

IN THE
Supreme Court of the United States

ANDREW P. SIDAMON-ERISTOFF, *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

REPLY BRIEF

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**REPLY BRIEF IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI**

This Petition raises an important and compelling question of federal common law that has not yet been, but must be, adjudicated by this Court. At issue is a circumstance not presented, considered, or resolved in *Texas v. New Jersey*, 379 U.S. 674 (1965), *Pennsylvania v. New York*, 407 U.S. 206 (1972), or *Delaware v. New York*, 507 U.S. 490 (1993), cases that addressed competing claims by several States to the same abandoned property. Here, in contrast, where no other state claims the abandoned property at issue and New Jersey fully preserves the ability of sister states to assert their rights under the *Texas* priority rules, New Jersey offers custodial conservation carefully circumscribed to property with clear connections to this State. No competing claims among the states exist and this Court's federal common law does not grant private corporate debtors any rights that trump New Jersey's sovereign authority to protect abandoned property within its borders.

While the State Legislature amended New Jersey's unclaimed property laws in 2012, it did not curtail this State's authority to regulate abandoned stored value cards (SVCs) within its borders. In particular, the Legislature left N.J. Stat. Ann. § 46:30B-10 untouched. That provision – the statutory foundation for the State Treasurer's September 2011 Guidance implementing SVC escheat – derives from the Uniform Unclaimed Property Act (UUPA) of 1995, is materially identical to statutes enacted by the majority of other states and the District of Columbia, and protects unclaimed property arising from transactions here, where only for-profit debtors otherwise seek to capture the value of SVCs.

This Petition is thus a particularly appropriate vehicle for reviewing the question presented: whether the *Texas* priority rules preclude a state from safeguarding unclaimed property arising within its borders that no other state seeks to escheat. By applying the *Texas* rules in a circumstance not considered by this Court and to an end inconsistent with the rationale for these rules, the Third Circuit contorted federal common law to preempt this State from protecting millions of dollars of burgeoning credit technology from corporate dissipation. Respondents now err by asserting that subsequent legislation affects the question presented by this Petition (NJRMA Opp. at 9-10), by suggesting that New Jersey has created a “tertiary rule” of custody (Amex Opp. at 15), and by contending that allowing these corporate debtors to hold unclaimed SVCs over a state with a legitimate claim of custodial escheat in some way preserves the “sovereign power” of other states (NJFC Opp. at 10).

Contrary to Respondents’ arguments, any modification of N.J. Stat. Ann. § 46:30B-42.1 in 2012 left undisturbed the question of whether federal common law preempts New Jersey’s ability to take custody of abandoned SVCs. Similarly, New Jersey’s protection of this intra-state property in no way “infringes” sister-state sovereignty. Now, twenty years after the last review of the *Texas* rules, New Jersey and the several States thus require this Court’s guidance as to how to protect SVC property, rightful SVC owners, other states with subsequent superior claims of escheat, and even the limited due process rights of corporate debtors, where the only two presumptive custodians are a single state or private corporations. This Petition remains of vital importance to all states and should be granted.

I. The *Texas* Rules Do Not Preempt New Jersey's Custodial Claim To Property Arising Within Its Borders That No Other State Claims.

As Respondents admit, “[t]his Court has long recognized the unquestioned right and power of states to enact legislation mandating that property deemed to be abandoned be escheated to the State for preservation until its owner claims it.” NJFC Opp. at 4; NJRMA Opp. at 2; Amex Opp. at 3-4. In *Texas*, this Court announced rules that addressed conflicts among competing state interests and resolved which state could claim a superior right of escheat among co-equal sovereigns. 379 U.S. at 675 (reviewing interstate controversy over “which State has jurisdiction” to escheat “intangible personal property”). These rules did not otherwise limit a single State’s ability to hold abandoned property arising within its borders.

Nor did the *Texas* rules confer any additional rights on debtors beyond the due process protection against double liability. *See, e.g., Texas*, 379 U.S. at 676; *W. Union Tel. Co. v. Pennsylvania*, 368 U.S. 71, 75 (1961); N.J. Stat. Ann. §§ 46:30B-62, -65 (2010) (providing for reimbursement and indemnification of debtors). And these cases allocated all of the unclaimed property at issue among the competing states, leaving no residual to non-governmental corporate debtors.

The federal common law established by this Court also did not foreclose single-state conservation of abandoned property, a principle particularly apposite where fortuitous corporate debtors seek to trump the custodial authority and duty of that single sovereign. The Third Circuit erred by concluding otherwise, finding preemption where none

existed. The lower court also undervalued the States' shared understanding, reflected in longstanding and widely adopted statutory provisions, that the *Texas* rules do not constrain a state from providing for single sovereign custody of unclaimed property arising within its borders. Indeed, New Jersey merely seeks to extend these custodial protections to unclaimed SVCs while protecting debtors against double liability and preserving the interests of SVC owners and other states. *See, e.g., Texas*, 379 U.S. at 675; *Anderson Nat'l Bank v. Lockett*, 321 U.S. 233, 240-41 (1944); *Provident Inst. For Sav. v. Malone*, 221 U.S. 660, 664-65 (1911). The Third Circuit's observation that SVC issuers could not comply with New Jersey law and "federal common law under Texas because two states cannot both escheat the same abandoned property," Pet. Appx. at 27a, ignores altogether the operation of N.J. Stat. Ann. § 46:30B-10, and does not address the circumstances at issue here.

Because the *Texas* rules only establish priorities among competing states and grant debtors no protections beyond those recognized in *Western Union*, Respondents incorrectly suggest that New Jersey now attempts to "supersede" or "rewrite" the *Texas* rules for abandoned property over which no other state asserts a custodial claim. Amex Opp. at 2. To the contrary, Respondents advance, and the Third Circuit adopted, an unwarranted expansion of the *Texas* rules that deprives states of their sovereign entitlement; defeats the Court's stated goal of adopting a rule that "in the long run will be the most generally acceptable to all the States," *Texas*, 379 U.S. at 683; and mistakenly enriches fortuitous debtors. No other state supports Respondents' arguments and New Jersey urges this Court to clarify a rule of federal common law

conforming to the Court's precedent and consistent with the uniform rules adopted by the majority of other states.

Respondents are also simply wrong when they contend that the *Texas* rules "comprehensively" or "definitively" foreclose New Jersey's exercise of its sovereign powers of escheat or that New Jersey has created a "tertiary" priority rule. Amex Opp. at 15; NJFC Opp. at 13. Indeed, unlike the Third Circuit and Respondents, New Jersey and most other states recognize that the *Texas* rules did not, and were not designed to, address custodial escheat where only one state seeks to hold property and, most certainly, assigned no superior rights to corporate debtors. This Petition should be granted to correct the Third Circuit's erroneous ruling.

II. This Case Is A Particularly Appropriate Vehicle To Review The Question Presented.

This Petition presents an appropriate vehicle to review the question presented. Despite the clear facts of the *Texas* cases, despite the Court's stated intent that the *Texas* rules prioritize competing states' claims, and despite any modification of N.J. Stat. Ann. § 46:30B-42.1, the Third Circuit raised the question of whether federal common law preempts New Jersey's ability to escheat unclaimed property arising within its borders consistent with this Court's precedent. While the Third Circuit enjoined enforcement of N.J. Stat. Ann. § 46:30B-42.1, both lower courts were presented with, and reviewed, all relevant provisions of this State's unclaimed property laws. Notably, neither court voided any other statute or questioned the settled power of New Jersey to assert its sovereignty over abandoned property within its borders.

Petitioners do not “swap” statutory provisions in this Petition (Amex Opp. at 16) and the issues raised by the Third Circuit’s ruling must be reviewed.

Time and again, this Court, the lower federal courts, and even Respondents have recognized that the *Texas* rules apply in the context of competing state interests. *See* Pet. Appx. at 27a (discussing application of the *Texas* rules where “two states” seek to escheat abandoned property). Here no competing state interests exist; in fact, the only competitors for the SVCs at issue are corporate debtors, who have neither any obligation nor any right to hold unclaimed property on behalf of rightful owners. While the lower courts and Respondents contend that the “ability to escheat necessarily entails the ability not to escheat” (Pet. Appx. at 32a), that flawed reasoning leaves entire classes of unclaimed property, such as SVCs, unprotected and unregulated in the hands of debtors. Contrary to Respondents’ claim, New Jersey is a “better custodian of the SVC funds” precisely because it is subject to this Court’s precedent as well as state statutory law. NJFC Opp. at 22-23. And, it is telling that no other States have come forward to support Respondents or to assert a superior right of escheat.

For the same reasons, none of Respondents’ arguments diminish the compelling nature of this Petition. Respondents cannot genuinely contest that this case presents a question not addressed by the *Texas* rules. New Jersey’s comprehensive unclaimed property laws do not contravene or supersede the *Texas* rules. In addition, this Petition does not offer a tertiary rule and does not ask this Court to “chang[e] the priority rules that it previously established based on new facts, which would

include the type of property at issue.” Amex. Opp at 22. The *Texas* rules simply do not cover the circumstance presented, do not preempt the state statutes applicable here, and do not compel the Third Circuit’s elevation of private debtor interests over the interests of owners and sovereign states. Because most states have a provision similar to that invalidated here, the Third Circuit’s ruling will vitiate the states’ ability to protect newer forms of unclaimed property.

American Petrofina Co. of Texas v. Nance, 697 F. Supp. 1183 (W.D. Okla. 1986), *aff’d*, 859 F.2d 840 (10th Cir. 1988), also does not assist Respondents’ suggestion that New Jersey has disturbed “settled expectations” of private debtors. Amex Opp. at 18; NJFC Opp. at 11. *American Petrofina* invalidated a statutory scheme that placed intangible proceeds from “unlocated owners’ mineral interests situated in Oklahoma” wholly outside of Oklahoma’s unclaimed property administration and then, only after seven years, afforded those interests the protections of custodial escheat. 859 F.2d at 841. By contrast, New Jersey law immediately provides full due process protections to debtors and preserves the value of the SVCs, in perpetuity, for rightful owners and any states that present a superior claim to this abandoned property.

In addition, *American Petrofina* did not truly consider the preemption principles raised by this Petition. Instead, the Tenth Circuit addressed preemption summarily, merely stating that “We have studied the record and are in substantial agreement with the court’s findings and conclusions on the preemption issue. A lengthy discussion is unwarranted, for the district court’s reasoning is in accord with our views.” *Id.* at 842. The *American*

Petrofina district court consideration of preemption was similarly cursory and noted that “decisions rendered in cases involving *disputes between states* and relying upon the original jurisdiction of the Supreme Court create federal common law” that may lead to cases requiring preemption analysis to ensure “national uniformity.” 697 F. Supp. at 1187 (emphasis added).

The Oklahoma district court also noted three ways that the state statute under review was inconsistent with the *Texas* rules, all relating to Oklahoma “ignoring the right[s] of another state.” *Id.* at 1187-88. Here, Respondents can proffer no such argument because New Jersey’s unclaimed property laws fully protect the rights of other states as well as owners and creditors. Finally, the Oklahoma district court identified a fourth infirmity in the challenged statute, that it “utilize[d] a scheme, for custodial taking of unclaimed property, that was considered and rejected by the Supreme Court.” *Id.* (citing *Texas*, 379 U.S. at 679 n.9). That conclusion cannot guide the preemption question presented here because, again, the *Texas* rules do not address “what happens when the debtor’s State of incorporation does not escheat the particular intangible property at issue.” Pet. Appx. at 142a. And, significantly, *American Petrofina* still does not recognize any purported rights of debtors now suggested by Respondents.

Respondents further argue that by taking custody of property within its borders, New Jersey attempts to “substitute its policy choices for those of other States” with a tertiary priority rule. Amex Opp. at 21 (citing *BMW of N. Am. Inc. v. Gore*, 517 U.S. 559 (1996)); NJFC Opp. at 10. In fact, no such extraterritorial infirmity exists

because New Jersey's unclaimed property laws carefully demarcate the limits of this State's custodial escheat. Contrary to Respondents' speculative contention that New Jersey thus undermines the "sovereign prerogative" of a state such as Arizona (Amex Opp. at 20), this Court has long recognized that wholly intra-state regulatory activity related to matters "brought to pass without a state" does not "transform" the in-state regulation into "something else." *Cf. Int'l Harvester Co. v. Evatt*, 329 U.S. 416, 420 (1947); *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444-45 (1940). Respondents also overlook that neither Arizona nor any other state has attempted to introduce their "sovereign interests" in this case. Notwithstanding Respondents' arguments, New Jersey's claim of custody of in-state abandoned SVCs does not reach beyond its borders in violation of the Supremacy Clause or the *Texas* rules.

Finally, Respondents tersely suggest that New Jersey's escheat of SVCs might effect an unconstitutional "taking." NJRMA Opp. at 10-11; Amex Opp. at 13-14. This argument merits little response, first, because as Respondents concurrently note, the "District Court and Third Circuit did not rule on the Takings Clause" and neither decision below "rested" on a takings analysis. NJRMA Opp. at 10. More to the point, Respondents' resort to the Takings Clause glosses over the undeniable fact that the intangible SVC property at issue is not theirs to be "taken." A compensable taking would require that Respondents have a "legally cognizable property interest" in the unclaimed SVCs, something they cannot establish. *See, e.g., American Express Travel Related Services, Inc. v. Sidamon-Eristoff*, 669 F.3d 359, 371 (3d Cir.), *cert. denied*, ___ U.S. ___, No. 12-105, 2012 U.S. Lexis 6465 (Oct.

1, 2012) (citing, *inter alia*, *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160-61 (1980)). Contrary to Respondents' assertions here, when the parties continue this case in the District Court, Respondents will not be able to prevail on a takings claim. NJRMA Opp. at 10.

In the end, the *Texas* rules do not (and were never intended to) provide Respondents with any claim to the abandoned SVCs superior to state custodial protection. The Third Circuit misread these rules by concluding otherwise. New Jersey is plainly the better custodian than for-profit corporations that undeniably conduct business planning to minimize state regulation, including with respect to unclaimed property. By operation of New Jersey law, including N.J. Stat. Ann. § 46:30B-10, New Jersey will preserve unclaimed SVC property rather than leave it to the exclusive and unregulated disposal of and dissipation by private debtors. And, in doing so, New Jersey wholly respects sister-state sovereignty. Indeed, in the thirty years that the principles and custody asserted by New Jersey have been incorporated into the UUPA and the laws of other states, it has not generated any of the speculative conflicts posited by Respondents.

New Jersey's unclaimed property act does not make it "impossible" for Respondents to comply with both the *Texas* rules and New Jersey state law. Pet. Appx. at 27a. The *Texas* rules impose no obligations on debtors, no other state asserts a competing claim to the SVC property at issue, and New Jersey will fully indemnify any debtors who turn over the abandoned property. The Third Circuit erred by expanding and elevating the interests of serendipitous debtors at the expense of SVC owners and the several states, in clear contradiction of this Court's precedent. The Court should grant review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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