

IN THE
Supreme Court of the United States

AMERICAN EXPRESS TRAVEL RELATED
SERVICES COMPANY, INC.,
Petitioner,

v.

ANDREW P. SIDAMON-ERISTOFF, *et al.*,
Respondents.

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

BRIEF IN OPPOSITION

JEFFREY S. CHIESA
Attorney General Of New Jersey
ROBERT LOUGY*
Assistant Attorney General
MARLENE G. BROWN
Senior Deputy Attorney General
R.J. Hughes Justice Complex
25 Market Street
P.O. Box 112
Trenton, N.J. 08625-0112
609-599-6868
robert.lougy@dol.lps.state.nj.us

Attorneys for Respondents

* *Counsel of Record*



TABLE OF CONTENTS

	<i>Page</i>
Table Of Contents	i
Table Of Cited Authorities	ii
Statement	2
Reasons For Denying The Petition	5
I. Chapter 25 Rationally Amended New Jersey's Unclaimed Property Laws Based On Myriad Legitimate Government Interests	6
II. Chapter 25 Is Not An Unconstitutional Taking Because Petitioner Has No Property Interest In The Abandoned Travelers Checks It Holds And Chapter 25 Does Not Confiscate Property Belonging To Petitioner	14
Conclusion	20

TABLE OF CITED AUTHORITIES

	<i>Page</i>
<i>Am. Express Travel Related Servs. Co. v. Kentucky</i> , 641 F.3d 685 (6th Cir. 2011).....	3, 13
<i>Am. Express Travel Related Servs. Co. v. Sidamon-Eristoff</i> , 755 F. Supp. 2d 556 (D.N.J. 2010)	4
<i>Am. Express Travel Related Servs. Co. v. Sidamon-Eristoff</i> , 669 F.3d 359 (3d Cir. 2012) (D.N.J. 2010)	3
<i>Anderson National Bank v. Lockett</i> , 321 U.S. 233 (1944)	11, 15
<i>Barnhill v. Johnson</i> , 503 U.S. 393 (1992).....	15
<i>Board of Regents v. Roth</i> , 408 U.S. 564 (1972).....	16
<i>Connolly v. Pension Benefit Guar. Corp.</i> , 475 U.S. 211 (1986).....	18
<i>Cunnius v. Reading Sch. Dist.</i> , 198 U.S. 458 (1905).....	11
<i>Delaware v. New York</i> , 507 U.S. 490 (1993) ..	5, 8, 15, 18
<i>FCC v. Beach Communications, Inc.</i> , 508 U.S. 307 (1993)	4, 7, 8, 9
<i>Ferguson v. Skrupa</i> , 372 U.S. 726 (1963).....	13
<i>Flemming v. Nestor</i> , 363 U.S. 603 (1960).....	7
<i>Heller v. Doe</i> , 509 U.S. 312 (1993)	10
<i>In re Erie Forge & Steel Co.</i> , 456 F.2d 801 (3d Cir. 1972)	15
<i>Landgraf v. USI Film Prods.</i> , 511 U.S. 244 (1994) ..	12
<i>Lehnhausen v. Lake Shore Auto Parts Co.</i> , 410 U.S. 356(1973)	7

Cited Authorities

	<i>Page</i>
<i>Malmed v. Thornburgh</i> , 621 F.2d 565 (3d Cir. 1980)	7
<i>Mathews v. Lucas</i> , 427 U.S. 495 (1976)	7
<i>New York County Nat’l Bank v. Massey</i> , 192 U.S. 138 (1904)	15
<i>Penn Central Transportation Co. v. New York</i> , 438 U.S. 104 (1978)	14, 18
<i>Pension Benefit Guar. Corp. v. R.A. Gray & Co.</i> , 467 U.S. 717 (1984)	12
<i>Sammon v. N.J. Bd. of Med. Exam’rs</i> , 66 F.3d 639 (3d Cir. 1995).....	7
<i>Sec. Sav. Bank v. California</i> , 263 U.S. 282 (1923) ..	5
<i>Standard Oil Co. v New Jersey</i> , 341 U.S. 428 (1951).....	8, 17
<i>Texas v. New Jersey</i> , 379 U.S. 674 (1965)	12, 15
<i>United States v. Carlton</i> , 512 U.S. 26 (1994)	8
Statutes & Other Authorities:	
U.S. Const., Art. I, § 8, cl. 1	8
12 U.S.C. 2501	17
2010 N.J. Laws c. 25	<i>passim</i>
N.J. Stat. Ann. § 46:30B-16	2
N.J. Stat. Ann. § 46:30B-18	2
N.J. Stat. Ann. § 46:30B-22	2
N.J. Stat. Ann. § 46:30B-31	2
N.J. Stat. Ann. § 46:30B-32	2
N.J. Stat. Ann. § 46:30B-41	2
Sup. Ct. R. 10	6

**BRIEF FOR THE RESPONDENTS
IN OPPOSITION**

This Court should deny American Express Travel Related Services Company's petition for a writ of *certiorari*. Petitioner contests a ruling of the Third Circuit that correctly construed this Court's Due Process Clause, Takings Clause, and unclaimed property precedent; correctly applied settled principles of constitutional law; and correctly reached the same conclusion as the Sixth Circuit Court of Appeals in rejecting Petitioner's due process challenge. *Certiorari* is not warranted here, where the courts of appeals are in agreement, the judgment below comports with the relevant decisions of this Court, and the petition raises no important or unsettled questions of federal law.

When evaluating Petitioner's due process claims, the Third Circuit properly found several reasonable bases for New Jersey's enactment of Chapter 25, which modified the provision establishing the abandonment period for travelers checks to agree with New Jersey's other unclaimed property laws. Petitioner has no property interest in the unclaimed travelers checks at issue and no constitutional right to profit from that abandoned property. Petitioner's efforts to wrap its own private investment expectations in a constitutional shroud and its suggestions about a confiscatory or retroactive "taking" do not provide a basis for review by this Court. The Third Circuit correctly decided that New Jersey's amended law does not take property, currently or retroactively, from Petitioner.

Petitioner's due process question fails because Chapter 25 advances numerous legitimate state interests

and satisfies rational basis scrutiny. Petitioner's takings question fails because Petitioner, as debtor, has no legally cognizable property interest in the unclaimed travelers checks of its customers. Because no compelling reasons exist for *certiorari*, the petition should be denied.

STATEMENT

In 2010, the New Jersey Legislature amended this State's unclaimed property laws, extending the protection of custodial caretaking by New Jersey to a broader range of unclaimed intangible property. 2010 *N.J. Laws* c. 25 (Chapter 25) (Pet. App. 201a-213a). When enacting Chapter 25, the Legislature stated its intent to modernize this State's laws, and Chapter 25 brought New Jersey's various unclaimed property dormancy periods into closer alignment. Pet. App. 187a.

Relevant here, Chapter 25 modified the presumptive period of abandonment for travelers checks from fifteen to three years. Pet. App. 205a-206a. In New Jersey, this same abandonment period already applies to a wide variety of property, including financial instruments. *See, e.g.*, Pet. App. 206a (money orders); N.J. Stat. Ann. §§ 46:30B-16, -18, -22, -31, -32 (three year abandonment periods for checks, drafts, cashier's checks, savings deposits, insurance policies, stocks, and unclaimed dividends or distributions). Other forms of property are subject to shorter presumptive abandonment periods, and only property held by New Jersey's courts and county surrogates is subject to an abandonment period longer than three years. *See* N.J. Stat. Ann. § 46:30B-41.

Petitioner American Express Travel Related Services, Inc. (Petitioner or AmEx) challenged Chapter 25, arguing unsuccessfully before the district court that this law should be enjoined pursuant to several constitutional provisions. The claims that Petitioner pursues before this Court failed below because AmEx is only a holder, not the owner, of unclaimed property and as demonstrated by its own admissions, more than 96% of the travelers checks sold in New Jersey are likely to be redeemed within three years. *See* Pet. App. 180a (Decl. of Susan Helms, ¶ 9). Because AmEx has no property interest in its customers' unclaimed travelers checks and Chapter 25 is rationally related to legitimate state interests, the district court denied injunctive relief, concluding that Petitioner failed to establish a reasonable likelihood of success on any of its claims. *Am. Express Travel Related Servs. Co. v. Sidamon-Eristoff*, 755 F. Supp. 2d 556 (D.N.J. 2010). Pet. App. 67a, 72a, 75a.

A short time earlier, Kentucky also modified its presumptive abandonment period for travelers checks. AmEx challenged Kentucky's amended unclaimed property law, raising the same constitutional claims under the Due Process, Takings, and Contracts Clauses that it alleged in this case. Reversing its lower district court, the Sixth Circuit Court of Appeals concluded that Kentucky's shorter abandonment period comported with the Due Process Clause. *Am. Express Travel Related Servs. Co. v. Kentucky*, 641 F.3d 685 (6th Cir. 2011). That court then remanded consideration of the remainder of AmEx's constitutional claims to the Kentucky district court. *Id.* at 694-95.

With respect to Chapter 25, Petitioner appealed the New Jersey district court's ruling. The Court of Appeals for the Third Circuit rejected AmEx's claims. *Am. Express Travel Related Servs. Co. v. Sidamon-Eristoff*, 669 F.3d 359 (3d Cir. 2012) (Pet. App. 1a-21a). Agreeing with its district court and the Sixth Circuit, the Third Circuit decided that modifying the presumptive period of abandonment for travelers checks met rational basis scrutiny and thus comported with substantive due process. Pet. App. 10a.

The Third Circuit recognized that Chapter 25 advanced several valid purposes, including providing greater consistency among New Jersey's unclaimed property laws, offering more protection for property owners with an earlier abandonment period, and supporting the legitimate State interest in "taking custody of abandoned property." Pet. App. 7a-8a. Since legitimate bases existed for New Jersey's enactment of Chapter 25, the Third Circuit found that AmEx failed to meet its substantial burden under *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993), which required Petitioner to negate every conceivable basis for New Jersey's law. Because Petitioner could not meet this burden, the Third Circuit concluded that Chapter 25 did not violate substantive due process. Pet. App. 10a.

The Third Circuit also rejected Petitioner's claim that Chapter 25 amounted to a "taking." Noting that a takings claim required Petitioner to establish a property interest, the lower court recognized that Petitioner is simply a holder of travelers checks and AmEx's travelers checks business has long been regulated by New Jersey's unclaimed property laws. Pet. App. 16a-17a. In fact, the court observed, Chapter 25 "only requires that issuers

like AmEx turn over property owned by the *travelers check owners* to State custody,” for perpetual and safer administration on behalf of rightful owners. Pet. App. 16a n.7.

The Third Circuit correctly noted that Petitioner held “no interest in the funds – precisely the opposite of having a ‘claim to the funds as an asset.’” Pet. App. 17a (quoting *Delaware v. New York*, 507 U.S. 490, 502 (1993)). And AmEx’s private “investment-backed expectations” from unclaimed travelers checks are, and always have been, “constrained by the owner’s ability to redeem a TC on demand and by the terms of the State’s unclaimed property laws.” Pet. App. 17a (citing *Sec. Sav. Bank v. California*, 263 U.S. 282, 285-86 (1923)). Accordingly, without error, the Third Circuit rejected Petitioner’s takings challenge because AmEx failed to establish a valid property interest in the unclaimed travelers checks.

Despite adverse rulings from the New Jersey district court and the Third and Sixth Circuits, Petitioner moved for panel rehearing or rehearing *en banc* by the Third Circuit, raising the same due process and takings arguments it previously advanced and the same arguments it offers again in its petition. The Third Circuit denied Petitioner’s motion without registered dissent. By order dated April 5, 2012, the Third Circuit stayed its mandate pending the filing and disposition of a petition for writ of *certiorari*. Pet. App. 155a.

REASONS FOR DENYING THE PETITION

Petitioner fails to establish compelling reasons why this Court should grant *certiorari*. Only two circuits have considered Petitioner’s arguments, and the Third Circuit’s

analysis and ruling regarding AmEx's substantive due process claim accord fully with the Sixth Circuit's decision concerning the same claims made by this same Petitioner. AmEx's takings claim fares no better. It has no property interest in the unclaimed funds, which belong instead to travelers checks' owners. The Third Circuit further applied all relevant precedent of this Court concerning Petitioner's burdens of proof and the States' legitimate interests in preserving the value of unclaimed property in perpetual custody for owners.

Petitioner's makeweight reliance on its own investment interests using the property of others neither creates a property right in AmEx nor raises an important question of federal law requiring review by this Court. Similarly, Petitioner's suggestions that Chapter 25 is "suspicious" or "irrational" ignore the Third Circuit's finding of several legitimate state interests that support this law and render Chapter 25 wholly constitutional. AmEx's petition should be denied.

I. Chapter 25 Rationally Amended New Jersey's Unclaimed Property Laws Based On Myriad Legitimate Government Interests.

The Third Circuit relied directly on this Court's precedent to deny Petitioner's due process challenge to Chapter 25. Petitioner cannot genuinely argue that the lower court applied an incorrect legal standard to review this economic legislation. In the face of the Third Circuit's "properly stated rule of law," *Sup. Ct. R.* 10, however, Petitioner again erroneously attempts to invert the burdens of the governing due process test and proffers the same untenable claims against Chapter 25 it posited

below and in the Sixth Circuit. The Third Circuit correctly rejected AmEx’s arguments. No further appellate review is required.

The Third Circuit began its analysis by recognizing that legislative acts contested under the Due Process Clause must survive rational basis scrutiny. Pet. App. 6a. The lower court next explained that rational basis review requires a showing of (1) one or more legitimate state interests that (2) are furthered by the statute at issue. *Id.* The Third Circuit then stated the applicable burden of proof: “those attacking the rationality of the legislative classification have the burden ‘to negative every conceivable basis which might support it[.]’” Pet. App. 7a (citing *FCC v. Beach Commc’ns*, 508 U.S. at 315) (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

As a result, the lower court recognized that Chapter 25 would withstand due process scrutiny if it “rationally further[ed] *any* legitimate state objective.” Pet. App. 7a (citing *Malmed v. Thornburgh*, 621 F.2d 565, 569 (3d Cir. 1980)). And, “[i]t [was] constitutionally irrelevant whether this reasoning in fact underlay the legislative decision,” so long as that court could find one or more legitimate state interests supporting Chapter 25. *Id.* (quoting *Flemming v. Nestor*, 363 U.S. 603, 612 (1960)). The Third Circuit thus understood that rational basis review is “not a toothless” test, but “requires significant deference to the legislature’s decisionmaking and assumptions.” *Id.* (citing *Mathews v. Lucas*, 427 U.S. 495 (1976) and *Sammon v. N.J. Bd. of Med. Exam’rs*, 66 F.3d 639 (3d Cir. 1995)). Thus, “a legislative choice is not subject to courtroom fact-finding” and, although not the case here, at the outer limits may

even “be based on rational speculation unsupported by evidence or empirical data.” *FCC v. Beach Communc’ns, Inc.*, 508 U.S. at 315.

Applying these properly stated rules of analysis and informed by this Court’s precedent governing unclaimed property, the Third Circuit found that Chapter 25 rationally furthers several legitimate State interests: taking custody of unclaimed property to preserve its value “more conservatively” than AmEx; offering greater protection, in perpetuity, than Petitioner to property owners who may later claim this property; and New Jersey’s stated interest “in modernizing its unclaimed property laws to promote consistency.” Pet. App. 7a-8a (citing *Delaware v. New York*, 507 U.S. at 497). Respondents add to this list: New Jersey’s legitimate interest in administrative convenience for property owners, property holders, and the State Unclaimed Property Administrator in understanding and applying consistent unclaimed property laws; use of the abandoned property “for the general good rather than for the chance enrichment of particular individuals or organizations,” *Standard Oil Co. v New Jersey*, 341 U.S. 428, 436 (1951); and the constitutionally sound interest in rational revenue raising. *See, e.g., United States v. Carlton*, 512 U.S. 26, 40 (1994) (Scalia, J., concurring) (observing that “[r]evenue raising is certainly a legitimate legislative purpose,” citing U.S. Const., Art. I, § 8, cl. 1). These legitimate state interests more than satisfy substantive due process.

The lower court properly applied this Court’s due process precedent. New Jersey has legitimate interests in custodial escheat. Chapter 25 enacts an abandonment period consistent with other forms of property and closely

reflects travelers checks' owners actual behavior. Pet. App. 8a. Yet Petitioner again suggests that a legislative act fails rational basis scrutiny where the "asserted grounds for the legislative classification lack any reasonable support in fact." Pet. 19-20 (citations omitted). This leads AmEx to proclaim that, while most owners will use their travelers checks within three years of purchase, the Third Circuit's "principal error was in discounting" that some owners may claim travelers checks beyond Chapter 25's modified presumptive abandonment period. Pet. 9.

Petitioner is again mistaken for several reasons. In the face of the stated and ascertainable rational bases for Chapter 25, AmEx bears the burden of negating "every conceivable basis which might support" this legislative act. *FCC v. Beach Commc'ns*, 508 U.S. at 315 (citation omitted). Petitioner failed to meet this test below, and the Third Circuit, like the Sixth Circuit, properly rejected AmEx's attempt to invert the Court's substantive due process test by placing the evidentiary burden on the Respondents. Pet. App. 8a-9a.

Petitioner also agrees that a "State's authority to take possession of abandoned property is undoubted," Pet. 18, and its own submissions reflect that more than 96% of the travelers checks it sells are likely to be used by purchasers within three years. Pet. App. 180a. Yet Petitioner oddly criticizes the Third Circuit for "crediting" this statistic to the Respondents and suggests that this information is "irrelevant" to rational basis review of Chapter 25. Pet. 20, n. 8.

Petitioner errs, first, by overlooking that AmEx provided this usage data below and, second, by adamantly

refusing to accept the Third Circuit's proper recognition that "the rational basis test does not require mathematical precision in the legislature's decisions." Pet. App. 8a (citing *Heller v. Doe*, 509 U.S. 312, 321 (1993)). Since AmEx has always been required to report and remit unclaimed travelers checks funds and knows that the vast majority of its travelers checks are used within three years, due process is not offended by modifying the relevant abandonment period in a manner that, as the district court noted, "in fact . . . reflects consumers' actual timing of redemption for travelers checks in this State." Pet. App. 59a. Petitioner's arguments are truly nothing more than an impermissible attack on states' sovereign authority to determine presumptive periods of abandonment for unclaimed property, including travelers checks. Pet. App. 61a.

While decrying the decision below and ignoring its own failure to "negative" all of the legitimate state interests for Chapter 25, Petitioner reveals its true belief that any loss of its private "means of earning revenue from its [travelers checks] business" that may occur under Chapter 25 should govern the result in this case. Pet. 21. AmEx again errs because rightful owners may, at any time, use their travelers checks and thus "eliminate" AmEx's "means of earning revenue." Pet. 26. And, Petitioner's "investment income" (derived from using the property of others) is always subject to the vicissitudes of the economy and even poor or incorrect investment strategy. By contrast, the Third Circuit correctly agreed with New Jersey's Legislature that a reduced abandonment period "better protected [Petitioner's] customers by giving custody of the property to the State" and providing for "more conservative[]" investment as required by law. Pet.

App. 10a. Plainly, AmEx's private interest in preserving its stream of income does not negate every conceivable basis for Chapter 25 and does not provide any compelling reason for review by this Court.

In addition, despite its own admission that 96% of travelers checks are used within three years and despite the indisputable fact that Chapter 25's three-year presumptive abandonment period aligns this property with most of New Jersey's other unclaimed property laws, Petitioner again relies on *Anderson National Bank v. Luckett*, 321 U.S. 233 (1944), to suggest, as it did below, that Chapter 25 "unreasonably" presumes travelers checks have been "forgotten" after three years. Pet. 18. Respondents agree that *Anderson National Bank* is relevant to Petitioner's due process claim, but not in the manner AmEx suggests.

Instead, consistent with the unbroken line of this Court's cases that have recognized that debtors have no claim to abandoned property, *Anderson National Bank* directed 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." *Anderson Nat'l Bank*, 323 U.S. at 242. That conclusion remains valid and undermines Petitioner's arguments again. In fact, cases preceding *Anderson National Bank* only required that the period of abandonment be "reasonable." See, e.g., *Cunnius v. Reading Sch. Dist.*, 198 U.S. 458, 477 (1905). Thus, even if that standard applied in lieu of rational basis, the presumptive abandonment period established by Chapter 25 would withstand judicial scrutiny, given its reflection of the actual behavior of travelers checks

owners, who, as even AmEx admits, use 96% of these checks within 3 years.

Petitioner next argues that Chapter 25 is impermissibly retroactive. This argument fails under the Due Process Clause as well. First, the Court has considered escheat actions seeking property “for periods of approximately seven to 40 years prior to the bringing of this action” without concern for retroactivity. *Texas v. New Jersey*, 379 U.S. 674, 675 (1965). In enunciating federal common law priorities for unclaimed property among states, this Court has clearly acknowledged that a state may claim abandoned property “if and when its law made provision for escheat of such property” and has recognized that states may claim previously abandoned property under newly enacted legislation. *Id.* at 682. Second, generally speaking, “the *constitutional* impediments to retroactive civil legislation are now modest.” *Landgraf v. USI Film Prods.*, 511 U.S. 244, 272 (1994). Any retroactive effects of laws must simply meet the settled due process test: “that the retroactive application of the legislation is itself justified by a rational legislative purpose.” *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984). Accordingly, even if Chapter 25 might have some retroactive effect, this law still withstands rational basis scrutiny given AmEx’s status as a holder who has always been required to remit unclaimed funds from travelers checks to State custody.

Finally, Petitioner ignores that the two circuits that have considered its due process claims have not varied in their review and rejection of Petitioner’s arguments. Shortly before the Third Circuit ruled, the Sixth Circuit denied Petitioner’s challenge to Kentucky’s modified

presumptive abandonment period. *AmEx v. Kentucky*, 641 F.3d at 686. In fact, for the same reasons and based on the same legal principles enunciated by this Court, the Third and Sixth Circuits both denied AmEx's attempts to undermine New Jersey's and Kentucky's legitimate state interests in protecting and preserving the value of unclaimed property for rightful owners as opposed to favoring Petitioner's concerns only for its private "investment-backed expectations." Petitioner cannot expect to obtain relief based on private enrichment and due process arguments that, as stated by the Sixth Circuit, seek to return constitutional jurisprudence to "a time when the *Due Process Clause* was used by [the Supreme] Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy." *AmEx v. Kentucky*, 641 F.3d at 691 (quoting *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963)).

Petitioner's due process arguments fail because Chapter 25 does not "rob" AmEx of "its very means of earning income from its business model," does not leave speculative "private property that is subject to regulation virtually unprotected," and is not "harshly" retroactive. Pet. 17, Pet. 22. Chapter 25 reasonably and rationally furthers New Jersey's legitimate interests in conserving abandoned property, protecting owners' rights, and modernizing and aligning this State's unclaimed property laws. Chapter 25 meets all due process requirements.

II. Chapter 25 Is Not An Unconstitutional Taking Because Petitioner Has No Property Interest In The Abandoned Travelers Checks It Holds And Chapter 25 Does Not Confiscate Property Belonging To Petitioner.

This Court has instructed time and again that unclaimed property belongs to creditors, not to debtors such as AmEx. Based on this settled principle, recognizing New Jersey's history of regulating travelers checks, and following the jurisprudence of this Court, the Third Circuit ably dispatched Petitioner's takings arguments. Pet. App. 15a-16a. In the face of the lower court's comprehensive ruling, however, Petitioner now contends that the Third Circuit erroneously focused on only one prong of the Court's three-part takings test to deny Petitioner's challenge to Chapter 25. Pet. 23.

On its face, the Third Circuit's decision reflects that it did not rely on a single-factor takings analysis. The Third Circuit identified all relevant legal standards, evaluated Petitioner's claims under those standards, and rejected AmEx's contentions by applying in full the test imparted in *Penn Central Transportation Co. v. New York*, 438 U.S. 104, 122 (1978), and related Court precedent. In fact, contrary to AmEx's myopic arguments, the Third Circuit examined the nature of Petitioner's asserted "property interest" as well as the "economic impact" of Chapter 25; the "extent to which" Chapter 25 might "interfere" with AmEx's "investment-backed expectations;" and the "character of the state action" at hand. Pet. 24.

Thus applying the analysis directed by this Court, the Third Circuit first recognized the same fundamental misstep of Petitioner's takings arguments that undermines Petitioner's due process claims: AmEx does not own

the travelers checks at issue and, as a statutory holder required to report and remit this unclaimed property, Petitioner has no constitutionally protected interest in abandoned travelers checks owned by its customers. As the Third Circuit explained, “[f]unds held by a debtor become subject to escheat because the debtor has no interest in the funds” and “a law requiring the delivery of such deposits to the State affects no property interest belonging to the bank [holder].” Pet. App. 17a (quoting *Delaware*, 507 U.S. at 502 (citations omitted)). See also *Texas v. New Jersey*, 379 U.S. 674, 680 (1965) (“[a] debt is property of the creditor.”); *Anderson Nat’l Bank*, 321 U.S. at 242 (a “bank is a debtor to its depositors”); *In re Erie Forge & Steel Co.*, 456 F.2d 801, 804 (3d Cir. 1972) (observing that deposit of money in bank does not amount to transfer of property where “an obligation to pay the amount of the deposit as soon as the depositor may see fit to draw a check against it” is created) (quoting *New York County Nat’l Bank v. Massey*, 192 U.S. 138, 147 (1904)). As this Court noted in *Texas* and reiterated in *Delaware*, “it would be strange to convert a liability into an asset when the State decides to escheat.” *Delaware*, 507 U.S. at 503; *Texas*, 379 U.S. at 680.

Since the funds Petitioner holds on behalf of its customers in the first instance are not its property, AmEx fails to demonstrate that “the State’s action affected a ‘legally cognizable property interest.’” Pet. App. 15a. As the lower court correctly observed, abandoned travelers checks belong to the purchaser, and AmEx has no right to retain the funds “once they are deemed abandoned under the State’s unclaimed property laws.” Pet. App. 17a. Petitioner also failed below, and fails again, to point to anything in state law that might somehow grant it a property interest, *Barnhill v. Johnson*, 503 U.S. 393, 398 (1992) (stating that property interests are “creatures of

state law”), or imbue AmEx with a “legitimate claim of entitlement,” *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), to the rightful owner’s funds. As a matter of settled law, the Third Circuit correctly found that Chapter 25 cannot effect a taking with a deleterious economic impact where AmEx does not have a legally cognizable property right in its customers’ abandoned travelers checks.

The Third Circuit further examined the relevant “character” of New Jersey’s state action as well as the degree to which Chapter 25 might “interfere” with Petitioner’s investment-backed expectations. Pet. App. 15a. Observing first that “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,” the lower court recognized that the mere regulation of “economic values” does not constitute an unconstitutional taking. *Id.* (internal quotes and citations omitted). Next, based on its comprehensive takings analysis, the Third Circuit found that Chapter 25 neither “interferes” with Petitioner’s investment-backed expectations nor “appropriates” “AmEx’s business enterprise,” as Petitioner claims. Pet. 27. This was so because “Amex’s “[travelers checks] business has long been subject to regulation by New Jersey;” AmEx already knows that 96% of its travelers checks are used within three years; and Chapter 25 was merely “a subsequent amendment to achieve the [legitimate] legislative end of assuming custody of abandoned property.” Pet. App. 16a.

Because the Third Circuit properly applied this Court’s takings precedent, AmEx’s suggestions ring hollow: Chapter 25 does not “appropriate[] private funds” solely for revenue purposes; the lower court’s decision

does not “dangerously undermine[] the protection of private property”; and, “in practical effect,” Chapter 25 does not constitute “the functional equivalent of a taking.” Pet. 25; Pet. 28. AmEx holds no cognizable “private property” interest in owners’ funds and New Jersey’s unclaimed property laws, with the statutory presumptive abandonment periods therein, serve legitimate state interests and protect owners, holders, and New Jersey alike.

Petitioner also contends that Chapter 25’s modified abandonment period does not advance reuniting travelers checks with owners since issuers of these checks do not collect and submit names and addresses to the State. Pet. 10-Pet. 11. AmEx overlooks that the State would not have that information regardless of when the property is presumed abandoned by State statute and Chapter 25 neither alters that fact nor violates the proscription against takings. *See* Pet. App. 61a (district court observing that because New Jersey will have no additional information at fifteen years than it has at three years, Petitioner’s argument “impermissibly challeng[es] New Jersey’s general right to escheat travelers checks because the abandonment period is irrelevant” to information that the State possesses); *see also* 12 U.S.C. § 2501 (stating that cost of maintaining and retrieving addresses of purchasers of travelers checks burden interstate commerce). In addition, reuniting unclaimed property with owners is just one legitimate basis among many state interests: unclaimed property laws also protect unclaimed property from “seizure by would-be possessors” and allow the property to be “used for the general good rather than for the chance enrichment of particular individuals or organizations.” *Standard Oil*, 341 U.S. at 436.

Petitioner’s takings arguments mischaracterize the Third Circuit’s decision and fail to support its petition to this Court. The Third Circuit did not apply a “dispositive single-factor test” to consider only state regulation of AmEx’s “investment-backed expectations.” Pet. 23. The lower court reviewed all relevant circumstances under the *Penn Central* test, including the nature of AmEx’s property interest, New Jersey’s state action, the economic impact of Chapter 25, and the authority of states to administer unclaimed property as a “sovereign exercise of a regulatory power over property and the private legal obligations inherent in property.” Pet. App. 17a (quoting *Delaware*, 507 U.S. at 502) (internal quotation marks omitted). Based on this complete analysis, the lower court unerringly rejected AmEx’s takings challenge.

In the end, the Third Circuit correctly recognized that two factors have always constrained AmEx’s ability to utilize its purchasers’ funds: “the owner’s ability to redeem a TC on demand” and “the terms of the State’s unclaimed property laws.” Pet. App. 17a. And because Chapter 25 comports with due process, it would be “surprising indeed” if it nonetheless violated the takings clause. *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 225 (1986). But, as the Third Circuit concluded, Chapter 25 does not violate the Takings Clause and presents no such surprises.

The decision AmEx contests fully comports with the due process, takings and unclaimed property precedent of this Court. There is no conflict among circuits. Petitioner presents no compelling questions of federal law. The Third Circuit stated the proper rules of law and applied those principles to Petitioner’s due process and takings claims. Petitioner’s assertion that the Third Circuit’s “permissive

opinion” requires review by this Court to forestall Sister state modifications of abandonment periods for financial instruments is contradicted by AmEx’s simultaneous recognition that “today, many States have [already] shortened that period to just three years.” Pet. 32. New Jersey’s treatment of travelers checks was consistent with the Constitution before Chapter 25 and New Jersey’s custodial escheat of this property remains constitutional with this enactment.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of *Certiorari* should be denied.

Respectfully submitted,

JEFFREY S. CHIESA

Attorney General Of New Jersey

ROBERT LOUGY*

Assistant Attorney General

MARLENE G. BROWN

Senior Deputy Attorney General

R.J. Hughes Justice Complex

25 Market Street

P.O. Box 112

Trenton, N.J. 08625-0112

609-599-6868

robert.lougy@dol.lps.state.nj.us

Attorneys for Respondents

* *Counsel of Record*