

No. 12-105

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IN THE  
**Supreme Court of the United States**

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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.*

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

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REPLY BRIEF IN SUPPORT OF PETITION  
FOR A WRIT OF CERTIORARI

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States have no authority to escheat property without a “substantial ground for belief” that the property has been “inactive so long as to be presumptively abandoned.” *Anderson Nat’l Bank v. Lueckett*, 321 U.S. 233, 240, 241 (1944). Absent that predicate, a State’s “creation ... 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 *Lockett*, 321 U.S. at 240; *Provident Inst. v. Malone*, 221 U.S. 660, 664-665 (1911).

There is no dispute that the vast majority of travelers cheques (“TCs”) to which New Jersey’s amended law applies, 2010 N.J. Laws ch. 25 (“Chapter 25”), have not been abandoned. That point bears repeating: The State did not contest below, and does not deny in this Court, that *90 percent* of all TCs that are subject to escheat under Chapter 25 have *not* been abandoned at all, but will be used within 15 years after issuance. Where it is thus established that property has not been abandoned, one need not look far to find a constitutional violation when the State confiscates it.

New Jersey nonetheless defends Chapter 25 and, in doing so, asserts breathtaking authority to escheat property even where it is uncontested that the presumption of abandonment is false and even where the State does nothing to reunite that property with its owner. The breadth of the State’s position alone demonstrates the urgent need for this Court’s review. According to the State, courts must uphold any shortening of an abandonment period that can be said to “moderniz[e]” the State’s escheat laws or advance the supposedly “sound interest” in raising revenue. Opp. 7-8.

That position has no limit, and the State does not pretend otherwise. In the State’s view, nothing in the Constitution would prevent it from enacting a one-month abandonment period for all forms of property, allowing the State to take custody of bank accounts, checks, dividends, hearth and home merely because the owner went away for an overseas job assignment, military deployment, or extended vacation. Such a law would promote “administrative convenience” by apply-

ing a “consistent” abandonment period to all property, and it would raise revenue. Opp. 8. The State would likely even claim that such a law would “protect” property owners (even if the State did nothing to notify them or try to return their property, Pet. 10-11, 21), because they could simply reclaim their property from the State’s “safekeeping” at a later date (as long as they did not mind waiting up to a year, Pet. 10).

New Jersey’s opposition exemplifies the unbounded concept of escheat that has driven States’ steady march toward shorter and shorter abandonment periods, *see* Pet. 12-13, 30-33 & n.10. In recent years, as this Court’s decisions addressing the limits of escheat have receded into the past, state treasuries have raked in billions through increasingly aggressive use of abandoned-property laws, to the particular detriment of businesses structured around the opportunity to hold and invest customers’ property for a period of time as compensation for services provided. *See* Pet. 30; COST Br. 2, 6-10. Here, for example, AmEx provides and administers a useful and beneficial financial product for customers and receives in exchange only the undisputed right to hold and invest the TC proceeds for as long as the owner waits to use the TC (until the escheat period elapses) and to keep any investment income as the revenue of its business. The State’s confiscation of the fruits of that business by arbitrarily declaring the TCs abandoned deprives AmEx of the economic value of its entire business model—including the income it would have earned by investing more than \$30 million in proceeds from *past* transactions it entered into in reliance on existing law. For New Jersey to assert, in the face of these stakes, that AmEx has no cognizable interest implicated by Chapter 25 simply underscores the compelling need for this Court’s review.

## I. REVIEW OF THE DUE PROCESS ISSUE IS WARRANTED

State escheat authority is “subject to constitutional limitations.” *Standard Oil Co. v. New Jersey*, 341 U.S. 428, 436 (1951); *see supra* pp. 1-2; Pet. 18-23. The court of appeals’ holding, embraced by New Jersey (Opp. 11), that a presumption of abandonment is “reasonable” in satisfaction of due process when it is wrong 90 percent of the time nullifies those limits. New Jersey offers no persuasive reason to deny review.

1. New Jersey emphasizes evidence that 96 percent of TCs are redeemed within the three-year abandonment period. Opp. 9, 11. But AmEx has shown why that statistic is irrelevant (Pet. 20 n.8), and the State offers no response. The relevant question is whether it is reasonable to presume that property subject to escheat has been abandoned. To illustrate, if 480 out of every 500 TCs sold (96 percent) are used within three years, and the State seeks to take custody of the other 20, the relevant question is whether those 20 may reasonably be presumed abandoned. The other 480 are not subject to the law. Here, it is undisputed that 18 of the 20 subject to escheat (90 percent) are not abandoned, but will be used within 15 years after issuance by owners who intentionally retain TCs for longer-term use as emergency funds or for future travel. Pet. 8-9. The Legislature could not have had—and has never even claimed to have—any “reasonable basis for believing” that those TCs are abandoned. *Vance v. Bradley*, 440 U.S. 93, 111 (1979). Yet under the State’s logic, escheat after only two weeks would be valid if it could be shown that a substantial percentage of TCs were redeemed within that time.

New Jersey responds that the “the rational basis test does not require mathematical precision.” Opp. 10.



But, as AmEx has explained (Pet. 20), a plaintiff may demonstrate the irrationality of legislation by showing that “the asserted grounds for the legislative classification lack any reasonable support in fact.” *New York State Club Ass’n v. City of N.Y.*, 487 U.S. 1, 17 (1988). Here, the evidence of irrationality is not merely “debatable.” *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981). It is uncontested. It is thus of no moment whether legislation may survive review when “based on rational speculation unsupported by evidence or empirical data.” *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993). Leaving aside the greater skepticism due when a law serves only the State’s own enrichment, New Jersey here has not provided even “rational speculation” that TC usage patterns have changed in any way that would justify shortening the abandonment period by 12 years. *See Heller v. Doe*, 509 U.S. 312, 321 (1993) (rational-basis review demands “some footing in the realities ... addressed by the legislation”). Nor is New Jersey correct to accuse AmEx (Opp. 9) of “invert[ing] the Court’s substantive due process test by placing the evidentiary burden on [New Jersey].” AmEx produced uncontested evidence that the statutory presumption of abandonment is false 90 percent of the time. That AmEx bore the burden to do so does not mean that New Jersey had no obligation to rebut or even deny AmEx’s unequivocal showing.

2. Without countering the evidence showing the presumption of abandonment to be false, the State argues (Opp. 8) that Chapter 25 must nonetheless be upheld because it rationally furthers various state interests. But the cited interests relate only to States’ general authority to take custody of property where there are reasonable grounds to believe the property has been abandoned. *See Lockett*, 321 U.S. at 240. They do

not themselves establish the reasonableness of any such presumption and cannot justify escheat of property that is not abandoned. Indeed, several of the cited interests are not served at all where property has not been abandoned. *See* Opp. 8 (citing interests in preserving value of “*unclaimed* property” (emphasis added)); *id.* (citing interest in using “*abandoned* property” for the general good (emphasis added)).

Other cited interests likewise fail. New Jersey posits (Opp. 8)—without support—that taking TCs into state custody would better preserve their value for the benefit of owners who may later reclaim them. That assertion would equally justify a one-day escheat period. Moreover, the State elsewhere concedes (Opp. 17) that Chapter 25 cannot be justified as a means of safeguarding property for return to its owner because the State never even tries to return the funds. The State has no way to identify or locate TC owners and makes no attempt to do so. It is AmEx that continues to honor TCs, returning their value to the owner upon redemption even after the State has taken the money for itself. Pet. 10-11, 21.

The State’s remaining arguments similarly drive home the boundless nature of its position. “[M]odernization,” “convenience,” and “consistency” (Opp. 8) are so pliable as to support *any* abandonment period. As for “revenue raising” (*id.*), seizing custody of property through escheat always raises revenue for the State. *See* Pet. 14; COST Br. 5-10. If that interest alone suffices, then state escheat authority would be truly limitless, no matter how arbitrary the presumption of abandonment. It is that view that has emboldened States increasingly to exploit their abandoned-

property laws as a source of revenue without regard to private property rights. Pet. 12-13, 31.<sup>1</sup>

3. New Jersey’s dismissal (Opp. 12) of Chapter 25’s retroactive nature is equally flawed. This Court’s “decisions treat due process challenges based on the retroactive character of the statutes in question as serious,” and it “does not follow ... that what [a legislature] can legislate prospectively it can legislate retrospectively.” *Eastern Enters. v. Apfel*, 524 U.S. 498, 548 (1998) (opinion of Kennedy, J.). The State does not deny that, under Chapter 25, it would confiscate approximately \$30 million of proceeds of not-yet-used TCs AmEx issued between three and 15 years ago—forcing AmEx to bear the burden of paying those funds twice (once to the State and once to the TC owner upon later redemption), to wait up to a year for reimbursement by the State in the event of a double payment (Pet. 10), and to lose forever the income it reasonably expected to earn from investing those funds in reliance on existing law.<sup>2</sup>

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<sup>1</sup> Contrary to New Jersey’s claim, the fact that two courts of appeals have now erroneously validated state efforts to accelerate escheat of abandoned property based on an arbitrary presumption of abandonment only underscores the need for this Court’s review to reaffirm the constitutional limits on state escheat power. See Opp. 12-13 (citing *American Express Travel Related Servs. Co. v. Kentucky*, 641 F.3d 685, 693-694 (6th Cir. 2011)); Pet. 32 n.10.

<sup>2</sup> These facts bear no resemblance to *Texas v. New Jersey*, 379 U.S. 674 (1965). Cf. Opp. 12. The property in *Texas* had been abandoned; the only question was which State had the right to escheat it. 379 U.S. at 675-676. And the Court’s observation about a change in state law referred only to the possibility a State might claim abandoned property from *another State* that had already properly escheated it. *Id.* at 682.

## II. REVIEW OF THE TAKINGS ISSUE IS WARRANTED

AmEx demonstrated (Pet. 23-30) that the court of appeals' takings analysis conflicts with this Court's decisions and would justify virtually any retroactive shortening of an existing abandonment period. New Jersey's defense of that decision only confirms that the State believes it may take property without constitutional scrutiny by simply declaring the property "abandoned."

1. The State argues principally that AmEx—and by extension any property "holder"—cannot challenge an exercise of escheat because a holder has "no right to retain the funds 'once they are [claimed] under the State's unclaimed property laws.'" Opp. 15 (relying on *Delaware v. New York*, 507 U.S. 490, 502 (1993)). But this case is a far cry from one in which property, through disuse, passes to the State as custodian. Pet. 26-27. Here, the State is declaring that private property AmEx was long entitled to hold *and use* under state law is now abandoned and belongs in state coffers.

AmEx built its TC business in reliance on longstanding abandoned-property laws. Pet. 9-10. AmEx could reasonably have expected that those laws would not be changed retroactively to reach property that the owner still intends to use and that generates the very revenue that funds AmEx's business. Chapter 25 renders that business marginal at best in New Jersey, and prevents AmEx from realizing the benefit of its bargain from transactions it entered into years ago. The State's suggestion that AmEx has no cognizable interest in this situation is difficult to fathom.

Indeed, the State does not contest that its laws long entitled AmEx to use TC proceeds for up to 15 years, consistent with AmEx's agreements with its

customers. Nor does the State dispute that AmEx sold TCs in reliance on that law or that the income AmEx earns from investing TC proceeds belongs to AmEx. Thus, even as a “debtor” to the TC owner, AmEx has a clear right to use the proceeds of unredeemed TCs until the expiration of the abandonment period in place when it issued the TCs. *See Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (“[p]roperty interests ... are created and their dimensions are defined by existing rules”); *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945) (“property” under the Takings Clause also “denote[s] ... the right to possess, use and dispose of it”).<sup>3</sup> Whatever rules New Jersey can make for the future, it cannot arbitrarily seize for itself the revenue of a business built in reliance on existing law by simply declaring, retroactively and without basis, that property AmEx has an undisputed right to use is “abandoned.” *See Texaco, Inc. v. Short*, 454 U.S. 516, 542 (1982) (Brennan, J., dissenting) (noting the Court’s recognition that “[i]f [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”); *cf. Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) (effort to “recharacteriz[e]” interpleader fund as public money and “appropriat[e] for the [State] the value of the use of the fund” implicated the Takings Clause).

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<sup>3</sup> Thus, the takings analysis does not depend on whether AmEx “own[s]” the TCs. *Cf.* Opp. 14-15. Chapter 25 is analogous to condemnation of an easement, leasehold, or other limited right to use property. A lessee, for example, unquestionably has a property interest that is protected under the Takings Clause even though he does not “own” the property in fee. *E.g., A.W. Duckett & Co. v. United States*, 266 U.S. 149, 151 (1924); *General Motors*, 323 U.S. at 377-378.

2. The State also advocates (Opp. 16) the court of appeals' theory that AmEx could not reasonably have relied on the prior legal regime because AmEx's TC business "has long been subject to regulation by New Jersey." But, as AmEx has shown (Pet. 28-29), that analysis is badly flawed and conflicts with numerous cases finding takings in regulated fields, including *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1013-1014 & n.17 (1984), which recognized that a taking may occur when a retroactive change in law deprives a party of property by removing or altering a guarantee on which it had relied. If a history of prior regulation alone could preclude a party from developing reasonable investment-backed expectations, that reasoning would erect a nearly insuperable barrier to regulatory takings challenges. The court's adoption of that reasoning highlights the importance of this case to holders of property in regulated fields, particularly in financial-services industries that depend on the opportunity to hold and invest customers' property temporarily and that, following the court's decision, now face an increased threat of unchecked state confiscation.

3. Finally, the State errs in maintaining (Opp. 14, 16, 18) that the court of appeals considered all the relevant factors under *Penn Central*. To the contrary, although the court recited those factors, its analysis of them began and ended with the conclusion that AmEx operates in a "regulated field." Pet. App. 15a-16a. The court placed no weight on Chapter 25's harsh economic impact and ignored its egregious character, contrary to this Court's decisions, *see, e.g., Tahoe-Sierra Preservation Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 326 n.23 (2002).

Attempting to fill that gap, the State argues (Opp. 16) that Chapter 25 merely "adjust[s] the benefits and

burdens of economic life to promote the common good.” It does no such thing. Chapter 25 takes the revenue of AmEx’s TC business for the State’s own use without advancing any of the traditional justifications for escheat. The State responds (Opp. 17) that the statute’s failure to reunite TCs with their owners can be overlooked because, even under the 15-year abandonment period, escheat of TCs never serves that purpose. But the State’s argument that escheat nevertheless promotes the “general good” depends—again—on the assumption that the property has been abandoned. *See Standard Oil*, 341 U.S. at 436. Where that assumption is false, the taking of private property for the “general good” requires just compensation, and escheat serves no end but to enrich the public fisc by confiscating the revenue of private enterprise.

\* \* \*

The State does not dispute that the vast majority of property subject to escheat under Chapter 25 is not abandoned. It nowhere contests that the issues presented by this case are of urgent importance to business and property interests far beyond the particular context of travelers cheques in New Jersey. And it does not deny that, in the decades that have passed since this Court last addressed these issues, States have made unprecedented use of abandoned-property laws to raise revenue on a massive scale. What the State does offer is an astonishingly broad understanding of its own authority to confiscate property that conflicts with this Court’s decisions and admits of no constitutional limit. The Court should grant review.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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