No. 12-108

IN THE

Supreme Court of the United States

ANDREW P. SIDAMON-ERISTOFF, AS TREASURER OF THE STATE OF NEW JERSEY, *et al.*,
Petitioners,

v.

NEW JERSEY FOOD COUNCIL, *et al.*,
Respondents.

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

BRIEF FOR RESPONDENT AMERICAN EXPRESS PREPAID CARD MANAGEMENT CORPORATION IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly applied this Court's decisions in holding that New Jersey's attempt—under a law that has now been repealed—to escheat intangible personal property sold in New Jersey where the last known address of the putative "owner" is unknown and the holder of the property is incorporated in another State violates federal common law as established in *Texas* v. *New Jersey*, 379 U.S. 674 (1965), which held that the authority to escheat intangible personal property resides in either the State of the owner's last known address or, where that State is unknown or does not escheat the property, the State of the holder's incorporation.

CORPORATE DISCLOSURE STATEMENT

The parent corporations of respondent American Express Prepaid Card Management Corporation are American Express Travel Related Services Company, Inc. and 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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INTRODUCTION

In a series of decisions, this Court has adopted and repeatedly adhered to two bright-line rules of federal common law governing the authority of States to escheat abandoned intangible property. *See Texas* v. *New Jersey*, 379 U.S. 674, 681-683 (1965); *Pennsylvania* v. *New York*, 407 U.S. 206, 214-215 (1972); *Delaware* v. *New York*, 507 U.S. 490, 499-500 (1993). The "primary rule" awards the first right of escheat to the State of the owner's last known address, as reflected in the

property holder's records. Where the owner's address is unknown, or where the laws of the first-priority State do not provide for escheat of the property in question, the "secondary rule" gives the right to the holder's State of incorporation. These straightforward rules have governed state escheat authority for decades. And the Court has made clear that "no State may supersede them by purporting to prescribe a different priority under state law." *Delaware*, 507 U.S. at 500.

As part of a broad effort to exploit its abandoned-property laws to raise revenue amid budget shortfalls, New Jersey nonetheless attempted to rewrite this federal common-law regime with respect to a form of intangible property that had not previously been subject to escheat in that State. In 2010, the New Jersey Legislature amended its abandoned-property law to apply for the first time to "stored-value cards" ("SVCs"), popularly known as gift cards. *See* 2010 N.J. Laws ch. 25 ("Chapter 25"). Under Chapter 25 as originally enacted, an SVC would be presumed "abandoned" after only two years of inactivity, at which time the SVC issuer would be required to pay cash to the State in an amount equal to the balance remaining on the card. At the same time, the Legislature provided that, for any SVC sold in New Jersey to a purchaser whose address was unknown, the purchaser would be irrebuttably presumed to reside in New Jersey, making the SVC subject to escheat to New Jersey instead of to the State of the SVC issuer's incorporation. Likely recognizing the direct conflict between that "place-of-purchase presumption" and this Court's secondary priority rule, the Treasurer of New Jersey interpreted this provision to establish a tertiary rule, under which New Jersey claimed authority to escheat the unused balance of any SVC sold in New Jersey after two years of inactivity

when no other State sought to escheat the property under this Court's primary or secondary rules.

On motions for a preliminary injunction, the district court and the court of appeals held that the plaintiff SVC issuers were likely to succeed on their claims that Chapter 25's "place-of-purchase presumption" and the Treasury Guidance interpreting that provision were preempted by the priority rules this Court established in *Texas*. And on June 29, 2012, after the court of appeals affirmed the preliminary injunction, the New Jersey Legislature repealed the "place-of-purchase presumption" and substantially revised the other SVC provisions of Chapter 25. App. 1a-2a.

These amendments make this case a uniquely poor vehicle to address the question presented. Not only has the SVC-specific priority rule been repealed, but it is far from clear that the Legislature would intend the general tertiary rule that New Jersey defends in its petition to apply to SVCs. More fundamentally, the facts of this case do not even present the question New Jersey has submitted for review, but instead make clear that, under the Takings Clause, New Jersey cannot take custody of SVC funds in the first place. In any event, the courts below carefully and correctly applied this Court's precedents in holding New Jersey's attempt to rewrite the *Texas* priority rules to be invalid.

STATEMENT

A. State Authority To Escheat Abandoned Property Under *Texas* And Its Progeny

Under the abandoned-property laws of New Jersey and other States, property that has gone unused or unclaimed is presumed abandoned after a prescribed period of time and the person or entity then holding the

property is required to turn it over to the State. In theory, by taking custody of property where the owner or his whereabouts is unknown, the State protects the absent owner by safeguarding the property and, if possible, identifying the owner and restoring his property to him. *Provident Inst.* v. *Malone*, 221 U.S. 660, 664-665 (1911). Such laws apply to many forms of property, including not only real property and tangible personal property, but also intangible property such as bank deposits, uncashed checks and dividends, stocks, bonds, utility deposits, and insurance drafts.

State authority to escheat abandoned property is "subject to constitutional limitations." *Standard Oil Co.* v. *New Jersey*, 341 U.S. 428, 436 (1951). Most relevant here, "the Due Process Clause of the Fourteenth Amendment prevents more than one State from escheating a given item of property," lest the holder be subjected to double liability. *Texas* v. *New Jersey*, 379 U.S. 674, 676 (1965) (citing *Western Union Tel. Co.* v. *Pennsylvania*, 368 U.S. 71 (1961)). With respect to real property or tangible personal property, "it has always been the unquestioned rule in all jurisdictions that only the State in which the property is located may escheat." *Id.* at 677. Intangible property, however, "is not physical matter which can be located on a map," and questions have accordingly arisen as to which, if any, State is entitled to take custody. *Id.* Recognizing that "the States separately are without constitutional power to provide a rule," this Court has fashioned rules of federal common law to determine which States may escheat intangible property. *Id.*

In *Texas* and its progeny, this Court established and later reaffirmed two straightforward rules to govern escheat of intangible personal property when no federal statute applies. Under the primary rule, "the

first opportunity to escheat" is provided to "the State of 'the creditor's last known address as shown by the debtor's books and records.'" *Delaware* v. *New York*, 507 U.S. 490, 499-500 (1993) (quoting *Texas*, 379 U.S. at 680-681). "[I]f the primary rule fails because the debtor's records disclose no address for a creditor or because the creditor's last known address is in a State whose laws do not provide for escheat, the secondary rule awards the right to escheat to the State in which the debtor is incorporated." *Id.* at 500.

In adopting this regime, the Court sought to "settle[] once and for all" the question of States' respective escheat power by providing "a clear rule" that would be "simple and easy to resolve" and "to which all States may refer with confidence." *Texas*, 379 U.S. at 678, 681. The Court accordingly rejected alternatives that would have required fact-specific, case-by-case determinations, *id.* at 679, including rules granting priority to the State with the "most significant 'contacts' with the debt," *id.* at 678; the State in which the holder's principal place of business is located, *id.* at 680; or the State in which the debt was created, *id.*; *see also Pennsylvania* v. *New York*, 407 U.S. 206, 214-215 (1972) (rejecting a rule under which the State where a money order was purchased would escheat abandoned money order funds when the creditor's address was unknown).

In addition to promoting ease of administration, the *Texas* rules also "reflect the traditional view of escheat as an exercise of sovereignty over persons and property owned by persons." *Delaware*, 507 U.S. at 503. "[O]nly a State with a clear connection to the creditor or the debtor may escheat." *Id.* at 504. Thus, "the primary rule permits the escheating State to protect the interest of a creditor last known to have resided there," while "the secondary rule protects the interests of the

debtor's State as sovereign over the remaining party to the underlying transaction." *Id.* at 503, 504. A State "having no continuing relationship to any of the parties to the proceeding," in contrast, has no authority to escheat intangible property. *Id.* at 504 (quoting *Pennsylvania*, 407 U.S. at 213).

B. AmEx Prepaid's SVC Business

SVCs are electronic "gift" cards that may be used to purchase goods or services. American Express Prepaid Card Management Corporation ("AmEx Prepaid") issues "open loop" SVCs, which are redeemable for merchandise or services anywhere in the United States that American Express credit cards are accepted. C.A.J.A. 383-384.[1] Unless the terms of the SVC provide otherwise, the purchaser of the SVC is entitled to use the card only to buy goods and services; the card owner has no right to receive the cash value of the card back from AmEx Prepaid or any retailer. AmEx Prepaid's obligation to honor the SVC does not expire, and AmEx Prepaid does not charge dormancy or inactivity fees—that is, fees that would apply if the SVC remained unused after some period of time. *Id.*

AmEx Prepaid principally sells SVCs in New Jersey through third-party retailers. Before the effective date of Chapter 25, those retailers did not collect any identifying information about the SVC purchaser at the point of sale or provide any such information to AmEx Prepaid. C.A.J.A. 384. Constructing and implementing systems and procedures to do so would be prohibitively

[1] "Closed loop" SVCs, in contrast, are retailer-branded cards redeemable only for merchandise or services from the retailer that issued the card. C.A.J.A. 382.

expensive and time consuming. C.A.J.A. 385-386. Moreover, most AmEx Prepaid SVCs are purchased as gifts. C.A.J.A. 383. Accordingly, even if a retailer obtained information about the SVC purchaser, that would not permit the retailer or AmEx Prepaid to identify the SVC's actual owner in most cases. In light of these circumstances, until enactment of Chapter 25, SVC issuers have not been legally required to collect or maintain any information from which to identify or locate the purchaser or owner of a particular SVC. C.A.J.A. 384-385.

C. Chapter 25 As Enacted In 2010

In 2010, the New Jersey Legislature amended its abandoned-property law to apply for the first time to SVCs. Under Chapter 25 as originally enacted, SVC funds were presumed "abandoned" and subject to escheat after two years of inactivity, at which time the issuer was required to pay cash to the State in an amount equal to the full balance remaining on the card. *See* N.J. Stat. Ann. § 46:30-B-42.1(a), (b), -46, -57 (2010). That requirement applied even when the card's owner had no right to redeem the SVC for cash, but could use the card only to purchase goods and services. Thus, after two years of inactivity on an SVC, the SVC *issuer's* property—*i.e.*, the cash that was paid for the card—was deemed to be the abandoned property of the SVC owner and escheated to the State. Moreover, this two-year abandonment period applied both prospectively and retroactively to SVCs that had already been issued but not yet fully used before the Act's effective date. 2010 N.J. Laws ch. 25, § 9.

To increase the amount of SVC funds New Jersey could escheat, Chapter 25 also included a so-called "place-of-purchase presumption," which provided that

> [i]f the issuer of [an SVC] does not have the name and address of the purchaser or owner of the [SVC], the address of the owner or purchaser of the [SVC] shall assume the address of the place where the [SVC] was purchased.

N.J. Stat. Ann. § 46:30B-42.1(c) (2010) (Pet. App. 172a).

As written, this place-of-purchase presumption directly conflicted with the priority rules established by this Court in *Texas*. Under *Texas*'s secondary rule, the State of the debtor's incorporation is entitled to escheat intangible personal property when the debtor's records do not disclose the owner's address. The relevant provision of Chapter 25, in contrast, would have placed New Jersey ahead of the debtor's State of incorporation by substituting New Jersey (the place of purchase) for the State where the owner was "last known to have resided," *Delaware*, 507 U.S. at 503, when the owner's address was unknown. Because, as noted, SVC issuers rarely obtain or maintain the purchaser's or owner's address, *supra* pp. 6-7, the place-of-purchase presumption would effectively have entitled New Jersey—instead of the States in which the issuers were incorporated—to escheat the funds associated with a substantial proportion of all SVCs sold in New Jersey.

Undoubtedly recognizing the conflict between that provision and this Court's priority rules, the New Jersey Treasurer issued an authoritative "Guidance on Implementation … of [Chapter] 25" attempting to minimize the infirmity. App. 3a; *see* App. 3a-5a. The Treasury Guidance construed Chapter 25 to mean that where there was no record of the owner's address, the State in which the SVC issuer was incorporated would retain the right to escheat under *Texas*'s secondary rule. App. 4a. But where the owner's address was un-

known and "the issuer's state of domicile exempts this type of property from its unclaimed property statute," unused SVCs sold in New Jersey would escheat to New Jersey. *Id.* The priority rules articulated in the Treasury Guidance applied only retroactively to SVCs "issued prior to the date of [the Guidance's] announcement." *Id.*

In effect, then, under Chapter 25 as implemented by the Treasury Guidance, the State of an SVC owner's last known address would have the first right of escheat (consistent with the primary *Texas* rule); the State of the SVC issuer's place of incorporation would have the second right of escheat (consistent with the secondary *Texas* rule); and, under the state-specific tertiary rule in the Treasury Guidance, New Jersey would claim the right to escheat the unused balance on any SVC sold in New Jersey before the date of the Treasury Guidance when no other State had escheated the funds under *Texas*.

D. Proceedings Below Before The June 2012 Amendments To Chapter 25

AmEx Prepaid and other SVC issuers filed separate suits to enjoin Chapter 25, both retrospectively and prospectively, on several grounds. Among other things, the plaintiffs argued that retroactive application of Chapter 25 to SVCs sold before the law's enactment would violate the Contract Clause; that retroactive and prospective application would violate the Takings and Due Process Clauses and conflict with federal regulation of SVCs under the Credit Card Accountability, Responsibility and Disclosure Act of 2009, 15 U.S.C. § 1693*l*-1(c); and that the priority rules in Chapter 25 and the Treasury Guidance conflicted with the federal common law established in *Texas* and its progeny.

Hearing the suits together, the district court entered a preliminary injunction barring Chapter 25's retroactive application. The court held that the plaintiffs had established a likelihood of success on their claim that requiring escheat under Chapter 25 of SVCs not redeemable for cash that had been issued but not yet fully used before the statute's enactment would violate the Contract Clause. Pet. App. 154a-157a. The court also acknowledged that "Chapter 25 could conceivably effect a taking" of SVC issuers' property, but concluded (mistakenly) that it did not need to base a "preliminary injunction on [a] Takings claim" because it had enjoined retroactive (but not prospective) application of the law under the Contract Clause. Pet. App. 159a. Thus, although AmEx Prepaid's claim under the Takings Clause challenged Chapter 25 both retrospectively and prospectively, the court did not address the takings claim.

With respect to the priority rules, the court held that Chapter 25's place-of-purchase presumption "clearly violate[d] the secondary priority rule [under *Texas*] by ignoring the right of the debtor's state of incorporation" to escheat intangible personal property when the address of the creditor was unknown. Pet. App. 132a. The court then considered the tertiary rule set forth in the Treasury Guidance. After concluding that the Treasury Guidance reflected a reasonable interpretation of Chapter 25 as a matter of state law, the district court held that the tertiary rule also violated the federal common-law priority rules. In particular, the court held that the *Texas* rules were intended by this Court to be "exclusive and exhaustive" and that States lacked the authority to supplement them, especially States that have "'no continuing relationship to any of the parties,'" such as the "the state of purchase."

Pet. App. 146a (quoting *Delaware*, 507 U.S. at 504). A contrary result, the court explained, would frustrate the purposes of the priority rules by allowing different States to "enact[] incompatible third priority rules." Pet. App. 148a.

On January 5, 2012, the court of appeals affirmed the preliminary injunction of the place-of-purchase presumption in Chapter 25 and the tertiary rule in the Treasury Guidance, agreeing that plaintiffs had demonstrated a likelihood of success on their claims that both of those provisions were preempted under *Texas* and its progeny. Pet. App. 25a-34a. The court held that Chapter 25's place-of-purchase presumption "directly contradicts the second priority rule announced in *Texas*." Pet. App. 25a. And it held that the tertiary rule adopted by the Treasury Guidance was also preempted, reasoning that "allowing states to implement additional priority rules" would defeat the purpose of the *Texas* rules and result in "competing state claims to abandoned property." Pet. App. 33a. The court further explained that New Jersey's tertiary rule "infringe[d] on the sovereign authority of other states" and conflicted with the *Texas* line of cases because New Jersey lacks "a sufficient connection with any of the parties to the [SVC] transaction to claim a right to escheat" the SVC funds. Pet. App. 31a, 32a.

With respect to Chapter 25's two-year abandonment period for SVCs, the court of appeals affirmed the partial injunction the district court had entered under the Contract Clause enjoining Chapter 25's retroactive application. Pet. App. 12a-18a. But the court repeated the district court's mistaken assumption that it did not "need [to] reach the Takings Clause claim" (Pet. App. 19a n.6), even though that claim, unlike the Contract Clause issue, challenged both retroactive and prospec-

tive application of Chapter 25 to SVCs as an impermissible *per se* taking.

E. June 2012 Amendments To Chapter 25

On June 29, 2012—after the court of appeals affirmed the preliminary injunction but before New Jersey filed its petition—the New Jersey Legislature significantly revised the SVC provisions of Chapter 25. Although New Jersey hardly acknowledges these amendments (Pet. 3 n.2), the Legislature in fact repealed section 46:30B-42.1(c), the provision of Chapter 25 that had created the "place-of-purchase presumption" for SVCs and provided the basis for the enjoined Treasury Guidance. *See* 2012 N.J. Laws ch. 14 (App. 2a). The 2012 amendments also lengthened the abandonment period for SVCs from two years to five and reduced from 100 percent to 60 percent the portion of the unused balance of SVCs not redeemable for cash that would be subject to escheat. *See* App. 1a.

REASONS FOR DENYING THE PETITION

I. THIS CASE IS AN EXCEPTIONALLY POOR VEHICLE TO ADDRESS THE QUESTION PRESENTED

A. The Question Posed By The Petition Is Not Actually Presented

As stated in the petition, the question submitted for this Court's review concerns the authority of a State to escheat "unclaimed property" that is owed by a "debtor[]" to a "rightful owner" who has abandoned it. Pet. i. The factual predicates of that question simply do not exist in this case. On the facts that *do* appear, the State has no authority to escheat the property in the first place.

When a customer purchases an AmEx Prepaid SVC, the cash paid for the card becomes AmEx Prepaid's property. It does not belong to the SVC owner, and it is not being held by AmEx Prepaid for the benefit of the SVC owner. Unless the terms of the SVC specifically provide otherwise, the cardholder has no right to redeem an SVC for cash, but can use it only to purchase goods or services. Thus, contrary to New Jersey's flawed description (Pet. i), cardholders are not "owner[s]" of the funds of not-yet-used SVCs, and SVC issuers are not "debtor[s]" with respect to those funds. This case has nothing to do with the "preservation of the rights of property owners, [the] conservation of the value of the unclaimed property, [or the] … use [of] unclaimed property for public purposes until a rightful owner steps forward." Pet. 11-12; *see also* Pet. 2, 6, 8, 13-15, 17-21. Nor does it involve a potential "windfall" (Pet. 6) to "serendipitous corporate holders of unclaimed … property" (Pet. 8). This case instead involves New Jersey's naked attempt to effect a confiscatory "forced contribution to general governmental revenues" by redefining the economic relationship between SVC issuers and cardholders by legislative edict. *Webb's Fabulous Pharm., Inc.* v. *Beckwith*, 449 U.S. 155, 163 (1980).

Application of New Jersey's abandoned-property law to SVCs thus rests on the fiction that the property of the SVC *issuer* is actually the abandoned property of the *cardholder*. That "*ipse dixit*" "recharacteriz[ation]" of private property amounts to an impermissible *per se* taking. *Webb's Fabulous Pharm.*, 449 U.S. at 164; *see also Phillips* v. *Washington Legal Found.*, 524 U.S. 156 (1998); *Brown* v. *Legal Found. of Wash.*, 538 U.S. 216

(2003).[2] In *Webb's Fabulous Pharmacies*, for example, this Court held that a state law confiscating the interest accruing on money deposited in a court fund was a forced exaction of the "very kind … the Taking Clause … was meant to prevent." 449 U.S. at 164. The Court reached the same conclusion in *Phillips*. *See* 524 U.S. at 172 ("[I]nterest income generated by funds held in [Interest on Lawyers Trust Accounts] is the 'private property' of the owner of the principal."). And in *Brown*, this Court made clear that confiscation of interest income from specific accounts is "akin to the occupation" of physical property and subject to a "*per se* approach." 538 U.S. at 235. Chapter 25 similarly takes the SVC issuer's property—the funds paid for the SVC—without just compensation. And that confiscation is all the more egregious because, lacking the name and address of most, if not all, SVC purchasers, the State has no reasonable prospect of returning the funds to the cardholder, making the State's assertion (Pet. 13) that it will hold the funds "in trust for rightful owners" not only legally, but factually, fallacious.

As noted, in ruling on the plaintiffs' motion for a preliminary injunction, neither the district court nor the court of appeals addressed AmEx Prepaid's challenge to Chapter 25's prospective application under the Takings Clause. *Supra* pp. 10, 11-12. AmEx Prepaid

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[2] Unlike laws imposing an "obligation to pay undifferentiated, fungible money," *West Virginia CWP Fund* v. *Stacy*, 671 F.3d 378, 386 (4th Cir. 2011), Chapter 25 aims to confiscate discrete and identifiable funds based on the unused balances on specific SVCs. Appropriation of such discrete funds is subject to takings analysis. *See Eastern Enters.* v. *Apfel*, 524 U.S. 498, 540 (1998) (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 554-556 (Breyer, J., dissenting).

intends to pursue this claim vigorously in the district court and, indeed, would have done so in this Court but for the recent amendments to Chapter 25, the effects of which the lower courts should address in the first instance. This Court's intervention now to address New Jersey's priority rules accordingly would be premature and potentially unnecessary because resolution of AmEx Prepaid's takings claim would likely render the priority question academic. At a minimum, that issue would best be addressed once the interrelated questions under the Takings Clause have been passed on by the lower courts in a subsequent phase of this litigation.

B. Recent Amendments To Chapter 25 Make This Case A Poor Vehicle To Address The Lawfulness Of New Jersey's Tertiary Rule

Even if the question posed in the petition were otherwise squarely presented, this case would nonetheless provide a poor vehicle to address the validity of New Jersey's priority rules because the recent amendments to Chapter 25 raise a substantial antecedent question of state law that may make resolution of the *Texas* issue irrelevant.

As discussed, *supra* pp. 9-12, the lawsuits brought by AmEx Prepaid and the other SVC issuers challenged the SVC-specific place-of-purchase presumption set forth in Chapter 25—*i.e.*, section 46:30B-42.1(c)—as well as the tertiary rule set forth in the Treasury Guidance implementing that provision. The district court and court of appeals found the plaintiffs likely to succeed on their claims that both of these provisions are preempted. *See* Pet. App. 25a-34a, 129a-153a.

After the court of appeals affirmed the preliminary injunction, the Legislature repealed the SVC-specific place-of-purchase presumption that appeared in section

46:30B-42.1(c) and provided the basis for the Treasury Guidance. *Supra* p. 12; App. 2a. New Jersey attempts (Pet. 3 n.2) to gloss over this fact by swapping in an entirely separate provision of New Jersey law—section 46:30B-10—which prescribes a general tertiary rule for all unclaimed property and which was part of the State's abandoned-property regime before Chapter 25 was enacted to provide for escheat of SVCs for the first time.

The State is undoubtedly correct that the court of appeals' decision, in effect, bars the enforcement of section 46:30B-10: The SVC-specific tertiary rule articulated in the Treasury Guidance and discussed in the lower courts' decisions was identical in substance to the generally applicable tertiary rule set forth in section 46:30B-10. The lower courts' holdings that such a rule is preempted under *Texas* and its progeny would thus apply equally to section 46:30B-10 in a case where that provision applied. But this Court should not address the validity of section 46:30B-10 in this case because it is far from clear whether that provision applies to SVCs at all as a matter of state law.

In the June 2012 amendments, the Legislature rejected the priority rule that had applied to SVCs under Chapter 25 and, with it, the Treasury Guidance interpreting and implementing that provision. *See Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978) ("[W]here … [the legislature] adopts a new law incorporating sections of a prior law, [it] normally can be presumed to have had knowledge of the [administrative] interpretation given to the incorporated law, at least insofar as it affects the new statute."); *accord Bedford* v. *Riello*, 948 A.2d 1272, 1282 (N.J. 2008). Given these actions, it would be odd, to say the least, to read section 46:30B-10—a general, preexisting provision that had never previously applied

to SVCs and was not cited or relied on in the Treasury Guidance (App. 3a-5a)—suddenly to apply to SVCs and to accomplish the same result as the provisions that the Legislature specifically eliminated in the June 2012 amendments. *Cf. FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) ("The classic judicial task of reconciling many laws enacted over time, and getting them to make sense in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute." (internal quotation marks omitted)).

This state-law question has not been briefed or decided by any court. A holding that section 46:30B-10 does not apply to SVCs as a matter of state law would make it unnecessary to resolve the validity of New Jersey's priority scheme under *Texas* in this case. This statutory background and the significant question of state law thus render this case an unfit vehicle to address the issue the State has submitted for review.

II. THIS COURT'S REVIEW IS UNWARRANTED BECAUSE THE DECISION BELOW PROPERLY APPLIES THIS COURT'S PRECEDENTS

Regardless of the foregoing vehicle problems, this Court's review is unnecessary because the court of appeals' conclusion that New Jersey may not supplement the *Texas* priority rules with a state-specific tertiary rule based on the place where the transaction occurred is correct. This Court's precedents already decide the question on which New Jersey seeks review.

A. This Court Established A Comprehensive Regime That No State May Supplement Or Amend

The common-law priority rules established in *Texas* in 1965 and adhered to for almost five decades embody a comprehensive and exclusive scheme to "settle[] once and for all by a clear rule" which States may escheat intangible property. *Texas*, 379 U.S. at 678. In *Texas*, the Court considered several possible priority rules and adopted the one that would best serve the interests in fairness and ease of administration as well as the sovereign interests of the States where the parties to the transaction are domiciled. This carefully calibrated scheme leaves no room for state-specific additions or amendments. This Court has accordingly made clear that "no State may supersede [the *Texas* rules] by purporting to prescribe a different priority under state law." *Delaware*, 507 U.S. at 500.

The court of appeals was therefore correct to hold that New Jersey's tertiary rule is preempted by the federal common law established in *Texas* and its progeny. That holding is also in accord with the only other court of appeals decision to have addressed the issue—a case New Jersey does not cite, let alone discuss. In *American Petrofina Co.* v. *Nance*, 859 F.2d 840 (10th Cir. 1988), the U.S. Court of Appeals for the Tenth Circuit held that an Oklahoma statute purporting to supplement the *Texas* priority rules was preempted by federal common law. The court held, similar to the decision below, that the *Texas* rules "limit[] the states' power to take custody of unclaimed intangible personal property" and that the scheme at issue "conflict[ed]" with those rules. *Id.* at 842. Given that *American Petrofina* has stood as the only federal appellate decision on the issue for nearly 25 years, the State's contention

(Pet. 12) that the court of appeals' decision in this case upsets "settled expectations" is unpersuasive.[3]

Nothing in this analysis depends on whether two or more States actually assert conflicting claims to escheat the same intangible property. This Court specifically took account of the possibility that the first-priority State might not seek to escheat property and provided an alternative rule to apply in that situation, but declined to do so for cases where the second-priority State does not seek to escheat. Rather, even recognizing that some States do not seek to escheat all forms of property, the Court adopted only a two-part rule to "settle[] [the question] once and for all." *Texas*, 379 U.S. at 678. As the courts below determined, that should be the end of the matter.

New Jersey's contrary position would frustrate the core objectives of *Texas* in two important respects. *First*, state-by-state tertiary rules would invade the sovereign prerogatives of the State of the debtor's in-

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[3] In a footnote, New Jersey cites (Pet. 9 n.3) a handful of state-court decisions for the view that the "*Texas* rules do not apply where only one state seeks to assume custody of the unclaimed property." But the cited decisions either involve distinguishable facts, straightforwardly apply the *Texas* priority rules, or rest on reasoning that cannot survive this Court's decision in *Delaware*. Similarly, New Jersey's reliance (Pet. 16) on the Uniform Unclaimed Property Act is misplaced because that model law cannot override the *Texas* rules. *See Pennsylvania*, 407 U.S. at 215 n.8 (Court's decree "prevails" over "any provision of the Revised Uniform Disposition of Unclaimed Property Act … inconsistent with th[e] decree"). Nor does the inclusion of a tertiary rule in the Uniform Act substantiate New Jersey's claim (Pet. 16) that "states will not adopt incompatible third-party rules," as the State cites no evidence that the Uniform Act's tertiary rule is ever regularly applied or enforced.

corporation. As noted, *supra* pp. 5-6, the *Texas* rules "reflect the traditional view of escheat as an exercise of sovereignty over persons and property owned by persons." *Delaware*, 507 U.S. at 503. The secondary rule "protects the interests of the debtor's State as sovereign over the remaining party to the underlying transaction." *Id.* at 504. It is therefore left to the judgment of that State to decide whether and how to escheat unclaimed intangible property. As the court of appeals put it, "[t]he ability to escheat necessarily entails the ability not to escheat." Pet. App. 32a; *see* Pet. App. 149a ("[I]nherent in the State's sovereignty is its choice *not* to exercise custodial escheat over SVCs.").

Permitting another State that has no connection to either party—and thus no sovereign interest at stake—to escheat property that the debtor's State has left untouched would undermine the debtor's State's sovereign prerogative. This conflict is not hypothetical. AmEx Prepaid is incorporated in Arizona. In 2002, Arizona made a deliberate policy choice to exclude "electronic gift cards" from a list of intangible personal property subject to escheat. *See* Ariz. Rev. Stat. Ann. § 44-301(15) (property covered by the abandoned-property law "does not include … property that is referred to or evidenced by gift certificates" or "electronic gift cards").[4] New Jersey, in effect, seeks to sec-

[4] Arizona is one of several States that does not apply their escheat laws to SVCs. *See also, e.g.*, Conn. Gen. Stat. § 3-73a(e) (exempting "gift certificates" and "general-use prepaid cards" from escheat); R.I. Gen. Laws §§ 33-21.1-14; 6-13-12 (exempting "gift certificates," including "stored-value card[s]"); Utah Code Ann. § 67-4a-211 (exempting "gift certificate[s]" and "gift card[s]"). Indeed, before 2010, New Jersey took the same view. Before Chapter 25's enactment, New Jersey courts had concluded that the

ond-guess that sovereign judgment by escheating property that Arizona has deemed appropriate to leave in the hands of SVC issuers incorporated in Arizona. *See* Pet. 15 (claiming intent to "encourage[] other states" to change their laws). And it seeks to do so not to serve the traditional purpose of escheat of protecting an absentee "owner"—to whom New Jersey has no connection and whom New Jersey makes no effort to identify or locate—but simply to reap a windfall profit from Arizona's sound policy judgment.

Enforcement of New Jersey's tertiary priority rule would thus "give [New Jersey] the right to override other States' sovereign decisions regarding the exercise of custodial escheat," contrary to this Court's decisions. Pet. App. 33a. New Jersey is free, within constitutional limits, to regulate the types of intangible property subject to escheat when it has a sovereign relationship with the creditor or the debtor. It is not free, however, to use tertiary rules to substitute its policy choices for those of other States. *Delaware*, 507 U.S. at 504 ("[O]nly a State with a clear connection to the creditor or the debtor may escheat."); *cf. BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 571 (1996) (under our federal system, "no single State [may] … impose its own policy choice on neighboring States").

State's abandoned-property law did not apply to any type of gift certificate because "issuers of gift certificates … frequently do not bind themselves to pay money," and the State had no "right to exact cash by escheating obligations which do not bind the obligor to pay money." *Matter of Nov. 8, 1996, Determination*, 706 A.2d 1177, 1179 (N.J. Super. Ct. App. Div. 1998), *aff'd*, 722 A.2d 536 (N.J. 1999); *cf. supra* Part I.A.

Second, as the district court and court of appeals held, permitting States to adopt their own state-by-state tertiary rules would invite precisely the interstate discord the *Texas* rules were established to prevent. *See* Pet. App. 33a, 148a. Were New Jersey's view accepted, nothing would prevent different States from enacting different rules—for example, a rule based on the debtor's principal place of business; a rule based on the place with the most significant contacts with the property; or a rule based on the State in which an SVC was last used—thereby shattering the predictability and uniformity this Court sought in *Texas* and bringing about the very interstate conflicts and threats of double liability that the *Texas* cases were intended to eliminate.

Accordingly, while the Court adopted the *Texas* priority rules in the exercise of its original jurisdiction to resolve disputes between multiple States seeking to escheat the same property, the resulting federal common law is binding on all States, which can "no more override … judicial rules validly fashioned than they can override Acts of Congress." *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U.S. 310, 314 (1955). Nothing in *Texas*, *Pennsylvania*, or *Delaware* suggests that the rules this Court adopted and adhered to in those cases would apply only when a dispute between two States has already materialized. To the contrary, the Court stated without qualification that no State may "purport[] to prescribe a different priority under state law." *Delaware*, 507 U.S. at 500.[5]

[5] Contrary to the State's claim (Pet. 11), the presumption against preemption has nothing to do with this case. That presumption is a canon of *statutory* interpretation that rests on the

B. The Particular Tertiary Rule New Jersey Has Adopted Would Be Foreclosed By This Court's Precedents Even If States Could Adopt Tertiary Rules

Even if States had general authority to adopt state-specific tertiary rules—which they do not—the particular rule New Jersey has adopted conflicts with this Court's decisions, as the district court and the court of appeals correctly held. Pet. App. 30a-31a, 151a.

In *Texas*, this Court specifically rejected a rule that would have accorded priority to "the State in which the debt was created"—*i.e.*, the State in which the transaction giving rise to the property occurred. 379 U.S. at 680. Such a rule, the Court explained, would "leav[e] so much for decision on a case-by-case basis" as to result in an unacceptable degree of "uncertaint[y]." *Id.* Similarly, this Court in *Pennsylvania* addressed a state proposal under which "the State where [a] money order was purchased" should "be permitted to take the funds" associated with an abandoned money order. 407 U.S. at 212. The Court rejected the application of "[a] presumption based on the place of purchase" and refused to "carv[e] out [an] exception to the *Texas* rule" to avoid the supposed inequity of the right of escheat of money orders going to the debtor's State of incorporation. *Id.* at 214; *see Delaware*, 507 U.S. at 499 (noting

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premise that "Congress does not cavalierly" preempt state law. *Bates* v. *Dow Agrosciences, LLC*, 544 U.S. 431, 449 (2005) (internal quotation marks omitted). Congress's intent is not at issue here. This case involves judicially crafted rules of federal common law. Such rules bind States, *see Wilburn Boat*, 348 U.S. at 314, and this Court has accordingly made clear that the *Texas* rules definitively govern all States' escheat authority, *see Texas*, 379 U.S. at 677-678; *Delaware*, 507 U.S. at 499-500.

that the Court in *Pennsylvania* rejected a proposed "place of purchase rule" in favor of "adher[ing] to [its] decision in *Texas*" (internal quotation marks omitted)).

Texas and *Pennsylvania* thus each rejected rules that are largely indistinguishable from the rule New Jersey now defends. New Jersey insists (Pet. 20-21) that *Pennsylvania* does not foreclose its tertiary place-of-transaction rule because the rejected proposal in that case would have given priority to the State of the transaction *over* the State of incorporation. This argument fails to account for the Court's concern in *Texas* that a place-of-transaction rule would undermine the goals of certainty and ease of administration—a concern that is only amplified now that a substantial portion of SVC sales occur online and thus may be more difficult to locate in one particular State. More fundamentally, New Jersey's argument misses the point of this Court's precedents. The upshot of *Texas*, *Pennsylvania*, and *Delaware* is that the right to escheat (or not to escheat) lies with those States that have a "clear connection to the creditor or the debtor," *Delaware*, 507 U.S. at 504, and a corresponding sovereign interest in the property—not with any of the other numerous States that might happen to have some attenuated "contact" with the property or the transaction giving rise to it, *Texas*, 379 U.S. at 678. By asserting authority to escheat property based on nothing more than the fact that a relevant transaction occurred there, New Jersey's tertiary rule would accomplish precisely what this Court's decisions foreclose.

At bottom, New Jersey's petition rests on the State's belief that application of this Court's priority rules to SVCs—together with Arizona's judgment that SVCs should not be subject to escheat—produces undesirable or inequitable consequences. As noted, those

concerns are illusory here as a factual matter, given that the funds paid for SVCs are rightfully the property of the SVC issuer. *Supra* Part I.A. In any event, "[i]f the States are dissatisfied with the outcome of a particular case, they may air their grievances before Congress." *Delaware*, 507 U.S. at 510. Congress, in fact, has established different priority rules by statute for other forms of property. *See* 12 U.S.C. § 2503 (establishing priority rules for escheat of travelers cheques and money orders). New Jersey is free to seek a similar federal legislative rule for SVCs. The State's policy objections to this Court's longstanding priority rules, however, provide no basis for revisiting sound and settled precedent.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2012

APPENDIX

APPENDIX A

P.L.2012, CHAPTER 14, *approved June 29, 2012*
Senate Substitute for
Senate, No. 1928

AN ACT concerning stored value cards, amending P.L.2010, c.25 and P.L.2002, c.14 and supplementing chapter 30B of Title 46 of the Revised Statutes.

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

1. Section 5 of P.L.2010, c.25 (C.46:30B-42.1) is amended to read as follows:

5. a. A stored value card for which there has been no stored value card activity for **[**two**]** five years is presumed abandoned. This subsection shall apply to any stored value card issued on or after July 1, 2010.

b. The proceeds of a **[**stored value**]** general purpose reloadable card presumed abandoned shall be the value of the card, in money, on the date the **[**stored value**]** general purpose reloadable card is presumed abandoned. The proceeds of all other stored value cards presumed abandoned shall be 60% of the value of the card, in money, on the date the stored value card is presumed abandoned.

c. **[**An**]** Beginning the first day of the 49th month following the date of enactment of P.L. , c. (pending before the Legislature as this bill), an issuer of a stored value card shall obtain the name and address of the purchaser or owner of each stored value

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 thus is new matter.

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.

* * *

4. This act shall take effect immediately.

* * *

APPENDIX B

[logo]

State of New Jersey

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

OFFICE OF THE STATE
TREASURER
PO BOX 002
TRENTON NJ 08625-0002

ANDREW P. SIDAMON-
ERISTOFF
State Treasurer

TREASURY ANNOUNCEMENT
FY 2011-03

Guidance on Implementation and Notice of Exemption from Certain Provisions of L.2010, c.25

Background

The provisions of L.2010, c.25, effective July 1, 2010, (hereinafter referred to as the "amended Statute") require *inter alia* that issuers of "stored value cards," including but not limited to "gift cards," report unredeemed balances from cards where there has been no activity or contact for at least a two-year period, to the Office of the Administrator of Unclaimed Property of the New Jersey Department of the Treasury.

* * *

Findings and Determinations

* * *

3. The Treasurer has determined that it is necessary to issue guidance on implementation of the reporting requirements of the amended Statute to reduce confusion that may exist as to the reporting requirements for issuers domiciled in

New Jersey and these domiciled in other states.

* * *

Guidance

* * *

Effective November 1, 2010, the following is required of issuers of stored value cards

* * *

- 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.

The amended Statute does not affect the contractual obligation of the issuer to honor a stored value card. Issuers may honor stored value cards where the unredeemed value has been reported to the State Treasurer and thereafter seek reimbursement from the State.

Stored value cards exempted from the unclaimed property provisions will be subject to the consumer protections provided under L.2002, c.14 (C.56:8-110 et.seq.).

The amended Statute applies to stored value cards with outstanding balances on or after July 1, 2010 including, but not limited to, those stored value cards issued before July 1, 2010.

Issuers of stored value cards who fail to comply with the provisions of L.2010, c.25 may be subject to the provisions of N.J.S.A. 46:30B-103, 104 and 105.

For further information, please contact the Office of the Administrator of Unclaimed Property at 609-292-9200.

Andrew P. Sidamon-Eristoff — September 23, 2010
State Treasurer