**Nos. 10-4553, 10-4716, 11-1141**

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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AMERICAN EXPRESS PREPAID CARD MANAGEMENT CORPORATION,

*Appellee-Cross-Appellant,*

v.

ANDREW P. SIDAMON-ERISTOFF, as Treasurer of the State of New Jersey, and STEVEN R. HARRIS, as Administrator of Unclaimed Property of the State of New Jersey,

*Appellants-Cross-Appellees.*

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On Appeal from the United States District Court
for the District of New Jersey
The Honorable Freda L. Wolfson, District Judge, Presiding
Case No. 3:10-cv-05206 (FLW)

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# BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLEE-CROSS-APPELLANT

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NATIONAL CHAMBER
LITIGATION CENTER, INC.
Robin S. Conrad
1615 H Street, N.W.
Washington, D.C. 20062
Telephone: (202) 463-5337
Facsimile: (202) 463-5346

MUNGER, TOLLES & OLSON LLP
Henry Weissmann
Paul J. Watford
Richard C. Chen
355 South Grand Avenue, 35th Floor
Los Angeles, CA 90071-1560
Telephone: (213) 683-9100
Facsimile: (213) 687-3702

Attorneys for *Amicus Curiae*
CHAMBER OF COMMERCE OF
THE UNITED STATES OF AMERICA

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## INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. The Chamber directly represents 300,000 members and indirectly represents the interests of over three million business, trade, and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs that raise issues of vital concern to the nation's business community. The Chamber has filed *amicus* briefs in numerous past cases raising issues under the Takings Clause of the U.S. Constitution and is well situated to address the Takings Clause issues raised in this case.

The New Jersey law challenged here is part of a disturbing trend in which States have misused their escheatment laws to raise revenue, rather than to reunite owners with their lost property, the traditional purpose of escheat. Many of these laws have the effect of confiscating private property from businesses that comprise the Chamber's membership – legislative action that is particularly suspect when, as here, the State's enactments are applied retroactively to transactions that have already been

consummated. This case will establish the first circuit-level precedent determining the limits imposed by the federal Constitution on these recent efforts to transfer to state coffers property formerly owned by private businesses through amendments to a State's escheatment laws.

The businesses represented by the Chamber rely on the protections of the Takings Clause when making business plans and investments. For example, issuers of gift cards, like the plaintiffs in this case, created a business model predicated on retaining the unused proceeds of gift card sales and the investment income those proceeds generate. By appropriating for itself these traditional property interests without affording just compensation, New Jersey has deprived the plaintiffs of the core protections the Takings Clause was intended to provide.

While the Chamber's brief focuses on the invalidity of the law at issue under the Takings Clause as applied retrospectively to gift cards sold before the date of the statute's enactment, the Chamber fully supports plaintiffs' other claims, including their challenges to prospective application of the law.[1]

[1] Pursuant to Fed. R. App. P. 29(c)(5), the Chamber states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this

## SUMMARY OF ARGUMENT

The plaintiffs in this case are issuers of gift cards that consumers load with funds and use to purchase goods and services. Gift cards of this sort generally are not redeemable for cash, and card purchasers therefore relinquish any ownership interest in the funds themselves to the card issuers. Prior to enactment of Chapter 25 – the statute challenged here – New Jersey exempted gift cards from the reach of its Unclaimed Property Act. As a result, under pre-enactment law, card issuers obtained at least two distinct property rights in the proceeds from card sales: (1) the right to the beneficial use of the funds between the time of sale and the time the card is used; and (2) the right to retain funds from gift cards that are never used.

Chapter 25 requires gift-card issuers to transfer to the State the value of all gift cards that have not been used for two years. Although enacted under the guise of the State's power to escheat abandoned property, as applied to gift cards issued before its enactment, Chapter 25 retroactively destroys card issuers' vested property rights in the proceeds from card sales and orders those rights transferred to the State. Because those property rights indisputably have *not* been abandoned, their seizure

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brief. The parties have consented to the filing of this brief.

by the State cannot be justified as a permissible exercise of the escheatment power, which has traditionally been used to reunite owners with their property. Chapter 25's central aim is to *separate* private property from its rightful owners – for the sole purpose of lining the State's cash-strapped coffers.

The retroactive application of Chapter 25 does not merely regulate the use of gift-card issuers' property rights, but actually confiscates them for the State's benefit. Under settled Supreme Court precedent, such confiscation of a discrete set of funds constitutes a per se taking. Because New Jersey provides no compensation for the property interests it has taken, Chapter 25 necessarily violates the Takings Clause.

## ARGUMENT

### CHAPTER 25 EFFECTS AN UNCONSTITUTIONAL TAKING OF GIFT-CARD ISSUERS' PROPERTY INTERESTS IN NOT-YET-USED CARD FUNDS.

#### A. Under Prior New Jersey Law, Gift-Card Issuers Possessed Property Interests In Not-Yet-Used Card Funds.

The Fifth Amendment, made applicable to the States through the Fourteenth Amendment, prohibits the taking of private property for public use without just compensation. *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 163-64 (1998). To state a takings claim, a plaintiff must first demonstrate that it possesses a property interest that is constitutionally

protected. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1000 (1984); *Schneider v. Cal. Dep't of Corrections*, 151 F.3d 1194, 1198 (9th Cir. 1998). "Because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law.'" *Phillips*, 524 U.S. at 164 (quoting *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)).

Under New Jersey law prior to the enactment of Chapter 25, gift-card issuers possessed at least two distinct property interests in the proceeds of gift-card sales: (1) the right to the beneficial use of those funds between the time of sale and the time the card is used; and (2) the right to retain funds from gift cards that are never used (commonly referred to as "breakage"). Those rights existed under state law at the time the gift cards were sold because, prior to enactment of Chapter 25, New Jersey's Unclaimed Property Act did not apply to gift cards at all. *See Matter of November 8, 1996 Determination of the State of New Jersey*, 309 N.J. Super. 272, 275-77, 706 A.2d 1177 (App. Div.), *aff'd*, 156 N.J. 599, 722 A.2d 536 (1999) (excluding gift certificates, the functional equivalent of modern-day gift cards, from the definition of property subject to escheat).

The issuer's property rights in earnings and breakage reflect the limitations on gift-card usage. Unlike cards redeemable for cash, the gift cards at issue here are redeemable only for merchandise or services. *See*, *e.g.*, JA 344, 356, 361 (declarations of Andrew Rowe, Linda Doherty, and John Durkin).[2] The card purchaser irrevocably surrenders the funds to the card issuer in exchange for the right to use the card at participating stores. The sale of the card inherently involves transfer of ownership of funds to the card issuer. Indeed, that is one of the reasons that gift certificates, which likewise cannot be exchanged for cash, were previously excluded from the reach of New Jersey's escheatment law. *See Matter of November 8, 1996 Determination*, 309 N.J. Super. at 277 ("The contractual terms of the Hilton gift certificates which are the subject of this suit provide that they can be redeemed only for services or merchandise.").

Under the long-standing "interest follows principal" rule, gift-card issuers have the right to earn investment income on the funds they own between the time of sale and the time the card is used. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162 (1980). New

[2] "JA" refers to the Joint Appendix filed in *New Jersey Retail Merchants Association v. Andrew P. Sidamon-Eristoff et al.*, Nos. 10-4551, 10-4552, and 10-4553.

Jersey has long recognized this traditional rule. *See Matthews v. State*, 187 N.J. Super. 1, 10, 453 A.2d 543 (App. Div. 1982) (collecting cases).

The court's reasoning in *Rosenfeld v. Port Authority of New York and New Jersey*, 108 F. Supp. 2d 156 (E.D.N.Y. 2000), reinforces the conclusion that gift-card issuers held property interests in this investment income. There the court held that the plaintiffs, who had advanced funds to state agencies to pay electronically for tolls through the E-ZPass system, surrendered their property rights in those funds and thus could not claim that the interest earned on such funds had been taken. *Id.* at 159-60. The court analogized the prepayment of tolls to the purchase of gift certificates from stores. *Id.* at 159. Indeed, in a typical gift-card transaction, card holders advance funds to the card issuer for the payment of as-yet unspecified goods or services. The logical corollary of *Rosenfeld* is that the card issuers, as the recipients of such advanced funds, become the owners of the funds and are entitled to receive the interest those funds earn, as well as the right to retain breakage (*i.e.*, any funds that ultimately go unused).

Under New Jersey law, the party advancing funds under an agreement has no right to interest unless the contract specifically provides for it. *See Consolidated Police and Firemen's Pension Fund Comm'n v.*

*City of Passaic*, 23 N.J. 645, 651-52, 130 A.2d 377 (1957). The contracts at issue here do not contain an explicit provision entitling gift-card holders to interest on the funds being held. To the contrary, implicit in the very structure of the transaction is the right of a gift-card issuer like AmEx Prepaid to earn investment income on the proceeds from gift-card sales. *See* JA 383 (declaration of Stefan Happ).

These contractual agreements establish a separate basis for recognizing card issuers' property interests in both investment income and breakage. As the district court correctly recognized, gift-card issuers possess a property interest in their contractual profits. *See United States Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 19 n.16 (1977) ("Contract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid."); *Prometheus Radio Project v. F.C.C.*, 373 F.3d 372, 430 (3d Cir. 2004) ("Contracts such as JSAs [Joint Sales Agreements] are protected property interests under the Fifth Amendment . . . ."). The contracts between gift-card issuers and card holders entitle the issuers to earn profits on the combination of investment income and breakage. *See* JA 383 (declaration of Stefan Happ). Further, issuers of "closed-loop" gift cards have a property interest in an additional source of contractual profits: the difference between the issuer's cost of

acquiring or providing the goods or services and the retail price paid by the gift-card holder to obtain the goods or services. *See, e.g.*, JA 344-45 (declaration of Andrew Rowe). Similarly, issuers of open-loop gift cards have a property interest in an additional source of contractual profits: the "merchant fee" earned when the card is used, which is the difference between the amount paid by the card issuer to the retail store and the amount paid by the retail customer to the card issuer (through the deduction of that amount from the card). *See* JA 383.

### B. Chapter 25 Retroactively Destroys Gift-Card Issuers' Property Interests.

Because plaintiffs hold cognizable property interests, the next issue is whether the State's action has "taken" those interests within the meaning of the Takings Clause. *See Monsanto*, 467 U.S. at 1000; *Schneider*, 151 F.3d at 1198.

The State cannot avoid takings scrutiny by purporting to exercise the escheatment power. The retroactive application of Chapter 25 to gift cards sold before its enactment does not reunite property with its owner. Instead, Chapter 25 is a blatant attempt to transfer discrete and identifiable funds from their owners – card issuers who are exercising their ownership rights – to the public fisc. No court has ever upheld such a scheme as a

proper exercise of the escheatment power. It is a classic instance of taking property from its private owner.

The power of States to escheat abandoned property is "subject to constitutional limitations." *Standard Oil Co. v. New Jersey*, 341 U.S. 428, 435-36 (1951). The Supreme Court has held that no "taking" occurs for purposes of the Takings Clause when a State escheats property that has actually been abandoned, for in that circumstance "[i]t is the owner's failure to make any use of the property – and not the action of the State – that causes the lapse of the property right." *Texaco, Inc. v. Short*, 454 U.S. 516, 530 (1982). By the same reasoning, some courts have held that a State does not owe just compensation to owners of abandoned or unclaimed property for the interest earned while that property is in the State's safekeeping. *See Turnacliff v. Westly*, 546 F.3d 1113, 1118-20 (9th Cir. 2008) ("interest follows principal" rule does not apply because claimant abandoned the principal, justifying escheat); *Simon v. Weissman*, 301 Fed. App'x 107, 114 (3d Cir. 2008) (same).

The issue presented here, however, is of an entirely different character because New Jersey seeks to exercise its escheatment power in a manner that appropriates property that indisputably has *not* been abandoned. No one contends that gift-card issuers have abandoned their

property rights in the investment income and breakage. Yet Chapter 25 confiscates these rights for the State's benefit under the guise of escheatment, notwithstanding that the card holders – even assuming they could be said to have abandoned their interests – gain nothing from this intervention. Because the gift cards at issue here have no expiration date, card holders can redeem them whenever they wish and do not need the State's assistance to recover their property. *See* JA 383. Thus, Chapter 25's only effect is to redefine as public property what gift-card issuers used to own privately.

If States are permitted to confiscate property that has not actually been abandoned, there is no limiting principle to the exercise of the escheatment power. A State could simply declare that funds in a private bank account, or wine in a private cellar, must be "escheated" without first providing for a statutory abandonment period to put property owners on notice of the consequences of inaction. The States, however, do not enjoy unchecked power to declare private property interests escheated in this fashion. As the Supreme Court has made clear, with respect to confiscatory regulations "a State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law." *Phillips*, 524 U.S. at 167.

When, as here, a statute applies retroactively to vested property interests derived from already completed transactions, particularly serious constitutional concerns are raised. *See, e.g.*, *United States v. Sec. Indus. Bank*, 459 U.S. 70, 78 (1982) (construing a bankruptcy statute to apply prospectively to avoid takings concern). As the Supreme Court explained in *Landgraf v. USI Film Products*, "[t]he Fifth Amendment's Takings Clause prevents the Legislature (and other government actors) from depriving private persons of vested property rights except for a 'public use' and upon payment of 'just compensation.'" 511 U.S. 244, 266 (1994).

A statute operates retroactively when it "attaches new legal consequences to events completed before its enactment." *Id.* at 270. Here, gift-card issuers sold cards under New Jersey laws that entitled the issuers to retain for themselves the investment income earned on funds between the time of sale and use, and to retain funds from cards that ultimately were never used. By making these property interests newly subject to escheat, Chapter 25 radically alters the legal consequences of these already completed transactions. Thus, as applied to cards issued before its enactment, Chapter 25 retroactively destroys property rights.

The Supreme Court's decision in *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935), illustrates these principles. In *Radford*, the Court held that the Frazier-Lemke Act, which retroactively limited a mortgage lender's preexisting right to seek recourse against the mortgaged property in the event of default, effected a taking of the lender's vested rights in the mortgaged property. *Id.* at 589-90. The Court reached this conclusion by comparing the rights mortgage lenders held under state law prior to the Act's adoption with the rights they held after passage of the Act. *See id.* at 590-93. Because the Act abridged the rights that mortgage lenders obtained in transactions completed under the earlier legal framework, it was subject to the limitations imposed by the Takings Clause. *Id.* at 589, 601-02; *see also Sec. Indus. Bank*, 459 U.S. at 76-77 (citing *Radford* with approval).

In short, whatever ability States may have to redefine property interests prospectively, they cannot "recharacterize as public property what was previously private property" without implicating the Takings Clause. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 130 S. Ct. 2592, 2601 (2010) (plurality opinion) (citing *Webb's Fabulous Pharmacies*, 449 U.S. at 163-65). New Jersey cannot sidestep the Takings

Clause's requirements by redefining the vested property rights of card issuers under the guise of exercising its escheatment power.

### C. Chapter 25 Effects A Per Se Taking Of Gift-Card Issuers' Property Interests.

When a State transfers the use and enjoyment of property from a private owner to the public, it has committed a per se taking. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002). By contrast, when a State merely imposes a restriction on an owner's use of property, the action must be evaluated under the ad hoc regulatory takings analysis established in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). The distinction is an important one because per se takings lie at the core of the Takings Clause's protection. As the Court explained in *Tahoe-Sierra*, the Fifth Amendment's "plain language requires the payment of compensation whenever the government acquires private property for a public purpose." 535 U.S. at 321. Once a per se taking has been shown, no inquiry into the *Penn Central* factors is necessary or appropriate. *See id.* at 323 ("[W]e do not ask whether a physical appropriation advances a substantial government interest or whether it deprives the owner of all economically valuable use . . . ."); *see also* William P. Barr, Henry Weissmann & John P. Frantz, *The Gild That Is Killing the Lily: How Confusion Over*

*Regulatory Takings Doctrine Is Undermining the Core Protections of the Takings Clause*, 73 Geo. Wash. L. Rev. 429, 469-91 (2005) (describing examples of judicial confusion leading to the improper use of the ad hoc test).

In *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003), the Supreme Court confirmed that a per se analysis applies to confiscation of funds in which a plaintiff has cognizable property rights. *Id.* at 234-35. There the plaintiffs challenged a program that required their funds to be placed in an interest on lawyers' trust account (IOLTA) while their real estate transactions were pending, with the interest earned on those funds to be transferred to a State foundation. *Id.* at 228-29. The Court held that the State's confiscation of that interest, which rightfully belonged to the owner of the principal, required a per se takings analysis. *Id.* at 234-35. Following *Brown*, the Sixth Circuit has explained that the per se approach applies when the state law at issue does not merely impose a generalized obligation to pay money, but rather "operate[s] to seize a sum of money from a specific fund." *McCarthy v. City of Cleveland*, 626 F.3d 280, 284 (6th Cir. 2010).

The reasoning of *Brown* and its progeny applies fully to this case. Chapter 25 does not impose a generalized payment obligation, but

specifically targets the discrete set of funds collected in gift-card transactions. The retroactive application of Chapter 25 does not merely regulate the use of previously collected gift-card funds, but actually confiscates card issuers' property interests in those funds for the State's benefit. Thus, *Brown*'s per se analysis applies here.

That conclusion follows not only with respect to the card issuers' right to receive investment income (the property interest directly at issue in *Brown*) but also with respect to the issuers' right to retain breakage. In *Brown*, the plaintiffs claimed that the requirement that their funds be placed in an IOLTA account constituted a taking as a separate matter from the confiscated interest earned on the funds. 538 U.S. at 228-29. The Court determined that this placement requirement, in contrast to the confiscation of interest, should be analyzed as a regulatory taking and rejected the plaintiffs' claim under that framework. *See id.* at 234-35. The premise of this conclusion was that the requirement governed only the *temporary location* of the funds (which had to be held somewhere in any event), and it therefore affected no property rights of the plaintiffs apart from the interest income, which was analyzed separately. By contrast, Chapter 25 permanently transfers never-used gift-card funds to the State,

and it thereby deprives issuers of the property rights they obtained in those funds through transactions consummated under prior New Jersey law.

In short, Chapter 25 targets a discrete set of funds in which the issuers have vested rights. It does not merely restrict the use of gift-card funds but actually transfers discrete property interests in those funds to the State. Thus, New Jersey has committed a per se taking.

Alternatively, if this Court opts to analyze the issuers' property interests in terms of their contractual rights, the analysis is largely the same. Chapter 25 does not merely burden or frustrate the card issuers' contractual rights; it actually transfers those rights to the State. This transfer also constitutes a per se taking. *See Omnia Commercial Co. v. United States*, 261 U.S. 502, 510, 513 (1923) (concluding that the government takes property when it acquires the benefits of a contract for itself rather than merely frustrates a party's contractual rights); *cf. Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224 (1986) (applying *Penn Central* because "here, the United States has taken nothing for its own use, and only has nullified a contractual provision").

**D. Chapter 25 Does Not Provide For Just Compensation.**

The Takings Clause proscribes the taking of private property unless just compensation is paid. *Brown*, 538 U.S. at 235. *Brown* involved an

unusual situation in that the funds required to be placed in IOLTA accounts were by definition insufficient to generate net interest outside such accounts. *Id.* at 239. Thus, measuring just compensation in terms of the property owner's loss rather than the government's gain, the Court held that the plaintiffs were entitled to nothing and thus could not establish a Takings Clause claim. *Id.* at 240.

In this case, there can be no dispute that Chapter 25's application to funds collected in past transactions would result in an actual – and significant – loss to card issuers. Indeed, their business model has been structured around the investment income they expected to earn and the breakage they expected to retain when they issued gift cards under prior New Jersey law. *See, e.g.*, JA 383 (declaration of Stefan Happ). New Jersey does reimburse card issuers when they honor gift cards presented for use after the two-year abandonment period, and thus after the issuers have been required to pay the face value of the cards to the State. *See* N.J. Stat. Ann. §§ 46:30B-42.1(d), 46:30B-62. But New Jersey law does not provide compensation to the issuers for the investment income and breakage that Chapter 25 confiscates from them. Because Chapter 25 does not provide for just compensation, it necessarily violates the Takings Clause.

## CONCLUSION

For the reasons stated above, the provisions of Chapter 25 applicable to gift cards should be preliminarily enjoined.

Dated: April 14, 2011

Respectfully submitted,

MUNGER, TOLLES & OLSON LLP

By: s/ Henry Weissmann
Henry Weissmann (CA Bar No. 132418)
Paul J. Watford (CA Bar No. 183283)
Richard C. Chen (CA Bar No. 270715)
355 South Grand Avenue, 35th Floor
Los Angeles, CA 90071-1560
Telephone: (213) 683-9100
Facsimile: (213) 687-3702

NATIONAL CHAMBER
LITIGATION CENTER, INC.
Robin S. Conrad
1615 H Street, N.W.
Washington, D.C. 20062
Telephone: (202) 463-5337
Facsimile: (202) 463-5346

Attorneys for *Amicus Curiae*
CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA

## CERTIFICATION OF BAR MEMBERSHIP

I certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

Dated: April 14, 2011 By: s/ Henry Weissmann
HENRY WEISSMANN

## CERTIFICATION OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C)(i) and L.A.R. 31.1(c), I certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7) because the brief contains 3,922 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and thus does not exceed the 7,000 word limit.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using the Microsoft Word word-processing program in Times New Roman that is at least 14 points.

3. The text of the brief filed with the Court by electronic filing is identical, except for signatures, to the text of the paper copies.

4. This brief complies with L.A.R. 31.1(c) in that prior to its being electronically mailed to the Court today, it was scanned by the following virus detection software and found to be free from computer viruses:

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Dated: April 14, 2011 By: s/ Henry Weissmann
HENRY WEISSMANN

**CERTIFICATION OF SERVICE**

I hereby certify that on April 14, 2011, I caused the Brief of *Amicus Curiae* Chamber of Commerce of the United States of America to be filed with the Clerk of the United States Court of Appeals for the Third Circuit via electronic filing and by causing an original and nine paper copies of the brief to be sent via postage-prepaid first-class mail. Opposing counsel and counsel for *amicus curiae* will receive service via the Court's electronic filing system.

Dated: April 14, 2011 By: s/ Henry Weissmann
HENRY WEISSMANN