to the remaining balance of the device.* "Gift card" does not include a prepaid telecommunications or technology card, prepaid bank card or rewards card;

N.J.S.A. 56:8-110c (emphasis added). According to Plaintiff Retail Merchants, the funds for gift cards are not necessarily stored on the card itself, but are "held in a bank account maintained by the card issuers." Rowe Afft. at ¶ 12. Other issuers maintain their gift card balances in a database. Watson Decl. at ¶ 12. Some issuers issue the cards directly, while others use subsidiaries or cooperatives to issue and process the cards. "Once the retail gift card is used to make a purchase, each [issuer] recognizes a profit based on the difference between the [issuer's] cost of acquiring the goods or of offering the services, and the retail price paid by the **[565]** customer to purchase the goods or services." Rowe Afft. at ¶ 17.

III. New Jersey's Unclaimed Property Law

Each of the 50 fifty states, including New Jersey, and the District of Columbia has a set of unclaimed property laws or escheat laws. These laws require that after property has been deemed "abandoned," the holder of the property, *e.g.*, banks, belonging to a property owner, *e.g.*, consumers, pay that property to the state. The laws of most states are based upon a version of the Uniform Unclaimed Property Act ("UUPA"). The Court notes that the purpose of enacting these escheat laws is to provide for the safekeeping of abandoned property and then reunite the abandoned property with its owner. In the usual course, when property is deemed abandoned, the holder of most types of property is required to attempt to contact the owner, using the name and last known address, and if possible, return the property. If the attempt is unsuccessful, the holder turns over the abandoned property to the state and provides the state with the name and last known address of the owner. Upon such payment, the holder is relieved of any liability to the owner. The state, in turn, makes the effort to reunite the owner with his/her property. New Jersey's Unclaimed Property Act is a custodial escheat statute. That is, when funds are turned over the State, the rightful owner may file a claim to recover the property at any time.

A. Travelers Checks

With respect to travelers checks, the issuer, Amex, does not obtain the name or address of purchasers of these checks. Thus, any requirement under state law to send notice to an apparent owner at the last known address before paying such property to the State does not apply to Amex. *See* N.J.S.A. 46:30B-5. In addition, in New Jersey, travelers checks issuers are exempted from the requirement to include the owner's name and last known address on unclaimed property reports. *See*

N.J.S.A. 46:30B-47. Rather, when travelers checks are sent to the state as unclaimed property, only the serial number, the amount and date of sale are reported. Indeed, New Jersey also exempts travelers checks from being published in a mandated notice by the Treasurer. *See* N.J.S.A. 46:30B51, -56. After a travelers check is cashed, Amex determines whether that particular check has been paid to any state as abandoned property. If it has, Amex seeks to reclaim those funds from that state. In New Jersey, while the time for processing such a claim is disputed, it is not disputed that the Treasurer returns the funds with interest.

Each version of the Unclaimed Property Act, enacted in a majority of the states, including New Jersey before the enactment of Chapter 25, includes a 15-year abandonment period for travelers checks.[7] However, on June 24, 2010, Bill A3002 was introduced in the New Jersey Legislature. According to the State, the purpose of the bill is "to protect New Jersey consumers from certain commercial dormancy fee practices and to modernize New Jersey's unclaimed property laws." *See* Assembly Budget Committee's statement. The Bill was signed into law six days later. Importantly, among other provisions, Chapter 25 shortened the abandonment period for travelers checks from 15 years to 3 years. **[566]** *See* N.J.S.A. 46:30B-11. After an issuer transfers the presumed abandoned property, that property is administered through New Jersey's un-

[7] Kentucky is another state that shortened the presumptive abandonment period of travelers checks from 15 years to 7 years. Amex recently successfully challenged Kentucky's statute in federal district court. *See AmEx v. Hollenbach*, 597 F. Supp. 2d 717, 722-23 (E.D. Ky. 2009). That decision, which is now on appeal, is discussed in more detail *infra*.

claimed property system. The State preserves the property in perpetuity for the owner, *see* N.J.S.A. 46:30B-9, or for another state that can prove a superior right of escheat. *See* N.J.S.A. 46:30B-81.

B. Stored Value Cards

Prior to the recent enactment, gift certificates—the predecessor to stored value cards and gift cards—were not covered by New Jersey's escheat law. *See In re November 8, 1996, Determination of the State of N.J., Dept. of the Treasury, Unclaimed Prop. Office*, 309 N.J. Super. 272, 277-79 (App. Div. 1998). When the Unclaimed Property Act was initially enacted by the New Jersey legislature in 1989, all references to gift certificates were deleted from earlier drafts. *Id.* at 276. This was a departure from the UUPA, which did provide for the escheat of gift certificates. Under the 1981 UUPA, gift certificates "which remain[ed] unclaimed by the owner for more than 5 years after becoming payable or distributable [were] presumed abandoned." *Id.* (citing Section 14 of the 1981 Model Act). "[T]he amount presumed abandoned [wa]s the price paid by the purchaser for the gift certificate. In the case of a credit memo, the amount presumed abandoned [wa]s the amount credited to the recipient of the memo." *Id.*

A key reason that gift certificates were not escheated in New Jersey was that they were not redeemable for cash. As explained by the New Jersey Appellate Division in *In re November 8, 1996*,

> All of the categories of intangible personal property expressly covered by the New Jersey Act or the 1981 Model Act, are, as a practical matter, claims for the payment of money … When any of these claims to the payment of money are transferred to the State, the obli-

> gors can readily discharge them by paying the State what they would have paid to the prior owners … The issuers of gift certificates, however, frequently do not bind themselves to pay money.

Id. at 276-77.

Chapter 25, thus, changes the legal landscape in New Jersey by providing for the escheat of stored value cards. There are several components to the statute. First, it defines stored value cards as

> a record that evidences a promise, made for monetary or other consideration, by the issuer or seller of the record that the owner of the record will be provided, solely or a combination of, merchandise, services, or cash in the value shown in the record, which is pre-funded and the value of which is reduced upon each redemption.

Chapter 25, § 1t (codified at N.J.S.A. 46:30B-6t). Hence, "stored value cards" include gift cards redeemable only for merchandise or services, as well as cards redeemable solely for cash.[8] Second, it places stored value cards in the section of the Unclaimed Property Act that addresses credits and over-payments. That section values credits at 100% face value, stating "in

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[8] In terms of the form of the card, the statute provides:

> The term "stored value card" includes, but is not limited to the following items: paper gift certificates, records that contain a microprocessor chip, magnetic stripe or other means for the storage of information, gift cards, electronic gift cards, rebate cards, stored-value cards or certificates, store cards, and similar records or cards. *Id.*

the case of credit balances … the amount presumed abandoned is the amount credited to the recipient." **[567]** N.J.S.A. 46:30B-43. Third, Chapter 25 bans the imposition of dormancy, inactivity, escheat or similar charges on stored value cards. Finally, the statute grants the Treasurer authority to grant exemptions to certain classes of businesses based on good cause; the statute does not apply to SVCs issued by issuers that sold less than $250,000 worth of cards in the past year, and the statute does not apply to promotional cards issued in connection with customer loyalty programs. N.J.S.A. 46:30B-42.1e-f.

The SVC Plaintiffs focus primarily on section 5c of Chapter 25, which amends the Unclaimed Property Act to require issuers to transfer the face value of stored value cards to the State upon the expiration of a two-year abandonment period. The Act, further, requires issuers to "obtain the name and address of the purchaser or owner … and shall, at a minimum, maintain a record of the *zip code* of the owner or purchaser." Chapter 25, ¶ 5c (emphasis added). In addition, the Act provides

> [i]f the issuer of a stored value card does not have the *name and address* of the purchaser or owner of the stored value card, the address of the owner or purchaser of the stored value card *shall assume the address of the place where the stored value card was purchased or issued* and shall be reported to New Jersey if the place of business where the stored value card was sold or issued is located in New Jersey.

Id., ¶ 5c (emphasis added); N.J.S.A. 46:30B-42.1c (emphasis added). The Court will refer to this provision as creating a "place of purchase presumption." As is ap-

parent from its text, the statute makes no mention of the issuer's domicile or state of incorporation in connection with this place of purchase presumption.[9]

After the statute was enacted, the Treasurer issued several guidances interpreting the statute. Portions of Treasury Guidance dated September 23, 2010, expound upon the place of purchase presumption found in the statute:

> • *If the issuer is domiciled in New Jersey*, any unredeemed balances of stored value cards issued prior to the date of this announcement where the names and addresses or zip code of the purchasers or owners were not *recorded must be reported to New Jersey*.
>
> • *If the issuer is not domiciled in New Jersey*, any unredeemed balances of stored value cards issued prior to the date of this announcement where the names and addresses or zip code of the purchasers or owners were not recorded *should be reported to the state* in which the issuer is domiciled in accordance with that state's unclaimed property laws.
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> • *If the issuer is not domiciled in New Jersey and the issuer's state of domicile exempts this type of property from its unclaimed property*

[9] The Court notes, here, that this provision is related to Plaintiffs' preemption challenge based upon the federal common law established in *Texas v. New Jersey*, 379 U.S. 674 (1965). As noted *infra*, the Supreme Court has made clear in the context of this federal common law that the issuer's state of incorporation—not domicile—controls. Because Chapter 25 and Treasury Guidance use the term "domicile," I may refer to the two terms interchangeably in this Opinion.

> *statute*, any unredeemed balances of stored value cards issued prior to the date of this announcement where the names and addresses or zip code of the purchasers or owners were not recorded *must be reported to New Jersey if the cards were issued or sold in New Jersey*. In these instances, the issuer must maintain the address of the business where the stored value card was purchased or issued.

[568] Treasury Guidance dated Sept. 23, 2010 at 3 (emphasis added). As explained in more detail below, Plaintiffs contend that both the statute and the Guidances are unconstitutional.

C. Procedural History

Beginning in September 2010, Plaintiffs filed separate complaints alleging that Chapter 25 violated several constitutional provisions and seeking declaratory and injunctive relief. Subsequently, the Court issued Orders to Show Cause as to each of the plaintiff's filing. In addition to opposing Plaintiffs' motions for injunctive relief, Defendants move to dismiss the complaints on immunity and/or abstention grounds. On October 21, 2010, the Court held a hearing wherein all parties, except Memo, appeared.[10] In that hearing, the Court denied Defendants' motion to dismiss based upon immunity and abstention grounds. In this Consolidated Opinion, the Court addresses Plaintiffs' motions for injunctive relief and renders its written decision on the immunity and abstention issues.

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[10] Memo did not file its Verified Complaint until the day of the hearing. Therefore, to clarify, the Court's decision made in that hearing does not apply to Memo.

JURISDICTION

The Court has federal question jurisdiction over this matter, in that Plaintiffs raise constitutional challenges to Chapter 25. For example, Plaintiffs seeks to enjoin enforcement of Chapter 25, asserting that the Federal CARD Act preempts that law. Such injunctive relief requests have been held to form the basis for federal question jurisdiction. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983) ("A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute [over] which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve."); *St. Thomas-St. John Hotel & Tourism Ass'n, Inc. v. Government of U.S. Virgin Islands*, 218 F.3d 232, 242 (3d Cir. 2000).

DISCUSSION

I. Sovereign Immunity under the Eleventh Amendment

The Eleventh Amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another state, or by Citizens or Subjects of any Foreign State." Based on this language, a federal court may not adjudicate a lawsuit brought by a citizen against his own state. *Hans v. Louisiana*, 134 U.S. 1, 13-14 (1890); *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974) ("[T]his Court has consistently held that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State.").

However, the Eleventh Amendment does not prevent federal courts from hearing all lawsuits involving a state. It has long been established by the Supreme Court that the Eleventh Amendment does not preclude lawsuits against state officials in their official capacities to enjoin violations of federal law even where the remedy would enjoin enforcement and implementation of an official state policy. *See Ex Parte Young*, 209 U.S. 123, 159-60 (1908). Since *Ex Parte Young*, the Supreme Court has extended this holding to violations of federal **[569]** statutes as well as of the United States Constitution. *See Green v. Mansour*, 474 U.S. 64, 68 (1985); *see, e.g.*, *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71, n.10 (1989); *Edelman*, 415 U.S. at 660; *Home Telephone & Telegraph v. Los Angeles*, 227 U.S. 278 (1913). To plead a cause of action under the strictures of *Ex parte Young*, a plaintiff must establish a present violation of federal law. *B.H. Papasan v. Allain*, 478 U.S. 265, 278 (1986) (*Ex parte Young* applies to those cases in which a violation of federal law is ongoing, not to those in which federal law was violated in the past). Furthermore, only prospective injunctive relief is available under *Ex parte Young*. *See Quern v. Jordan*, 440 U.S. 332, 337 (1979); *Edelman*, 415 U.S. at 677; *see also Pa. Fed'n of Sportsmen's Clubs, Inc. v. Hess*, 297 F.3d 310, 323 (3d Cir. 2002).

Defendants claim that although Plaintiffs seek only injunctive relief in this suit, the Eleventh Amendment still bars this action because Plaintiffs seek to divest the State of its special sovereign interest in abandoned property in offense to the "dignity and respect afforded a State." For support, Defendants rely on the Supreme Court's decision in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997) and the Third Circuit decision in *MCI Telecommunication Corp. v. Bell Atlantic*

Pennsylvania, 271 F.3d 491 (3d Cir. 2001). In *Coeur d'Alene*, the Supreme Court held that the Eleventh Amendment barred an Indian tribe's lawsuit in federal court against the state of Idaho which sought to establish the tribe's ownership of submerged lands to which that state claimed title. The Court reasoned that "if the Tribe were to prevail, Idaho's sovereign interest in its lands and waters would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury. Under these particular and special circumstances, we find the *Young* exception inapplicable." 521 U.S. at 287. After Coeur d'Alene, the Third Circuit, in *MCI*, explained that the *Ex Parte Young* doctrine did not apply where a lawsuit affects "a unique or essential attribute of State sovereignty." 271 F.3d at 508. Using the language and holding of these two cases, Defendants cite to historical cases, within and outside the United States, that they contend establishes New Jersey's power to take possession of abandoned chattels as an essential and historical attribute that belongs to the State as a sovereign, and thus, the state officials are immune from this suit. Notwithstanding Defendants novel assertion in the context of the facts of this case, the authorities on this issue weigh against Defendants' position.

This Court's analysis starts with the Supreme Court's pronouncement in *Verizon Maryland Inc. v. Public Serv. Comm'n of Maryland*, 535 U.S. 635 (2002). In that case, having reviewed its prior precedent in *Coeur d'Alene*, the Supreme Court held that when "determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as

prospective.'" *Id.* at 645 (citations omitted). In that connection, while this Court does not find that *Verizon Maryland* expressly overruled the consideration of certain unique attributes of state sovereignty imposed by *Coeur d'Alene*, cases decided since *Verizon Maryland*, including the Third Circuit, endorse the "straightfor-**[570]** ward" inquiry when determining whether the *Ex Parte Young* doctrine applies. Notably, in *Ameritech Corp v. McCann*, 297 F.3d 582, 588 (7th Cir. 2002), the Seventh Circuit expounded:

> [defendant] also suggests that [plaintiff's] lawsuit cannot proceed because it impermissibly burdens the state's sovereign interest in law enforcement. In doing so, [defendant] urges this court—like the district court—to examine the underlying nature of [plaintiff's] suit and its concomitant impact on the State's sovereign interests. While the Supreme Court in a relatively recent Eleventh Amendment case seemed to advocate this balancing approach, *see Coeur d'Alene*, 521 U.S. at 267-80 (principal opinion of Kennedy, J., joined by Rehnquist, C.J.), a majority of the Court in [*Verizon Maryland*] rejected it in favor of the straightforward inquiry described above.… As a result, we need not assess the precise nature of the State's sovereign interest in law enforcement—so long as [plaintiff's] complaint seeks prospective injunctive relief to cure an ongoing violation of federal law, the Eleventh Amendment poses no bar.

Id. at 588; *Hill v. Kemp*, 478 F.3d 1236, 1259 (10th Cir. 2007), *cert. denied*, 552 U.S. 1096 (2008) (instructed district courts to "not linger over the question whether 'special' or other sorts of sovereign interests are at

stake before analyzing the nature of the relief sought"); *see also Pennsylvania Federation of Sportsmen's Clubs, Inc. v. Hess*, 297 F.3d 310, 324 (3d Cir. 2002) ("[i]n determining whether the *Ex parte Young* doctrine avoids an Eleventh Amendment bar, the Supreme Court has made it quite clear that a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" (quotation omitted)).

Notwithstanding the limited value of *Coeur d'Alene*, Defendants maintain that based on a state's historical and universal rights towards lands integral to its territory, New Jersey's right to escheat is rooted in aspects of sovereignty tracing back to the ancient times. Defendants' analogy of a state's power to regulate its territory and its right to escheat abandoned property is inapt. Escheat laws, particularly those relating to intangible property rights, such as the ones at issue in this case, often implicate other states' property rights rather than the interest of one state. As such, cases addressing the constitutionality of unclaimed property law have rejected the defense of sovereign immunity. *See, e.g.*, *Commonwealth Edison Co. v. Vega*, 174 F.3d 870, 871 (7th Cir. 1999) (the Seventh Circuit, citing *Coeur d'Alene*, rejected an Eleventh Amendment defense to an action against an Illinois state official seeking to enjoin the application of Illinois's Unclaimed Property Act to pension benefits); *American Petrofina Co. of Texas v. Nance*, 859 F.2d 840, 841 (10th Cir. 1988); *AmEx*, 597 F. Supp. 2d at 722-23 (Eleventh Amendment did not bar action against Kentucky Treasurer who sought to enjoin enforcement of statute which shortened abandonment period of travelers checks from 15 years to seven years).

Having reviewed the aforementioned cases and their reasoning, the Court rejects Defendants' contention that New Jersey's ability to claim abandoned property and act as its custodian is a unique state sovereignty right deserving of immunity. The Court does not hold, because it need not, whether there are other essential state sovereign interests that could be afforded immunity by the Eleventh Amendment. Rather, in this case, the Court does not find that New Jersey's interest in **[571]** claiming abandoned property rises to the level of unique state sovereignty as proclaimed in *Coeur d'Alene*. Instead, Plaintiffs' claims satisfy the "straightforward inquiry" because they seek injunctive and declaratory relief against defendant state officials' enforcement of Chapter 25, which Plaintiffs assert violates the federal Constitution. In that regard, Defendants' conduct is ongoing, and Plaintiffs only seek to have an injunction imposed prospectively. As such, Defendants are not immune from suit.

II. *Burford* Abstention

Pursuant to the *Burford* abstention doctrine, Defendants urge the Court to abstain from hearing the instant suits because timely state court review of Plaintiffs' claims is available, and the Complaint challenges central components of New Jersey's policy with regard to abandoned property. Defendants caution that federal review of Plaintiffs' claims will disrupt New Jersey's continued efforts to integrate Chapter 25 within a policy of protecting unclaimed property.

"The purpose of *Burford* is to 'avoid federal intrusion into matters of local concern and which are within the special competence of local courts.'" *Matusow v. Trans-County Title Agency, LLC*, 545 F.3d 241, 247-48 (3d Cir. 2008) (quoting *Hi Tech Trans, LLC v. New Jer-*

sey, 382 F.3d 295, 303-04 (3d Cir. 2004)). In order to determine whether abstention under *Burford* is appropriate, the Third Circuit has instructed courts to employ a "two-step analysis." *Id.* (quotations and citations omitted). The first consideration is "whether timely and adequate state law review is available." *Id.* If such review is available, courts should abstain only if "the case … involves difficult questions of state law impacting on the state's public policy or … [the] exercise of jurisdiction would have a disruptive effect on the state's efforts to establish a coherent public policy on a matter of important state concern." *Id.* (citations and quotations omitted). Each of these factors need not be present to warrant abstention. *Lac D'Amiante du Quebec, Ltee v. Am. Home Assurance Co.*, 864 F.2d 1033, 1043 (3d Cir. 1988).

Plaintiffs argue that this Court should not abstain because this case does not turn on any question of state law as the claims presented are only federal constitutional claims. However, as the Third Circuit has made clear, the focus of review is not whether the claims at issue are federal causes of action, but rather, whether the state law or regulation being reviewed involves matters of substantial public concern or whether it is of a complex technical scheme to which *Burford* is usually applied. *Culinary Serv. of Del. Valley, Inc. v. Borough of Yardley*, 385 Fed. Appx. 135, 143-44 (3d Cir. 2010); *see Rucci v. Cranberry Twp.*, 130 Fed. Appx. 572, 578 n.8 (3d Cir. 2005); *Chiropractic Am. v. LaVecchia*, 180 F.3d 99, 108 (3d Cir. 1999) (the "focus should not be on whether a federal claim has been presented, but rather on the nature of that claim."). In that regard, the Court will weigh the factors to determine whether abstention is appropriate.

The parties do not dispute that there could be adequate state law review; rather, Plaintiffs argue that there are no difficult questions of state law for the Court to address. To begin, the Court looks to *Burford* for guidance. In *Burford*, the Supreme Court acknowledged the complexity of the state administrative procedures that were in place to regulate the oil and gas industry in Texas, which it characterized "as [a] thorny problem as [it] has challenged the ingenuity and wisdom of legislatures." *Burford v. Sun Oil Co.*, **[572]** 319 U.S. 315, 318 (1943). Indeed, in the area of gas and drilling, courts unfamiliar with the industry would not be well-equipped to render decisions. *See Mt. Holly Citizens in Action, Inc. v. Township of Mount Holly*, No. 08-2584, 2008 U.S. LEXIS 87105, at *26 (D.N.J. Oct. 28, 2008). On the contrary, Chapter 25 is not difficult to review in the sense that it does not involve complex areas of expertise that should be left to the state. Instead, reviewing Chapter 25 "merely involve[s] reading and construing a statute, a task for which courts are best equipped." *United Servs. Automobile Ass'n v. Muir*, 792 F.2d 356, 365 (3d Cir. 1986) (*Burford* abstention did not apply because the interpretation of a statute prohibiting certain types of mergers did not require consideration of any other statute, did not require analysis of a complicated regulatory scheme and did not require peculiar local conditions or special expertise). Indeed, *Burford* abstention has no application when the Court is called upon to interpret an uncomplicated state statute. *See, e.g.*, *Mount Holly*, 2008 U.S. LEXIS 87105 at *26-27, (finding that interpretation of the New Jersey Constitution, Local Redevelopment and Housing law and Open Public Meetings Act was not so difficult to warrant abstention under *Burford*); *Tillery v. Hayman*, 2008 U.S. Dist. LEXIS 41656, at *10-11 (D.N.J.

May 28, 2008) (regulatory scheme pertaining to custody in the Management Control Unit was not the sort of complex, technical regulatory scheme to which *Burford* is usually applied); *Matusow*, 545 F.3d at 248 (plaintiff's claims of violations of a statute governing title insurance polices and statute governing sheriff sales of property did "not involve any difficult questions of state law or implicate any complex state policies."). Accordingly, because no special expertise is needed in order for the Court to adjudicate the claims in this case and because Chapter 25 does not involve complex intertwined state laws, this factor is not implicated.

Next, Defendants contend that the challenged statute is an integral part of a detailed and exhaustive scheme to protect the interests of the rightful owners of the abandoned property. Notwithstanding Defendants' contention, Plaintiffs' claims do not attack any established New Jersey state policy. In that respect, Plaintiffs do not raise any objections regarding New Jersey's ability to escheat property for the benefit of its citizens. Rather, Plaintiffs challenge New Jersey's attempt to raise its own state revenue by enacting Chapter 25, which Plaintiffs claim runs afoul of the purpose of New Jersey's prior unclaimed property laws—to reunite abandoned property with its rightful owner. Indeed, the claims raised here only challenge the time period, both retroactively and prospectively, for which New Jersey could escheat certain abandoned property, as well as the additional administrative burden Chapter 25 imposes—these challenges hardly attack a detailed exhaustive policy scheme. Finally, for abstention purposes, the Court need not decide whether these mat-

ters involve substantial public concern.[11] Because the Court finds that the majority of the abstention factors are not implicated, that is, the claims in this case do not implicate a complex state regulatory scheme or New Jersey's ability to es- **[573]** cheat property, abstention is not warranted.

Furthermore, with respect to plaintiffs, Food Council, Retail Association and AMEX Prepaid, an additional consideration for the Court is their claim that to the extent Chapter 25 regulates store valued cards, it is preempted by federal statute. Courts have held almost uniformly that "abstention is inappropriate when a federal plaintiff asserts a preemption/Supremacy Clause claim." *See, e.g., New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 362-363 (1989); *Kentucky West Va. Gas Co. v. Pennsylvania Pub. Util. Comm'n*, 791 F.2d 1111, 1115-1116 (3d Cir. 1986); *Middle S. Energy, Inc. v. Arkansas Pub. Serv. Comm'n*, 772 F.2d 404, 417 (8th Cir. 1985); *Baggett v. Department of Professional Regulation, Bd. of Pilot Commissioners*, 717 F.2d 521, 524 (11th Cir. 1983). This is because "supremacy clause claims are 'essentially ones of federal policy,' so that 'the federal courts are particularly appropriate bodies for the application of preemption principles.'" *Kentucky West Va. Gas Co.*, 791 F.2d at 1115 (quoting *Kennecott Corp. v. Smith*, 637 F.2d 181, 185 (3d Cir. 1980)). Although Defendants argue that Plaintiffs' assertion of preemption

[11] On one hand, Defendants submit that Chapter 25 would advance substantial public policy because the State is protecting owners' interests in abandoned property. On the other hand, Plaintiffs counter that this legislation is simply an unconstitutional attempt at raising state revenue, which is not a matter of substantial public concern.

should be "well-founded" or should raise "substantial questions" of preemption, a reading of the Third Circuit precedent in *Kentucky West Virginia Gas Co.* does not lead the Court to agree. To contrary, the circuit court, relying on sister circuit cases, held explicitly that where "Congress has created a statutory scheme … which *arguably* preempts the local regulation complained of, a fundamental element of *Burford* abstention is thrown into doubt …." *Id.* at 1116 (emphasis added). Indeed, the court did not suggest that there must be an initial determination that the preemption claim has substantial merit. Here, Plaintiffs advance that those sections of Chapter 25 that address stored value cards violate the Supremacy Clause because those provisions are preempted by the federal CARD Act—a congressional enactment specifically regulating stored value cards. Clearly, Plaintiffs, by having cited a congressional statutory scheme that arguably preempts the State's legislation, have satisfied their burden of showing that *Burford* abstention does not apply here. Accordingly, for the reasons already stated, as well as Plaintiffs' assertion of preemption, the Court will not abstain from hearing the merits of Plaintiffs' application for preliminary injunction.

III. Standard of Review

Plaintiffs move to preliminarily enjoin the implementation of Chapter 25. The Third Circuit Court of Appeals has outlined four factors that a court ruling on a motion for a preliminary injunction must consider: (1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably injured by denial of the relief; (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and (4) whether granting the preliminary relief will be in the public in-

terest. *Crissman v. Dover Downs Entertainment Inc.*, 239 F.3d 357, 364 (3d Cir. 2001). The above factors merely "structure the inquiry" and no one element will necessarily determine the outcome. The court must engage in a delicate balancing of all the elements, and attempt to minimize the probable harm to legally protected interests between the time of the preliminary injunction to the final hearing on the merits. *Constructors Association of Western Pa. v. Kreps*, 573 F.2d 811, 815 (3d Cir. 1978). The movant bears the burden of establishing these elements. *Adams v. Freedom Forge Corp.*, 204 F.3d 475, 486 (3d Cir. 2000).

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IV. Legal Concepts

A. Substantive Due Process

The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." The Supreme Court has long held that the clause has a substantive component. *See, e.g., Planned Parenthood of S.E. Pennsylvania v. Casey*, 505 U.S. 833, 846-47 (1992) ("it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure") (quoting *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring)). The Third Circuit has explained that substantive due process "is an area of law 'famous for controversy, and not known for its simplicity.'" *Nicholas v. Pennsylvania State Univ.*, 227 F.3d 133, 140 (3d Cir. 2000) (citations omitted). In that connection, the circuit clarified that the substantive due process encompasses at least two very different components. *Id.*

The first component of substantive due process is implicated when a plaintiff challenges the validity of a legislative act. *Id.* Typically, "a legislative act will withstand substantive due process challenge if the government 'identifies a legitimate state interest that the legislature could rationally conclude was served by the statute,' although legislative acts that burden certain 'fundamental' rights may be subject to stricter scrutiny." *Id.* (quotations and citations omitted); *see Alexander v. Whitman*, 114 F.3d 1392, 1403 (3d Cir. 1997). The second component, which is not implicated in this case, protects against certain types of non-legislative state action. To prevail on this claim, a plaintiff must first establish as a "threshold matter that [it] has a protected property interest to which Fourteenth Amendment's due process applies." *Woodwind Estates, Ltd. v. Gretkowski*, 205 F.3d 118, 123 (3d Cir. 2000). Here, Plaintiffs challenge the validity of Chapter 25 under the first component of substantive due process, and as such, the Court's discussion will be confined to this issue.

The first step in any substantive due process analysis is to determine the standard of review. "The choice of a standard of review … turns on whether a 'fundamental right' is implicated." *Sammon v. New Jersey Bd. of Medical Examiners*, 66 F.3d 639, 644 (3d Cir. 1995) (citations omitted). Here, the parties do not dispute that the rational basis test applies in this case.

Where rational basis review is appropriate, "a statute withstands a substantive due process challenge if the state identifies a legitimate state interest that the legislature rationally could conclude was served by the statute." *Id.* In determining whether a law comports with substantive due process, the inquiry is whether the law is rationally related to a legitimate state inter-

est. *Rogin v. Bensalem Township*, 616 F.2d 680 (3d Cir. 1980), *cert. denied*, 450 U.S. 1029 (1981). "The law need not be in every respect consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." 616 F.2d at 689 (quoting *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 487-88 (1955)); *see also Midnight Sessions, Ltd. v. City of Philadelphia*, 945 F.2d 667, 682 (3d Cir. 1991), *cert. denied*, 503 U.S. 984 (1992).

The Third Circuit has repeatedly cautioned that a court engaging in rational **[575]** basis review is not entitled "to second guess the legislature on the factual assumptions or policy considerations underlying the statute. If the legislature has assumed that people will react to the statute in a given way or that it will serve the desired goal, the court is not authorized to determine whether people have reacted in the way predicted or whether the desired goal has been served." *Sammon*, 66 F.3d at 645. The sole question is "whether the legislature rationally might have believed the predicted reaction would occur or that the desired end would be served." *Id.* When legislation is being tested under rational basis review, "'those challenging the legislative judgment must convince the court that the legislative facts on which the classification [of the statute] is apparently based could not reasonably be conceived as true by the governmental decisionmaker.'" *Id.* (quoting *Vance v. Bradley*, 440 U.S. 93, 111 (1979)); *see also Pace Resources, Inc. v. Shrewsbury Township*, 808 F.2d 1023, 1034-35 (3d Cir.), *cert. denied*, 482 U.S. 906 (1987).

Indeed, "those attacking the rationality of the legislative classification have the burden 'to negat[e] every conceivable basis which might support it.'" *FCC v.*

Beach Communications, Inc., 508 U.S. 307, 315 (1993) (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)); *see, e.g.*, *Heller v. Doe*, 509 U.S. 312, 319-20 (1993) (finding that laws scrutinized under rational basis review are "accorded a strong presumption of validity"); *Hodel v. Indiana*, 452 U.S. 314, 331-32 (1981). Ordinarily, that burden is insurmountable. "[C]ourts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational basis review because it 'is not made with mathematical nicety or because in practice it results in some inequality.'" *Heller*, 509 U.S. at 321 (internal quotations and citations omitted).

Importantly, a state need not provide justification or rationale for its legislative decision. Indeed, the Supreme Court has held that "legislative choice[s] [are] not subject to court factfinding and may be based on rational speculation unsupported by evidence or empirical data." *Beach Communications*, 508 U.S. at 315; *see Merrifield v. Lockyer*, 547 F.3d 978, 989 (9th Cir. 2008) (state action survives rational basis review if "there is any reasonably conceivable [set]of facts that could provide a rational basis for the challenged law" (quoting *Beach Communications*, 508 U.S. at 313 (internal quotation marks omitted))). The rationale for such a deferential standard is that the legislative process will, from time to time, yield imperfect results, but "[o]nly by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function." *Lehnhausen*, 410 U.S. at 365 (quoting *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 510 (1937)). Nevertheless, the rational basis test is not a "toothless" one, *Mathews v. Lucas*, 427 U.S. 495,

510 (1976), and "it is the function of courts … to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory." *Nebbia v. New York*, 291 U.S. 502, 536 (1934).

B. Contract Clause

The Contracts Clause, found in Article I, § 10, of the Constitution, states **[576]** that "No State shall … pass any … Law impairing the Obligation of Contracts." To ascertain whether there has been a Contract Clause violation, through retroactive application or otherwise, a court must first inquire whether the change in state law has "operated as a *substantial impairment* of a contractual relationship." *General Motors v. Romein*, 503 U.S. 181, 186 (1992) (citations omitted) (emphasis added); *Nieves v. Hess Oil Virgin Islands Corp.*, 819 F.2d 1237, 1243 (3d Cir. 1987); *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983).

> In determining the degree to which an obligation has been impaired, one must be mindful that the Contracts Clause is designed to "enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them." The obligations protected by the clause "include [ ] not only the express terms [of the contract] but also the contemporaneous state law pertaining to interpretation and enforcement."

Legal Asset Funding, LLC v. Travelers Cas. & Sur. Co., 155 F. Supp. 2d 90, 99 (D.N.J. 2001) (quoting *United States Trust Co. v. New Jersey*, 431 U.S. 1, 19-20 n.17 (1977)). *See also Transport Workers Union of America, Local 290 By and Through Fabio v. Southeastern Pennsylvania Transp.*, 145 F.3d 619, 621 (3d Cir. 1998). Thus, in sum, the "Contract Clause analysis requires three threshold inquiries: (1) whether there is a contractual relationship; (2) whether a change in a law has impaired that contractual relationship; and (3) whether the impairment is substantial." *Transport Workers*, 145 F.3d at 621.

If the court concludes that the challenged act works a substantial impairment, the court must then engage in a careful examination of "whether the law at issue has a legitimate and important public purpose." *Id.* Finally, the court must consider "whether the adjustment of the rights of the parties to the contractual relationship was reasonable and appropriate in light of that purpose." *Id.*; *West Indian Co., Ltd. v. Government of Virgin Islands*, 844 F.2d 1007, 1021 (3d Cir. 1988) ("Once a legitimate public purpose has been identified, the next inquiry is whether the adjustment of 'the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.'" (quoting *Energy Reserves Group*, 459 U.S. at 411-12)). That determination will necessarily depend upon whether the state is a party to the contract at issue. If it is not, "'as is customary in reviewing economic and social regulation, … courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.'" *Energy Reserves*, 459 U.S. at 412-13 (quoting *United States Trust*, 431 U.S. at 22-23). If the state is a party

to the contract, such deference is inappropriate, and the court may inquire whether a less drastic alteration of contract rights could achieve the same purpose and whether the law is reasonable in light of changed circumstances. *United States Trust*, 431 U.S. at 25-26, 30-32. Generally, the standard of review applied to the court's review of the legislature's interests is more exacting than rational basis. *See Legal Asset*, 155 F. Supp. 2d at 100-01 (citing *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 733 (1984)); *Mercado-Boneta v. Administracion del Fondo de Compensacion al Paciete Through Ins.* **[577]** *Com'r of Puerto Rico*, 125 F.3d 9, 12 (1st Cir. 1997) ("This inquiry is more searching than the rational basis review employed in Due Process or Equal Protection analysis. Although deference is due to the legislature, and weight is given to the legislature's own statement of purposes for the law, a court must undertake its own independent inquiry to determine the reasonableness of the law and the importance of the purpose behind it.").

C. Takings Clause

The Takings Clause prohibits states from taking private property for public use without just compensation. U.S. Const. Amend. V, XIV; *County Concrete Corp. v. Town of Roxbury*, 442 F.3d 159, 164 (3d Cir. 2006) (citing *Cowell v. Palmer Twp.*, 263 F.3d 286, 290 (3d Cir. 2001)). To succeed on a takings claim, a plaintiff must … demonstrate that the state's action affected its "legally cognizable property interest." *Prometheus Radio Project v. F.C.C.*, 373 F.3d 372, 428 (3d Cir. 2004) (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985) and *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160-61 (1980)).

There is no "set formula' for determining when governmental action constitutes a taking …." *State of New Jersey v. U.S.*, 91 F.3d 463, 468 (3d Cir. 1996) (quoting *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123 (1978)). To the contrary, courts must engage in a factual inquiry to determine whether a taking has been effected. In ascertaining whether a taking has affected a property interest, "[r]elevant considerations include the economic impact of the regulation on the claimant and … the extent to which the regulation has interfered with distinct investment-backed expectations." *Id.* (quoting *Penn Cent.*, 438 U.S. at 124) (alterations in text omitted). The nature of the action is another relevant consideration. While "a physical invasion of land [is] more likely to constitute a taking, … a public program adjusting the benefits and burdens of economic life to promote the common good, … ordinarily will not be compensable." *Id.*

Hence, it is not enough that an enactment "adversely affect recognized economic values." *Id.* The enactment must "interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes." *Id.* Thus, legislation that prohibits the most beneficial use of property or even precludes an individual from operating his business does not necessarily violate the clause. *Penn Cent.*, 438 U.S. at 125-27. This is true whether or not the individual suffers substantial economic harm. *Id.* at 125.

Where a taking has been effected, the Takings Clause does not prohibit the taking altogether, but merely requires that there be a "public purpose" for it, and that "just compensation" be paid. *RLR Investments, LLC v. Town of Kearny*, 386 Fed. Appx. 84, 86 (3d Cir. 2010). In terms of public purpose, "[s]tate leg-

islatures have 'broad latitude in determining what public needs justify the use of the takings power,' *Id.* (quoting *Kelo v. City of New London*, 545 U.S. 469, 483 (2005)), and courts give 'great respect' to those determinations." *Id.* (citation omitted). In short, a taking is effected for a public use "'where the exercise of the eminent domain power is rationally related to a conceivable public purpose.'" *Id.* (quoting *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 241 (1984)).

[578] Moreover, courts equate the public use requirement as "coterminous with the scope of a sovereign's police powers." *Carole Media LLC v. New Jersey Transit Corp.*, 550 F.3d 302, 307 (3d Cir. 2008). A taking effected for a purely private purpose or under the pretext of a public purpose would not withstand constitutional scrutiny. *Id.* at 309. However, "that a taking creates incidental benefits for individual private parties does not condemn that taking as having only a private purpose." *Id.* (internal quotation mark and citation omitted). So, for example, economic regulation that effects a taking in order to encourage revitalization is a public use under the Takings Clause. *Id.* at 310. That a state legislature may also have revenue raising as one of its motives in enacting the challenged legislation does not render a taking unconstitutional. *Id.*

In the escheat context, several cases find no Takings Clause violation based on a state's retention of interest earned on the abandoned property while held in state custody. *See Simon v. Weissmann*, 301 Fed. Appx. 107, 113 (3d Cir. 2008) (collecting cases). By way of example, the Seventh Circuit in *In re Folding Carton Antitrust Litigation*, 744 F.2d 1252 (7th Cir. 1984), rejected an owner-asserted takings claim, reasoning:

> Since any legitimate claimant has been afforded an adequate remedy against the United States, there is no bar to interim governmental use of the escheated money deposited in the Treasury and to the credit of the United States.

Id. at 1255 (internal quotation marks omitted). These sorts of cases rely upon the Supreme Court's rationale in *Texaco, Inc. v. Short*, 454 U.S. 516 (1982), that "[i]t is the owner's failure to make any use of the property—and not the action of the State—that causes the lapse of the property right; there is no 'taking' that requires compensation." *Texaco*, 454 U.S. at 529. In other words, an owner that abandoned its property, also abandons his or her right to earn interest on that property while in state custody. *Simon*, 301 Fed. Appx. at 112. Obviously, these cases focus on the owner of the property—not the debtor.

D. Retroactivity

The parties have all raised the question of retroactive application of Chapter 25 in their briefing. The retroactive application of statutes is affected by several constitutional provisions, and some aspects of state law.

> Generally, courts favor prospective application of statutes. Fundamental fairness suggests that government give prior notice of a statute so citizens may conform their behavior before its enforcement. Retroactive application also tends to disturb feelings of security in past transactions. Moreover, retroactive application of a statute may implicate due process rights.

Twiss v. State, Dept. of Treasury, 124 N.J. 461, 466 (1991) (internal quotation marks and citations omitted). *See also Unity Real Estate Co. v. Hudson*, 178 F.3d

649, 659 (3d Cir. 1999) ("[O]ur legal system has a long-standing and well-justified distaste for retroactive laws, because of their heightened potential for unfairness." (citation omitted)).

Where it is clear that the legislature intended to apply a statute retroactively, however, the only question before a reviewing court is whether retroactive application is prohibited by a specific constitutional provision. *See In re Minarik*, 166 F.3d 591, 596, 596 n.1 (3d Cir. 1999). While the record before the Court suggests that the retroactive application of Chapter 25 will work create an onerous **[579]** administrative burden for Plaintiffs, nonetheless, my discussion of Chapter 25's retroactive application is limited only to whether the statute violates the challenged constitutional provisions.

V. Likelihood of Success

Because much of the parties' dispute centers around the likelihood of success of Plaintiffs' claims, the Court first focuses on this factor.

A. Travelers Checks

1. Substantive Due Process

Amex claims that Defendants can identify no legitimate state interest which would justify the violation of Amex's rights to invest the proceeds from the sale of travelers checks. Rather, Amex submits that New Jersey's primary purpose for shortening the abandonment period is to raise revenue for the State, which Amex vehemently contends does not pass constitutional muster. Indeed, in response, Defendants advance several rationales for the enactment of Chapter 25 which they contend comport with substantive due process. First, Defendants explain that the New Jersey Legislature

could have concluded that establishing greater consistency and uniformity in the presumptions of abandonment for various forms of intangible property was crucial to modernizing the State's unclaimed property laws. Defendants also advance that shortening the time period would confer greater protection for New Jersey property owners, in that Chapter 25 would protect owners from losing their rights to their property. Moreover, Chapter 25, as Defendants claim, would protect property owners from the uncertainty of the economy in the event that a company, like Amex, declares bankruptcy and would be unable to pay the sum due on a traveler's check.

Affording Defendants great deference and the presumption of validity under the rational basis review, as this Court must, the Court finds that Amex has failed to demonstrate a reasonable likelihood of success on its substantive due process argument. Because on this motion it is Amex's burden to establish a likelihood of success, the Court will address each of Amex's contentions. Amex focuses on the stated purposes of Chapter 25, which according to the State's Assembly Budget Committee are "to protect New Jersey consumers from certain commercial dormancy fee practices and modernize the State's unclaimed property laws." Budget Comm. Statement, p. 1. As there are no dormancy fees associated with travelers checks, Amex argues that Chapter 25's only other stated aim—to "modernize" the Unclaimed Property Act with respect to travelers checks—is irrational.

First, Amex points out that there is no evidence to suggest that a three-year period before abandonment bears any rational relation to the actual abandonment of travelers checks since over 90% of the checks sold in New Jersey that are uncashed three years after sale

will be cashed within fifteen years—the current abandonment period. *See* Campbell Decl. at ¶ 6. Essentially, Amex argues that because the vast majority of the travelers checks are used before the fifteen-year abandonment period, it is irrational for New Jersey to presume that those checks have been abandoned only after three years. However, from a statistical standpoint, the record before the Court reveals that more than 96% of travelers checks sold in New Jersey in a given year are likely to be redeemed within a three year period. Helms Decl. at ¶ 9. Therefore, it would not be irrational for the Legislature to have determined that the small percentage of the unclaimed three-year old travelers checks are presumed abandoned. In fact, **[580]** the shortened abandonment period reflects consumers' actual timing of redemption for travelers checks in this State. Regardless, it is not the Court's role to inject mathematical precision into the Legislature's decisions. *Heller*, 509 U.S. at 321. Indeed, "legislative choice[s] [are] not subject to court factfinding and may be based on rational speculation unsupported by evidence or empirical data." *Beach Communications*, 508 U.S. at 315.

Next, Amex argues that without the names and addresses of travelers checks owners, the change in the abandonment period does not advance the purpose of New Jersey's Unclaimed Property Law, which is to reunite the property with its rightful owner. To properly address this issue, a discussion of the purpose and the application of the Act is necessary. Under the Act, "the State takes custody of the property and has full use of it and has full use of [the funds] until the rightful owner comes forward to claim it." *Clymer v. Summit Bancorp.*, 171 N.J. 57, 63 (2002). In *Clymer*, the New Jersey Supreme Court expounded:

Regardless of the applicable dormancy period, once turned over to the Treasurer, title to the unclaimed property does not vest in the State but remains in the owner, as the State only assumes custody of the intangible property until the owner or his or her successors assert a claim that is verified and allowed. In the meantime, the property is placed in the Unclaimed Personal Property Trust Fund and the Treasurer has the discretion to transfer a percentage of these funds to the State Treasury's General Fund. N.J.S.A. 46:30B-74. Seventy-five percent of all proceeds from property received by the State (except abandoned child support funds) is transferred from the unclaimed property trust funds to the General State Fund; the balance is used to pay claims of persons who establish their ownership of the presumptively abandoned property in the State's custody. *Id.*

Thus, all unclaimed funds are held by the Treasurer as trustee for the public interest. Notice is published in newspapers of general circulation listing the missing owners. N.J.S.A. 46:30B-51. A person may make a claim to the property at any time in perpetuity. N.J.S.A. 46:30B-77. Notably, when a claim is verified and paid, the Treasurer pays interest for the period during which the monies were in state custody. N.J.S.A. 46:30B-79. By the same token, upon delivery of the unclaimed property to the Treasurer, a holder is fully and unconditionally relieved of all liability concerning the property. N.J.S.A. 46:30B-61. If some party thereafter claims the fund by an action against the former holder, the State will defend the

> holder against the claim and indemnify the holder against liability. N.J.S.A. 46:30B-65.

Id. at 63-64 (quoting *Clymer v. Summit Bancorp.*, 320 N.J. Super. 90, 98-99, 726 A.2d 983 (Ch. Div. 1998)). Moreover, "the public policy of the State is in favor of the custodial taking of abandoned or unclaimed property by the State Treasurer …. [B]ecause of the remedial effect of the custodial scheme, the prevailing custodial statutes have been given a liberal interpretation in favor of the State and as to the position of any stakeholder or obligor." *Id.* at 67 (quoting *Safane v. Cliffside Park Borough*, 5 N.J. Tax 82, 88 (1982) (internal citations omitted)).

Here, by arguing that the State has insufficient information to reunite owners with their unclaimed travelers checks, Amex is impermissibly challenging New **[581]** Jersey's general right to escheat travelers checks because the abandonment period is irrelevant to whether the State has possession of the names and address of the owners. Stated differently, if the State does not have any information pertaining to the travelers checks at the three-year period, it certainly would not have any more information after fifteen years. Therefore, the ability of the State to reunite the abandoned property at three years or fifteen years is directly dependent upon the information provided by the holder, or Amex, in this case.

Indeed, on this motion, Amex has not provided sufficient information for the Court to determine how the transfer of unclaimed travelers checks to the State will in fact occur, and thus, whether the State will have sufficient information to be able to reunite the unclaimed checks with their rightful owners. Regardless, the ability of the State to reunite property with its owner has

little bearing on the time frame when the State determines to escheat. Rather, as declared by the New Jersey Supreme Court, the Unclaimed Property Act is remedial legislation which should be given a liberal construction in favor of protecting property owners. Therefore, since the State's ability to escheat is rooted in consumer protection, the State is a better custodian for abandoned property than any private holder. Accordingly, Amex's argument in this respect also fails to show how it would succeed on its substantive due process claim.

Likewise, the Court does not find that Amex will succeed with its contention that the enactment of Chapter 25 fails the rational basis test because it serves as a revenue generating measure for New Jersey. In support of its argument, Amex cites extensively to *Hollenbach*, wherein the district court struck down a Kentucky statute that shortened the presumptive abandonment period for travelers checks to seven years. *Id.* Specifically, the court there found on a summary judgment motion that, because the state legislature enacted the abandoned property law as an effort to raise revenue, "[c]omplete deference to a legislative assessment of reasonableness and necessity is not appropriate [where] the State's self-interest is at stake." *American Exp. Travel Related Services Co., Inc. v. Hollenbach*, 630 F. Supp. 2d 757, 763 (E.D. Ky. 2009). The Kentucky court relied upon *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 25-26 (1977), for its determination. However, that Supreme Court case dealt with Contract Clause allegations where a state itself is a contracting party. This Court finds no basis to import the heightened scrutiny standard, delineated in *U.S. Trust Co.*, to the substantive due process claim here. Moreover, the *Hollenbach* court found conclusively that the only rea-

son the legislature in Kentucky passed the measure to shorten the presumptive abandonment period for travelers checks was to raise revenue. *Hollenbach*, 630 F. Supp. 2d at 764. On the other hand, in this case, while revenue raising appears to have been a consideration in enacting Chapter 25, it was not the only conceivable basis.

Furthermore, as stated previously, by operation of law, the State enjoys the right to transfer a percentage of unclaimed property into the General State Fund, and that fund is held in a fiduciary capacity with interest accruing to the rightful owner. While Amex acknowledges that it uses the purchaser's property for its own private gain until the checks are redeemed, the difference is that the State holds and uses the money for the public's interest. As the Supreme Court has explained, when states serve as custodians of abandoned property, "[s]uch property thus escapes seizure by would-be possessors and **[582]** is used for the general good rather than for the chance enrichment of particular individuals or organizations." *Standard Oil v. New Jersey*, 341 U.S. 428, 436 (1951); *Commonwealth of Mass. v. FDIC*, 102 F.3d 615, 618 (1st Cir. 1996) (Massachusetts' abandoned property laws "enacted both to protect the rights of the true owners when and if they appear and to bring additional revenues to the Commonwealth's treasury"); *Travelers Express Co. v. Minnesota*, 664 F.2d 691, 695 (8th Cir. 1981) (preference established in Uniform Act for Disposition of Unclaimed Property for "adopting state's use of the unclaimed fund over possession by the fortuitous holder"). Accordingly, the mere fact that New Jersey generates revenue by es-

cheating abandoned property does not run afoul of any substantive due process safeguards.[12]

Finally, Amex argues that because New Jersey's Money Transmitter law, N.J. S.A. 17:15C-2, *et seq.*, requires Amex to invest the proceeds from the sale of travelers checks in a safe and secure permissible investment, there is no rational basis upon which the Legislature could have concluded that it needed to seize the uncashed checks in order to protect consumers.[13] In **[583]** this argument, Amex invites the Court

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[12] Amex further suggests that the shortened abandonment period in Chapter 25 will not raise any revenue for the state. It reasons that because 90% of the uncashed travelers checks after three years will be cashed before the 15-year mark, and 80% will be cashed thereafter, it would be neither "prudent" nor "advisable" for Defendants to transfer any but a minute percentage of the additional funds received as a result of Chapter 25 to the General Fund, and transferring more than a minute amount, Amex argues, would be a violation of N.J.S.A. 46:30B-74. The Court refuses to determine as a constitutional issue how the State will allocate its funds; that determination is not properly before the Court. Moreover, whether the State will generate revenue from escheating travelers checks is irrelevant to the Court's rational basis review. Instead, the Court's focus is whether there is a rational basis in enacting Chapter 25.

[13] The NJ Money Transmitter Law defines "money transmitter" as

> "Money transmitter" means a person who engages in this State in the business of:
>
> (1) the sale or issuance of payment instruments for a fee, commission or other benefit;
>
> (2) the receipt of money for transmission or transmitting money within the United States or to locations abroad by any and all means, including but not limited to

> payment instrument, wire, facsimile, electronic transfer, or otherwise for a fee, commission or other benefit; or
>
> (3) the receipt of money for obligors for the purpose of paying obligors' bills, invoices or accounts for a fee, commission or other benefit paid by the obligor.

N.J.S.A. 17:15C-2. The statute defines "payment instrument" as:

> any check, draft, money order, travelers check or other instrument or written order for the transmission or payment of money, sold or issued to one or more persons, whether or not the instrument is negotiable.

N.J.S.A. 17:15C-2. The statute requires that funds equal to the full outstanding balance of travelers checks sold be invested in "permissible investments":

> a. Each licensee shall at all times possess a surety bond, irrevocable letter of credit or such other similar security device acceptable to the commissioner in the amount required pursuant to section 8 of this act.
>
> b. Each licensee shall at all times possess permissible investments having an aggregate market value, calculated in accordance with generally accepted accounting principles, of not less than the aggregate face amount of all outstanding payment instruments issued or sold by the licensee in the United States. This requirement may be waived by the commissioner if the dollar volume of a licensee's outstanding payment instruments does not exceed the bond or other security devices posted by the licensee pursuant to section 8 of this act.
>
> c. In the event of bankruptcy of the licensee, permissible investments, even if commingled with other assets of the licensee, shall be deemed to be held in trust for the benefit of the purchasers and holders of the licensee's outstanding payment instruments by operation of law.

N.J.S.A. 17:15C-6. Under the statute, "permissible investments" include cash, certificates of deposit, bills of exchange, any investment which is rated in one of the three highest rating categories, investment securities, shares in a money market mutual fund, de-

to second-guess the Legislature's decision to provide broader protection for the State's consumers by pointing to a statutory scheme that also provides consumer protection. The Court does not find that the Money Transmitter Statute negates the State's effort of affording broader protection to property owners by enacting Chapter 25. Indeed, according to Defendants, the regulatory and licensing provisions under the Money Transmitter Statute do not fully eliminate the risks and concerns of a holder's financial status. It is therefore rational for the Legislature to determine that by shortening the presumptive abandonment period consumers would be better protected.

Amex submits that, if the State is permitted to shorten the presumptive abandonment period, it may cease selling travelers checks in New Jersey in light of the sharp decrease in profits that it will suffer. In Amex's view, Chapter 25 was enacted for the sole purpose of raising revenue for the State at Amex's expense. Based on the record before the Court and the lack of legislative history, it appears that a primary aim of Chapter 25 was to increase the State's coffers. While the Court finds the purpose troubling, especially as compared to the conventional purpose of escheat legislation, which is to reunite owners with their abandoned property, nonetheless, so long as revenue raising was not the only basis for this legislation, it is not the Court's role to decide whether the Legislature's judgment is sound. Rather, the Court's substantive due

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mand borrowing agreements made to a corporation, receivables which are due to a licensee from its authorized delegates pursuant to a contract and any other investments authorized by the commissioner. *See* N.J.S.A. 1715C-2.

process inquiry is limited to whether the State has put forth a *conceivable* rational basis for its action. The Court has already so found in this Opinion. Thus, having considered Amex's arguments, the Court does not find that Amex has established a likelihood of success on its substantive due process claim.

2. Contract Clause

Similarly, Amex has failed to show a likelihood of success with respect to its Contract Clause claim. Amex submits that it has a binding contractual relationship with its purchasers, and that relationship provides a contractual right for Amex to invest the proceeds from the sale of the travelers checks from the date of sale until the travelers checks are cashed, or under the current law, until the checks are escheated by the State in fifteen years. In that respect, Amex argues that the 15-year abandonment period is an implied term in the contract upon which Amex relies for its business model.[14] However, contrary to well-settled law, Amex erroneously argues that it has the contractual right to invest the proceeds, and apparently, for some defined period of time.

While there are no cases directly on point with respect to whether a seller of travelers checks has a contractual right to invest the proceeds, the Court finds that cases that have dealt with bank deposits are applicable in this discussion, particularly since Amex analogized the sale of **[584]** travelers checks to a bank deposit. The Supreme Court long ago stated that

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[14] The Court notes that Amex's TCs do not expressly set forth on the checks any contractual term that reflects Amex will invest the proceeds of the TCs.

> the contract of deposit does not give the banks a tontine right to retain the money in the event that it is not called for by the depositor. It gives the bank merely the right to use the depositor's money until called for by him or some other person duly authorized. If the deposit is turned over to the state in obedience to a valid law, the obligation of the bank to the depositor is discharged.

Security Sav. Bank v. California, 263 U.S. 282, 286 (1923). Accordingly, "[a] state law requiring a bank, through appropriate procedure, to pay over such deposits, when long unclaimed, to the State as depositary or by way of escheat, violates no right of the bank under the contract clause of the Constitution or the due process clause of the Fourteenth Amendment, since the bank's contracts with the depositors merely give it the use of the money until called for by proper authority, and payment to the State in obedience to a valid law discharges its obligation to them." *Id.* at 282. Indeed, the Supreme Court reaffirmed this principle in *Anderson Nat'l Bank v. Luckett*, 321 U.S. 233, 242-43 (1944). The Court stated that "since the bank is a debtor to its depositors, it can interpose no due process or contract clause objection to payment of the claimed deposits to the state, if the state is lawfully entitled to demand payment" because, once transferred to the state, the bank is no longer liable as a debtor. *Id.* In other words, a state's ability to escheat ordinarily does not violate the Contract Clause in this context.

Nevertheless, Amex argues that the 15-year abandonment period, which was in effect prior to the enactment of Chapter 25, is an implied term of the contractual relationship between Amex and its customers and cannot be impaired retroactively. The Court rejects

Amex position at this stage for several reasons. First, while in a Contract Clause analysis, the expectations of the parties to the contract and reliance upon state law at the time of the contract play a role in determining the substantiality of the contractual impairment, an important factor in determining the parties' expectations is whether the parties were operating in a regulated industry. *Mercado-Boneta v. Administracion del Fondo de Compensacion al Paciente*, 125 F.3d 9, 13 (1st Cir. 1997) (citing *Energy Reserves*, 459 U.S. at 416). Here, New Jersey has been consistently regulating the sale of travelers checks, *e.g.*, New Jersey's Money Transmitter Law and Uniform Commercial Code, and unclaimed property. Therefore, because Amex was operating in a regulated industry, it could have readily foreseen future changes in regulation involving the subject matter of its contract. *See, e.g.*, *United States Trust*, 431 U.S. at 19 n.17 ("[t]he parties may rely on the continued existence of adequate statutory remedies for enforcing their agreement, but they are unlikely to expect that state law will remain entirely static. Thus, a reasonable modification of statutes governing contract remedies is much less likely to upset expectations than a law adjusting the express terms of an agreement"). As such, Amex's expectations under the contract may not have been significantly affected. *See Energy Reserves*, 459 U.S. at 411.

Second, Amex is correct in contending that the obligations of a contract have been regarded as including not only the express terms but also the contemporaneous state law relating to the contract. However, not all "state regulations are implied terms of every contract entered into while they are effective, especially when the regulations themselves cannot be **[585]** fairly interpreted to require such incorporation." *General Motors*,

503 U.S. at 189. For the most part, "state laws are implied into private contracts regardless of the assent of the parties only when those laws affect the validity, construction, and enforcement of contracts." *Id.* (citing *United States Trust Co.*, 431 U.S. at 19, n.17). The Supreme Court in *General Motors* elaborated on this principle:

> While it is somewhat misleading to characterize laws affecting the enforceability of contracts as "incorporated terms" of a contract, *see* 3 A. Corbin, Contracts § 551, pp. 199-200 (1960), these laws are subject to Contract Clause analysis because without them, contracts are reduced to simple, unenforceable promises. "The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other …. If any subsequent law affect to diminish the duty, or to impair the right, it necessarily bears on the obligation of the contract." *McCracken v. Hayward*, 43 U.S. 608, 2 How. 608, 612, 11 L. Ed. 397 (1844). *See also* [*Von Hoffmann v. City of Quincy*, 71 U.S. 535, 4 Wall. 535, 550, 18 L. Ed. 403 (1867)]. A change in the remedies available under a contract, for example, may convert an agreement enforceable at law into a mere promise, thereby impairing the contract's obligatory force. *See Sturges v. Crowninshield*, 17 U.S. 122, 4 Wheat. 122, 197-198, 4 L .Ed. 529 (1819); *Edwards v. Kearzey*, 96 U.S. 595, 601, 24 L. Ed.

> 793 (1878). For this reason, changes in the laws that make a contract legally enforceable may trigger Contract Clause scrutiny if they impair the obligation of pre-existing contracts, even if they do not alter any of the contracts' bargained-for terms. *See, e.g.*, *Von Hoffman v. City of Quincy*, *supra* (repeal of tax designed to repay bond issue); *Bronson v. Kinzie*, 42 U.S. 311, 1 How. 311, 316, 11 L. Ed. 143 (1843) (law limiting foreclosure rights); *McCracken*, *supra*, at 611-614 (same).

General Motors, 503 U.S. at 189-190. Contrary to Amex's suggestion, it is clear from the forgoing Supreme Court discussion that the State's escheat laws do not relate to the "validity, construction, and enforcement" of the sales contract of travelers checks, nor do they impair the obligations of preexisting contracts. Amex's reliance on *Nieves* is misplaced because *Nieves* predates *General Motors*, which then calls into question *Nieves*' analysis on implied contract under the Contract Clause. Moreover, the retroactive amendment to Virgin Island's Worker Compensation Act at issue in *Nieves* exposed employers to significant tort liability. At the time the employer entered into employment contracts, the employer relied on state law which did not impose such a liability. Consequently, the subsequent amendment altered the obligations of the employer under its existing contracts. *Nieves*, 819 F.2d at 1248 ("Hess' expectation that its contracts of employment with its borrowed employees, albeit implied, were covered under the Workmen's Compensation Act was not unreasonable. The retroactive application provision, by completely destroying this expectation, represents a substantial impairment of Hess' contractual expectations."). Contrary to the amendment in *Nieves*,

while Amex might realize less profits than it had expected at the time it issued travelers checks, the State's escheat laws only seek to claim travelers checks that have been presumed abandoned; this type of regula- [586] tion does not alter the parties' contractual obligations, implicitly or explicitly, nor does it subject Amex to any liability.

Third, and finally, while it is true that the terms to which the contracting parties give assent may be express or implied in their dealings, *see Nieves*, 819 F.2d at 1243, the contracting parties have to manifest assent to the implied terms of the contract. *General Motors*, 503 U.S. at 188. On this motion, Amex has not shown that the previous purchasers of travelers checks have assented to, or were even aware of, the fact that Amex had an investment period of at most 15 years for the proceeds of travelers checks. Without such a showing, Amex's reliance on the Uniform Property Act and its expectation thereof is merely unilateral. Accordingly, Amex has not shown that it will likely succeed on its Contract Clause claim. Because the Court finds that there is no substantial impairment, the Court need not engage in an analysis of the remaining factors.

3. Takings Clause

The first inquiry this Court must make in a takings analysis is to determine whether Amex has a property right in the opportunity to invest proceeds from the sale of travelers checks. As a preliminary matter, the Court stresses that there is no dispute that New Jersey has the power to escheat. *See Delaware v. New York*, 507 U.S. 490, 497 (1993) ("[s]tates as sovereigns may take custody of or assume title to abandoned personal property as *bona vacantia*."). Indeed, Plaintiffs concede that the State has the right to escheat and that

power does not run afoul of the Constitution. Rather, Amex maintains that it has a constitutional right in the opportunity to invest the proceeds from the sale of its travelers checks. Relying on *Hollenbach*, Amex reasons that it should enjoy a property interest in the funds generated when a customer purchases a traveler's check because, like a bank deposit that becomes the property of the bank, the purchase money passes to Amex until the check is cashed. Having reviewed the relevant state law and authority on this issue, the Court finds that Amex has failed to satisfy its burden of showing that it will succeed on the merits with regard to its assertion that it has a constitutional right to invest in the proceeds from the sale of travelers' checks.

The Court's inquiry begins with state law. Pursuant to N.J.S.A. 12A:3-104(i), "'Traveler's check' means an instrument that is payable on demand, is drawn on or payable at or through a bank, is designated by the term 'traveler's check' or by a substantially similar term, and requires, as a condition to payment, a countersignature by a person whose specimen signature appears on the instrument." N.J. S.A. 12A:2-104(i). In that regard, a travelers check is essentially an unconditional promise to pay by the issuer when presented with the check document. *See* N.J.S.A. 12A:3-106(c). Chapter 25 does not change the legal relationship between the purchaser, as the "owner" of "any sum payable on a travelers check," and Amex, the "issuer" of the instrument. N.J.S.A. 46:30B-11. An "owner," in turn, is defined as a "creditor, a claimant, or payee in the case of other tangible property." N.J.S.A. 46:30B-6(k). Importantly, there are no New Jersey statutory provisions that expressly provide whether Amex retains a property interest in the proceeds until an owner, the purchaser of the travelers' check, redeems

the check. Additionally, the Court's research did not reveal any statute or case law, in New Jersey or otherwise, that expressly provides that Amex retains a property interest in the proceeds from the sale of travelers checks **[587]** until they are either cashed or presumed abandoned; neither did Amex provide the Court with any conclusive authority on this issue, except for the *Hollenbach* decision.

In *Hollenbach*, the court in a cursory analysis found that "a purchase of a traveler's check is, in effect, a deposit with the financial institution issuing the check." *Id.* at 761. "The relationship between a bank and depositor is that of a debtor and creditor. The bank then retains an interest in those funds until the money is claimed by the creditor." *Id.* For such a proposition, the *Hollenbach* court relied on Kentucky state and Supreme Court cases, which this Court finds do not support the *Hollenbach* court's decision in this respect.

Rather, I find guidance in the Supreme Court's decision in *Delaware*. The Court begins with *Delaware*'s proposition that

> [f]unds held by a debtor become subject to escheat because the debtor has no interest in the funds—precisely the opposite of having "a claim to the funds as an asset." We have recognized as much in cases upholding a State's power to escheat neglected bank deposits. Charters, bylaws, and contracts of deposit do not give a bank the right to retain abandoned deposits, and a law requiring the delivery of such deposits to the State affects no property interest belonging to the bank. *Security Savings Bank v. California*, 263 U.S. 282, 285-286 (1923); *Provident Institution for Savings v.*

> *Malone*, 221 U.S. 660, 665-666 (1911). Thus, "deposits are debtor obligations of the bank," and a State may "protect the interests of depositors" as creditors by assuming custody over accounts "inactive so long as to be presumptively abandoned." [*Anderson Nat. Bank*, 321 U.S. at 241] (emphasis added). Such "disposition of abandoned property is a function of the state," a sovereign "exercise of a regulatory power" over property and the private legal obligations inherent in property. [*Standard Oil Co.*, 341 U.S. at 436, 71 S.Ct. 822].

Delaware, 507 U.S. at 502. Here, because the "owner" of the travelers checks, or the purchaser, retains the property interest in the travelers checks, it would appear that Amex cannot assert any constitutional right to funds generated by the sale of travelers checks; Amex has not shown that any profits made by investing the funds for any given period of time would rise to a property interest under the Constitution. Hence, the Court finds that Amex has not shown that there is a likelihood that it can establish it enjoys a property interest in investing the proceeds of travelers checks—for any specified period of time—and therefore, it would not likely succeed on its takings claim.

B. Stored Value Cards

1. Preemption under Federal CARD Act

The Electronic Fund Transfers Act, 15 U.S.C. § 1693 *et seq.* ("EFTA") is a law establishing "the basic rights, liabilities, and responsibilities of consumers who use electronic fund transfer services and of financial institutions that offer these services." 12 C.F.R. § 205.1(b). "The primary objective of the [EFTA] … is

the protection of individual consumers engaging in electronic fund transfers." *Id.*

Preceding the enactment of the Credit Card Accountability, Responsibility and Disclosure Act of 2009 ("CARD Act"), SVCs were not covered by the EFTA. *See* 15 U.S.C. § 1693, *et seq.* (2006); 10A Hawkland U.C.C. Series § 2:20. The Federal Reserve initially reasoned that SVCs need not be regulated by federal law because such cards "may only be used for limited purposes or on a short-term basis, [588] and … may hold minimal funds." Electronic Fund Transfers, 71 Fed. Reg. 51437-01, 2006 WL 2480319 (F.R.) (August 30, 2006). Nonetheless, Congress passed the CARD Act in 2009 in response to concerns that consumers were being taken advantage of by credit and gift card issuers. *See* H.R. 627, Credit Cardholders' Bill of Rights Act of 2009, H.Rep. 111-88 at 9-10 (Apr. 27, 2009) (detailing credit card issuer abuses); S.414, Credit Card Accountability Responsibility and Disclosure Act of 2009, S.Rep. 111-16 (May 4, 2009) (describing dormancy, inactivity, and other fees as well as expiration dates of less than five years as "unfair or deceptive acts").[15] Congress, further, directed that Federal Reserve regulations "take into consideration current and future needs and methodologies for transmitting and storing value in electronic form." 31 U.S.C. § 5311 (Note).

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[15] H.R. 627 ultimately became the Credit Card Accountability Responsibility and Disclosure Act of 2009, but contained no gift card provisions. S. 414 is not designated as formally having become part of the CARD Act; however, it is designated as a bill related to H.R. 627 and otherwise appears to be the basis for the CARD Act's gift card provisions. *See* Duncan B. Douglass, *Credit Card Accountability, Responsibility and Disclosure Act of 2009 Becomes Law*, 126 Banking L.J. 691 n. 2 (2009).

The CARD Act explicitly precludes SVC issuers from issuing SVCs with an expiration date of less than five years unless certain conditions are met:

> it shall be unlawful for any person to sell or issue a gift certificate, store gift card, or general-use prepaid card that is subject to an expiration date … [unless] the expiration date is not earlier than 5 years after the date on which the gift certificate was issued, or the date on which card funds were last loaded to a store gift card or general-use prepaid card; and … the terms of expiration are clearly and conspicuously stated.

15 U.S.C. § 1693*l*-1(c); *see* 12 C.F.R. 205.20(e).[16]

Importantly, the EFTA explicitly bars any state laws "relating to electronic fund transfers, except to the extent that those laws are inconsistent with the provisions of this subchapter, and then only to the extent of the inconsistency." 15 U.S.C. § 1693q. However, the FCRA clarifies, "[a] State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection afforded by this subchapter." *Id.* Hence courts that have analyzed whether section 1693q preempts a state law have queried whether the state law affords greater protection to the consumer. *See e.g.*, *Stegall v. Peoples Bank of Cuba*, 270 S.W.3d 500, 505 (Mo. App. S.D. 2008); *Grillasca v. Amerada Hess Corp.*, No. 8:05-cv-

[16] The parties agree that the CARD Act covers the SVCs issued by the SVC Plaintiffs in this case. Indeed, the definitions of the Act specify that "general-use prepaid card[s]," redeemable at multiple locations, and "store gift card[s]" are covered by the Act. 15 U.S.C. § 1693*l*-1(a)(2).

1736-T-17TGW, 2006 WL 3313719, *3 (M.D. Fla. Nov. 14, 2006).

Federal Reserve Board ("FRB") regulations, authorized by the CARD Act, suggest circumstances in which the Board would consider a state law inconsistent with the CARD Act. *See* 15 U.S.C. § 1602 (granting Federal Reserve authority to issue rules to carry out the CARD Act). Relevant here is FRB's statement that a state law will be deemed inconsistent with the requirements of the CARD Act if it "[r]equires or permits a practice or act prohibited by the federal law …." 12 C.F.R. § 205.12(b)(1) (emphasis added). The FRB regulations, further, permit states to apply for an exemption of "any **[589]** class of electronic fund transfers within the state" from the EFTA. 12 C.F.R. § 205.12(c)(1). Such an exemption may be granted where "[u]nder state law the class of electronic fund transfers is subject to requirements substantially similar to those imposed by the federal law; and [t]here is adequate provision for state enforcement." *Id.*

Finally, for those card issuers that choose to issue cards with an expiration date, they must also comply with regulations requiring that specific disclosures be made on the card. Of import here are the disclosures relating to what occurs when a gift card (*i.e.*, the tangible item) expires, but the underlying funds are still available. The disclosure must specify that:

> [t]he certificate or card expires, but the underlying funds either do not expire or expire later than the certificate or card, and; [t]he consumer may contact the issuer for a replacement card; and [n]o fee or charge is imposed on the cardholder for replacing the gift certificate, store gift card, or general-use prepaid card or for

> providing the certificate or card holder with the remaining balance in some other manner prior to the funds expiration date, unless such certificate or card has been lost or stolen.

12 C.F.R. 205.20(e)(3)-(4). In other words,

> [w]hen it comes to expiration dates, a consumer has to contend with two different issues. First, the card or certificate itself can expire. Second, the consumer must often spend the funds represented by the card or certificate by a certain date. Complicating matters, the two dates do not have to coincide.

Stephen Veltri, et al., *Payments*, 65 Bus. Law. 1241 (Aug. 2010).

Despite this apparent incongruency between the expiration date for the card itself and the underlying funds, the regulations adopt a rather simple scheme to handle the differing expiration dates. Under 12 C.F.R. 205.20(e), the consumer has five years to spend the funds on the card even if the card itself expires and needs to be replaced. *Id.* And, the issuer may not charge the consumer to replace the card itself. This regulation does not apply, however, if the card has been lost or stolen. Noticeably, the regulation makes no mention of what occurs if the card has been presumptively abandoned under an escheat statute.

Plaintiffs argue that Chapter 25 is preempted under the doctrine of implied conflict preemption. "Implied conflict preemption occurs when it is either impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Kurns v.*

A.W. Chesterton Inc., 620 F.3d 392, 395 (3d Cir. 2010) (internal quotations and citation omitted); *accord Farina v. Nokia Inc.*, 625 F.3d 97, 115 (3d Cir. 2010). Courts must "consider 'the entire scheme of the … statute' and identify 'its purpose and intended effect.' Only then can [courts] determine whether the opposing state law presents a 'sufficient obstacle' such that it requires preemption." *Deweese v. National R.R. Passenger Corp.*, 590 F.3d 239, 246 (3d Cir. 2009) (internal citation omitted).

As recently reiterated by Third Circuit in *Farina*, a court must focus its preemption inquiry on both congressional intent, and the structure and purpose of the federal statute:

> In every preemption case, our inquiry is guided by two principles. First, the intent of Congress is the "ultimate touchstone" of preemption analysis. In discerning this intent, we look not only to Congress's express statements, but also **[590]** to the "structure and purpose of the statute as a whole …."

625 F.3d at 115 (internal citations omitted). Importantly, a court must consider not only the structure and purpose "as revealed … in the [statutory] text, but [also] through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." *Id.*

In connection with its issuance of the final CARD Act regulations, the Federal Reserve Board responded to concerns that state escheat laws may conflict with the CARD Act:

> State escheat laws vary significantly. For example, the number of years that may elapse before an issuer must remit funds to the state differs among the states. Moreover, some state laws do not require an issuer of gift certificates or gift cards to remit remaining funds to the state in certain circumstances. *Some states may also provide a process through which an issuer may recover funds previously escheated to the state in the event the issuer subsequently honors a consumer's claim to funds.* As such, the Board believes it is not feasible or prudent to make a preemption determination that applies generally to all states.

75 FR 16580-01 (emphasis added). The Federal Reserve further noted that, per its regulations, it will issue its own determination as to preemption upon request.[17] *See id.*

The SVC Plaintiffs place great weight on the Federal Reserve comment, suggesting that the comment

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[17] In this connection, the State suggests that any preemption determination must be made by the FRB in the first instance. I disagree. While 12 C.F.R. § 205.12(b) provides that "[t]he Board shall determine, upon its own motion or upon the request of a state … whether the act and this [regulation] preempt state law ….," the FRB's Official Staff Interpretation notes "[a] state law that is inconsistent may be preempted *even if the Board has not issued a determination*." 12 CFR Pt. 205, Supp. I (Aug. 22, 2010) (emphasis added). And, "[u]nless demonstrably irrational, Federal Reserve Board staff opinions construing the Act or Regulation should be dispositive …." *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980). More to the point, the State has not pointed to any provision in the EFTA that divests federal courts of jurisdiction to hear preemption challenges.

supports their position that state escheat laws may be preempted by the CARD Act. To the extent the SVC Plaintiffs suggest that this Court should defer to the Federal Reserve's comment as an agency interpretation of the CARD Act, the Court agrees that such agency deference is appropriate. *See Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980) (applying Chevron deference to FRB interpretation of a statute); *Clemmer v. Key Bank Nat. Ass'n*, 539 F.3d 349, 351 (6th Cir. 2008) ("The EFTA grants to the Board of Governors of the Federal Reserve System … the authority and responsibility to 'prescribe regulations to carry out the purposes' of the act.") (quoting 15 U.S.C. § 1693b(a)).[18] "[C]on- **[591]** siderable respect is due the interpretation given a statute by the officers or agency charged with its administration …." *Ford Motor Credit*, 444 U.S. at 565 (internal quotation marks and

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[18] The Supreme Court, in *Household Credit Services, Inc. v. Pfennig*, 541 U.S. 232 (2004), reiterates the *Chevron* deference applicable to the Federal Reserve Board:

> [I]n determining whether [the FRB's] interpretation of [statutory] text is binding on the courts, we are faced with only two questions. We first ask whether 'Congress has directly spoken to the precise question at issue.' *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). If so, courts, as well as the agency, 'must give effect to the unambiguously expressed intent of Congress.' *Id.*, at 842-843, 104 S.Ct. 2778. However, whenever Congress has 'explicitly left a gap for the agency to fill,' the agency's regulation is 'given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute.' *Id.*, at 843-844, 104 S.Ct. 2778.
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> *Id.* at 239.

alterations omitted). Moreover, the SVC Plaintiffs are correct in deducing from the Federal Reserve's comment that state escheat laws *may* be preempted. However, the mere possibility of preemption does not end the inquiry. By stating that "it is not feasible or prudent to make a preemption determination that applies generally to all states," the Federal Reserve made clear its view that state escheat laws must be analyzed on a statute-by-statute basis.

Turning to the New Jersey statute at bar, it is theoretically possible for an issuer subject to New Jersey's escheat law to comply with both the escheat law and the CARD Act by honoring the gift card and then seeking reimbursement from the State. *See* N.J.S.A. 46:30B-42.1d ("Nothing in this section shall be construed to prevent an issuer from honoring a stored value card, the unredeemed value of which has been reported to the State Treasurer pursuant to R.S.46:30B-1 et seq., and thereafter seeking reimbursement from the State Treasurer pursuant to R.S.46:30B-62.") Indeed, this is what the Federal Reserve intimates when it noted "[s]ome states may also provide a process through which an issuer may recover funds previously escheated to the state in the event the issuer subsequently honors a consumer's claim to funds." 75 FR 16580-01.

Conceivably, there is a preemption problem in that Chapter 25 permits issuers to decline to honor escheated gift cards after the two-year abandonment period but before the CARD Act's five-year expiration-date limit.[19] Although the statute does not "prevent an

[19] The Court clarifies here that there is a New Jersey statute that specifically addresses expiration dates for gift cards. "New

issuer from honoring a stored value card," it also does not *require* an issuer to honor the card. *Clymer*, 171 N.J. at 63 ("[U]pon delivery of the unclaimed property to the Treasurer, a holder is fully and unconditionally relieved of all liability concerning the property.") (citing N.J.S.A. 46:30B-61). Were an issuer to refuse to honor the gift card, that could frustrate the purposes of the CARD Act by making it more difficult for a purchaser to redeem his or her card in the two-to-five-year time frame. The purchaser would be required to somehow seek reactivation of the gift card through the unclaimed property division of the State, and it is unclear from the record how that would take place. Moreover, purchasers with small balances, such as $25 or less, would not likely bother to seek reactivation of the escheated card. On the other hand, the State argues, Chapter 25 affords consumers greater protection because, once the funds are taken into custody by the State, a consumer may recover his or her funds in perpetuity. Furthermore, the Act does not prevent an issuer from honoring the gift card after escheatment to the State.

[592] In my view, Chapter 25 affords consumers greater protection than that provided by the CARD Act's expiration provision. While the CARD Act prevents issuers from expiring a card prior to the five-year limitation date, Chapter 25 imposes no time restriction

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Jersey's Gift Certificate Act ("GCA") supplements the CFA by establishing the standard for unlawful conduct in terms of gift certificates. N.J. Stat. Ann. § 56:8-110. The GCA provides that a gift certificate or gift card may not expire within 24 months immediately following the date of sale. *Id.* § 56:8–110(a)(1)." *Shelton v. Restaurant.com Inc.*, Civil Action No. 10-0824, 2010 WL 2384923, *2 (D.N.J. Jun. 15, 2010).

on the consumer's right to recover his or her funds. Moreover, for those SVCs that are redeemable only for goods or services, the effect of Chapter 25 is to convert the value of those cards into 100% cash value. This means that the consumer holding a goods-or-services SVC may receive cash back after the abandonment period—a right the holder did not possess under his or her agreement with the SVC issuer. The right to receive cash back is a form of protection afforded by Chapter 25 that is not afforded, or even addressed, by the CARD Act.

I find this result consistent with the purposes and structure of the CARD Act. The CARD Act was enacted in order protect the interests of the consumer who purchases and uses SVCs. While the CARD Act, and the EFTA generally, set forth the rights and obligations attendant to card issuers, it is, at its core, a consumer protection statute and must be construed with that overarching purpose in mind. *See* 15 U.S.C. § 1693(b) ("The primary objective of [the EFTA] is the provision of individual consumer rights."); 12 C.F.R. § 205.1(b) ("The primary objective of the [EFTA] … is the protection of individual consumers engaging in electronic fund transfers."); *Bank One, Utah v. Guttau*, 190 F.3d 844, 850 (8th Cir. 1999). In addition, the Federal Reserve regulations that direct issuers to honor the underlying funds on a SVC even if the card itself has expired, 12 C.F.R. 205.20(e), buttresses my conclusion that the specific purpose of the CARD Act's five-year expiration date limitation is to ensure that consumers have access to their funds. While Chapter 25 may make it a more cumbersome process for a consumer to access his/her funds once the funds are presumed abandoned, it ultimately provides greater protection to the consumer by ensuring that the funds are available during

the five-year time period and beyond. For these reasons, I conclude that the SVC Plaintiffs have not demonstrated a likelihood of success on the merits of their CARD Act preemption claim.[20]

2. *Texas* Priority Rules

a. Background of Escheat Laws

Many would agree that the new technologies of electronic gift certificates and stored value cards "do not necessarily fit neatly into the present framework for escheatment" enacted by the various states, and created by the Supreme Court in the *Texas* line of cases. Anita Ramasastry, *State Escheat Statutes and Possible Treatment of Stored Value, Electronic Currency, and Other New Payment Mechanisms*, 57 Bus. Law. 475, 477 (2001). For one, the issuers of gift cards and gift certificates have historically not retained the last known address of the purchaser, and have no means of tracking the whereabouts of **[593]** the current recipient/owner of the certificate or card. To be sure, travelers checks may suffer from the same historical infirmity, but with travelers checks there is a specific

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[20] Indeed, this Court's research has revealed only one instance in which the FRB concluded that a state law was preempted. In 1981, the FRB determined that a Michigan state law was inconsistent with and less protective of the consumer than the federal law because it "place[d] liability on the consumer for the unauthorized use of an account in cases involving the consumer's negligence" whereas "[u]nder the federal law, a consumer's liability for unauthorized use is not related to the consumer's negligence and depends instead on the consumer's promptness in reporting the loss or theft of the access device." 12 CFR Pt. 205, Supp. I (Aug. 22, 2010). Two other provisions of the Michigan law were preempted because they were likewise inconsistent and less protetive of the consumer's interests. *Id.*

federal statute establishing a priority scheme. 12 U.S.C. § 2503. No such provision has been enacted for SVCs.

The second complexity related to the escheatment of gift cards or certificates is how to define their value. While some prepaid cards (i.e., open loop cards) can be used like cash at numerous locations, others may be redeemed only for goods or merchandise. The escheatment framework must contend with how to value this latter group of cards, and whether to impose upon issuers the obligation to turn over to the state the full face value of the card with the prospect of losing the profits in the event the owner never attempts to redeem his gift card or reclaim his funds from the escheating state. The UUPA provides for the escheat of gift certificates, "but if redeemable in merchandise only, the amount abandoned is deemed to be [60] percent of the certificate's face value," UUPA § 2(6) (1995); however, states have taken various approaches to valuing merchandise-based SVCs for escheatment purposes.

Professor Anita Ramasastry aptly explains the conundrum posed by the escheatment of merchandise and service based SVCs:

> The question then arises as to whether there is property to escheat. If the originator of an electronic instrument or stored value card has an obligation to the owner to redeem unused value, the originator would be deemed a "holder" of unclaimed property and should fall under a state escheat statute's general provision. For example, if a stored value card represents cash that can be converted back into cash upon demand, the unused funds should be deemed reportable and subject to escheatment.

> A stored value card that does not require an obligation to redeem the unused value into cash, however, would not be abandoned property. Although there may be value on the card, there is no "property" to escheat.

Id. at 477. Of course, as *Texas* directs, state law determines the contours and terms of the debtor-credit relationship in the SVC context. So, the question posed by the author in this passage—whether there is any "property" to escheat—must be resolved in this case by turning to New Jersey state law.

As noted, New Jersey did not initially include gift certificates in its unclaimed property act, *see In re November 8, 1996*, 309 N.J. Super. at 277-79, even though the 1995 Uniform Unclaimed Property act includes gift certificates in its definition of intangible property. The Appellate Division noted in *In re November 8*, that several states had specifically excluded gift certificates from their unclaimed property statutes, or chose to value them at less than face value in order to compensate for the issuer's profit. For example, and as noted *infra*, Arizona's unclaimed property act provides that "Property does not include … property that is referred to or evidenced by gift certificates, electronic gift cards, non-refundable tickets, certificates evidencing property denominated in value other than a currency, including prepaid phone cards, frequent flyer miles, stored value cards, and merchandise points." A.R.S. § 44-301(15). Other states likewise exempt gift cards or gift certificates redeemable for only goods or services from escheat. *See e.g.*, Ark. Stat. Ann. § 18-28-201(13)(B) (Arkansas); Colo. Rev. Stat. § 38-13-108.4 (Colorado); Conn. Gen. Stat. § 3-73a (Connecticut); Fla. Stat. § 717.1045 (Florida).

[594] More recent compilations of state laws reveal that the lack of uniformity among the states as to how to value gift certificates and gift cards persists. *See generally* National Conference of State Legislatures, Gift Cards and Gift Certificates Statutes and Recent Legislation, http://www.ncsl.org/default.aspx?tabid=12474 (visited Nov. 11, 2010) (last updated September 3, 2010). Several states escheat gift cards, including Delaware, Del. Code Ann. tit. 12, § 1197, *et seq.*, and Georgia, Ga. Code § 44-12–205, *inter alia*. Of those states, several escheat at full face value. *See e.g.*, Alaska Stat. § 34.45.240 (Alaska); D.C. Code Ann. § 41-101, *et seq.* (District of Columbia); Hawaii Rev. Stat. § 523A-14 (Hawaii). Others escheat at less than full face value, or only those gift cards exceeding a set dollar amount. Alabama, for example, escheats at 60% value those cards redeemable only for merchandise. Ala. Code § 35-12-72(a)(17). Wyoming escheats only those cards exceeding $100 in value. Wyo. Stat. § 34-24-114 (1993). Recently, one state passed legislation escheating gift cards retroactively. *See* Mich. Comp. Law Ann. § 567.235 (Oct. 5, 2010). And, the gift card escheat laws of some states do not fit neatly into any of the aforementioned categories. *See e.g.*, Cal. Civ. Proc. Code § 1520.5 (exempting gift cards usable with multiple sellers of goods or services); Idaho Code § 14-501(10)(b) (escheating only those gift cards without an expiration date printed on the card).

b. Pullman Abstention and the Treasury Guidances

As an initial matter, the Court must address the legal effect of the Treasury Guidances issued after Chapter 25's enactment. If the Guidances represent a permissible exercise of the Treasury's authority, they will

serve to limit the Court's supremacy clause inquiry under the *Texas* line of cases.

The State urges this Court to abstain, under *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941), from deciding the legal effect of the Guidances that redefine the scope of Chapter 25's escheat rules for SVCs. The Court notes, at the outset, that "[a]bstention from the exercise of federal jurisdiction is, in all its forms, the exception, not the rule." *Muir*, 792 F.2d at 360 (quoting *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813 (1976)) (internal citations omitted). And, "[a] district court has little or no discretion to abstain in a case that does not meet traditional abstention requirements." *Id.* at 361 (citation omitted).

"Pullman abstention … instructs that federal courts should abstain from decision when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided." *Id.* (quoting *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 236 (1984)) (internal quotation marks omitted). Whether a question of state law is unsettled is a legal determination. *Id.* By way of example, "[a] statute is unsettled for Pullman purposes when two of its provisions are contradictory" or it is otherwise ambiguous. *Id.* (quoting *Georgevich v. Strauss*, 772 F.2d 1078, 1090-91 (3d Cir. 1985) (en banc), cert. denied, 475 U.S. 1028 (1986)). Furthermore, "an administrative interpretation of a facially ambiguous state statute will not remove the ambiguity, for *Pullman* purposes." *Id.* at 362 (citing *Anderson v. Babb*, 632 F.2d 300, 306 (4th Cir. 1980)).

[595] Suggesting that the legal effect of the Treasury Guidances is a difficult or unsettled question of

state law, the State argues here that the interplay of the Guidances and Chapter 25 should be determined by the New Jersey courts in the first instance under the *Pullman* abstention doctrine. However, the Third Circuit has held *Pullman* abstention inappropriate in preemption cases: "[A] federal court should not abstain under *Pullman* from interpreting a state law that might be preempted by a federal law, because preemption problems are resolved through a non-constitutional process of statutory construction." *Id.* at 363. *See also New Jersey Payphone Ass'n, Inc. v. Town of West New*, 130 F. Supp. 2d 631, 634 (D.N.J. 2001) (citing *Muir*, 792 F.2d at 361).[21] Because, as explained *infra*, Chapter 25, without the benefit of the Guidances, is facially inconsistent with the *Texas* priority scheme, this Court may not abstain from deciding the legal import of the Treasury Guidances under *Pullman*. *Accord Ayers v. Philadelphia Housing Authority*, 908 F.2d 1184, 1194 n.21 (3d Cir. 1990) (vacating district court's *Pullman* abstention ruling in federal preemption case).

The State, further, argues that *Pullman* abstention is appropriate because the federal preemption question could be resolved by a New Jersey court decision hold-

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[21] Several courts of appeals faced with the issue of whether *Pullman* preemption may apply to preemption claims have reached the same result. *See Fireman's Fund Ins. Co. v. City of Lodi, California*, 302 F.3d 928, 940 (9th Cir. 2002) (holding that; *GTE North, Inc. v. Strand*, 209 F.3d 909, 921 (6th Cir. 2000); *Bath Memorial Hosp. v. Maine Health Care Finance Com'n*, 853 F.2d 1007, 1013 (1st Cir. 1988); *Federal Home Loan Bank Bd., Washington, D.C. v. Empie*, 778 F.2d 1447, 1451 (10th Cir. 1985)). *But see Fleet Bank, Nat. Ass'n v. Burke*, 160 F.3d 883, 893, 893 n.8 (2d Cir. 1998) (suggesting that *Pullman* abstention is appropriate where the plaintiff's preemption claim does not challenge the meaning and application of state law).

ing that the Treasury Guidances were authorized by state law. The Court disagree. The State's argument presumes that the Treasury Guidances render Chapter 25 wholly consistent with the *Texas* priority scheme. But the Treasury Guidance language that implements the *Texas* priority scheme applies only retroactively to those "stored value cards issued prior to the date of [its] announcement"—September 23, 2010. Thus, even if the Treasury Guidance could render the retroactive application of Chapter 25 constitutional, this Court must separately consider the prospective application of the Act. Hence, the Court will not abstain from deciding the validity of the Guidances under the *Pullman* preemption doctrine.

c. Standing

One of Plaintiffs' constitutional challenges is that the Act violates the priority rules established by the Supreme Court in *Texas v. New Jersey*, 379 U.S. 674 (1965), and its progeny, which rules dictate what state is entitled to escheat abandoned, intangible property in the case of a transaction involving more than one state. As explained in *Delaware*,

> [n]o serious controversy can arise between States seeking to escheat tangible property, real or personal, for it has always been the unquestioned rule in all jurisdictions that only the State in which the property is located may escheat. On the other hand, intangible property is not physical matter which can be located on a map, and frequently no single State can claim an uncontested right to escheat such property.

507 U.S. at 497-98 (internal quotation marks and citations omitted).

[596] In order to facilitate resolution of such disputes, the Supreme Court created two priority rules. The first rule provides: "the right and power to escheat the debt should be accorded to the State of the *creditor's last known address* as shown by the debtor's books and records."[22] *Texas*, 379 U.S. at 680-81. This rule is referred to as the "primary rule." Where the creditor's last known address is unknown, or where the last known address is in a state that does not provide for the escheat of the abandoned property, the second priority rule comes into play. *Id.* at 682; *Delaware*, 507 U.S. at 498. That rule, referred to as the "secondary rule," "award[s] the right to escheat to the debtor's State of corporate domicile …." *Texas*, 379 U.S. at 683; *see also Delaware*, 507 U.S. at 498. According to the Supreme Court, these two rules are "the fairest, … easy to apply, and in the long run … the most generally acceptable to all the States." *Texas*, 379 U.S. at 683.

The Supreme Court applied these rules in *Pennsylvania v. New York*, 407 U.S. 206 (1972), a suit brought by the Western Union Company ("Western Union"). In that case, Western Union had not retained the last known address of purchasers of its money orders. Several states "perceived injustice" because the

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[22] A creditor "might be either a payee or a sender: 'the payee of an unpaid draft, the sender of a money order entitled to a refund,' or a payee or sender 'whose claim has been underpaid through error.'" *Delaware*, 507 U.S. at 503 (quoting *Pennsylvania v. New York*, 407 U.S. 206, 213 (1972)). A debtor, in the escheat context, is typically the issuer of a money order, stored value card, or other obligation. *See Id.* at 504. The precise determination of the debtor-creditor relationship depends upon state law. *Id.* at 503-04.

primary rule would rarely apply in light of Western Union's failure to maintain last known addresses, and the secondary rule would often apply, resulting in the abandoned money orders most often escheating to the state of Western Union's domicile. *Id.* at 214. Rejecting the states' argument that an alternate rule should be established, the Supreme Court upheld the two-rule priority scheme, reasoning "the resulting likelihood of a windfall for the debtor's State of incorporation would [not] justify the carving out of an exception to the *Texas* rule[s]." *Id.* at 214.

Relevant here, the plaintiff States in *Pennsylvania* urged the Supreme Court to "define the creditor's residence according to a presumption based on the *place of purchase*," *id.* (emphasis added), because there were numerous money order transactions for which no last known address was kept. The Supreme Court explicitly rejected this proposal, reasoning:

> *Texas v. New Jersey* was not grounded on the assumption that all creditors' addresses are known. Indeed, as to four of the eight classes of debt involved in that case, the Court expressly found that some of the creditors 'had no last address indicated.' Thus, the only arguable basis for distinguishing money orders is that they involve a higher percentage of unknown addresses. But … to vary the application of the Texas rule according to the adequacy of the debtor's records would require this Court to do precisely what we said should be avoided—that is, 'to decide each escheat case on the basis of its particular facts or to devise new rules of law to apply to ever—developing new categories of facts.'

Id. at 214-15 (internal citations omitted); *see also Delaware*, 507 U.S. at 509.

[597] The Supreme Court reaffirmed the immutability of the priority rules a second time in *Delaware*. In that case, abandoned securities distributions could not be traced to a last known address. 507 U.S. at 500. Hence, those distributions "f[e]ll out of the primary rule and into the secondary rule. Consequently, under *Texas* and *Pennsylvania*, the debtor's State of incorporation should [have] be[en] entitled to escheat this unclaimed property." *Id.* In rejecting the State of New York's arguments for variations of the priority rules, the Supreme Court reiterated that the place of purchase may not be used to override the primary or secondary rule. *Id.* at 509.

Defendants argue that Plaintiffs do not have standing to challenge the Act based on Supreme Court priority precedents because Plaintiffs are not states. This Court rejects the State of New Jersey's standing argument. AMEX Prepaid is incorporated in Arizona—a state that does not escheat stored value cards. Happ Decl. at ¶ 20. Under the secondary rule, those corporations incorporated in a state that does not escheat SVCs are entitled to retain the abandoned SVCs when the address of the owner is unknown. But under Chapter 25, those corporations would never be entitled to retain such SVCs.[23] By stating that the place of purchase may be substituted for the owner's address when that address is unknown, the Act assures that the pri-

[23] This argument applies with equal force to those SVC issuers that utilize subsidiaries or cooperatives to issue their gift cards because it is, ultimately, the issuer that would be permitted to retain the unused value.

mary rule will always operate. In so doing, the Act deprives corporations of the benefit of the secondary rule. Here, because AMEX Prepaid is incorporated in a state that does not escheat SVCs in situations where the owner's address is unknown, Amex has heretofore enjoyed the benefit of Arizona not escheating abandoned SVCs.[24]

The language of the Act, before consideration of the Guidances, makes clear how it arguably obviates the secondary rule. I raise these preemptive concerns only for the sake of illustrating that the SVC issuers stand to suffer injury-in-fact under Chapter 25. A more complete preemption analysis follows in my substantive analysis of the statute under the *Texas* line of cases.

Chapter 25 requires issuers to "obtain the name and address of the purchaser or owner … and shall, at a minimum, maintain a record of the *zip code* of the owner or purchaser." Chapter 25, ¶ 5c (emphasis added). The Act, further, provides

> [i]f the issuer of a stored value card does not have the *name and address* of the purchaser or owner of the stored value card, the address of the owner or purchaser of the stored value card *shall assume the address of the place where the stored value card was purchased or issued* and shall be reported to New Jersey if the place of

[24] AMEX Prepaid earns its profit from the sale of stored value cards by, *inter alia*, investing the card proceeds until the funds are redeemed and retaining those funds never redeemed by the owner. Happ Decl., ¶ 10. This latter category is referred to as "breakage." *Id.* It is the deprivation of these two forms of income that causes AMEX Prepaid harm.

> business where the stored value card was sold or issued is located in New Jersey.

Id., ¶ 5c (emphasis added); N.J.S.A. 46:30B-42.1c (emphasis added). Inexplicably, the Act does not provide that this place of purchase presumption applies when the *zip code* is unknown. In operation, the Act dictates that the presumption applies when the "name and address" of **[598]** the purchaser/owner is unknown while, at the same time, neglecting to require the issuer to retain that information. And, even when the zip code is retained, the issuer is directed to presume that the place of purchase is the owner's or purchaser's address. Furthermore, the "place of purchase" rule applies only if the stored value card was sold in New Jersey—not other states.

Read as a whole, this language illustrates how the secondary rule will not apply to the sale of stored value cards in New Jersey based upon the plain language of the statute and before an analysis of the applicability of the Treasurer's Guidances, as explained in more detail *infra*. For this reason, I conclude that AMEX Prepaid has demonstrated that it will suffer an injury-in-fact because it will be deprived of the benefits it obtains when the secondary priority rule is properly applied.

Plaintiffs Retail Merchants and Food Council likewise have standing to challenge Chapter 25 based upon the Supreme Court priority rules, to the extent that their members issue their own stored value cards and they are incorporated in states that do not escheat gift cards.[25] This results in differing standing rulings for

[25] These plaintiffs earn their profits by selling their cards at face value, and then redeeming for goods or services at a rate exceeding their costs. They recognize their profit upon redemption

different members of the Food Council and Retail Merchants associations, depending upon their state of incorporation. Furthermore, members of the Food Council and Retail Merchants associations do not have standing in connection with their sale of cards issued by third parties because only issuers of cards (*i.e.*, the merchant obligated to honor the stored value card) is obligated to escheat and entitled to the benefit of the secondary priority rule.[26]

For example, according to the Declaration of James F. Watson, the New Jersey cooperative, Wakefern Food Corp., is comprised of owners and operators of ShopRite supermarkets in New Jersey, Maryland, Delaware, Pennsylvania, New York, and Connecticut. Watson Decl. at ¶ 2. These entities, which are members of the Food Council, sell their own proprietary gift cards, *see Id.* at ¶ 4, prepaid credit and debit cards, *see Id.* at ¶ 15, and third-party cards redeemable at national and local retailers. *See Id.* What is critical for the standing analysis is that the Wakefern Food Corp. members are all incorporated in New Jersey. Hence those entities do not have standing because they are not incorporated in a different state, and the secondary

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of the card. *See generally* Rowe Afft., ¶ 17. In the event a gift card is not redeemed, the owner's last known address is unknown, and the issuer is incorporated in a state that does not escheat gift cards, the issuer-plaintiff may retain the gift card proceeds or breakage. Chapter 25 deprives this plaintiff of this income producing option.

[26] By way of example, a convenience store that sells a card issued by a bookstore would not suffer harm because the secondary rule relates to the state of incorporation of the creditor. As noted, the "creditor" in the escheat context is the party responsible for honoring the stored value card.

priority rule would never come into play. The same is true for members of the Foodtown, Inc. cooperative, which is incorporated in New Jersey. Durkin Decl. at ¶¶ 1-2.

The Court appreciates Food Council's argument that its members incorporated in New Jersey nonetheless have standing because Chapter 25 places them at a competitive disadvantage with their competitors incorporated in non-escheating states, *see Id.* at ¶ 30; however, Food Council has not cited to any case law indicating that such a purported competitive disadvantage constitutes injury for standing purposes.

[599] Other members of the Food Council, however, are "incorporated throughout the United States, including Delaware, Maryland, New Jersey, and elsewhere." Doherty Decl., ¶ 3. Maryland does not escheat gift cards. Md. Commercial Code Ann. § 17-101(m). Thus, the Food Council has standing on behalf of its members incorporated in states that do not escheat stored value cards. Finally, the Court notes that some Food Council members issue gift cards through a separately incorporated entity. *See id.* at ¶ 7. This does not alter the Court's analysis because it is the issuer's state upon which application of the secondary priority rule turns and, where that issuer is a subsidiary, the harm sustained by the subsidiary would flow to the parent corporation. In sum, the Court concludes that Plaintiffs AMEX Prepaid, Food Council, and Retail Merchants have standing to challenge Chapter 25's failure to comply with the Supreme Court's priority rules, to the extent that Plaintiffs have demonstrated that they issue

stored value cards and are incorporated in states that do not escheat gift cards.[27]

d. Application of *Texas* Priority Rules to Chapter 25 and Guidances

While the SVC Plaintiffs contend that both Chapter 25 and the Guidances are each preempted by the *Texas* line of cases, the State argues that the Guidances are a reasonable agency interpretation of Chapter 25 entitled to deference under State law. The Court's preemption analysis, therefore, is three-fold. First, the Court must address whether the statute, on its face, violates the Supreme Court's priority scheme. For the reasons stated herein, the Court concludes that the statute's place-of-purchase presumption violates the priority rules. Second, the Court must address whether, and to what extent, the Treasurer's Guidances embody a reasonable interpretation of the statute. As to this issue, the Court concludes that the Guidances constitute such a reasonable interpretation. Finally, the Court must address whether the Treasurer's Guidances eradicate Chapter 25's constitutional infirmities. The Court finds that they do not.

(i) Chapter 25's Place of Purchase Presumption

As noted, the Supreme Court has created escheat priority rules, which "arise from [its] 'authority and duty to determine for [itself] all questions that pertain' to a controversy between States, … and *no State may supersede them by purporting to prescribe a different*

[27] For this same reason, and contrary to the State's assertion, Plaintiff Retail Merchants can demonstrate an injury-in-fact in connection with its Full Faith & Credit Clause claim.

priority under state law." *Delaware*, 507 U.S. at 500 (internal citation omitted) (emphasis added). These rules constitute federal common law developed in response to the "overriding federal interest in the need for a uniform rule of decision …." where more than one state could potentially escheat intangible personal property. *Illinois v. City of Milwaukee*, 406 U.S. 91, 105 (1972); *Id.* at 106 (citing *Texas v. State of Florida*, 306 U.S. 398, 405 (1939) as an example of federal common law). Recognizing that federal common law has the same preemptive force as the Constitution or laws of Congress, the State concedes that the *Texas* priority rules may preempt inconsistent state law.

The State argues that its priority scheme is fully consistent with *Texas* and its progeny. As summarized by the Supreme Court in *Delaware*, *Texas* created two priority rules:

> (1) where the last known address of the creditor (*i.e.*, owner of the intangible **[600]** personal property) is known, the State in which that address is located has the right to escheat ("primary rule"); and
>
> (2) where the last known address of the owner is unknown, or in a state that "does not provide for escheat of the property owed," the State in which the debtor is incorporated is awarded the right to escheat subject to the "superior" right of the creditor's state should the creditor's state submit proof of the owner's address ("secondary rule").

See 507 U.S. at 499. On its face, Chapter 25 provides that the place of purchase will be substituted for the last known address of *all* unknown addresses: "If the

issuer of a stored value card does not have the name and address of the purchaser or owner …, the address of the owner or purchaser of the stored value card s*hall assume the address of the place where the stored value card was purchased* ….” Chapter 25, § 5c. The statute makes no accommodation for the issuer’s domicile or State of incorporation in connection with this place-of-purchase presumption.

This presumption, on its face, clearly violates the secondary priority rule by ignoring the right of the debtor’s state of incorporation to escheat in the event that the owner’s last known address was not retained. *See Pennsylvania*, 407 U.S. at 214-15 (rejecting a secondary rule based on place of purchase). The State argues that the Treasury Guidances remedy this defect by incorporating the secondary rule into the escheat scheme applicable to SVCs, and by directing that all issuers must retain at least the purchaser’s zip code. Hence, I now consider the legal effect of the Guidances.

(ii) Guidances as Reasonable Interpretation

While Chapter 25, on its face, fails to incorporate the secondary priority rule, portions of Treasury Guidance dated September 23, 2010, acknowledge the right of the debtor’s state of incorporation to escheat when the owner’s last address is unknown:

> • *If the issuer is domiciled in New Jersey*, any unredeemed balances of stored value cards issued prior to the date of this announcement where the names and addresses or zip code of the purchasers or owners were not recorded *must be reported to New Jersey*.

> • *If the issuer is not domiciled in New Jersey*, any unredeemed balances of stored value cards issued prior to the date of this announcement where the names and addresses or zip code of the purchasers or owners were not recorded *should be reported to the state in which the issuer is domiciled* in accordance with that state's unclaimed property laws.
>
> • *If the issuer is not domiciled in New Jersey and the issuer's state of domicile exempts this type of property from its unclaimed property statute*, any unredeemed balances of stored value cards issued prior to the date of this announcement where the names and addresses or zip code of the purchasers or owners were not recorded *must be reported to New Jersey if the cards were issued or sold in New Jersey*. In these instances, the issuer must maintain the address of the business where the stored value card was purchased or issued.

Treasury Guidance dated Sept. 23, 2010 at 3 (emphasis added). Unlike the plain language of the statute, the Guidances provide that the place-of-purchase presumption applies only where the debtor's State of incorporation "exempts [SVCs] from its **[601]** unclaimed property statute …." *Id.* Although this Guidance language applies only retroactively, if the Guidance language constitutes a reasonable interpretation of the statute, and does not violate the *Texas* priority scheme, it could render the statute constitutional on a retroactive basis.

Under New Jersey law, the Treasury Department's interpretation of New Jersey's escheat statute is entitled to deference. *Clymer*, 171 N.J. at 67. Where, as here, there is an "absence of case law" inter-

preting a precise issue under a statute, "the Treasurer's construction of the statute takes on added significance." *Id.* Thus, in construing the escheat statute, New Jersey courts are directed to "give[] appropriate weight" to the Treasurer's interpretation. *Id.* This is not to say that any interpretation by the Treasurer will suffice; rather, the Treasurer's interpretation must be "consistent with the Legislature's intent in enacting the statute, consonant with the State's strong public policy favoring custodial escheat, and reflective of a sensible reading of the statute itself." *Id.*

Simply put, the Treasurer's interpretation of the statute must be reasonable. *See In re Suspension of Teaching Certificate of Van Pelt*, 414 N.J. Super. 440, 446 (App. Div. 2010) ("[B]eing a strictly legal issue, a … court is not bound by an agency's construction of a statute, and an agency's determination will be reversed where it is plainly unreasonable.") (quoting *T.H. v. Div. of Developmental Disabilities*, 189 N.J. 478, 490 (2007)) (internal quotation marks omitted). According to the New Jersey Supreme Court, there are several circumstances in which an administrative interpretation will be deemed unreasonable, where the interpretation: (a) gives a statute "greater effect than is permitted by the statutory language;" (b) is "plainly at odds with the statute,"; (c) "violates express and implied legislative intent." *T.H.*, 189 N.J. at 490-91. To ascertain whether an agency interpretation avoids these legislative landmines, then, a court must first determine the meaning of the enabling statute.

In determining legislative meaning, New Jersey courts first look to the plain language of the statute, considering it along with the statute's structure, history, and underlying policies. *Id.* at 491. By way of example, in *T.H.*, the New Jersey Supreme Court deter-

mined that administrative regulations imposing an age limit of "before age 22" upon applicants with developmental disabilities was inconsistent with the enabling statute which did not include an express age limitation. *Id.* at 492. That court reasoned:

> Although we recognize the deference that an administrative agency regulation is ordinarily accorded, we repeat here the well-established principle that that [sic] deference is not warranted where the agency alters the terms of a legislative enactment. *This is not a case in which an agency simply filled in the interstices of an act* or provided details specifically left to it by the Legislature. Rather, in adopting [its regulations, the agency] added an eligibility standard that does not exist in [the enabling statute]. That regulation, therefore, is not entitled to deference.

Id. at 494-95, 916 A.2d 1025 (emphasis added).

Here, by contrast, the Treasury Regulations "fill[] in the interstices of [Chapter 25]." *Id.* Under New Jersey law, a state agency expressly authorized by statute to implement rules and regulations may flesh out statutory directives through subsequent rulemaking. *Metromedia, Inc.* **[602]** *v. Director, Div. of Taxation*, 97 N.J. 313, 336 (1984). The rationale underlying such delegation is that "[p]ersons subject to regulation are entitled to something more than a general declaration of statutory purpose to guide their conduct before they are restricted or penalized by an agency for what it then decides was wrong from its hindsight conception of what the public interest requires in the particular situation." *Id.* at 337 (quoting *Boller Beverages, Inc. v. Davis*, 38 N.J. 138, 151 (1962)). This reasoning has been

held equally applicable to other forms of agency action. *Id.* (applying agency deference rationale to agency's decision to use a particular non-statutory factor in assessing a corporation for tax liability).

For example, in *Metromedia*, the New Jersey Supreme Court upheld a decision by the Director of the Division of Taxation to "modify the statutory formula for determining a multi-state taxpayer's New Jersey tax base by which the tax is measured." *Id.* at 337. In that case, the court noted:

> In a case such as this, involving a multi-state radio and television enterprise reaching audiences in several states, the language of the statute supports the determination of a more realistic method than provided by the statutory three-ply formula to calculate the receipts of the taxpayer that can fairly and reasonably be attributable to its activities in New Jersey.

Id.

Here, the State appears to argue that Chapter 25 granted the Treasurer statutory authority to issue the portions of the Guidances related to the escheat priority scheme. But the State has pointed to no express language in Chapter 25 to that effect. While Chapter 25 authorizes the Treasurer to grant certain exemptions, the statutory language does not reach the precise issue presented here. Rather, the language authorizes the Treasurer to grant exemptions "from [Chapter 25] … for a business or class of businesses that demonstrate good cause …." Thereafter, it describes the factors to be considered to include "the amount of stored value card transactions processed, the technology in place, whether or not stored value cards issued contain a microprocessor chip, magnetic strip, or other means

designed to trace and capture information about place and date of purchase, and such other factors as the State Treasurer shall deem relevant." N.J.S.A. 46:30B-42.1(f). This list of factors makes no mention of the issuer's (or debtor's) state of incorporation, and its tenor does not suggest that it is directed at the priority scheme.

Even without an express statutory grant within Chapter 25, however, it is my view that the Legislature's general grant of authority to the Treasurer to "assist[] in the implementation of the legislative design," sufficiently empowers the Treasure to issue the Guidances. *Clymer*, *supra* at 67. The Guidances further explicate how SVCs are to be escheated in a way that is consistent with the legislature's "strong public policy favoring custodial escheat …." *Id.* at 68.

Furthermore, I find the Guidances consistent with overall statutory scheme. The general priority provisions of the Unclaimed Property Act permit New Jersey to hold intangible property where "[t]he transaction out of which the property arose occurred in this State, and … [t]he holder is a domiciliary of a state that does not provide by law for the escheat or custodial taking of the property or its escheat or unclaimed property law is not applicable to the property …." N.J.S.A. 46:30B-10. And, N.J.S.A. 46:30B-81.d, allows New Jersey to hold **[603]** the property until a debtor State of incorporation "has escheated or [the property] become[s] subject to a claim of abandonment by that state ….". Thus, the Treasurer's Guidances appropriately reconcile Chapter 25 with, and integrate Chapter 25

into, the Unclaimed Property's Act overall scheme, thereby effectuating the Act's purpose.[28]

Similarly, the Guidances render Chapter 25 consistent with the 1981 version of the UUPA, which served as the model for the New Jersey priority provisions. Section 3 of the UPPA (1981) permits a state to custodially escheat property when

> the transactions out of which the property arose occurred in this State, and … the holder is a domiciliary of a state that does not provide by law for the escheat or custodial taking of the property or its escheat or unclaimed property law is not applicable to the property.

UPPA § 3(6)(ii) (1981). Like N.J.S.A. 46:30B-81.d, section 25 of the UUPA (1981) provides that, where funds have been delivered to New Jersey, a debtor State of incorporation may recover the funds by demonstrating that "the laws of the state of domicile of the holder the property has escheated to or become subject to a claim of abandonment by that state." In this way, the Guidances help ensure that the Act is "applied and construed as to effectuate its general purpose to make uniform the law with respect to the subject of this law among states enacting it," N.J. S.A. 46:30B-2 cited in *Clymer*, 171 N.J. at 64, thereby effectuating the purpose underlying the Unclaimed Property Act. *See Haven Savings Bank v. Zanolini*, 416 N.J. Super. 151, 166

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[28] While "it is well settled that where the Legislature specifically includes a requirement in one subsection of a statute but not in another, the term should not be supplied where it has been omitted," *T.H.*, 189 N.J. at 492, that rule of interpretation carries less force where the "sense of a statute" suggests otherwise. *See Id.*

(App. Div. 2010) ("[New Jersey's unclaimed property act] should be construed to achieve and maintain uniformity with the thirty-nine jurisdictions that have adopted either the 1981 or 1995 Uniform Act.").

Plaintiff Food Council argues that the Treasurer's Guidances are an impermissible revision of the Unclaimed Property Act, citing *Galbraith v. Lenape Regional High School*, 964 F. Supp. 889 (D.N.J. 1997). In *Galbraith*, a District of New Jersey district court noted: "Administrative agencies belong to a separate branch of government and are only empowered to 'exercise executive power in administering legislative authority selectively delegated to them by statute.'" *Id.* at 894. This statement in *Galbraith* is nothing more than a restatement of the New Jersey's agency deference law, and is unhelpful in elucidating any of the issues here. That *Galbraith* is inapposite is further illustrated by the source of its quote—*City of Hackensack v. Winner*, 82 N.J. 1, 28 (1980). Both *Galbraith* and *Winner* are entire controversy cases that have nothing to do with agency interpretation of an enabling statute.

Finally, Plaintiff Retail Merchants appears to argue that the New Jersey legislature violated a nondelegation doctrine by failing to provide adequate boundaries for the Treasurer's discretion. The New Jersey Supreme Court in *Worthington v. Fauver*, 88 N.J. 183 (1982) explains:

> whether [an act] itself represents an unconstitutional delegation of power by the Legislature to the executive branch … requires a determination of whether the delegation impairs the 'essential integrity' of the Legislature, and whether it **[604]** provides sufficient standards to guide the exercise of delegated power.

Id. at 207-08 (internal citations omitted). Other than its *ipse dixit* conclusion that the Guidances' priority language "clearly runs afoul" of this precept, Retail Merchants has not pointed to any specific language in Chapter 25 of the Unclaimed Property Act that it contends is insufficiently specific. To the contrary, Chapter 25 specifically addresses the escheat priority scheme and the pertinent language in the Guidances explicate upon this one precise issue. The tailored nature of the statute and Guidances, coupled with the aforementioned New Jersey case law stating that the Treasurer has broad authority to implement the Act, leads me to reject Retail Merchant's argument.

Finally, Treasury Guidance dated September 25, 2010 also "exempt[s] issuers and holders from the requirement that the name and address of the purchaser be maintained *so long as the purchaser's zip code is obtained*." Treasury Guidance dated Sept. 23, 2010 at 3 (emphasis added). This interpretation is consistent with the express language of Chapter 25. Chapter 25 provides that "[a]n issuer of a stored value card shall obtain the name and address of the purchaser or owner of each stored value card issued or sold and *shall, at a minimum, maintain a record of the zip code of the owner or purchaser*." Chapter 25, § 5c (emphasis added).

For the foregoing reasons, I conclude that the Treasurer's Guidances are consistent with New Jersey's Unclaimed Property Act and, therefore, constitute reasonable administrative interpretations entitled to deference under New Jersey law.[29] Having clarified

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[29] The Court notes the SVC Plaintiffs' invitation to view the Guidances as an admission that Chapter 25 was erroneously

the legal import of the Guidances, I now turn to whether the priority scheme created by the Guidances and Unclaimed Property Act are preempted by federal common law.

(iii) Preemption of Guidances

Having concluded that the Guidances embody reasonable interpretations of the statute, I must now address whether the Guidances themselves are preempted by the *Texas* line of cases. As noted, it is the State's argument that the Guidances remedy any constitutional infirmity found in Chapter 25 in two ways. With respect to the secondary rule, the State argues, the Guidances properly acknowledge the right of the debtor's State of incorporation to escheat. And, if the debtor's state of incorporates does not escheat SVCs, *Texas* does not preclude New Jersey from applying a place-of-purchase presumption. Because *Texas* does not address the circumstance in which the debtor's state of incorporation does not escheat the intangible personal property owned by the creditor, so the State's argument goes, New Jersey may create a "third priority rule" under which it temporarily holds the property until the creditor's address becomes apparent and the creditor's state asserts its superior right to escheat. The State's second argument is that, because the Guidances require that the purchaser's or owner's zip code will be maintained on a going-forward basis, the place-of-purchase presumption will never apply prospectively.

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drafted. As is apparent from the my analysis of Chapter 25's priority scheme, the statute facially violates *Texas*. However, I need not view the Guidances as such an "admission," rather than a fleshing out of the statute.

The State is correct that *Texas* does not explicitly address what happens when the debtor's State of incorporation does not escheat the particular intangible property at issue. Texas merely held that the debtor's State of incorporation had "the *right* **[605]** to escheat." *Id.* (emphasis added). Indeed, state courts have held that *Texas* applies only when two states affirmatively seek to escheat the same property. *See e.g.*, *Riggs Nat. Bank v. District of Columbia*, 581 A.2d 1229 (D.C. App. 1990); *O'Connor v. Sperry & Hutchinson Co.*, 32 Pa. Cmwlth. 599 (1977); *State v. Liquidating Trustees of Republic Petro. Co.*, 510 S.W.2d 311 (Tex. 1974). These cases reason that Texas does not apply when no state seeks to escheat under either the primary or secondary rule, yet a third state intends to serve as custodian of the abandoned assets. *See TXO Prod. Corp. v. Oklahoma Corp. Comm'n*, 829 P.2d 964, 971 (Ok. 1992) ("Nothing in *Texas* prohibits a state from claiming temporary custody of unclaimed property until some other state comes forward with proof that it has a superior right to it."); *O'Connor*, 379 A.2d at 1381 ("It is apparent in our view that the Court meant its rule to be binding only where there were multiple claims to the same property. Moreover, we believe it equally clear that the Court did not decide whether any other state would have rights next in line to those it considered because it believed either one of those states would be willing and able to escheat.").

While this rationale has some facial appeal, it does not withstand more careful examination. Consider the following hypothetical. Owner, a resident of Arizona, visits her cousin who lives in New Jersey. While visiting there, she purchases a gift card from an SVC issuer that is incorporated in Maryland and the issuer retains her zip code. At first blush, the primary rule would ap-

pear to apply because the Owner's last known address is known. However, the secondary rule applies not only "where the last known address of the owner is unknown," but also when the owner resides "in a state that does not provide for escheat of the property owed …." *Delaware*, 507 U.S. at 499. In that instance, "the State in which the debtor is incorporated is awarded the right to escheat …." *Id.* So, under the secondary rule, the SVC issuer's state of incorporation, Maryland, would be entitled to escheat because Arizona, the state of the owner, does not escheat SVCs. Herein lies the rub: neither Maryland nor Arizona escheats SVCs, thereby resulting in the abandoned property being left in the hands of the issuer.

The state court rulings view such a "private escheat" as antithetical to the goals of the *Texas* priority scheme. In their view, the state of purchase is a better custodian on behalf of the rightful owner. "By taking temporary custody of the unclaimed proceeds from a private holder, [the State] does not divest any state with a constitutional priority claim of custody or title to the funds. The public policy supporting custodial taking by a State is superior to any claim that a private holder may assert to any unclaimed proceeds." *TXO*, 829 P.2d at 972. Further, these cases reason, the state of purchase will turn over the funds to a state with a higher priority should either of those states submit a claim.

This rationale does not apply, however, when neither the primary nor secondary state escheats. In such an instance, no claim will be made for the funds and they will remain in the coffers of the state of purchase. The only conceivable circumstance in which a claim could be made is if either the creditor's state of last known address or the debtor's State of incorporation

subsequently amends its laws to provide for escheat. But, the State here has pointed to no reason why it should be permitted to hold the property until that unlikely possibility occurs, if at all.

[606] I find the decision in *TXO* instructive in this regard. In construing an Oklahoma statute that permitted the custodial escheat of pooled mineral interests located in Oklahoma, the *TXO* Court interpreted it in such a way as to preserve its constitutionality under the *Texas* line of cases. The court reasoned:

> The legislature's failure to include the Texas guidelines in the UPMA is not fatal to its validity. Texas was decided in 1965. Its effect on the custodial taking of intangible property was well established by 1983, when the UPMA was passed, and in 1984, when the Uniform Act was amended to include custodial taking of monies owed to unknown mineral interest owners. The legislature presumably considered Texas' impact on the statutory scheme when drafting these acts and intended to conform them to the Texas guidelines ….

Because the court concluded that the Oklahoma legislature intended its statute to conform with *Texas*, the *TXO* Court arrived at the following constitutional interpretation of the statute:

> [the statute] intended to allow Oklahoma to seize unclaimed monies belonging to (a) owners of forced pooled oil and gas interests with a last known address in Oklahoma, (b) owners with no known address where the holder is domiciled in Oklahoma, or (c) owners whose last known address is in a state with no custodial

> taking or escheat provisions *and the holder's domicile is Oklahoma.*

829 P.2d at 970-71 (emphasis added). Important here is the *TXO* Court's recognition that a state may serve as a "temporary custodian" only where the holder is incorporated in that state. In other words, there is no room for a third priority position. If the secondary-rule state does not escheat, the buck stops there. In contrast to the Oklahoma statute, the plain language of Chapter 25 and the Guidances preclude this Court from construing New Jersey's law to conform with the federal common law. *Cf. Amer. Petrofina Co. of Texas v. Nance*, 697 F. Supp. 1183 (W.D. Okl. 1986) *aff'd* 859 F.2d 840 (10th Cir. 1988).[30]

Accordingly, in my view, when current state laws do not provide for escheat in the primary and secondary—rule states, there is no indication in *Texas* that the state of purchase—"a forum having no continuing relationship to any of the parties to the proceedings"—has the right to retain the property. *Delaware*, 507 U.S. at 504 (citing *Pennsylvania*, *supra* at 213). "*Texas*

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[30] In a thorough decision, the *Nance* Court reasons that "[t]he Supreme Court's decision in *Texas v. New Jersey*, may be relied upon to prevent state officials from enforcing a state law in conflict with the *Texas v. New Jersey* scheme for escheat or custodial taking of unclaimed property, because the decision was rendered as a result of the Supreme Court exercising its original jurisdiction and to ensure uniformity." 697 F. Supp. at 1187 (citing *State v. Amsted Indus.*, 48 N.J. 544 (1967)). Based on this legal conclusion, the court ruled that a 1984 Oklahoma law conflicted with the *Texas* scheme by "ignor[ing] the right of another state to recover property when the state within which there is a last known address has no law governing the custody or escheat of unclaimed property." *Id.*

and *Pennsylvania* … [mandate] that only a State with a clear connection to the creditor or the debtor may escheat," *Id.*, and "no State may supersede them by purporting to prescribe a different priority under state law." *Id.* at 500. In addition, I find it telling that, in fashioning the Texas rules, the Supreme Court expressly stated that the secondary rule applied when the law of the primary rule state "do[es] not provide for escheat." *Delaware*, 507 U.S. **[607]** at 500. That it made no similar concession in connection with the secondary rule further suggests that no third priority was envisioned by the Court. This is not to say that the Supreme Court may not create a third priority rule at some future date. My point here is that is not the province of New Jersey to create that rule.

There are several other indications in the *Texas* line of cases that the Supreme Court intended its priority rules to be exclusive and exhaustive. Turning first to the *Texas* decision itself, *Texas* considered several rules proposed by the States to determine which one State had the right to escheat in any given case. Although the Court recognized the attractiveness of several of the proposed rule schemes, it chose only one scheme. That the Court found it necessary to choose only one scheme suggests that it did not intend for the scheme to be altered. In this connection, the Court explicitly noted that

> We realize that this case could have been resolved otherwise, for the issue here is not controlled by statutory or constitutional provisions or by past decisions, nor is it entirely one of logic. *It is fundamentally a question of ease of administration and of equity. We believe that the rule we adopt is the fairest, is easy to apply*,

> and in the long run will be the most generally acceptable to all the States.

379 U.S. at 683 (emphasis added).

Permitting the creation of a third priority rule, as the State suggests, would necessarily complicate the priority scheme the Supreme Court designed for ease of administration and would run afoul of *Texas*' bright-line-demarcation rules. Moreover, as Plaintiff AMEX Prepaid argues, the State has not indicated how the Supreme Court's priority scheme would work in the event different states enacted incompatible third priority rules. Incompatible third priority rules would unquestionably undermine the Supreme Court's focus on ease of administration.

To be sure, the Supreme Court rejected such case-by-cases analyses in developing the priority scheme, reasoning:

> The uncertainty of any test which would require us in effect either to decide each escheat case on the basis of its particular facts or to devise new rules of law to apply to ever-developing new categories of facts, might in the end create so much uncertainty and threaten so much expensive litigation that the States might find that they would lose more in litigation expenses than they might gain in escheats.

Id. at 678. And, the *Texas* Court's comment that "the States separately *are without constitutional power to provide a rule to settle this interstate controversy* ...." buttresses my conclusion that *Texas* leaves no room for such alterations. *Id.* at 677 (emphasis added).

Language in *Delaware* confirms my reading of *Texas*. Most explicitly, *Delaware* states that the *Texas*

priority rules arise from the Supreme Court's authority and "[n]o state may supersede them by purporting to prescribe a different priority under state law." *Delaware*, 507 U.S. at 500. In describing the secondary rule, the Court expressed that "the secondary rule protects the interests of the debtor's State *as sovereign over the remaining party* to the underlying transaction" *Id.* at 504 (emphasis added). In my view, inherent in the State's sovereignty is its choice *not* to exercise custodial escheat over SVCs. To rule otherwise, would permit other states, such as New Jersey, to supplant their **[608]** choice for that of the debtor's state of incorporation.[31]

Also, the Supreme Court's "sovereign over the remaining party" language calls to memory the historical, jurisdictional basis for escheat. For tangible property, it is the location of the *res* in its borders that grants a state jurisdiction to escheat. For intangible property, it is the legal fiction that the property follows the owner that forms the basis for the "last known address" primary rule. *See Texas*, 379 U.S. at 681. Hence, the Supreme Court affirmed the *Texas* priority scheme in *Delaware* to avoid having "intangible property rights

[31] In this connection, Retail Merchants additionally argues that the Full Faith & Credit Clause would be violated to the extent that New Jersey failed to give full effect to another state's choice not to escheat SVCs. However, while that clause requires states to recognize the validity of the legislation of other states, it does not mandate uniformity in state legislation. *See Adkins v. Rumsfeld*, 464 F.3d 456, 467 (4th Cir. 2006). Nor does it require a state to defer to another's states more limited statutory provisions in every circumstance. *See Garcia v. American Airlines, Inc.*, 12 F.3d 308, 312 (1st Cir. 1993) (citing *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 278 (1980)). Hence, I decline to rest a preliminary injunction ruling on this basis.

… cut off or adversely affected by state action … in a forum having no continuing relationship to any of the parties to the proceedings." 507 U.S. at 504 (citation omitted). New Jersey's proposed priority rule would do exactly what the Supreme Court sought to prevent. It would permit New Jersey to fabricate an interest where it otherwise does not have one by presuming that the place of purchase is the creditor's last known address, and by usurping the right of the debtor's state of incorporation to rule over the debtor. This is particularly true in the case of internet sales, where the only connection to New Jersey may be that the SVC issuer is authorized to do business in New Jersey even though incorporated elsewhere.

If, as the State concedes, the Supreme Court decisions constitute federal common law entitled to preemptive force under the Supremacy Clause, there can be no basis for importing an exception into the federal law. Such a result would turn preemption analysis on its head by defining the federal law in light of state interests. Moreover, contrary to the implication of the State's argument, the parties in the Supreme Court decisions included corporate holders—not just states. *See e.g.*, *Texas*, *supra* at 675 (listing Sun Oil Company as a party); *Texas*, 379 U.S. at 676 (listing Western Union as party). It is true that the Supreme Court's original jurisdiction was premised on the dispute between state parties, but to say that the Court's substantive decision is limited to state parties confuses jurisdiction with merits.

Furthermore, and as noted *supra*, by stating that the place of purchase may be substituted for the owner's address, the Act explicitly authorizes what the Supreme Court's priority rules disallow. This is a quintessential indicator of conflict, if not express, preemp-

tion. The Supreme Court took pains in both *Pennsylvania*, *supra*, and *Delaware* to make clear that a last known address presumption based upon place of purchase is inappropriate.

For the sake of completeness, I address a few remaining arguments by the parties. The parties argues over whether the Unclaimed Property Act sufficiently insulates, through indemnification, the SVC issuer from the potential for multiple liability to more than one state. Whether or not New Jersey law partially or fully indemnifies the issuer would not alter my analysis **[609]** because I conclude that Chapter 25 is preempted by federal common law.

Furthermore, two additional points must be made. First, the Guidance language implements the secondary rule under *Texas* applies only retroactively. As noted, the Guidance explicitly states that it applies to SVCs "issued prior to the date of this announcement ….", which was September 23, 2010. That it applies only retroactively does not affect my ultimate conclusion because both the plain language of Chapter 25 and the Guidance are preempted by the federal common law. Second, the Guidance language directing that SVC issuers retain zip codes has no effect on my analysis. The plain language of the statute already directs that zip codes must be maintained "at a minimum." Chapter 25, § 5c.

Finally, Plaintiff Retail Merchants argues that it is often impossible to determine the "true creditor" in the SVC context because, though a card is purchased by one party, that party may give the card to a third party and it is the physical possessor of the card that is entitled to redeem it. Indeed, it is the possessor of a gift card that is entitled to redeem it because it is most akin

to a bearer obligation. *See Mann v. TD Bank, N.A.*, No. 09-1062, 2010 WL 4226526, *9 (D.N.J. Oct. 20, 2010). However, I do not find this argument relevant because the Supreme Court has made clear in *Pennsylvania*, that a holder's failure or inability to obtain the last known address of the owner is of no moment. 407 U.S. at 214-15. Like the SVC issuers here, Western Union did not routinely collect the owner's address information. *Id.* at 209.

In sum, Chapter 25 creation of a place-of-purchase presumption when the last known address or zip code of a stored value card purchaser/owner is unknown is preempted by the federal common law set forth in the *Texas* line of cases. The Treasury Guidance sets forth a reasonable interpretation of Chapter 25, by construing it in conjunction with the general provision of New Jersey's Unclaimed Property Act and the UUPA such that the place-of-purchase presumption applies retroactively only when the debtor's State of incorporation does not escheat SVCs. But this language is also preempted by the *Texas* line of cases. Thus, for the foregoing reasons, I conclude that the SVC Plaintiffs have demonstrated a likelihood of success on their preemption claim, with respect to both retroactive and prospective application of the statute and Guidances. The State shall be preliminarily enjoined from applying the place-of-purchase presumption in the Act to SVCs.

3. Substantive Due Process

The SVC Plaintiffs' substantive due process argument centers on whether the legislature had a legitimate state interest in enacting Chapter 25. For the same reasons expressed in connection with my analysis of travelers checks, I conclude similarly that the SVC

Plaintiffs have failed to demonstrate a likelihood of success on their substantive due process claim.

4. Contracts Clause

As with Travelers Checks, those SVC Plaintiffs that sell prepaid SVCs redeemable for cash have not demonstrated a likelihood of success on their Contract Clause claim. These plaintiffs have not pointed to any express or implied contractual obligation between themselves and prepaid SVC purchasers that is impaired by Chapter 25. Without meeting this threshold inquiry, their Contract Clause claim may not proceed.

Those SVC Plaintiffs that issue gift cards, however, have demonstrated a likelihood of success on their Contract **[610]** Clause claim. The effect of Chapter 25 on these plaintiffs is unique because, by operation of the statute, the issuers are required to transfer the entire face value of the gift card to the state for custody upon abandonment even though gift cards are not redeemable for cash. In addition to the added accounting burden of converting the gift card value to cash, this works a harm upon the issuers because if the owner fails to ever present the card to the issuer, but instead files a claim with the state, the issuer will be removed entirely from the transaction and lose its profit. Conversely, if a gift card owner fails to present the card to the issuer post-abandonment, and never files a claim with a state, the issuer will also not recover its profit in that circumstance. Under either scenario, the issuer is

deprived of its right to earn a profit in connection with the gift card sale and redemption.[32]

Plaintiff AMEX Prepaid asserts that it issues many "open loop" cards that are not redeemable for cash. Happ. Decl. at ¶ 5.[33] Plaintiff Retail Merchants assert that its members "issue retail gift cards that are usable solely to purchase goods and services from the issuing retailer's location." Rowe Afft. at ¶ 3. Plaintiff Food Council asserts that its members issue "merchandise-only" cards, which are not redeemable for cash. Watson Decl. at ¶ 5. For these plaintiffs, then, the threshold Contract Clause inquiries are easily met—the gift card issuers have pointed to contractual agreements between themselves and gift card owners providing that the cards may be redeemed only for goods or services; Chapter 25 impairs that contractual relationship by requiring the gift card issuers to transfer their profit to state custody; and this impairment is substantial because the issuers will permanently lose their profits if

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[32] That some gift card issuers issue the cards through a subsidiary, *see* Rowe Afft., ¶ 4, does not alter the affect of an unredeemed or unclaimed card on the issuer's profits.

In addition, the State cites to Rowe Afft., ¶ 17, arguing that the gift card issuers realize their profit "at the time the Gift Card is redeemed …." and, therefore, at the time of abandonment, the gift issuer is not required to transfer over its profits. Def. Opp. to Pl. Ret. Merch. OTSC at 36. I reject the State's interpretation of Mr. Rowe's statement. Read in context, his statement merely indicates that the gift card issuer realizes its profits *on its books* once the card is redeemed.

[33] The Court notes that AMEX Prepaid has not pointed to any specific contract provision, between itself and gift card purchasers, stating that the cards are not redeemable for cash. However, the State does not dispute that such a provision exists.

the gift card owner never claims or redeems the card post-abandonment.

Having concluded that the challenged act works a substantial impairment, the next question is "whether the law at issue has a legitimate and important public purpose." *Transport Workers*, 145 F.3d at 621. It is undisputed that custodial escheat is generally a legitimate public purpose. But, for Contract Clause purposes, my analysis may not end there. I must also consider "whether the adjustment of the rights of the parties to the contractual relationship was reasonable and appropriate in light of that purpose." *Id.* Here, the gift card issuers have met their burden in demonstrating that Chapter 25's requirement that they transfer their profits to the State is unreasonable. Many other states that escheat gift cards make an accommodation for the issuer's profits,[34] and the State has not pointed to any justification for its impairment of this contractual right. Rather, the State cites generally to cases stating that banks and similar holders of funds on account of an owner do not pos- **[611]** sess a contractual right impaired by the Contract Clause. *See e.g.*, *Standard Oil*, *supra* at 436. While the reasoning of these cases are applicable to the Court's analysis regarding travelers checks, *supra*, these cases are inapposite here; these cases involve cash whereas here, the card issuers are obligated to provide only merchandise or services. The gift card issuers have, thus, demonstrated that their right to earn and retain their profit is substantially impaired by the statute. Accordingly, I conclude that the gift card issuing SVC Plaintiffs have demonstrated a

[34] Similarly, the UUPA's gift certificate provision escheats only at 60% of the face value.

likelihood of success on their Contract Clause claim, and hereby enter a preliminary injunction enjoying the application of Chapter 25 to issuers of gift cards, retroactively, to the extent that the legislation affects *existing* contracts between gift card issuers and purchasers/owners.[35]

This preliminary injunction does not preclude the prospective application of the statute to gift card issuers. Chapter 25 is unconstitutional only to the extent that it affects existing contracts. *Troy Ltd. v. Renna*, 727 F.2d 287, 296-99 (3d Cir. 1984) (describing contract clause as impairing existing contracts); *Pennsylvania Mortg. Bankers Ass'n v. Zimmerman*, 664 F. Supp. 186, 194 (M.D. Pa. 1987) ("The … contract clause does not apply to prospective state action."). This may include a gift card issued one year ago, that could be presumed abandoned a year following the effective date of the statute. But, gift cards issued after the effective date of the statute are not entitled to Contract Clause protection. This result makes sense because the Contract Clause protects existing contracts entered into with legitimate expectation based upon law in effect at the time of contracting. No party may legitimately expect that the law will remain static. Going forward, gift card issuers may alter their contracts or choose to

[35] Additionally, Plaintiff Food Council argues that the escheat of its profit violates the derivative rights rule under the New Jersey state constitution, contending that a state may not escheat greater rights than those held by the rightful owner. In light of my Contracts Clause ruling in Food Council's favor, I need not reach this state constitutional issue. Similarly, I need not reach Food Council's argument under the manifest injustice clause of the New Jersey state constitution.

cease issuing cards in the State of New Jersey altogether if they find the issuance no longer profitable.

5. Takings Clause

With respect to gift card issuers, the analysis again differs from that for travelers checks and prepaid SVCs. Unlike the cash-for-cash exchange inherent in the latter type of transactions, gift cards are not redeemable for a dollar value and issuers of gift cards necessarily include their profit margin in the cost of the SVC. So, when the gift card issuer transfers the proceeds of abandoned gift cards to the state, the issuer is forced to transfer its profit as well.

Contracts are a form of property and, therefore, are protected property interests under the Fifth Amendment. *Prometheus*, 373 F.3d at 430 (citing *United States Trust*, 431 U.S. at 19 n.16).[36] I conclude in my Contracts **[612]** Clause analysis that the gift card issuers have a contractual right to honor the cards for only merchandise or services. Accordingly, the gift card issuers profit may also constitute a property interest for Takings purposes.

The State, nonetheless, argues that any escheatment of the gift card issuers' profit is not a taking, but

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[36] The SVC Plaintiffs also rely upon the state court decision in *Service Merch. Co., Inc. v. Adams*, No. 97-2782-III, 2001 WL 34384462 (Tenn. Ch. Jun. 29, 2001), which reasoned that requiring a gift card issuer to deliver cash to the state constitutes a taking. That court based its takings clause analysis upon the Supreme Court's decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). Because I read the Supreme Court's decision in *Lucas* as specific to takings of real property, I decline to adopt the *Service Merch.* Court's analysis here. *See Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 674-75 (3d Cir. 1999).

only a temporary deprivation because the issuer may apply for reimbursement from the State in the event that the owner redeems the gift card post-abandonment. But the takings problem for the gift card issuer is that Chapter 25 makes no provision for the issuer to recover its profits in the event the gift card owner does *not* use the card after the abandonment period. As noted, if the owner fails to present the card to the issuer, but instead files a claim with the state, the issuer will be removed entirely from the transaction and lose its profit. And, if a gift card owner fails to present the card to the issuer post-abandonment, and never files a claim with a state, the issuer will not recover its profit in that circumstance. Under either scenario, the issuer is deprived of its contractual right to earn profits in connection with the gift card sale and redemption. In this way, Chapter 25 could conceivably effect a taking of the gift card issuer's profits. However, The Court need not rest its decision to grant a preliminary injunction on this Takings claim in light of the foregoing Contracts Clause analysis.

C. Commerce Clause

As the arguments made by all Plaintiffs regarding violations of the Commerce Clause are similar, the Court will address them in this section. The Commerce Clause of the United States Constitution grants Congress the authority to "regulate Commerce … among the several States." U.S. Const. Art. 1, § 8, cl. 3. To state a claim under the Commerce Clause, a plaintiff must demonstrate that the challenged state regulation "has extraterritorial effects that adversely affect economic production (and hence interstate commerce) in other states" or "the object of the law is local economic protectionism, in that it disadvantages out-of-state businesses to benefit in-state ones." *Cloverland-Green*

Spring Dairies, Inc. v. Pa. Milk Mktg. Bd., 462 F.3d 249, 261-62 (3d Cir. 2006) (alterations and quotations omitted). Alternatively, a plaintiff may state a claim by demonstrating that "the burden imposed on [out-of-state] commerce is clearly excessive in relation to the putative local benefits." *Id.* at 263. The Commerce Clause also has an implied requirement—called the "dormant" Commerce Clause—that limits the power of the states to discriminate against interstate commerce by forbidding "'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" *Cloverland-Green*, 462 F.3d at 261 (quoting *Granholm v. Heald*, 544 U.S. 460 (2005)).

More particularly, state regulations may burden interstate commerce "when a statute (i) shifts the costs of regulation onto other states, permitting in-state lawmakers to avoid the costs of their political decisions, (ii) has the practical effect of requiring out-of-state commerce to be conducted at the regulating state's direction, or (iii) alters the interstate flow of the goods in question, as distinct from the impact on companies trading in those goods." *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 208-09 (2d Cir. 2003) (citations omitted); *see also Pac. Northwest Venison Producers v. Smitch*, 20 F.3d 1008, 1015 (9th Cir. 1994) (reviewing types of burdens such as "disruption of travel and shipping due to lack of unifor- **[613]** mity of state laws," "impacts on commerce beyond the borders of the defendant state," and "impacts that fall more heavily on out-of-state interests.").

By contrast, courts will uphold a nondiscriminatory statute that affects interstate commerce only incidentally, "unless the burden imposed on such commerce is clearly excessive in relation to the putative local bene-

fits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). To prove that a state law is either *per se* invalid or fails the *Pike* balancing test, a plaintiff must at least show that the law has a "disparate impact" on interstate commerce. *Automated Salvage Transp., Inc. v. Wheelabrator Envtl. Sys., Inc.*, 155 F.3d 59, 75 (2d Cir. 1998); *see also Freedom Holdings Inc. v. Spitzer*, 357 F.3d 205, 218 (2d Cir. 2004).

Plaintiffs claim that the implementation of Chapter 25 violates the Commerce Clause because Chapter 25 forces Plaintiffs to alter their business models, which include interstate sales and marketing terms. Essentially, Plaintiffs argue that Chapter 25 would negate Plaintiffs' ability to engage in a uniform interstate marketing and sales program. In addition, Plaintiffs maintain that the alternative of charging a fee for travelers checks sold throughout the United States, including in New Jersey and other states, would burden interstate commerce by permitting New Jersey to dictate the operation of Plaintiffs' sales model. For support, Plaintiffs rely on the Supreme Court's decision in *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 336 (1989) and *Brown-Forman Distillers Corp. v. N.Y. State Liquor Authority*, 476 U.S. 573, 582 (1986). However, these cases do not help Plaintiffs' position.

Plaintiffs attempt to analogize Chapter 25 to regulations the Supreme Court held unconstitutional. In *Healy* and *Brown-Forman* both cases concerned state laws that pegged the in-state prices of liquor or beer to prices charged outside the states in question. *See Healy*, 491 U.S. at 326-27 (describing Connecticut's beer price-affirmation statute); *Brown-Forman*, 476 U.S. at 575-76 (describing New York's Alcoholic Beverage Control Law). Although the statutes at issue in those two cases differed, each had "the undeniable ef-

fect of controlling commercial activity occurring wholly outside the boundary of the State." *Healy*, 491 U.S. at 337. In *Brown-Forman*, the Court found that New York had "project[ed] its legislation into other States" by effectively requiring distillers to seek the approval of the New York State Liquor Authority before lowering prices elsewhere. 476 U.S. at 583-84 (internal quotation marks omitted). Likewise, in *Healy*, the Court observed that Connecticut had "require[d] out-of-state shippers to forgo the implementation of competitive-pricing schemes in out-of-state markets because those pricing decisions are imported by statute into the Connecticut market regardless of local competitive conditions." 491 U.S. at 339. Holding both statutes unconstitutional, the Supreme Court warned that "States may not deprive businesses and consumers in other States of 'whatever competitive advantages they may possess' based on the conditions of the local market." *Id.* (quoting *Brown-Forman*, 476 U.S. at 580).

Here, on this motion, Plaintiffs fail to show that they are likely to win on the merits based on the Commerce Clause. Absent from Plaintiffs' reasoning is how the effects of Chapter 25 might be projected into other states. Unlike the price-affirmation laws in *Healy* and *Brown-Forman*, Chapter 25 does not by its terms or **[614]** its effects, directly regulate sales of store valued cards and travelers checks in other states. Nor does it prevent other states from regulating store valued cards or travelers checks differently within their own territories. Nevertheless, Plaintiffs argue that Chapter 25 operates as an extraterritorial restriction because it forces the costs of compliance onto out-of-state consumers. However, in the context of a state regulating gift cards specifically, the Second Circuit has opined that it does "not agree that out-of-state consumers

must inevitably be the ones to bear such costs" so as to violate the Commerce Clause. *SPGGC, LLC v. Blumenthal*, 505 F.3d 183, 196 (2d Cir. 2007). Instead, any compliance costs could be passed on to New Jersey consumers or else be absorbed by Plaintiffs in the form of lower profits. Indeed, "simply because a state regulation would force the regulated manufacturers to bear some of its costs, it does not automatically violate the Commerce Clause." *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 111 (2d Cir. 2001).

Accordingly, Plaintiffs have failed to show a likelihood of success on their Commerce Clause claim.

VI. Remaining Preliminary Injunction Factors

In addition to whether the movant has shown a reasonable probability of success on the merits, the remaining preliminary injunction factors are: (1) whether the movant will be irreparably injured by denial of the relief; (2) whether granting preliminary relief will result in even greater harm to the nonmoving party; and (3) whether granting the preliminary relief will be in the public interest. *Crissman*, 239 F.3d at 364. Because Amex has not show a likelihood of success with respect to any of its claims, the Court need not address the remaining factors in connection with its motion. As such, Amex's motion is denied. *Morton v. Beyer*, 822 F.2d 364, 371 (3d Cir. 1987) ("[A] failure to show a likelihood of success … must necessarily result in the denial of a preliminary injunction.")

With respect to the SVC Plaintiffs, this Court has concluded, *supra*, that they have shown a likelihood success on their on their *Texas* based preemption argument regarding Chapter 25's place of purchase presumption. These plaintiffs, further, argue that they will suffer irreparable harm if required to comply with the

law. Were this Court to deny their request for a preliminary injunction, and permit the statute to be enforced, the SVC issuers would face threat of prosecution if they chose not to expend the large amounts of funds necessary to comply with the statute's prospective and retroactive reporting requirements—funds they would not to be entitled to receive back if the statute is later found unconstitutional. For gift card SVC issuers, in particular, they contend that the same holds true for the profits they must remit under the statute. I agree that these bases sufficiently demonstrate irreparable harm. *See ECRI v. McGraw-Hill, Inc.*, 809 F.2d 223, 226 (3d Cir. 1987) (stating that irreparable harm is shown where the harm is "of a peculiar nature, so that compensation in money cannot atone for it."). In addition, "that the [SVC Plaintiffs] will suffer an immediate irreparable harm is buttressed by my finding that the [statute] is unconstitutional. Courts have found that 'an alleged constitutional infringement will often alone constitute irreparable harm.'" *Accord Association for Fairness in Business, Inc. v. New Jersey*, 82 F. Supp. 2d 353, 359 (D.N.J. 2000) (citing *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997)).

Further, in the context of a motion for preliminary injunction, the Government **[615]** does not have an interest in the enforcement of an unconstitutional law, and the public interest is not served by the enforcement of an unconstitutional law. *ACLU v. Ashcroft*, 322 F.3d 240, 247 (3d Cir. 2003). Thus, granting the preliminary injunction will not result in any harm to the State. Finally, the public's interest is not served by enforcing unconstitutional laws. Accordingly, in balancing the interests, I conclude that the remaining preliminary injunction factors have been satisfied.

VII. Conclusion

Accordingly, having balanced the injunction factors, the Court enjoins the State of New Jersey from enforcing the place-of-purchase presumption found in Chapter 25—subsection 5c—and Guidances issued by the Treasurer. The Court further enjoins the State from enforcing Chapter 25 retroactively against issuers of stored value cards with existing stored value card contracts that obligate the issuers to redeem the cards solely for merchandise or services.

OPINION

Presently before the Court is a motion brought by Plaintiffs American Express Prepaid Card Management Corporation ("AMEX Prepaid"), New Jersey Retail Merchants Association ("Retail Merchants"), and New Jersey Food Council ("Food Council") (collectively, "Plaintiffs' "), each issuers of stored value cards ("SVCs"), for construction of the Court's November 13, 2010 Opinion and Order ("November 13th Ruling"[1]) granting a preliminary injunction enjoining Defendants Andrew P. Sidamon-Eristoff, Treasurer of the State of New Jersey ("Treasurer"), and Steven R. Harris, Administrator of Unclaimed Property of the State of New Jersey (collectively, "Defendants") from enforcing portions of New Jersey's recent amendment to its Unclaimed Property Law, 2010 N.J. Laws Chapter 25 ("Chapter 25" or "the Act"), codified at N.J.S.A. 46:30B-1, et seq. ("Unclaimed Property Act"), and portions of the Treasury Guidance dated September 23, 2010. In the alternative, Plaintiffs seek another preliminary injunction enjoining Defendants from enforcing the data collection requirements created by Chapter 25 as well as portions of the Treasury Announcements dated November 23, 2010 and November 24, 2010. For the reasons that follow, the Court clarifies its November 13th Order and denies Plaintiffs' request to enjoin the data collection provisions of the Act.

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[1] *American Exp. Travel Related Services Co., Inc. v. Sidamon-Eristoff*, 755 F. Supp. 2d 556, 2010 WL 4722209 (D.N.J., Nov. 13, 2010).

I. BACKGROUND

The facts surrounding Plaintiffs' dispute with Chapter 25 are set forth in great detail in the Court's opinion dated November 13, 2010. Since I write for the sake of the parties, I recount here only those facts necessary for the disposition of this motion.

In the November 13th Ruling, *inter alia*, this Court enjoined application of the place-of-purchase presumption found in subsection 5c of Chapter 25. The basis for this ruling was that the place-of-purchase presumption is preempted by the federal common law set forth in a series of Supreme Court cases that create a priority scheme for the escheat of abandoned intangible property—the *Texas* line of cases. At the conclusion of this Court's *Texas* preemption analysis, the Opinion stated **[616]** "[t]he State shall be preliminarily enjoined from applying the place-of-purchase presumption in the Act to SVCs." 755 F. Supp. 2d at 609.

Shortly thereafter, on November 23, 2010, the Treasurer issued Treasury Announcement FY 2011-05, which directed all issuers of SVCs to collect and maintain zip code information. This Announcement relied on a separate paragraph found in subsection 5c of the Act, which states "[a]n issuer of a stored value card shall obtain the name and address of the purchaser or owner of each stored value card issued or sold and shall, at a minimum, maintain a record of the zip code of the owner or purchaser." The next day, on November 24, 2010, the Treasurer issued Treasury Announcement FY 2011-06, which extended the effective date for this data collection provision to January 3, 2011. Thereaf-

ter, the State appealed the place-of-purchase presumption aspect of the Court's November 13th Ruling.[2]

The instant motion was filed on December 8, 2010, followed by opposition and reply papers. Via a conference call, on December 21, 2010, the Treasurer agreed to further extend the effective date to January 15, 2011, to afford the Court time to consider and rule on Plaintiffs' motion.

II. DISCUSSION

A. Construction of November 13th Ruling

Plaintiffs first move for clarification or construction of this Court's November 13th Ruling, citing language in *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 192 (1949), stating that a party may petition "the District Court for a modification, clarification, or construction of [a previously-issued] order." There is no provision in the Federal Rules of Civil Procedure for such a motion. However, according to both Federal Rule of Civil Procedure 62(c) and Federal Rule of Appellate Procedure 8(a)(C), a party may move in the district court for "an order suspending, modifying, restoring, or granting an injunction while an appeal is pending." Fed. R. App. Proc. 8(a)(C). The State's appeal of this Court's place-of-purchase presumption is still pending. Thus, I find it appropriate to consider Plaintiffs' request for clarification and construction of the November 13th ruling.

Plaintiffs interpret the November 13th Ruling as enjoining not only the place of purchase presumption found in 5c of Chapter 25, but also the data collection

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[2] Some plaintiffs appealed other non-place-of-purchase presumption aspects of the Court's November 13th Ruling as well.

requirement in the preceding paragraph. Subsection 5c reads as follows:

> An issuer of a stored value card shall obtain the name and address of the purchaser or owner of each stored value card issued or sold and shall, at a minimum, maintain a record of the zip code of the owner or purchaser.
>
> If the issuer of a stored value card does not have the name and address of the purchaser or owner of the stored value card, the address of the owner or purchaser of the stored value card shall assume the address of the place where the stored value card was purchased or issued and shall be reported to New Jersey if the place of business where the stored value card was sold or issued is located in New Jersey.

As noted, the Order provides that "the State is preliminarily enjoined from enforcing subsection 5c of Chapter 25 and **[617]** Treasurer Guidance dated September 23, 2010, which apply a place-of-purchase presumption for all stored value cards …."

1. Plain Language of the Order and Opinion

The Court appreciates that the Order's language could have been more precisely worded, however, when read in context, both the Opinion and the Order make clear that only the place of purchase presumption found in 5c—not the entire subsection—was enjoined. For one, the Order uses the term "which" to define the aspects of the subsection 5c and the September 23rd Treasury Guidance that were enjoined. "Which" is defined as "what one or ones (of the number mentioned or implied) …." Webster's New Universal Unabridged Dictionary (1979). By stating "*which* apply a place-of-

purchase presumption for all stored value cards," the Order necessarily implies that any non-place-of-purchase presumption clauses found in subsection 5c and the Treasurer's Guidance remain undisturbed by the Order.

The Opinion, which is, of course, expressly referred to in the Order, further makes clear that the Court enjoined only the place of purchase presumption. For one, the entire substance of the Court's discussion of subsection 5c is limited to the place-of-purchase presumption and how that presumption violates the Supreme Court's priority scheme. And, at the conclusion of the *Texas* preemption analysis, the Opinion states "[t]he State shall be preliminarily enjoined *from applying the place-of-purchase presumption* in the Act to SVCs." 755 F. Supp. 2d at 609 (emphasis added).

In addition, Plaintiffs point to a colloquy between the Court and the State at the Order to Show Cause hearing preceding the November 13th Ruling, arguing that an SVC issuer's failure to collect zip code data would be inconsequential. In that colloquy, the State suggested that, in the event no zip code was collected by an SVC issuer, the right to custodial escheat "would go first to the corporate domicile; so if it was [a corporation domiciled in New Jersey,] it would come to New Jersey …." AMEX Prepaid Open. Br. at 11 (quoting Tr., 87:21-88:18). When the Court questioned what would occur if the State of corporate domicile did not escheat SVCs, the State responded that, in its view, it had the right to retain the abandoned property "[u]ntil the state of corporate domicile or the proper owner of the property asserts its superior right of escheat." *Id.*

Plaintiffs argue that, via this colloquy, the State waived any argument that subsection 5c's data collec-

tion provision could operate independent of the place of purchase presumption. The Court strongly disagrees. The aforesaid colloquy addresses how the State suggests the place of purchase presumption would apply. It speaks nothing of what would happen in the event the Court invalidated the presumption, but left in place the collection of zip code information. Accordingly, the Court declines Plaintiffs' invitation to read into the colloquy some sort of waiver unsupported by the State's statements at the hearing.

2. Severability

Plaintiffs further argue that the Court should construe the November 13th Ruling as enjoining the data collection provision because that provision cannot be severed from the place-of-purchase presumption. New Jersey Statute 1:1-10 sets forth the law on the severability of unconstitutional portions of a statute:

> If any title, subtitle, chapter, article or section of the Revised Statutes, or of any statute or any provision thereof, shall be declared to be unconstitutional, **[618]** invalid or inoperative, in whole or in part, by a court of competent jurisdiction, *such title, subtitle, chapter, article, section or provision shall, to the extent that it is not unconstitutional, invalid or inoperative, be enforced and effectuated, and no such determination shall be deemed to invalidate or make ineffectual the remaining titles, subtitles, chapters, articles, sections or provisions.*

N.J.S.A. 1:1-10 (emphasis added).

In *Affiliated Distillers Brands Corp. v. Sills*, 60 N.J. 342 (1972), the Supreme Court of New Jersey succinctly explains the state's severability doctrine as "a

question of legislative intent." *Id.* at 346. To determine that intent, courts must ascertain

> whether the objectionable feature of the statute can be exercised without substantial impairment of the principal object of the statute. To justify severance of a part of a statute there must be such a manifest independence of the parts as to clearly indicate a legislative intention that the constitutional insufficiency of the one part would not render the remainder inoperative.

at 346 (internal quotation marks omitted).

By way of example, the New Jersey Supreme Court in *Brady v. New Jersey Redistricting Com'n*, 131 N.J. 594 (1992), was faced with congressional redistricting legislation that, among other things, granted the Court original jurisdiction over challenges to the statute. In that case, the Court determined that the jurisdictional provision was severable. In reaching that determination, the Court focused on the overarching purpose of the legislation: "[i]n deciding whether the principle of severability applies, we consider whether the Legislature designed that the enactment stand or fall as a unitary whole." *Id.* at 607 (internal quotation marks omitted). In that connection, the Supreme Court indicated that it would not "ascribe to the lawmakers a belief that the [entire] Act should fail without [the severed] provision" when the severed provision was "an attractive addition to the bill but not a critical feature." *Id.* Focusing on the purpose of the entire act, the Court ascertained that "the Legislature would desire that the remainder of the enactment remain in effect despite [the jurisdiction provision's] invalidity." *Id.* New Jersey Appellate Court decisions following *Brady* have

adhered to this analytical approach. *See Cockerline v. Menendez*, 411 N.J. Super. 596, 626 (App. Div. 2010); *L. Feriozzo Concrete Co., Inc. v. Casino Reinvestment Develop. Auth.*, 342 N.J. Super. 237, 251-52 (App. Div. 2001).

The primary purpose underlying New Jersey's enactment of its Unclaimed Property Act is

> that all unclaimed property shall be placed into the protective custody of the State Treasurer after the property has remained in the hands of the holder for a specified period of time. The rights of the original party in interest shall not be forfeited or extinguished. The State Treasurer serves as the conservator or trustee of the unclaimed property, acting always, and with full authority, to safeguard and foster the rights of the original owner or party entitled to the property.

Clymer v. Summit Bancorp., 320 N.J. Super. 90, 98 (App. Div. 1998) (quoting Statement to Senate Bill 888 (1983) at 20 (Nov. 23, 1987)) *reversed on other grounds by* 171 N.J. 57 (2002). By enacting Chapter 25, the Legislature extended the reach of the Unclaimed Property Act to stored value cards. It can be said, then, that a key purpose of enacting Chapter 25 was to ensure that the rights of SVC purchasers **[619]** will not be forfeited by the passage of time. Keeping intact the data collection portion of Chapter 25 furthers this purpose by making it more likely that the State will be able to reunite the purchaser/owner with the abandoned SVC funds. In my view, the Act's inclusion of the place-of-purchase presumption was "an attractive addition to the bill but not a critical feature." *Brady*, 131 N.J. at 607.

Plaintiffs argue that the data collection provision is so interrelated with the place-of-purchase presumption that the two cannot be severed. I disagree. The question is not whether the provisions are interrelated, but whether they are interdependent. Historically, New Jersey courts have described the sort of interdependence that would require invalidation of an entire statute as where different parts of a statute are so "intimately connected with and dependent upon each other so as to make the statute one composite whole …." *Lane Distr. v. Tilton*, 7 N.J. 349, 370 (1951). *See also State by McLean v. Lanza*, 27 N.J. 516, 528 (1958); *Wilentz v. Galvin*, 125 N.J.L. 455, 458 (1940).[3] An example of this sort of dependency is that a statute's definitions could not be severed from the remainder of the statute without rendering the statute meaningless or confusing. *Lane*, 7 N.J. at 370; *L. Feriozzo*, 342 N.J. Super. at 251-53.

Here, unlike the relationship between a statute's definitions and the operational text, the requirement that an SVC issuer obtain the purchaser's zip code is entirely independent from what presumption is applied

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[3] This interdependence rationale is actually part of the legislative intent analysis; it is based on the notion that "an unconstitutional provision in a statute does not affect the validity of a separate article or clause of the enactment, if otherwise valid, unless the two are so intimately connected and mutually dependent as reasonably to sustain the hypothesis that the Legislature would not have adopted the one without the other." *Lanza*, 27 N.J. at 528. *See Van Cleef v. Comm's of New Brunswick*, 38 N.J.L. 320, *3 (1876) ("It has been stated as a rule that all provisions of an act which are dependent, conditional, or connected *so as to warrant the belief that the legislature intended them as a whole*, stand or fall together under the test of the constitutionality of any such provision.") (emphasis added).

when no zip code is actually obtained, and the place-of-purchase presumption is applied. Under the statutory scheme, the place-of-purchase presumption necessarily applies when no address (or zip code) is collected. On the other hand, the data collection provision focuses on the *person who purchased* the SVC and aids the State in determining what state is entitled to escheat the SVC in accordance with the *Texas* priority scheme. The place-of-purchase presumption, by contrast, focuses on where the SVC was purchased and works to override the priority scheme by presuming that the purchaser is a New Jersey resident simply because he/she purchased the SVC in New Jersey. The effect of excising the presumption does not impede the operation of the data collection provision. To the contrary, removing the presumption merely frees the data collection provision to operate in a manner consistent with the *Texas* scheme, which focuses on the purchaser/owner. In short, Chapter 25's data collection provision may operate with or without the place-of-purchase presumption and is, therefore, not dependent upon the presumption.

That the statute is intended to operate with a data collection provision is, further, made clear by referring to other sections of the Unclaimed Property Act. For example, N.J.S.A. 46:30B-10.1 directs that "the **[620]** records of [the] holder" are to be consulted to determine the identity of the owner of the abandoned property. In addition, N.J.S.A. 46:30B-47g grants the Administrator of the Unclaimed Property Act authority to collect from holders "[o]ther information the administrator prescribes by rule as necessary for the administration of the [Act]." Presumably, such information countenances a purchaser's zip code.

Plaintiffs' citations to *Affiliated*, *supra*, *New Jersey Chapter, Am. Institute of Planners v. New Jersey State Bd. of Professional Planners*, 48 N.J. 581 (1967) ("Professional Planners"), and *Washington Nat'l Ins. Co. v. Bd. of Review of N.J. Unemployment*, 1 N.J. 545, (1949), are unavailing. *Affiliated* is distinguishable; the Court in that case was presented with evidence that a severed grandfather clause would deny protection to a large number of manufacturers that the legislature likely intended to save from liability. Here, by contrast, excising the place-of-purchase presumption does not affect the inclusion of SVC issuers in the Unclaimed Property Act, nor the State's ability to identify purchasers/owners for whose benefit the State will hold the funds. Rather, since the presumption does not focus on the purchaser/owner, whereas the data collection provision focuses on the purchaser/owner in order to determine which state has the right to custody of the abandoned funds, the latter provision can stand alone and survives. In *Professional Planners*, there was specific legislative history indicating that the statute would not have been adopted without the allegedly unconstitutional provision. 48 N.J. at 594-98. There is no such relevant legislative history here. Lastly, *Washington* involved an unemployment insurance law that provided coverage solely to life insurance agents, to the exclusion of agents selling commission-based forms of insurance. After rejecting the law as unconstitutional, the Court could not sever any unconstitutional portion where the purpose of the statute was "coverage of life insurance agents alone …." 1 N.J. at 556. Here, as explained *supra*, severing the place-of-purchase presumption does not vitiate the purpose of the entire Act, which is to reunite purchaser/owners with their abandoned property, and collecting the zip code assists in

meeting that objective. Accordingly, I reject Plaintiffs' argument that New Jersey's severability doctrine requires the Court to enjoin all aspects of subsection 5c of Chapter 25.

3. *Purchaser v. Owner*

In addition, Plaintiffs argue that the Court should construe the November 13th Ruling as enjoining the data collection provision because that provision does not further the Supreme Court's *Texas v. New Jersey* priority scheme. In Plaintiffs' view, the *Texas* line of cases require States to determine the last known address of the actual owner of the abandoned property in order to properly apply the first priority rule. As explained in detail in the November 13th Opinion, the Supreme Court created a two-tier priority scheme to govern the escheat of intangible property:

> The first rule provides: "the right and power to escheat the debt should be accorded to the State of the creditor's last known address as shown by the debtor's books and records." This rule is referred to as the "primary rule." Where the creditor's last known address is unknown, or where the last known address is in a state that does not provide for the escheat of the abandoned property, the second priority rule comes into play. That rule, referred to as the "secondary rule," "award[s] the right to escheat to the debtor's State of corporate domicile …."

[621] 755 F. Supp. 2d at 596 (internal citations omitted).

Contrary to Plaintiffs' assertions, the *Texas* line of cases clearly authorize States to require issuers of intangible property to collect the last known address of

the purchaser and to rely on that address in reuniting the "owner" with the abandoned property. In both the *Pennsylvania v. New York*, 407 U.S. 206 (1972), and *Delaware v. New York*, 507 U.S. 490 (1993), decisions, the Supreme Court expressly stated that "nothing in our decisions 'prohibits the States from requiring [debtors] to keep adequate address records.'" *Delaware*, 507 U.S. at 509, n.12 (quoting *Pennsylvania*, 407 U.S. at 215). The Supreme Court even stated that such as an approach was advisable, noting that "New York and other states could have anticipated and prevented some of the difficulties stemming from incomplete debtor records" if it had required debtors to maintain better records. *Id.*

As to the address obtained, in both of those decisions, the Supreme Court explains that a creditor, in the money order context, "might be *either a payee or a sender*: 'the payee of an unpaid draft, the sender of a money order entitled to a refund,' or a payee or sender 'whose claim has been underpaid through error.'" *Delaware*, 507 U.S. at 503 (quoting *Pennsylvania*, 407 U.S. at 213) (emphasis added). Just as in the money order context, where either the payee or sender may redeem the money order, either the purchaser of the gift card or the recipient of the gift card may redeem the card. Indeed, *Mann v. TD Bank, N.A.*, Civ. No. 09-1062 (RBK/AMD), 2010 WL 4226526 (D.N.J. Oct. 20, 2010), a case cited by Plaintiffs, expressly acknowledges this: "gift cards … are a promise by the bank to make payment pursuant to stated terms on behalf of the cardholder; regardless of whether that is the purchaser, recipient, or other authorized card-user." *Id.* at *9. While the purchaser's ownership right may be extinguished once he transfers the card to a recipient, *id.*, despite this legal maxim, the Supreme Court has con-

sistently permitted states to escheat based on the last known address of the purchaser. *Pennsylvania*, 407 U.S. at 215 (defining creditor as the individual who purchased intangible property); *Delaware*, 507 U.S. at 503 (affirming *Pennsylvania*'s holding that "Western Union was a 'debtor' insofar as it owed contractual duties to two separate creditors. Western Union was obligated not merely to deliver a negotiable draft to the sender's payee; if Western Union could not locate the payee or if the payee failed to claim his money order, the company was bound to make a refund to the sender.").

Indeed, under these precedents, it is the location of the purchaser's last known address that determines what state has the right to escheat, *Texas*, 379 U.S. at 680, and the data collection provision focuses on that key location. To be sure, the *Texas* Court was not troubled by the fact that some purchasers may provide an inaccurate address, i.e., one that does not reflect their true residence at the time of purchase. *Id.* at 680-81 ("It may well be that some addresses left by vanished creditors will be in States other than those in which they lived at the time the obligation arose or at the time of the escheat. But such situations probably will be the exception, and any errors thus created, if indeed they could be called errors, probably will tend to a large extent to cancel each other out."). If the Court was not troubled by an inaccurate address, which might cause the wrong state to obtain custody of the funds, neither would **[622]** the Court's rulings be offended by a purchaser's post-purchase decision to transfer the property to a party residing in another state. What was offensive to the Court in *Pennsylvania* and *Delaware* was the attempt by states to override the Court's priority scheme by presuming that all property pur-

chased in its state (when no address was on record) had been purchased by a state resident. Thus, Plaintiffs' arguments that the United States Supreme Court mandates that the primary rule's application requires that the address of the actual owner, and not simply the purchaser, be obtained is without merit.

D. Injunction of Data Collection Provisions

Finally, Plaintiffs move to enjoin the data collection provisions of the Act pursuant to Federal Rule of Civil Procedure 62(c). That rule permits district courts to "suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights" while an appeal is pending. Fed. R. Civ. P. 62(c). In determining whether to grant a motion for injunction pending appeal, a court must consider: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Sanofi-Aventis U.S. LLC v. Sandoz, Inc.*, Civ. No. 07-2762, 2009 WL 1968900, *1 (D.N.J. Jul. 01, 2009). The burden on the movant under the rule is a "heavy one." 11 Fed. Prac. & Proc. Civ. 2d § 2904 *cited in Sanofi-Aventis*, 2009 WL 1968900 at *2.

The hole in Plaintiffs' argument is that Plaintiffs have not pointed to any constitutional infirmity with the data collection provision. Because I conclude that the data collection provision is entirely severable from the unconstitutional place-of-purchase presumption, there is no legal basis for this Court to enjoin the enforcement of the data collection provision. To the contrary, collection of the purchaser's last known address

has been sanctioned by the United States Supreme Court and is integral to the *Texas* priority scheme.

In terms of irreparable harm, this Court concluded in its November 13th Opinion that Plaintiffs will suffer some harm by virtue of being required to implement Chapter 25 as a whole. Specifically, the Court stated:

> With respect to the SVC Plaintiffs, this Court has concluded, *supra*, that they have shown a likelihood [of] success on their on their Texas based preemption argument regarding Chapter 25's place of purchase presumption. These plaintiffs, further, argue that they will suffer irreparable harm if required to comply with the law. Were this Court to deny their request for a preliminary injunction, and permit the statute to be enforced, the SVC issuers would face threat of prosecution if they chose not to expend the large amounts of funds necessary to comply with the statute's prospective and retroactive reporting requirements-funds they would not to be entitled to receive back if the statute is later found unconstitutional. For gift card SVC issuers, in particular, they contend that the same holds true for the profits they must remit under the statute. I agree that these bases sufficiently demonstrate irreparable harm.

AmEx, 755 F. Supp. 2d at 614.

[623] To the extent this language has been construed by the Plaintiffs to state that they will suffer irreparable harm if forced to comply with the data collection provision, their reading is too broad and not supported by the text. For one, the opening sentence cabins the irreparable harm inquiry to the place-of-

purchase presumption and the remaining language must be understood in that context. Second, the Plaintiffs did not separately challenge the Act's data collection provision. Thus, the Court was not called upon to analyze whether that provision alone would lead to irreparable harm. Now faced with that question, the Court concludes that it does not. With the place-of-purchaser presumption removed, there is no constitutional right impinged by subsection 5c and, therefore, no threat that the SVC issuers will be prosecuted for failing to comply with an unconstitutional law. Plaintiffs argue that they will incur great costs in converting their cash registers to retain zip codes, and the Court appreciates the practical difficulties that certain Plaintiffs may experience. But the Court also recognizes that Treasurer Guidances permit SVC issuers to file for exemptions for that precise reason.[4]

Furthermore, the issuance of the stay will substantially injure the other parties interested in the proceeding. Having found no constitutional infirmity, the State

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[4] N.J.S.A. 46:30B-42.1 provides:

> The State Treasurer is authorized to grant an exemption from [the data collection] provisions concerning stored value cards, on such terms and conditions as the State Treasurer may require, for a business or class of businesses that demonstrate good cause to the satisfaction of the State Treasurer. In exercising his discretion pursuant to this section, the State Treasurer may consider relevant factors including, but not limited to, the amount of stored value card transactions processed, the technology in place, whether or not stored value cards issued contain a microprocessor chip, magnetic strip, or other means designed to trace and capture information about place and date of purchase, and such other factors as the State Treasurer shall deem relevant.

stands to be injured by a injunction against the data collection provision when it should be entitled to reunite owners with their abandoned property. Finally, the potential for reuniting owners with their abandoned property sooner versus later is in the public interest. Thus, consideration of all four factors leads to the causes the Court to conclude that the Plaintiffs have not met their heavy burden, and that an injunction is not warranted. Accordingly, Plaintiffs' request for preliminary injunction enjoining the data collection provision is denied.

III. CONCLUSION

For the foregoing reasons, Plaintiffs' motion is DENIED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 10-4328

AMERICAN EXPRESS TRAVEL RELATED SERVICES, INC.,
Appellant,

v.

ANDREW P. SIDAMON-ERISTOFF,
AS TREASURER OF THE STATE OF NEW JERSEY;
STEVEN R. HARRIS, AS ADMINISTRATOR OF
UNCLAIMED PROPERTY OF THE STATE OF NEW JERSEY

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 3-10-cv-04890)
District Judge: Honorable Freda L. Wolfson

Present: McKEE, *Chief Judge*, SLOVITER, SCIRICA, RENDELL, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, and VANASKIE, *Circuit Judges*.

SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING EN BANC

The petition for rehearing filed by Appellant having been submitted to all judges who participated in the decision of this court, and to all the other available circuit judges in active service, and a majority of the judges who concurred in the decision not having asked

for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is hereby DENIED.

BY THE COURT:

/s/ D. Michael Fisher
Circuit Judge

Dated: February 24, 2012

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 10-4328

AMERICAN EXPRESS TRAVEL RELATED SERVICES
Appellant,

v.

ANDREW P. SIDAMON-ERISTOFF, ET AL.

Present: SCIRICA, SMITH and FISHER, Circuit Judges

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of a formal mandate is hereby stayed pending the filing and disposition of a petition for writ of certiorari.

BY THE COURT:

/s/ D. Michael Fisher
Circuit Judge

Dated: April 5, 2012

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 10-4328, 11-1141,
11-1164, & 11-1170

AMERICAN EXPRESS TRAVEL RELATED SERVICES, INC.,
Appellant,

v.

ANDREW P. SIDAMON-ERISTOFF, ET AL.
(D.N.J. No. 10-cv-04890)

AMER. EXPRESS PREPAID CARD MANAGEMENT CORPORATION,
Appellant in No. 11-1141

v.

ANDREW P. SIDAMON-ERISTOFF, ET AL.
(D.N.J. No. 10-cv-05206)

NEW JERSEY FOOD COUNCIL,
Appellant in No. 11-1164

v.

ANDREW P. SIDAMON-ERISTOFF, ET AL.
(D.N.J. No. 10-cv-05123)

NEW JERSEY RETAIL MERCHANTS ASSOCIATION, *Appellant in* No. 11-1170

v.

ANDREW P. SIDAMON-ERISTOFF, ET AL.
(D.N.J. No. 10-cv-05059)

Present: SCIRICA, SMITH and FISHER, Circuit Judges

1. Emergency Motion by Appellant in No. 10-4328 for Injunctive Relief Pending Appeal
2. Response by Appellees in No. 10-4328 in Opposition
3. Emergency Motions by Appellants in Nos. 11-1141, 11-1164, and 11-1170 for Injunctive Relief Pending Appeal
4. Appellees' Response in Nos. 11-1141, 11-1164, and 11-1170 in Opposition
5. Motion by Unclaimed Property Professionals Organization to Proceed as Amicus Curiae and for Leave to File a Memorandum in Support of Appellants' Motions for Emergency Injunctive Relief
6. Reply by Appellant in No. 11-1141 to Appellees' Response.

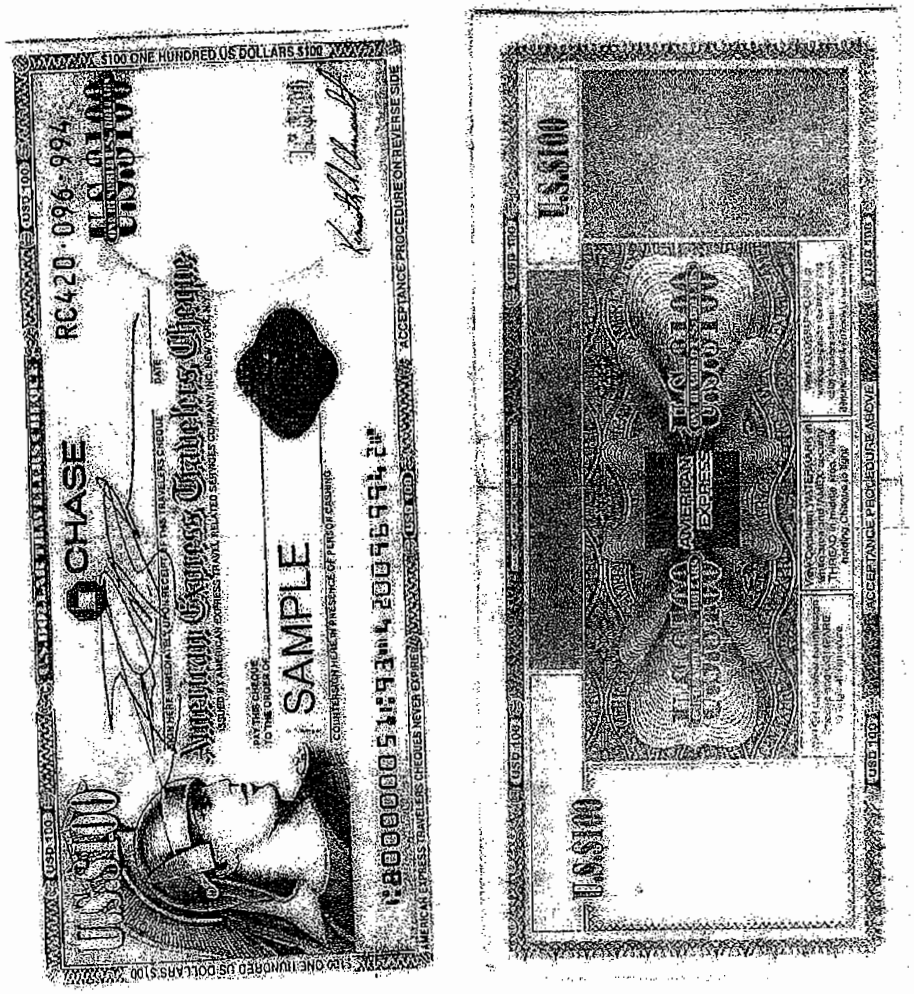
ORDER

The foregoing emergency motions for injunctive relief pending appeal are granted. The motion by Unclaimed Property Professionals Organization for leave to proceed as Amicus Curiae and for leave to file a memorandum in support of the motions for injunctive relief is granted. The appeals docketed at Nos. 10-4328, 10-4551, 10-4552, 10-4553, 10-4714, 10-4715, 10-4716, 11-1141, 11-1164, and 11-1170 are hereby expedited and consolidated for scheduling and disposition. All parties are directed to consult with one another and to submit a proposed expedited briefing schedule within three business days of the date of this order.

BY THE COURT:

/s/ Anthony J. Scirica
Circuit Judge

Dated: February 8, 2011


$100 ONE HUNDRED US DOLLARS $100
CHASE
RC420-096-994
American Express Travelers Cheques
SAMPLE
U.S.$100
U.S.$100

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

No. 10-cv-04890-FLW-LHG

AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC.

Plaintiff,

v.

ANDREW P. SIDAMON-ERISTOFF, AS TREASURER OF THE STATE OF NEW JERSEY; AND STEVEN R. HARRIS, AS ADMINISTRATOR OF UNCLAIMED PROPERTY OF THE STATE OF NEW JERSEY,

Defendants.

Filed: September 23, 2010

DECLARATION OF JAMES M. CAMPBELL

JAMES M. CAMPBELL declares:

1. I am Vice President-Finance of American Express Travel Related Services Company, Inc. ("AmEx"), where I have worked for 15 years. My responsibilities include AmEx's Travelers Cheque operations. I have personal knowledge of the facts set forth in this declaration.

2. In this declaration, I will describe the structure of the business model of travelers cheques ("TCs"), including AmEx's key right to invest funds paid by purchasers of TCs. I will also describe the impact on that

business model of the recent New Jersey law, Assembly Bill A3002 ("A3002") which shortened the period after which TCs are "presumed abandoned" from 15 years to three years.

3. AmEx is also submitting herewith a Declaration of Susan Helms, which describes the process under which, after the amount of uncashed TCs is paid to New Jersey and other States as abandoned property, AmEx nevertheless honors the TCs, making payment with its own funds, and then seeks reclamation of those funds from the States.

A. THE ESSENTIAL CHARACTERISTICS OF THE BUSINESS MODEL OF TRAVELERS CHEQUES

4. The sale of TCs is a unique financial transaction in that the purchasers (or "owners") are not charged a fee to purchase a TC.[1] From the perspective of TC issuers such as AmEx, the crux of the contractual relationship with TC customers is that issuers will have tire use of the funds, and the ability to earn money from the investment of those funds. AmEx's more than a century of experience in issuing TCs enables it to project what percentage of TCs will remain outstanding and for how long—and to place the proceeds from TC sales in investments with appropriate maturities. That investment income enables AmEx to cover the costs of its TC business and to earn a profit.

5. Consideration of the impact that A3002 on AmEx requires a review of four essential characteristics of the business model and unique nature of TCs.

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[1] The bank, or other agent, which sells the TC may charge a small administrative fee, but that is retained by the selling agent, and does not go to AmEx.

6. *First*, while most TC owners use their TCs within the first year after purchase—for example, on a specific trip for which the TCs were purchased—many intentionally retain unused TCs for many years, for use on later travels, or as a convenient source of "emergency funds." AmEx's experience documents that over 90% of TCs that are uncashed three years after sale will be cashed before the fifteenth anniversary of the sale. It is utterly irrational to presume that these TCs have been "abandoned."

7. *Second*, AmEx's ability to sell its TCs without charging a fee is premised on its contractual right to earn money from its use and investment of funds used to purchase TCs. In effect, all consumers who have purchased TCs in New Jersey and other States, without having to pay a fee, have received the benefit of the fact that some consumers retain those TCs for many years before cashing or using them. Prior to the enactment of A3002, all 50 States utilized a 15-year period of abandonment for TCs.[2] AmEx has been able to rely upon that period in determining how to use and invest its funds—including funds representing TCs that have not been cashed three years after sale, 90% of which will be cashed before 15 years after sale. A3002 would deprive AmEx of the use of those funds, which represent a key part of the benefit of AmEx's bargain with its customers. AmEx would have more than likely not sold TCs in New Jersey without charging a fee had it been required to pay the amounts of uncashed TCs to

[2] I am advised that a Kentucky statute attempted to shorten the period to seven years, but that statue never came into effect, and our Abandoned Property Unit has always used the 15-year period for all 50 states and the District of Columbia.

the State a mere three years after sale, and been deprived of the investment income which makes the TC business viable.

8. *Third*, each AmEx TC states that "American Express Travelers Cheques Never Expire." Thus, a TC owner can cash an AmEx TC at any time, whether or not the funds have been paid to New Jersey (or another State) as abandoned property. If the funds have already been paid to a State, AmEx advances its own funds when a TC is cashed or used, and then seeks to reclaim those funds from the State. Shortening the abandonment period from 15 years to three years would increase fifteen-fold the number of TCs for which AmEx would have to advance funds, and then seek reclamation. While New Jersey pays interest on such reclaimed funds, it is paid at a rate lower than that which AmEx attains through its own investments.

9. *Fourth*, unlike with respect to other personal property, there is no benefit to the consumer in having a TC "presumed abandoned." AmEx does not obtain the name and address of TC purchasers. That means that when the amounts from uncashed TCs are remitted to the States, the only information provided is the date and place of sale, the serial number, and the amount of the TC. In contrast, for most other forms of abandoned property, such as bank accounts, the holder which remits the funds to the States is able to provide the name and last known address of the owner, which the States use to attempt to reunite owners with their abandoned property. That process does not apply, in any respect, to uncashed TCs; indeed, New Jersey and other States do not, and cannot, make any attempt to "reunite" TC owners with their funds. Owners of uncashed TCs obtain the funds by using them or cashing them (or if the TCs have been lost, by presenting a

claim to AmEx), whether or not the funds have been paid to a State as unclaimed property.

B. How Travelers Cheques Work

10. AmEx has issued TCs since the nineteenth century, and is the world's largest issuer of TCs. AmEx TCs are sold in New Jersey and every other State of the United States, as well as throughout the world.

11. Since their introduction more than a century ago, TCs have been a convenient, safe alternative to carrying cash, used by consumers not only on travels but in their own cities and towns. The use of TCs has significantly declined with the availability of ATM machines, stored value cards, and other methods of accessing funds, but the TC market is still substantial. AmEx sold over $200 million in TCs in New Jersey between 2007 and 2009.

12. A representative example of an AmEx TC appears as **Exhibit A** hereto. In this declaration, I will describe the attributes of AmEx TCs. I understand that, with respect to the issues raised by shortening the abandonment period, TCs issued by other companies work in a similar manner.[3]

13. Amex TCs are preprinted "checks," each bearing a unique serial number, in fixed amounts, ranging from $20 to $100 (and also available denominated in Eu-

[3] AmEx is the sole remaining issuer of TCs in New Jersey, and throughout the United States, and the principal impact of A3002 will be felt by AmEx. A3002 will have a far more modest impact on TC issuers which sold TCs in New Jersey within the past 15 years, but no longer do so, which still have the funds related to uncashed TCs invested.

ros and other foreign currencies). To deter forgery, TCs have elaborate designs and engraving and, in more recent years, additional security features such as trademark-design watermarks, security threads, and holographic foils—all of which make the production of TCs costly.

14. AmEx TCs never expire, and each AmEx TC states, on its face, "American Express Travelers Cheques Never Expire."

15. TCs do not state the date or place of sale.

16. AmEx sells TCs for the face amount, without charging any fee. Sometimes, the bank or agency selling the TC charges a modest administrative fee, but that fee is retained by the bank or agency.

17. AmEx has never imposed "dormancy charges" on its TCs. Because AmEx TCs never expire, and because dormancy charges are never imposed. AmEx TCs always retain their face value, until cashed or used.

18. From a consumer's perspective, the way TCs work is simple: Each TC has spaces for two signatures by the TC owner—one in the upper left corner, and one in the lower left corner. Upon purchase, usually at a bank, the purchaser pays the amount of the TCs, and is instructed to sign each TC in the upper left corner. The purchaser is instructed to write down the serial numbers of the TCs, and to maintain that record separately from the TCs. When a TC owner wishes to either cash the TC, or use the TC as payment for goods of services, the TC owner is instructed to sign the TC in the lower left corner in front of the bank teller or merchant to whom the TC is presented for payment. The bank teller or merchant can then compare the lower-left signature (signed upon presentation for payment) with the

upper-left signature (which had been signed upon purchase of the TC), to verify that the TC is being presented by the TC owner. The bank teller or merchant may also ask the TC owner for additional identification. The TC owner then receives cash for the TC (either in the currency in which the TC is denominated, or in a different currency, often at a favorable conversion rate) or receives the goods and services for which the TC was used as payment. Upon the second signature, the TC becomes a negotiable instrument. The bank or merchant which accepted the TC presents the TC, usually through the banking system, to AmEx, which makes payment.[4]

19. If a TC is lost or stolen, the TC owner contacts AmEx and provides the serial number of the lost or stolen TC, and AmEx replaces the TC, often within 24 hours. Because TCs are not tied to any bank account number, credit card number, or other personal information, there is no risk of "identity theft" if a TC is lost or stolen.

20. When a TC is sold, the bank selling the TC transmits the funds to AmEx, and provides AmEx with the serial number of the TC, its amount, and the date and place of sale, but does not provide AmEx with the name, last known address, or any other identifying information about the purchaser. When AmEx sells TCs directly to consumers, it retains only the same informa-

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[4] Because of the manner in which TCs are cashed and used—cashed at a bank or merchant, who accepts the TC for its face amount, based on the second signature, without contacting AmEx for authorization to verify any information about the TC—it would not be feasible for any other TC issuer to impose dormancy charges on a TC.

tion that it receives from third party sales—the serial number, amount, and date and place of sale.

21. AmEx is able to sell TCs without charging a fee, based on its contractual relationship with the TC owners, which gives AmEx the right to retain, use, and invest funds from the sale of TCs, from the date of sale until the date the TCs are cashed or used (except, as discussed below, subject to valid unclaimed property laws including a 15-year abandonment period). That right to invest the funds is integral to the contractual relationship between the TC owners and AmEx, and the 15-year abandonment period relied upon by AmEx has long been the law in all 50 states in which AmEx sells TCs. AmEx invests the funds in instruments with varying maturities to obtain the highest possible yield, using detailed projections, based on historical patterns of TC use. In accordance with money transmitter laws, TC funds are invested in segregated accounts, in investment grade federal, state, municipal, and corporate bonds. Without that investment income, AmEx would not be able to cover the costs of its TC business, including printing TCs with fraud-protection features, issuing the TCs, maintaining records of outstanding TCs based on serial number, issuing replacements when TCs are lost or stolen, redeeming TCs, and absorbing or seeking to recover losses (e.g., if a TC is reported lost and is subsequently presented for payment by an intermediary bank).

22. While most TC owners use their TCs within the first year of purchase, the TC business works because a significant minority of TC owners intentionally retain unused TCs for many years, for use on later travels, or as a convenient source of "emergency funds." For example, AmEx's experience demonstrates that over 90% of TCs that are uncashed three

years after sale will be cashed before the fifteenth anniversary of the sale.

23. If all TC owners used their TCs within the first several years of purchase—decreasing the opportunity for AmEx to earn investment income on the TC proceeds—AmEx would be unable to sell TCs without charging a fee, because the investment income would be insufficient to cover operating expenses. In effect, all consumers who have purchased TCs in New Jersey and elsewhere, without having to pay a fee, have received the benefit of the fact that some consumers retain those TCs for many years before cashing or using them.

24. AmEx TCs are marketed on the same terms and conditions throughout the United States, are recognized throughout the world, and are widely accepted at banks and merchants throughout the world. One of the reasons why there are so few issuers of TCs is that maintaining an effective TC business requires not only worldwide recognition and acceptance of TCs, but a worldwide system for TC owners to report lost or stolen TCs and to have them replaced promptly.

C. NEW JERSEY'S UNCLAIMED PROPERTY LAW

25. Each of the 50 States and the District of Columbia has abandoned property laws which require that, after the property has been "abandoned" for a number of years set forth in the State law, the "holder" of the property (such as a bank, holding a savings account that has not been used for the statutory number of years) pay funds belonging to a property "owner" (such as a passbook depositor) to the State. AmEx has an Unclaimed Property Unit, in which Ms. Helms is a manager, responsible for its compliance with those laws.

26. However, no State law can, or does, relieve AmEx of the continuing contractual obligation to honor Amex TCs after the payment of the amount as abandoned property, because (a) AmEx TCs by contract, do not expire, (b) TCs are cashed by third parties (banks and merchants) who have no way of knowing (because the TCs do not show the date or place of sale) whether the amount of the TCs has been paid to a State as unclaimed property, (c) after the second signature, the TC becomes a negotiable instrument, which AmEx must pay upon presentation, and (d) only after making such payment can AmEx determine, from its records, the date and place of sale of the TC, and whether or not the amount of the TC has been paid to any State as unclaimed property.

27. After AmEx pays the amount of an uncashed TC to a State, as abandoned property, if the TC is subsequently cashed or used, AmEx reclaims those funds from the State. That process is described in the accompanying declaration of Ms. Helms.

28. I am advised that, until the enactment of A3002, the laws of all 50 States and the District of Columbia established a 15-year "abandonment period" for TCs. A3002 provides that TCs sold in New Jersey are "presumed abandoned" three years after sale.

D. THE IMPACT OF A3002 ON AMEX

29. AmEx has sold TCs, and authorized banks and agencies to sell TCs on its behalf, in the State of New Jersey for many years, without charging any fee, in reliance on its agreement with the TC owners, and in reliance on New Jersey law, that it would have the right to invest the proceeds of all TCs from the date of sale until the date the TCs are cashed, subject only to the 15-year abandonment period under New Jersey law.

30. Under prior law, AmEx would have been obliged to pay to the NJ Treasurer before November 1, 2010, the next reporting date, the amount of uncashed TCs that were sold in New Jersey more than 15 years ago—anticipated to be less than $2 million. If the three-year abandonment period comes into effect this year, Amex will be obliged to pay the amount outstanding on TCs sold in New Jersey between 3 and 15 years ago—an additional payment of approximately $39 million.

31. If A3002 comes into effect, AmEx will lose the ability to earn investment income on that $39 million. As described in the accompanying declaration of Ms. Helms, the overwhelming majority of those TCs will later be cashed or used by the TC owners, and AmEx will then reclaim the funds from New Jersey. However, that does not eliminate the adverse impact on AmEx because, among other reasons, AmEx is able to attain a higher rate of return, and receive that rate of return on a current basis, when it makes its own investments with appropriate maturities. AmEx currently earns a taxable-equivalent yield of 6.37% on its long term investments. While New Jersey does not state the rate of interest that it uses when it makes reclamation payments, a recent payment (described in Ms. Helms' declaration) was made at 2.95%. Losses will continue year after year.

32. In addition to the loss of investment income that will occur on the $39 million accelerated payment, if A3002 comes into effect, AmEx will lose investment income on each successive annual payment. For example, as described in Ms. Helms' declaration (¶ 9), AmEx sold $86 million of TCs in New Jersey in 2007. Of that amount, it is likely that about $3.4 million (or 3.9%) will remain outstanding three years after sale but only

$250,000 (or .3%) will remain outstanding 15 years after sale. The loss of investment income will continue, year after year, on each year's sale of TCs.

33. Depriving AmEx of this contractual right to invest the funds from TCs goes to the heart of the business model of TCs. AmEx has issued TCs in reliance on its ability to invest these funds, and to invest them in instruments with appropriate maturities, based on historical patterns of when TCs will be cashed or used by their owners.

34. As noted above, if all TC owners used their TCs within the first several years of purchase—decreasing the opportunity for AmEx to earn investment income on the TC proceeds—AmEx would be unable to sell TCs without charging a fee, because the investment income would be insufficient to cover operating expenses. A3002 will place AmEx in the same position—making its TC business in New Jersey either marginal or unprofitable.

35. That would leave Amex a choice of either: (a) selling TCs in New Jersey on a marginal basis or at a loss, (b) ceasing to sell TCs in New Jersey, (c) charging a fee for selling TCs in New Jersey, while not charging a fee anywhere else in the United States, or (d) to maintain uniform terms and conditions for the sale of TCs, charging a fee for selling TCs throughout the United States. Each one of these alternatives imposes a substantial burden on AmEx and its ability to operate a worldwide TC business. If AmEx concludes that it is necessary to discontinue the sale of TCs in New Jersey, or impose a fee on such sales (even though such fee is not imposed in any other State, because no other State has an abandonment period shorter than 15 years), that would not only be detrimental to AmEx's TC business,

but would be detrimental to consumers in New Jersey (who would be denied the opportunity to purchase TCs in New Jersey without a fee.)

I declare under penalty of penury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct.

Executed on September 23, 2010

/s/ James M. Campbell
James M. Campbell

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

No. 10-cv-04890-FLW-LHG

AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC.

Plaintiff,

v.

ANDREW P. SIDAMON-ERISTOFF, AS TREASURER OF THE STATE OF NEW JERSEY; AND STEVEN R. HARRIS, AS ADMINISTRATOR OF UNCLAIMED PROPERTY OF THE STATE OF NEW JERSEY,

Defendants.

Filed: September 23, 2010

DECLARATION OF SUSAN HELMS

SUSAN HELMS declares:

1. I have been employed by American Express as the Manager of the Abandoned Property unit since May 2008, and I have been employed as a Manager with American Express since June 1998. I have personal knowledge of the facts set forth in this declaration.

2. In this declaration, I describe the process through which American Express Travel Related Services Company, Inc. ("AmEx") reclaims funds from New Jersey after a travelers cheque ("TC") which was purchased in New Jersey is used by the owner, and the

amount of the TC has already been paid to New Jersey by AmEx. A similar process is used in the other States and the District of Columbia.

3. I also describe the anticipated impact on that process of the recent New Jersey law, Assembly Bill A3002 ("A3002"), which shortened the period after which TCs are "presumed abandoned" from 15 years to three years.

4. Until the enactment of A3002, the laws of all 50 States and the District of Columbia provided that TCs which were not used or cashed by their owners were "presumed abandoned" 15 years after sale.[1] In accordance with those laws, when any TC reaches the 15-year mark, AmEx pays the amount of that TC to the State in which the TC was sold.

5. However, each AmEx TC states on its face, "American Express Travelers Cheques Never Expire." TC owners can continue to use their TCs after the amount of the TCs has been paid to the State as "abandoned property" in the exact same manner that they were able to use the TCs from the date of purchase. The TC owner takes the TC to a bank or merchant, signs the TC in the lower left corner in front of the bank teller or merchant (having signed in the upper left corner when the TC was purchased), provides additional identification if so requested, and receives cash for the TC (or receives the goods or services for which the TC was given in payment). The bank or merchant

[1] I am advised that a Kentucky statute attempted to shorten the period to seven years, but that statute never came into effect, and our Abandoned Property Unit has always used the 15 year period for all 50 States and the District of Columbia.

which accepted the TC presents the TC, usually through the banking system, to AmEx, which makes payment.

6. For every TC which is cashed by the owner after the amount has been paid to New Jersey (or another State) as "abandoned property," AmEx pays twice—first when AmEx paid the amount of the unused TC to the State when the TC reached the 15-year mark, and next when AmEx paid the bank which had accepted the TC after the TC owner used it.

7. After a TC is used or cashed, AmEx compares the serial number of the TC with its records to determine when the TC was sold, and thus determine whether the amount of the TC has already been paid to a State as "abandoned property." If it has been, AmEx then seeks to reclaim those funds from the State to which the funds were paid (the State where the TC was sold). AmEx's experience has shown that, about 80% of TCs which have been paid to the States as "abandoned property," after the 15-year mark, will ultimately be used by the TC owners. These TCs were, in fact, not abandoned.

8. Under A3002, if the three-year abandonment period comes into effect, this year, in addition to paying to New Jersey the amount of uncashed TCs which reached the 15-year mark, AmEx will be required to pay to New Jersey the amount of uncashed TCs that were sold in New Jersey between three and 15 years ago. AmEx sold over $3 billion in TCs in New Jersey during that time period—of which about $39 million (about one million individual TCs) remain uncashed. Thus, under A3002, AmEx would be required to pay that $39 million to the New Jersey Treasurer this year. However, the overwhelming majority of those TCs will

be used before reaching the 15-year mark. Based on historical usage patterns, of that $39 million, approximately $30 million of TCs will be used before the 15-year mark, and another $7 million will be used thereafter, leaving only about $2 million in TCs actually "abandoned." Thus, if the shortened abandonment period comes into effect, AmEx will be required to use its own funds to pay TC owners that $37 million, and only then seek reclamation from New Jersey by presenting claims on nearly one million TCs.

9. The shortened abandonment period would also have an ongoing impact, year after year. For example, American Express sold $86 million of TCs in New Jersey in 2007. Of that amount, it is likely that (a) about $3.4 million (or 3.9%, or about 80,000 TCs) will remain outstanding three years after sale, (b) about $250,000 (or 0.3%, about 6,000 TCs) will remain outstanding 15 years after sale, and (c) about $50,000 (or 0.06%, about 1,200 TCs) will not eventually be cashed. Thus, more than 90% of the TCs that are uncashed after three years will be cashed before the 15-year mark. If the three-year period applies, about $3,400,000 would be paid, and then $3,350,000 reclaimed (through the presentation of a claim on each of nearly 80,000 TCs). Fifteen times as much money and fifteen times as many individual TCs will go through the reclamation process if A3002 is enforced.

10. Under the current 15-year abandonment period, AmEx files, reclamation requests with the New Jersey Treasurer, usually each month. It takes the New Jersey Treasurer a year to process the reclamation requests. Thus, for example, AmEx received payment on July 9, 2010 based on a reclamation request filed with New Jersey on July 8. 2009. With a fifteenfold increase in reclamation, requests, unless the NJ

Treasurer's staff and resources are expanded proportionately, AmEx would have to wait several years for New Jersey to return its money.

11. The amount reclaimed is then refunded, with interest from the date payment was made to New Jersey, until the date of the refund. While New Jersey does not state what interest rate it uses, the payment that New Jersey made on July 9, 2010 included interest at the rate of 2.95%.

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct.

Executed on September 23, 2010

/s/ Susan L. Helms
Susan L. Helms

APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

No. 10-cv-04890-FLW-LHG

AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC.

Plaintiff,

v.

ANDREW P. SIDAMON-ERISTOFF, AS TREASURER OF THE STATE OF NEW JERSEY; AND STEVEN R. HARRIS, AS ADMINISTRATOR OF UNCLAIMED PROPERTY OF THE STATE OF NEW JERSEY,

Defendants.

AMERICAN EXPRESS PREPAID CARD MANAGEMENT CORPORATION

Plaintiff,

v.

ANDREW P. SIDAMON-ERISTOFF, AS TREASURER OF THE STATE OF NEW JERSEY; STEVEN R. HARRIS, AS ADMINISTRATOR OF UNCLAIMED PROPERTY OF THE STATE OF NEW JERSEY,

Defendants.

Filed: October 27, 2010

SUPPLEMENTAL DECLARATION OF STEFAN HAPP

STEFAN HAPP declares:

1. I am employed by American Express Travel Related Service Company, Inc. ("AmEx TRS") as Senior Vice President / General Manager in charge of, among other areas, Prepaid Cards. American Express Prepaid Card Management Corporation ("AmEx PCMC") is a wholly owned subsidiary of AmEx TRS. I have personal knowledge of the facts set forth in this declaration.

2. I make this declaration to set forth facts relating to the applicability of New Jersey's Money Transmitter Law, N.J.S.A. 17:15C-2 *et seq.* (the "NJ Money Transmitter Law") to the investment of the proceeds from AmEx TRS's sale of travelers cheques ("TCs") and from AmEx PCMC's sale of stored value cards ("SVC"). Those requirements include that funds from the sale of TCs and "open loop" SVCs be invested in safe, secure "permissible investments."

3. AmEx TRS issues TCs. Prior to 2009, Amex TRS began to issue SVCs. In 2009, AmEx TRS transferred its SVC business to AmEx PCMC (originally formed as an Arizona limited liability company, and reorganized in early 2010 as an Arizona corporation). AmEx PCMC now conducts the SVC business which was formerly conducted by AmEx TRS. All of the SVCs issued by AmEx TRS and Amex PCMC are "open loop" SVCs.

4. AmEx TRS has long been licensed, and continues to be licensed, as a money transmitter under the NJ Money Transmitter Law. AmEx TRS holds License No. 8400418. AmEx TRS fully complies with all of the requirements of the NJ Money Transmitter Law, including maintaining funds from the sale of the TCs in "permissible investments."

5. When AmEx TRS entered the open loop business in New Jersey, it did so under its existing money transmitter license, and abided by all requirements of the NJ Money Transmitter Law, including the "permissible investments" requirements, for both its TC business and its open loop SVC business.

6. When AmEx TRS transferred its open look SVC business to its subsidiary, AmEx PCMC, it reviewed the issue of whether it was necessary (in New Jersey and other states) to obtain separate money transmitter licenses for AmEx PCMC, and determined that it was not necessary to do so. AmEx TRS and AmEx PCMC determined that it was sufficient to maintain AmEx TRS's license, and that AmEx PCMC could issue SVCs as AmEx TRS's delegate or agent, as long as the dollar volume of AmEx PCMC's open loop SVC sales was taken into account in computing the amount of the permissible investments. However, some states (not including New Jersey) told AmEx PCMC that it, as an issuer of SVCs, must be separately licensed as a money transmitter. AmEx PCMC decided to obtain its own licenses.

7. AmEx PCMC filed its application for a money transmitter license in the State of New Jersey on August 19, 2010. The State of New Jersey has not raised any issues with respect to the license application. AmEx PCMC is awaiting issuance of the license.

8. Just as AmEx TRS abided by the "permissible investment" requirements of the NJ Money Transmitter Law when it entered the SVC business in New Jersey, AmEx PCMC had complied (and continues to comply) with those requirements since assuming responsibility for the business from its parent corporation, AmEx TRS.

9. The NJ Money Transmitter Law requires that AmEx PCMC maintain "permissible investments" equal to "the aggregate face amount of all outstanding payment instruments issued or sold by the licensee in the United States"—not merely those outstanding SVCs which were sold in New Jersey. The money transmitter laws of other states, in which AmEx PCMC has already been licensed, contain similar requirements. AmEx PCMC is also in compliance with those laws.

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct.

Executed on October 26, 2010

/s/ Stefan Happ
STEFAN HAPP

APPENDIX J

ASSEMBLY BUDGET COMMITTEE

STATEMENT TO

ASSEMBLY, No. 3002

STATE OF NEW JERSEY

DATED: JUNE 24, 2010

The Assembly Budget Committee reports favorably Assembly Bill No. 3002.

The bill modifies the State's unclaimed property laws to adjust the time periods for presumptions of abandonment, limit issuer imposes dormancy fees, and provide for related administration of certain unclaimed property. The primary purposes of this measure are to protect New Jersey consumers from certain commercial dormancy fee practices and modernize the State's unclaimed property law.

The bill provides the following presumptions of abandonment:

- Adjusts the period of time which triggers abandonment for travelers checks from 15 to 3 years;
- Adjusts the period of time which triggers abandonment for money order from 7 to 3 years; and
- Creates a 2 year trigger for abandonment of stored value cards. The bill's definition of stored value cards, includes, but is not limited to, paper gift certificates, gift cards and rebate cards.

The bill also limits the imposition of dormancy fees as follows:

- Precludes the imposition of dormancy fees on travelers checks or money orders in the first 12 months

after issuance and limits permissible dormancy fees to $2 per month; and

- Precludes the imposition of dormancy fees on stored value cards, credit balances, overpayments, security deposits, unused tickets, refunds, credit memoranda and similar instruments.

The bill also includes stored value cards into an existing reimbursement process for escheated properties so that if an escheated stored value card is subsequently claimed by an owner and honored by the issuer, the State can reimburse the issuer.

Additionally, the bill requires stored value card issuers to obtain the name and address of purchasers and to maintain, at a minimum, a record of the zip code of the purchaser. In instances where an issuer does not have the name and address of a purchaser, the address of the purchaser shall assume the address of the place where the stored value card is purchased, if that place is located in New Jersey. These provisions are designed to modernize the State's unclaimed property processes relative to other states and enhance New Jersey's capacity to protect its residents' stored value cards from being subject to other state's escheatment processes.

Stored value cards issued under a promotional program, customer loyalty program, charitable program or by a business selling $250,000 or less of stored value cards in the prior year are exempted from the stored value card provisions of the bill.

The bill also authorizes the State Treasurer to grant an exemption from such provisions concerning stored value cards, on such terms and conditions as the State Treasurer may require, for a business or class of

businesses that demonstrate good cause. In determining whether to exercise the discretion to grant an exemption, the State Treasurer may consider relevant factors including, but not limited to, the amount of stored value card transactions processed, the technology in place, whether or not stored value cards issued contain a microprocessor chip, magnetic strip, or other means designed to trace and capture information about place and date of purchase, and such other factors as the State Treasurer shall deem relevant.

The bill specifies that only stored value cards exempted from the unclaimed property provisions of the bill shall be deemed gift cards or gift certificates subject to the consumer protections provided under P.L.2002, c.14 (C.56:8-110).

The bill takes effect July 1, 2010 and applies to stored value cards, travelers checks, money orders and certain similar instruments outstanding on and after July 1, 2010, including, but not limited to, those issued before July 1, 2010.

FISCAL IMPACT:

In the FY 2010-2011 Budget in brief, the Executive projects that this proposal, prior to revision, would have increased State General Fund revenues by $79,580,000 in FY 2011. The OLS can neither concur nor disagree with this estimate, given that the Executive has not elaborated on the method and data underlying its projection and that a lack of data precludes the OLS from ascertaining its accuracy. The OLS agrees, however, that the bill will produce an annual revenue gain to the State General Fund. The office also points out that the FY 2011 revenue increase will be noticeably larger than the gain in subsequent years because of

significant one-time collections that will occur in FY 2011 as a consequence of the naturally front-loaded mechanics of accelerating and establishing abandonment periods.

The OLS also notes that the legislation might cause the New Jersey Department of the Treasury to incur additional administrative expenses since the unclaimed property program will be extended to a new asset type, stored value cards.

APPENDIX K

2010 N.J. LAWS, CH. 25

AN ACT concerning presumptions of abandonment, issuer imposed dormancy fees and related administration of certain unclaimed properties, amending and supplementing chapter 30B of Title 46 of the Revised Statutes and repealing parts of the statutory law.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*:

1. R.S.46:30B-6 is amended to read as follows:

Definitions.

46:30B-6. Definitions. As used in this chapter:

a. "Administrator" means the Treasurer of the State of New Jersey, any individual serving as the Acting Treasurer in the absence of the appointed Treasurer, and any State employee to whom the Treasurer has delegated authority to administer the provisions of this chapter and to execute any pertinent documents;

b. "Apparent owner" means the person whose name appears on the records of the holder as the person entitled to property held, issued, or owing by the holder;

c. (Deleted by amendment, P.L.2002, c.35).

d. "Business association" means a corporation, joint stock company, investment company, business trust, partnership, unincorporated association, joint venture, limited liability company, safe deposit company, safekeeping depository, financial organization, insurance company, mutual fund, utility or other busi-

ness entity consisting of one or more persons, whether or not for profit;

e. "Domicile" means the state of incorporation of a corporation and the state of the principal place of business of an unincorporated person;

f. "Financial organization" means a savings and loan association, building and loan association, credit union, savings bank, industrial bank, bank, banking organization, trust company, safe deposit company, private banker, or any organization defined by other law as a bank or banking organization;

g. "Holder" means a person, wherever organized or domiciled, who is the original obligor indebted to another on an obligation;

h. "Insurance company" means an association, corporation, fraternal or mutual benefit organization, whether or not for profit, which is engaged in providing insurance coverage, including accident, burial, casualty, credit life, contract performance, dental, fidelity, fire, health, hospitalization, illness, life (including endowments and annuities), malpractice, marine, mortgage, surety, and wage protection insurance;

i. (Deleted by amendment, P.L.2002, c.35).

j. (Deleted by amendment, P.L.2002, c.35).

k. "Owner" means a person having a legal or equitable interest in property subject to this chapter or the person's legal representative and includes, but is not limited to, a depositor in the case of a deposit, a beneficiary in the case of a trust other than a deposit in trust, and a creditor, claimant, or payee in the case of other property;

l. "Person" means an individual, business association, state or other government, governmental subdivision or agency, public corporation, public authority, estate, trust, two or more persons having a joint or common interest, or any other legal or commercial entity;

m. "State" means any state in the United States, district, commonwealth, territory, insular possession, or any other area subject to the jurisdiction of the United States;

n. "Utility" means a person who owns or operates for public use any plant, equipment, property, franchise, or license for the transmission of communications or the production, storage, transmission, sale, delivery, or furnishing of electricity, water, steam, or gas;

o. "Mineral" means gas, oil, coal, other gaseous, liquid and solid hydrocarbons, oil shale, cement material, sand and gravel, road material, building stone, chemical raw material, gemstone, fissionable and nonfissionable ores, colloidal and other clay, steam and other geothermal resources, or any other substance defined as a mineral by the law of this State;

p. "Mineral proceeds" means amounts payable for the extraction, production, or sale of minerals, or, upon the abandonment of those payments, all payments that become payable thereafter, and includes, but is not limited to, amounts payable:

for the acquisition and retention of a mineral lease, including bonuses, royalties, compensatory royalties, shut-in royalties, minimum royalties, and delay rentals;

for the extraction, production, or sale of minerals, including net revenue interests, royalties, overriding royalties, extraction payments, and production payments; and

under an agreement of option, including a joint operating agreement, pooling agreement, and farm-out agreement;

q. "Money order" means an express money order and a personal money order, on which the remitter is the purchaser;

r. "Property" means tangible property described in R.S.46:30B-45 or a fixed and certain interest in intangible property that is held, issued, or owed in the course of a holder's business, or by a government, government subdivision, agency, or instrumentality, and all income or increments therefrom, and includes property that is referred to as or evidenced by:

money, a check, draft, deposit, interest, or dividend;

stored value card;

credit balance, customer's overpayment, security deposit, refund, credit memorandum, unpaid wage, unused ticket, mineral proceeds or unidentified remittance;

stock or other evidence of ownership of an interest in a business association or financial organization;

a bond, debenture, note, or other evidence of indebtedness;

money deposited to redeem stock, bonds, coupons, or other securities or distributions;

an amount due and payable under the terms of an annuity or insurance policy, including policies providing life insurance, property and casualty insurance, workers compensation insurance, or health and disability insurance; and

an amount distributable from a trust or custodial fund established under a plan to provide health, welfare, pension, vacation, severance, retirement, death stock purchase, profit sharing, employee savings, supplemental unemployment, insurance, or similar benefits;

s. "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form; and

t. "Stored value card" means a record that evidences a promise, made for monetary or other consideration, by the issuer or seller of the record that the owner of the record will be provided, solely or a combination of, merchandise, services, or cash in the value shown in the record, which is pre-funded and the value of which is reduced upon each redemption. The term "stored value card" includes, but is not limited to the following items: paper gift certificates, records that contain a microprocessor chip, magnetic stripe or other means for the storage of information, gift cards, electronic gift cards, rebate cards, stored-value cards or certificates, store cards, and similar records or cards.

2. R.S.46:30B-11 is amended to read as follows:

Presumption of abandonment of travelers check.

46:30B-11. Presumption of abandonment of travelers check. Subject to R.S.46:30B-14, any sum payable on a travelers check that has been outstanding for more than three years after its issuance is presumed abandoned unless the owner, within three years, has communicated in writing with the issuer concerning it or otherwise indicated an interest as evidenced by a con-

temporaneous memorandum or other record on file prepared by an employee of the issuer.

3. R.S.46:30B-12 is amended to read as follows:

Presumption of abandonment of money order.

46:30B-12. Presumption of abandonment of money order. Subject to R.S.46:30B-14, any sum payable on a money order or similar written instrument that has been outstanding for more than three years after its issuance is presumed abandoned unless the owner, within three years, has communicated in writing with the issuer concerning it or otherwise indicated an interest as evidenced by a contemporaneous memorandum or other record on file prepared by an employee of the issuer.

4. R.S.46:30B-13 is amended to read as follows:

Limitation on holder's power to impose service charges.

46:30B-13. Limitation on holder's power to impose service charges. A holder may not deduct from the amount of a travelers check or money order any charge imposed by reason of the failure to present the instrument for payment unless there is a valid and enforceable written contract between the issuer and the owner of the instrument pursuant to which the issuer may impose a charge and the issuer regularly imposes the charges and does not regularly reverse or otherwise cancel them. The amount of the deduction shall be limited to an amount not to exceed $2 per month. Notwithstanding any provision of this section to the contrary, no service charge, dormancy fee or other similar charge shall be imposed against a travelers check or money order within the twelve months immediately following the date of sale.

C.46:30B-42.1 Presumption of abandonment of stored value card.

5. a. A stored value card for which there has been no stored value card activity for two years is presumed abandoned.

b. The proceeds of a stored value card presumed abandoned shall be the value of the card, in money, on the date the stored value card is presumed abandoned.

c. An issuer of a stored value card shall obtain the name and address of the purchaser or owner of each stored value card issued or sold and shall, at a minimum, maintain a record of the zip code of the owner or purchaser.

If the issuer of a stored value card does not have the name and address of the purchaser or owner of the stored value card, the address of the owner or purchaser of the stored value card shall assume the address of the place where the stored value card was purchased or issued and shall be reported to New Jersey if the place of business where the stored value card was sold or issued is located in New Jersey.

d. Nothing in this section shall be construed to prevent an issuer from honoring a stored value card, the unredeemed value of which has been reported to the State Treasurer pursuant to R.S.46:30B-1 et seq., and thereafter seeking reimbursement from the State Treasurer pursuant to R.S.46:30B-62.

e. This section does not apply to a stored value card that is distributed by the issuer to a person under a promotional or customer loyalty program or a charitable program for which no monetary or other consideration has been tendered by the owner and this section does not apply to a stored value card issued by any

issuer that in the past year sold stored value cards with a face value of $250,000 or less. For purposes of this subsection, sales of stored value cards by businesses that operate either (1) under the same trade name as or under common ownership or control with another business or businesses in the State, or (2) as franchised outlets of a parent business, shall be considered sales by a single issuer.

f. The State Treasurer is authorized to grant an exemption from such provisions concerning stored value cards, on such terms and conditions as the State Treasurer may require, for a business or class of businesses that demonstrate good cause to the satisfaction of the State Treasurer. In exercising his discretion pursuant to this section, the State Treasurer may consider relevant factors including, but not limited to, the amount of stored value card transactions processed, the technology in place, whether or not stored value cards issued contain a microprocessor chip, magnetic strip, or other means designed to trace and capture information about place and date of purchase, and such other factors as the State Treasurer shall deem relevant.

g. Notwithstanding the provisions of this act or any other law to the contrary, only a stored value card which is exempt from the provisions of this act pursuant to subsection e. or f. of this section shall be deemed a gift card or gift certificate for purposes of P.L.2002, c.14 (C.56:8-110 et seq.).

h. As used in this section:

"Stored value card activity" means the purchase or issuance of the stored value card, a transaction executed by the owner that increased or decreased the value of the stored value card, or communication by the owner of the stored value card with the issuer of the

stored value card concerning the value of the balance remaining on the stored value card as evidenced by a contemporaneous record prepared by or on behalf of the issuer.

"Issuer" means an issuer or seller of a stored value card that is a person, retailer, merchant, vendor, provider or business association with the obligations of a holder to accept the stored value card as redeemable for, solely or a combination of, merchandise, services, or cash, and to report and deliver proceeds of the stored value card if abandoned.

6. Section 37 of P.L.2002, c.35 (C.46:30B-43.1) is amended to read as follows:

C.46:30B-43.1 Limitation on holder's power to impose charges.

37. Limitation on holder's power to impose charges. A holder of property subject to R.S.46:30B-42, section 5 of P.L.2010, c.25 (C.46:30B-42.1), and R.S.46:30B-43 shall not impose on the property a dormancy charge or fee, abandoned property charge or fee, unclaimed property charge or fee, escheat charge or fee, inactivity charge or fee, or any similar charge, fee or penalty for inactivity with respect to the property. Neither the property nor an agreement with respect to the property may contain language suggesting that the property may be subject to that kind of charge, fee or penalty for inactivity.

7. R.S.46:30B-62 is amended to read as follows:

Reimbursement of holder paying claim.

46:30B-62. Reimbursement of holder paying claim. A holder who has paid money to the administrator pursuant to this chapter may make payment to any person appearing to the holder to be entitled to payment and,

upon filing proof of payment and proof that the payee was entitled thereto, the administrator shall promptly reimburse the holder for the payment without imposing any fee or other charge. If reimbursement is sought for a payment made on a negotiable instrument, including a stored value card, travelers check or money order, the holder shall be reimbursed under this section upon filing proof that the instrument was duly presented and that payment was made to a person who appeared to the holder to be entitled to payment. The holder shall be reimbursed for payment made under this section even if the payment was made to a person whose claim was barred under R.S.46:30B-88.

Repealer.

8. The following sections are repealed:

Sections 1 through 3 of P.L.2007, c.326 (C.56:8-182 et seq.).

9. This act shall take effect July 1, 2010 and apply to travelers checks, money orders, stored value cards, credit balances, customer overpayments, security deposits, refunds, credit memoranda, unused tickets, or similar instruments outstanding on and after July 1, 2010, including, but not limited to, those outstanding instruments issued before July 1, 2010.

Approved June 29, 2010.

P.L.2010, CHAPTER 25, *approved June 29, 2010*
Assembly, No. 3002
(CORRECTED COPY)

AN ACT concerning presumptions of abandonment, issuer imposed dormancy fees and related administration of certain unclaimed properties, amending and supplementing chapter 30B of Title 46 of the Revised Statutes and repealing parts of the statutory law.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*:

1. R.S.46:30B-6 is amended to read as follows:

46:30B-6. Definitions.

As used in this chapter:

a. "Administrator" means the Treasurer of the State of New Jersey, any individual serving as the Acting Treasurer in the absence of the appointed Treasurer, and any State employee to whom the Treasurer has delegated authority to administer the provisions of this chapter and to execute any pertinent documents;

b. "Apparent owner" means the person whose name appears on the records of the holder as the person entitled to property held, issued, or owing by the holder;

c. (Deleted by amendment, P.L.2002, c.35).

d. "Business association" means a corporation, joint stock company, investment company, business trust, partnership, unincorporated association, joint venture, limited liability company, safe deposit company, safekeeping depository, financial organization, insurance company, mutual fund, utility or other busi-

EXPLANATION—Matter enclosed in bold-faced brackets **[**thus**]** in the above bill is not enacted and is intended to be omitted in the law.

Matter underlined <u>thus</u> is new matter.

ness entity consisting of one or more persons, whether or not for profit;

e. "Domicile" means the state of incorporation of a corporation and the state of the principal place of business of an unincorporated person;

f. "Financial organization" means a savings and loan association, building and loan association, credit union, savings bank, industrial bank, bank, banking organization, trust company, safe deposit company, private banker, or any organization defined by other law as a bank or banking organization;

g. "Holder" means a person, wherever organized or domiciled, who is the original obligor indebted to another on an obligation;

h. "Insurance company" means an association, corporation, fraternal or mutual benefit organization, whether or not for profit, which is engaged in providing insurance coverage, including accident, burial, casualty, credit life, contract performance, dental, fidelity, fire, health, hospitalization, illness, life (including endowments and annuities), malpractice, marine, mortgage, surety, and wage protection insurance;

i. (Deleted by amendment, P.L.2002, c.35).

j. (Deleted by amendment, P.L.2002, c.35).

k. "Owner" means a person having a legal or equitable interest in property subject to this chapter or the person's legal representative and includes, but is not limited to, a depositor in the case of a deposit, a beneficiary in the case of a trust other than a deposit in trust, and a creditor, claimant, or payee in the case of other property;

l. "Person" means an individual, business association, state or other government, governmental subdivision or agency, public corporation, public authority, estate, trust, two or more persons having a joint or common interest, or any other legal or commercial entity;

m. "State" means any state in the United States, district, commonwealth, territory, insular possession, or any other area subject to the jurisdiction of the United States;

n. "Utility" means a person who owns or operates for public use any plant, equipment, property, franchise, or license for the transmission of communications or the production, storage, transmission, sale, delivery, or furnishing of electricity, water, steam, or gas;

o. "Mineral" means gas, oil, coal, other gaseous, liquid and solid hydrocarbons, oil shale, cement material, sand and gravel, road material, building stone, chemical raw material, gemstone, fissionable and nonfissionable ores, colloidal and other clay, steam and other geothermal resources, or any other substance defined as a mineral by the law of this State;

p. "Mineral proceeds" means amounts payable for the extraction, production, or sale of minerals, or, upon the abandonment of those payments, all payments that become payable thereafter, and includes, but is not limited to, amounts payable:

for the acquisition and retention of a mineral lease, including bonuses, royalties, compensatory royalties, shut-in royalties, minimum royalties, and delay rentals;

for the extraction, production, or sale of minerals, including net revenue interests, royalties, overriding royalties, extraction payments, and production payments; and

under an agreement of option, including a joint operating agreement, pooling agreement, and farm-out agreement;

q. "Money order" means an express money order and a personal money order, on which the remitter is the purchaser;

r. "Property" means tangible property described in R.S.46:30B-45 or a fixed and certain interest in intangible property that is held, issued, or owed in the course of a holder's business, or by a government, government subdivision, agency, or instrumentality, and all income or increments therefrom, and includes property that is referred to as or evidenced by:

money, a check, draft, deposit, interest, or dividend;

<u>stored value card;</u>

credit balance, customer's overpayment, security deposit, refund, credit memorandum, unpaid wage, unused ticket, mineral proceeds or unidentified remittance;

stock or other evidence of ownership of an interest in a business association or financial organization;

a bond, debenture, note, or other evidence of indebtedness;

money deposited to redeem stock, bonds, coupons, or other securities or distributions;

an amount due and payable under the terms of an annuity or insurance policy, including policies providing life insurance, property and casualty insurance, workers compensation insurance, or health and disability insurance; and

an amount distributable from a trust or custodial fund established under a plan to provide health, welfare, pension, vacation, severance, retirement, death stock purchase, profit sharing, employee savings, supplemental unemployment, insurance, or similar benefits; [and]

s. "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form; and

t. "Stored value card" means a record that evidences a promise, made for monetary or other consideration, by the issuer or seller of the record that the owner of the record will be provided. solely or a combination of, merchandise, services, or cash in the value shown in the record, which is pre-funded and the value of which is reduced upon each redemption. The term "stored value card" includes, but is not limited to the following items: paper gift certificates, records that contain a microprocessor chip, magnetic stripe or other means for the storage of information, gift cards. electronic gift cards, rebate cards, stored-value cards or certificates. store cards, and similar records or cards.

(cf: P.L.2002, c.35, s.3)

2. R.S.46:30B-11 is amended to read as follows:

46:30B-11. Presumption of abandonment of travelers check. Subject to R.S.46:30B-14, any sum payable on a travelers check that has been outstanding for more than [15] three years after its issuance is presumed abandoned unless the owner, within [15] three years, has communicated in writing with the issuer concerning it or otherwise indicated an interest as evidenced by a

contemporaneous memorandum or other record on file prepared by an employee of the issuer.

(cf: P.L.2002, c.35, s. 10)

3. R.S.46:30B-12 is amended to read as follows:

46:30B-12. Presumption of abandonment of money order. Subject to R.S.46:30B-14, any sum payable on a money order or similar written instrument that has been outstanding for more than [seven] three years after its issuance is presumed abandoned unless the owner, within [seven] three years, has communicated in writing with the issuer concerning it or otherwise indicated an interest as evidenced by a contemporaneous memorandum or other record on file prepared by an employee of the issuer.

(cf: P.L.2002, c.35, s. 11)

4. R.S.46:30B-13 is amended to read as follows:

46:30B-13. Limitation on holder's power to impose service charges. A holder may not deduct from the amount of a travelers check or money order any charge imposed by reason of the failure to present the instrument for payment unless there is a valid and enforceable written contract between the issuer and the owner of the instrument pursuant to which the issuer may impose a charge and the issuer regularly imposes the charges and does not regularly reverse or otherwise cancel them. The amount of the deduction shall be limited to an amount [that is not unconscionable] not to exceed $2 per month. Notwithstanding any provision of this section to the contrary, no service charge, dormancy fee or other similar charge shall be imposed against a travelers check or money order within the twelve months immediately following the date of sale.

(cf: P.L.2002, c.35, s.12)

5. (New section) a. A stored value card for which there has been no stored value card activity for two years is presumed abandoned.

b. The proceeds of a stored value card presumed abandoned shall be the value of the card, in money, on the date the stored value card is presumed abandoned.

c. An issuer of a stored value card shall obtain the name and address of the purchaser or owner of each stored value card issued or sold and shall, at a minimum, maintain a record of the zip code of the owner or purchaser.

If the issuer of a stored value card does not have the name and address of the purchaser or owner of the stored value card, the address of the owner or purchaser of the stored value card shall assume the address of the place where the stored value card was purchased or issued and shall be reported to New Jersey if the place of business where the stored value card was sold or issued is located in New Jersey.

d. Nothing in this section shall be construed to prevent an issuer from honoring a stored value card, the unredeemed value of which has been reported to the State Treasurer pursuant to R.S.46:30B-1 et seq., and thereafter seeking reimbursement from the State Treasurer pursuant to R.S.46:30B-62.

e. This section does not apply to a stored value card that is distributed by the issuer to a person under a promotional or customer loyalty program or a charitable program for which no monetary or other consideration has been tendered by the owner and this section does not apply to a stored value card issued by any issuer that in the past year sold stored value cards with a face value of $250,000 or less. For purposes of this

subsection, sales of stored value cards by businesses that operate either (1) under the same trade name as or under common ownership or control with another business or businesses in the State, or (2) as franchised outlets of a parent business, shall be considered sales by a single issuer.

f. The State Treasurer is authorized to grant an exemption from such provisions concerning stored value cards, on such terms and conditions as the State Treasurer may require, for a business or class of businesses that demonstrate good cause to the satisfaction of the State Treasurer. In exercising his discretion pursuant to this section, the State Treasurer may consider relevant factors including, but not limited to, the amount of stored value card transactions processed, the technology in place, whether or not stored value cards issued contain a microprocessor chip, magnetic strip, or other means designed to trace and capture information about place and date of purchase, and such other factors as the State Treasurer shall deem relevant.

g. Notwithstanding the provisions of this act or any other law to the contrary, only a stored value card which is exempt from the provisions of this act pursuant to subsection e. or f. of this section shall be deemed a gift card or gift certificate for purposes of P.L.2002, c.14 (C.56:8-l 10 et seq.).

h. As used in this section:

"Stored value card activity" means the purchase or issuance of the stored value card, a transaction executed by the owner that increased or decreased the value of the stored value card, or communication by the owner of the stored value card with the issuer of the stored value card concerning the value of the balance remaining on the stored value card as evidenced by a

contemporaneous record prepared by or on behalf of the issuer.

"Issuer" means an issuer or seller of a stored value card that is a person, retailer, merchant, vendor, provider or business association with the obligations of a holder to accept the stored value card as redeemable for, solely or a combination of, merchandise, services, or cash, and to report and deliver proceeds of the stored value card if abandoned.

6. Section 37 of P.L.2002, c.35 (C.46:30B-43.1) is amended to read as follows:

37. Limitation on holder's power to impose charges. A holder [may not deduct from the amount of any instrument] of property subject to R.S.46:30B-42, section 5 of P.L. c. (C.) ("pending before the legislature as this bill), and R.S.46:30B-43 [any] shall not impose on the property a dormancy charge [imposed by reason of the failure to present the instrument for payment unless there is a valid and enforceable written contract between the issuer and owner of the instrument pursuant to which the issuer may impose a] or fee, abandoned property charge [and the issuer regularly imposes the charges and does not regularly reverse or otherwise cancel them. The amount of the deduction shall] or fee, unclaimed property charge or fee, escheat charge or fee, inactivity charge or fee, or any similar charge, fee or penalty for inactivity with respect to the property. Neither the property nor an agreement with respect to the property may contain language suggesting that the property may be [limited to an amount that is not unconscionable] subject to that kind of charge, fee or penalty for inactivity.

(cf: P.L.2002, c.35, s.37)

7. R.S.46:30B-62 is amended to read as follows:

46:30B-62. Reimbursement of holder paying claim. A holder who has paid money to the administrator pursuant to this chapter may make payment to any person appearing to the holder to be entitled to payment and, upon filing proof of payment and proof that the payee was entitled thereto, the administrator shall promptly reimburse the holder for the payment without imposing any fee or other charge. If reimbursement is sought for a payment made on a negotiable instrument, including a stored value card, travelers check or money order, the holder shall be reimbursed under this section upon filing proof that the instrument was duly presented and that payment was made to a person who appeared to the holder to be entitled to payment. The holder shall be reimbursed for payment made under this section even if the payment was made to a person whose claim was barred under R.S.46:30B-88.

(cf: P.L.1989, c.58, s.1)

8. The following sections are repealed:

Sections 1 through 3 of P.L.2007, c.326 (C.56:8-182 et seq.).

9. This act shall take effect July 1, 2010 and apply to travelers checks, money orders, stored value cards, credit balances, customer overpayments, security deposits, refunds, credit memoranda, unused tickets, or similar instruments outstanding on and after the July 1, 2010, including, but not limited to, those outstanding instruments issued before July 1, 2010.

STATEMENT

This bill modifies the State's unclaimed property laws to adjust the time periods for presumptions of

abandonment, limit issuer imposed dormancy fees, and provide for related administration of certain unclaimed property. The primary purposes of this measure are to protect New Jersey consumers from certain commercial dormancy fee practices and modernize the State's unclaimed property laws. The bill provides the following presumptions of abandonment:

- Adjusts the period of time which triggers abandonment for travelers checks from 15 to 3 years;
- Adjusts the period of time which triggers abandonment for money orders from 7 to 3 years; and
- Creates a 2 year trigger for abandonment of stored value cards. The bill's definition of stored value cards, includes, but is not limited to, paper gift certificates, gift cards and rebate cards.

The bill also limits the imposition of dormancy fees as follows:

- Precludes the imposition of dormancy fees on travelers checks or money orders in the first 12 months after issuance and limits permissible dormancy fees to $2 per month; and
- Precludes the imposition of dormancy fees on stored value cards, credit balances, overpayments, security deposits, unused tickets, refunds, credit memoranda and similar instruments.

The bill also includes stored value cards into an existing reimbursement process for escheated properties so that if an escheated stored value card is subsequently claimed by an owner and honored by the issuer, the State can reimburse the issuer.

Additionally, the bill requires stored value card issuers to obtain the name and address of purchasers and

to maintain, at a minimum, a record of the zip code of the purchaser. In instances where an issuer does not have the name and address of a purchaser, the address of the purchaser shall assume the address of the place where the stored value card is purchased, if that place is located in New Jersey. These provisions are designed to modernize the State's unclaimed property processes relative to other states and enhance New Jersey's capacity to protect its residents' stored value cards from being subject to the escheatment processes of other states.

Stored value cards issued under a promotional program, customer loyalty program, charitable program or by a business selling $250,000 or less of stored value cards in the prior year are exempted from the stored value card provisions of the bill.

The bill also authorizes the State Treasurer to grant an exemption from such provisions concerning stored value cards, on such terms and conditions as the State Treasurer may require, for a business or class of businesses that demonstrate good cause. In determining whether to exercise the discretion to grant an exemption, the State Treasurer may consider relevant factors including, but not limited to, the amount of stored value card transactions processed, the technology in place, whether or not stored value cards issued contain a microprocessor chip, magnetic strip, or other means designed to trace and capture information about place and date of purchase, and such other factors as the State Treasurer shall deem relevant. The bill specifies that only stored value cards exempted from the unclaimed property provisions of the bill shall be deemed gift cards or gift certificates subject to the consumer protections provided under P.L.2002, c.14 (C.56:8-110 et seq.).

The bill takes effect July 1, 2010 and applies to stored value cards, travelers checks, money orders and certain similar instruments outstanding on and after July 1, 2010, including, but not limited to, those issued before July 1, 2010.

Adjusts time periods for presumptions of abandonment, limits issuer imposed dormancy fees, and provides for related administration for certain unclaimed property.