Nos. 22O145 & 22O146

IN THE
Supreme Court of the United States

DELAWARE,
Plaintiff,
v.
PENNSYLVANIA AND WISCONSIN,
Defendants.

ARKANSAS, *et al.*,
Plaintiffs,
v.
DELAWARE,
Defendant.

On Exceptions To The Report Of The Special Master

EXCEPTIONS TO REPORT OF THE SPECIAL MASTER BY THE STATE OF DELAWARE AND BRIEF IN SUPPORT OF EXCEPTIONS

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EXCEPTIONS TO REPORT OF THE SPECIAL MASTER

Plaintiff State of Delaware respectfully submits the following exceptions to the First Interim Report of the Special Master issued on July 23, 2021:

1. Delaware takes exception to, and this Court should decline to adopt, the Special Master's report and recommendation to deny Delaware's request for partial summary judgment and to grant Defendants' request for partial summary judgment.

2. Delaware takes exception to, and this Court should decline to adopt, the components of the Special Master's report and recommendation, including:

a. The Special Master's definition of "money order";

b. The Special Master's definition of "third party bank check";

c. The Special Master's definition of "other similar written instrument";

d. The other flaws discussed in the accompanying brief, which addresses these exceptions (and related errors) more fully.

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EXCEPTIONS TO REPORT OF THE SPECIAL MASTER BY THE STATE OF DELAWARE AND BRIEF IN SUPPORT OF EXCEPTIONS

INTRODUCTION

At issue in this case is the statutory interpretation of two terms: "money order" and "third party bank check." The Federal Disposition of Abandoned Money Orders and Traveler's Checks Act (FDA), governs the escheatment of "any sum" that "is payable on a money order, traveler's check, or other similar written instrument (other than a third party bank check) on which a banking or financial organization or a business association is directly liable." 12 U.S.C. § 2503. Escheatment is the process through which "States as

sovereigns may take custody of or assume title to" abandoned property. *Delaware* v. *New York*, 507 U.S. 490, 497 (1993).

Intangible property (such as an uncashed check) is generally escheated under common-law rules and typically escheats to the State of the creditor's last known address, and if no address is available, to the State of the debtor's incorporation. *See Texas* v. *New Jersey*, 379 U.S. 674, 680-682 (1965). The FDA creates an exception to the common-law rules. Intangible property that falls within the scope of the FDA is generally escheated to the State where the financial instrument was purchased. *See* 12 U.S.C. § 2503.

The dispute here involves the escheatment of teller's checks and agent checks issued by MoneyGram Payment Systems, Inc. MoneyGram escheats these checks to Delaware, the State of MoneyGram's incorporation, in accordance with the common-law rules. Several States claim that those checks should be escheated under the FDA either because they are "money orders" or because they are "similar written instruments." Delaware contends that these checks are either "third party bank checks" exempted from the FDA or simply do not fall within the FDA at all.

Delaware, the Plaintiff in this case, filed this original jurisdiction action against Defendant States to resolve the dispute. The Court appointed a Special Master, who first ruled in a Draft Interim Report that the term "money order" was defined as any prepaid written order to pay money to a named payee, and concluded that MoneyGram teller's checks and agent checks met that definition. App.135-136. After Delaware objected that the Special Master's definition was far too broad, the Special Master issued an Interim

Report that refused to adopt any definition of "money order," but nevertheless concluded that MoneyGram teller's checks and agent checks should be escheated under the FDA. *Id.* at 55-57.

This Court should decline to adopt the Special Master's recommendation—which is contrary to the text, structure, and history of the FDA—and instead hold that MoneyGram teller's checks and agent checks are subject to escheatment under the common-law rules. When the FDA was adopted in 1974, the term "money order" referred to specific commercial products labeled "money order" and typically sold to consumers without bank accounts to pay small debts. MoneyGram teller's checks and agent checks are not money orders; they are not labeled "money order" and they are usually sold to consumers with bank accounts seeking to transfer large sums of money. These MoneyGram products are bank checks paid through third parties; they thus meet the plain meaning of the term "third party bank check" and are subject to escheatment under the common-law rules. This conclusion is predictable, reflects longstanding practice, and provides a bright-line rule to govern the escheatment of other financial products.

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are reproduced in the appendix to this brief. App.1a-3a.

STATEMENT

A. Common Financial Products

A "check" is "a bill of exchange drawn on a bank, payable on demand." App.369 (*Munn's*). A bill of exchange is a written order to pay money, and it is generally synonymous with the term "draft." *See id.* at

367 (*Munn's*); U.C.C. § 3-104(f). Checks all serve the same basic function of directing payment of money to someone else, but they come in many different forms. The most familiar form is the personal check, which is typically used by consumers to pay money from an individual checking account to another person or company (a "payee"). Personal checks are convenient. A consumer can write a check whenever necessary—such as when a monthly electric bill comes due. But with convenience comes drawbacks: Only the individual who signs the instrument is liable for it. *See* U.C.C. § 3-401. Banks need not honor personal checks and may refuse to pay because a checkwriter lacks funds (or for other reasons).

In many situations, a payee requires a better guarantee that she will receive the money. Prepaid commercial products such as cashier's checks, teller's checks, and certified checks provide that guarantee. Those products become effective when an employee of the bank signs the check, providing certainty that the recipient will receive the funds. Those products, "which collectively are known as bank checks," are typically used to transfer large sums of money—for instance, to buy a car or make a down payment on a house. Lary Lawrence, *Making Cashier's Checks and Other Bank Checks Cost-Effective: A Plea for Revision of Articles 3 and 4 of the Uniform Commercial Code*, 64 Minn. L. Rev. 275, 278, 280-281 (1980).

There are a variety of bank checks, which work in similar and overlapping ways. For a *certified check*, a consumer presents a personal check at the bank window. A bank employee verifies the consumer's identity and then either transfers funds from the consumer's account to the bank's account, or places a hold on the consumer's account. The bank employee then

signs the check to certify it. App.368-369 (*Munn's*). For a *cashier's check*, a consumer pays upfront and receives a prepaid check signed by a bank employee as the drawer; the same bank is listed as the drawee. *Id.* at 367 (*Munn's*); U.C.C. § 3-104(g). A *teller's check* is like a cashier's check except the bank selling the check lists another bank as ordered to make payment. U.C.C. § 3-104(h). Teller's checks originated because consumers historically could not write checks from accounts at savings and loan institutions. *See* Lawrence, *supra*, at 333. Teller's checks allowed customers to transfer large sums from savings accounts to third parties using a regular bank as an intermediary. *See* App.429, 459-460 & n.92 (67 Colum. L. Rev. 524).

Bank checks primarily serve as prepaid "cash substitutes" for bank customers, but "bank checks can [also] serve as the personal checks of banks." Lawrence, *supra*, at 340. For instance, a financial institution might use a cashier's check to pay its "own obligations." App.367 (*Munn's*).

Banks and other companies sell other prepaid instruments for the transmission of money. A *money order* operates as a substitute for a personal check and is typically used by consumers without bank accounts. *Id.* at 373-376 (*Munn's*). Money orders are labeled "money order" and may be purchased at a variety of retailers, such as drug stores and supermarkets, in addition to banks. They are generally used to pay small debts—such as $50 or $100—and may be used, for instance, to pay utility bills. The purchaser of a money order typically signs the money order herself—just like she would sign a personal check. *See infra* pp. 9, 20.

Banks and other companies also offer *traveler's checks*, which are typically used by consumers when traveling as a substitute for personal checks—which may not be readily accepted—and for cash. *See* App.376-378 (*Munn's*). Traveler's checks are paid for upfront and signed twice by the purchaser: once when the consumer purchases the check, and a second time when the consumer uses the check, as a means of verifying the consumer's identity and deterring theft. *See infra* p. 25.

B. Escheatment of Abandoned Property

This is a case about uncashed and abandoned financial instruments. When it comes to real or tangible property—such as a vacant home or the contents of an abandoned safe deposit box—"only the State in which the property is located may escheat" it. *Texas*, 379 U.S. at 677. Deciding which State escheats intangible property is more complicated. Intangible property cannot "be located on a map," and multiple States may have connections to that property. *Id*. Escheatment conflicts between States date back to the 1950s. *See New York* v. *New Jersey*, 358 U.S. 924 (1959) (mem.) (dispute over unclaimed traveler's checks). This Court is the only forum that can resolve those disputes. *See Western Union Tel. Co.* v. *Pennsylvania*, 368 U.S. 71, 79 (1961).

1. Texas *v.* New Jersey *establishes priority rules to resolve conflicting claims.*

This Court's decision in *Texas* v. *New Jersey* established common-law rules to resolve escheatment conflicts. *Texas* involved the escheatment of company "small debts," such as unclaimed royalty checks. 379 U.S. at 675 & n.4. The Court rejected the argument that "the State with the most significant 'contacts'

with the debt should be allowed exclusive jurisdiction to escheat it." *Id*. at 678. That approach would "leave in permanent turmoil a question which should be settled once and for all by a clear rule which will govern all types of intangible obligations." *Id*. The Court similarly rejected a rule based on the debtor's principal place of business, which "would raise in every case the sometimes difficult question of where" the debtor's main office is located. *Id*. at 680.

Instead, this Court announced common-law priority rules that govern escheatment: *First*, "since a debt is property of the creditor, not of the debtor, fairness among the States requires that the right and power to escheat the debt should be accorded to the State of the creditor's last known address as shown by the debtor's books and records." *Id*. at 680-681 (footnotes omitted). *Second*, where the debtor's records do not provide an address, the property escheats to the State of the debtor's incorporation. *Id*. at 682. These common-law rules have governed escheatment since *Texas*.

2. In 1972, this Court refuses to modify the Texas *rules for money orders.*

In *Pennsylvania* v. *New York*, Pennsylvania urged the Court to modify the common-law rules for the escheatment of telegraphic money orders, contending that "Western Union does not regularly record the addresses of its money order creditors" and that the common-law rules granted an unfair windfall to New York, Western Union's state of incorporation. 407 U.S. 206, 214 (1972). This Court declined Pennsylvania's request. *Id*. Departing from the common-law rules would mean deciding "each escheat case on the basis of its particular facts or to devise new rules of law to apply to ever-developing new categories of

facts." *Id*. at 215 (quoting *Texas*, 379 U.S. at 679). The Court stated, however, that nothing "prohibits the States from requiring Western Union to keep adequate address records," *id.*, which would require escheatment of those products to the State of the creditor's last known address.

American Express filed an amicus brief in *Pennsylvania*, explaining that it sold commercial money orders primarily used "to pay bills by persons who do not have checking accounts." App.511. American Express explained that it did not keep address records because it was too costly and would pose a "monumental administrative burden[ ]." *Id*. at 509-510, 517.

3. Congress adopts the FDA.

Congress passed the FDA in 1974, two years after *Pennsylvania*. The preamble to the FDA expressed concern that it would "burden * * * interstate commerce" to keep "addresses of purchasers of money orders and traveler's checks." 12 U.S.C. § 2501(5). The FDA thus created new escheatment rules for abandoned "money order[s], traveler's check[s], or other similar written instrument[s] (other than a third party bank check)." 12 U.S.C. § 2503. Under the FDA, "if the books and records" of the organization that is directly liable for the product "show the State in which such money order, traveler's check, or similar written instrument was purchased," the abandoned property is escheated to that State. *Id*. § 2503(1). Otherwise, it escheats to the State of the organization's principal place of business. *Id.* § 2503(2).

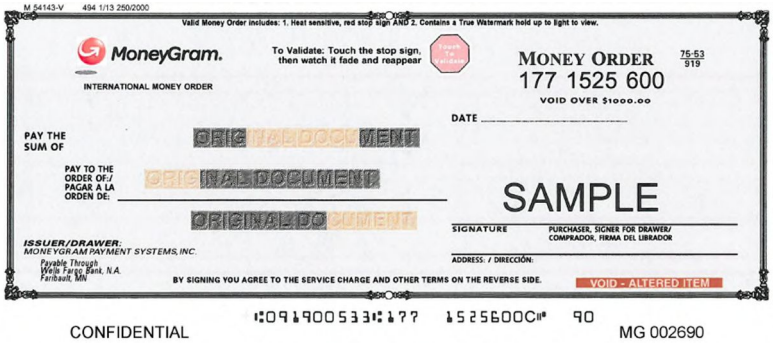
C. Factual Background

MoneyGram provides various products and services for transferring money, and it is one of the largest companies of its kind.

MoneyGram sells money orders, which are marketed directly to consumers and sold at a network of 17,500 retailers across the country—including chains like CVS and Walmart, local "mom and pop stores," and some financial institutions. App.242, 330. MoneyGram money orders are labeled "money order" and signed by the individual purchasing it. *Id*. at 212-232, 270, 279-280, 285. The back of each money order contains terms and conditions, which warn that the instrument is "limited recourse." *Id*. at 213-232, 244, 256.

For the most part, MoneyGram's customers use money orders instead of a personal checking account. *Id*. at 247. Some of MoneyGram's customers are unable to maintain a checking account, while others make "a regular habit of using money orders to pay their bills instead of checks." *Id*. MoneyGram money orders typically have a maximum limit of $1,000. *Id*. at 251, 255-256, 278-279.

When a customer purchases a money order, the seller transmits the funds to MoneyGram, which deposits the funds into a central account. After signing the money order and inputting the payee's name, the customer may use the money order like a personal check—for instance, to pay a monthly utility bill. When the payee cashes the money order, a "clearing bank" pays the payee, and MoneyGram pays the clearing bank. *Id*. at 23-24, 26-27. Here is an example of a money order:



Id. at 212.

Starting in the late 1970s, MoneyGram began offering an "official check" service. This service allows financial institutions like banks and credit unions to outsource their bank checks to MoneyGram, saving the institution time and money. As part of this service, MoneyGram provides financial institutions with a range of services, including daily reconciliation, assistance with managing the inventory of blank checks, real time information about checks' statuses, legal compliance, and other data processing. *Id*. at 312-321. By outsourcing these behind-the-scenes tasks to MoneyGram, financial institutions reduce their overhead. *Id*. at 242, 315.

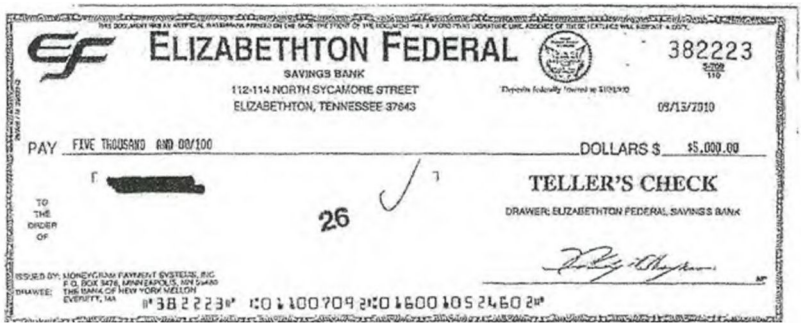
This case concerns escheatment of two MoneyGram "official checks," called teller's checks and agent checks.[1] Historically, financial institutions issued their own teller's checks through a third-party bank. *Supra* p. 5. MoneyGram teller's checks are the same product, processed through MoneyGram and a third-party bank. App.259, 280-281. Financial institutions typically sell teller's checks to existing customers who

[1] MoneyGram refers to money orders sold at banks as "agent check money orders." "Agent check money orders" are a different product, whose status is not at issue in this case. App.25 n.15.

have accounts at the bank and require "a check drawn on a bank." *Id*. at 330; *see id*. at 259-260, 265. To issue a MoneyGram teller's check, the financial institution debits its customer's bank account, transmits the money to MoneyGram, and then relies on MoneyGram and a clearing bank to transfer the funds to a third party. *Id*. at 30.

Historically, financial institutions also issued their own bank checks to pay the bank's bills. *Supra* p. 5. MoneyGram agent checks are the same product, processed through MoneyGram and a third-party bank. App.274-276. MoneyGram agent checks are typically used by financial institutions to pay their own bills, although they can also be sold to bank customers. *Id*. at 274-275. After a financial institution sells an agent check, the institution wires the funds to MoneyGram; after the payee cashes the check, a third-party clearing bank wires the funds to the payee bank, and MoneyGram reimburses the clearing bank. *Id.* at 27-28. A MoneyGram agent check is thus a bank's own check facilitated by MoneyGram and a third-party bank.

MoneyGram prohibits banks from labeling teller's checks or agent checks "money orders." *Id*. at 270-271, 326. Unlike a money order, the purchaser does not sign a MoneyGram teller's check or agent check. Instead—like a teller's check or cashier's check—a bank employee signs both products. *Id*. at 237, 239, 274, 282. Unlike a MoneyGram money order, agent checks and teller's checks are not subject to terms of service and do not contain a limited recourse warning. *Id*. at 294. MoneyGram does not set a maximum limit on teller's checks or agent checks. *Id*. at 259, 272. Here is an example of a MoneyGram teller's check sold by Elizabethton Federal Savings Bank:


ELIZABETHTON FEDERAL
SAVINGS BANK
112-114 NORTH SYCAMORE STREET
ELIZABETHTON, TENNESSEE 37643
382223
09/13/2010
PAY FIVE THOUSAND AND 00/100 DOLLARS $ $5,000.00
TELLER'S CHECK
DRAWER: ELIZABETHTON FEDERAL SAVINGS BANK
TO THE ORDER OF
26
ISSUED BY: MONEYGRAM PAYMENT SYSTEMS, INC.
DRAWEE: THE BANK OF NEW YORK MELLON
EVERETT, MA

App.297.

MoneyGram escheats all abandoned money orders to the State of purchase pursuant to the FDA. *Id.* at 332-333. In contrast, MoneyGram escheats teller's checks and agent checks according to the common-law rules. Financial institutions can choose to record the addresses of customers who purchase teller's checks and agent checks (as they do other bank checks, like cashier's checks), but they do not transmit this information to MoneyGram. *Id*. at 282, 332, 598-599. As a result, MoneyGram escheats abandoned teller's checks and agent checks to Delaware, its place of incorporation. *Id*. at 332.

D. Procedural History

1. In August 2014, Pennsylvania, Wisconsin and 18 other States retained a private auditing firm to conduct a review of MoneyGram's escheatment of teller's checks and agent checks. A year later, that firm sent MoneyGram a letter claiming that MoneyGram had improperly escheated hundreds of millions of dollars to Delaware over more than a decade. The letter demanded that MoneyGram pay the "past-due" escheatment.

In 2016, Pennsylvania and Wisconsin sued MoneyGram and Delaware's escheator in federal

district court, alleging that MoneyGram teller's checks and agent checks were either "money orders" or "similar written instruments" under the FDA. In response, Delaware sought to file an original bill in this Court, stating that the "Court is the sole forum in which Delaware may enforce its rights." *Id*. at 191. Delaware explained that teller's checks and agent checks are neither money orders nor similar written instruments as commonly understood. *Id*. at 194. In response, 20 other States requested to file a bill against Delaware.

2. This Court granted both bills and appointed Hon. Pierre Leval as Special Master. The parties stipulated to Delaware as the "Plaintiff" and the other states as the "Defendants." *Id*. at 199-204. The Special Master bifurcated proceedings into liability and damages phases. The liability phase addresses solely "the question which State or States are entitled to escheat" the products at issue. *Id*. at 206.

After discovery, both sides moved for partial summary judgment. Delaware argued that MoneyGram teller's checks and agent checks are not "money orders" under Section 2503 because they are not labeled "money order" and are not typically purchased or used like money orders. *Id.* at 37. Defendant States disagreed, arguing that the term "money order" was broad enough to cover all prepaid orders to pay money. *Id.* at 40.

The Special Master issued a Draft First Interim Report that agreed with Defendants' position. *Id.* at 98-188. The Special Master concluded that the term "money order" sweeps in *any* "prepaid draft" that is "used by a purchaser to safely transmit money to a named payee"—which would include nearly any order

to pay money, from a money order to a traveler's check to a bank check (and potentially even products like prepaid cards). *Id*. at 135-136. In exceptions to the Draft Interim Report, Delaware pointed out that the Special Master's interpretation was overbroad in light of the text of Section 2503, which used distinct terms for specific instruments—"money order" and "traveler's check" and thus does not cover *every form of prepaid draft*. *Id*. at 54-55.

In the First Interim Report, the Special Master acknowledged that the definition of "money order" adopted in the Draft Interim Report was "indeed broad, and might perhaps be subject to narrowing refinement." *Id*. at 55. Rather than come up with a better definition of "money order," however, the Special Master refused to adopt any definition at all. *See id.* at 55-56. Nonetheless, the Special Master held that agent checks and teller's checks are either "money orders" or "similar written instruments" for "substantially the same" reasons they are "money orders." *Id*. at 61, 64-65.

The Interim Report concluded that a "third party bank check" included *only* "an ordinary personal check drawn on a checking account," and that MoneyGram teller's checks and agent checks thus did not qualify. *Id*. at 76, 80. Although the Special Master found this definition not "completely satisfying," he concluded that it was "the most likely * * * meaning intended by Congress" because a report on banking written two years prior to the FDA's enactment had used the term "third party payment services" to describe financial instruments that included personal checks (among other financial instruments). *Id*. at 76-77. The Special Master thus determined that MoneyGram teller's checks and agent checks should

be escheated under the FDA, and he recommended granting partial summary judgment to Defendants on that issue.

These exceptions followed.

SUMMARY OF ARGUMENT

I. The FDA exempts from the common law of escheatment a narrow set of instruments: a "money order, traveler's check, or other similar written instrument (other than a third party bank check)." 12 U.S.C. § 2503. At the time of the FDA's enactment, the terms "money order" and "traveler's check" referred to specific commercial products typically used in small-dollar transactions, often by consumers without bank accounts or when traveling, where addresses were not kept by the seller. Historically, those products were labeled "money order" and "traveler's check." This Court should thus read those terms narrowly in the FDA to refer to specific commercial products labeled "money order" and "traveler's check," which do not include MoneyGram teller's checks and agent checks.

II. This Court should hold that MoneyGram teller's checks and agent checks are "third party bank checks" not subject to the FDA. A "bank check" is a check—such as a teller's check—that is effective on the signature of a bank officer or employee. A "third party bank check" is a bank check that is paid through a third party. MoneyGram teller's checks and agent checks meet that definition. Whatever definition of "third party bank check" this Court adopts, however, it should interpret the term "other similar written instrument" narrowly to exclude MoneyGram teller's checks and agent checks. Those products are not

similar to money orders or traveler's checks, which are specific commercial products with specific uses.

III. Delaware offers the only workable interpretation of the FDA that is consistent with its text, structure, and history. Looking to an instrument's label to determine whether it is a "money order" or a "traveler's check" is a predictable and easily administrable bright-line rule. The Special Master's approach, on the other hand, will create uncertainty and lead to this Court's frequent intervention in escheatment disputes among States.

ARGUMENT

I. MONEYGRAM TELLER'S CHECKS AND AGENT CHECKS ARE NOT "MONEY ORDERS."

At the heart of this case is the definition of "money order." The FDA exempts from the common law of escheatment a specific set of financial instruments: a "money order, traveler's check, or other similar written instrument (other than a third party bank check) on which a banking or financial organization or a business association is directly liable." 12 U.S.C. § 2503. Traveler's checks have a narrow and accepted definition as a specific commercial product that is labeled "traveler's check" on its face, used by travelers, and signed twice by the customer. *See infra* p. 25. Money orders, however, can be defined broadly and literally to mean *all* orders to pay money. Money orders can also be defined more narrowly to encompass two commercial products: The telegraphic service for rapidly transmitting money across long distances or a specific financial instrument that is titled "money order," is usually signed by the purchaser, and is generally used in a specific context—by a consumer without a bank

account to pay a bill or send a relatively small amount of money. Historically, these commercial products bore the label "money order" on their face.

Defendants' position, which was initially adopted by the Special Master in the Draft Interim Report, is that the term "money order" refers to all prepaid orders to pay money.[2] That sweeping conclusion, however, is inconsistent with the contemporary understanding of the term "money order" in 1974, as well as the structure and history of the FDA. This Court should instead hold that the term "money order" refers to specific, well-known commercial products, recognized and labeled as money orders, and that MoneyGram teller's checks and agent checks do not meet that definition.

A. The Term "Money Order" In 1974 Referred To Specific Commercial Products.

The term "money order" is not defined in Section 2503. This Court should thus look to the "ordinary, contemporary, common meaning" of that term "at the time Congress enacted the statute." *Perrin* v. *United States*, 444 U.S. 37, 42 (1979); *see Tanzin* v. *Tanvir*, 141 S. Ct. 486, 491 (2020). Important sources of meaning include dictionaries and encyclopedias, journals and treatises, and contemporary litigation. *See, e.g.*, *Wisconsin Cent. Ltd.* v. *United States*, 138 S. Ct. 2067, 2070-71 (2018); *Taniguchi* v. *Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566-567 (2012); *Amoco Prod. Co.* v. *Southern Ute Indian Tribe*, 526 U.S. 865, 874, 876 (1999). Those sources show that at the time the FDA

[2] Defendants use the term "prepaid drafts." A draft is an order to pay money, and the word "prepaid" apparently refers to the FDA's description of "money orders" as "purchased," and thus paid in advance. 12 U.S.C. § 2503.

was enacted, the term "money order" referred to two specific commercial products, both labeled "money order": The telegraphic service for sending money and a commercial product primarily used to send small sums of money by consumers without bank accounts as a substitute for a personal check.

1. Contemporary Dictionaries and Encyclopedias

Most contemporary dictionaries and encyclopedias describe money orders as discrete commercial products marketed for specific purposes—and not as any order to pay money.

The 1973 edition of *Munn's Encyclopedia of Banking and Finance* defined a money order by *who* bought it: a money order is a "form of credit instrument" used "by persons not having checking accounts." App.373. *Munn's* further described a money order in terms of *where* it is purchased, including "the Post Office Department; American Express Co., and various other private organizations, and their franchised retail stores"; and financial institutions. *Id.* at 374. *Munn's* stressed that companies who sell money orders often limited their *amount*, such as "$100 on any single Order." *Id.*

The 1972 edition of *Compton's Encyclopedia* confirmed that a money order is "[a] safe and convenient way to send money through the mails," stating that money orders "are especially helpful to persons who do not have checking accounts" and generally limited to a specific amount, such as "one hundred dollars." App.379-380. *Compton's* explained that the post office and "[p]rivate organizations, such as the American Express Company, currency exchanges, and banks and savings institutions," issue money orders. *Id.* at

380. It included an illustration of a money order, which is labeled "personal money order." *Id.* at 381.

The 1968 edition of *Black's Law Dictionary* defined "money order" as "a species of draft drawn by one post-office upon another for an amount of money deposited at the first office by the person purchasing the money order, and payable at the second office to a payee named in the order." App.363. This definition focused on *where* money orders were sold—at post offices. Meanwhile, the 1979 edition of *Black's Law Dictionary* defined a "money order" as a "type of negotiable draft issued by banks, post offices, telegraph companies and express companies and used by the purchaser as a substitute for a check." App.365. This definition focused on *where* money orders were sold and *how* money orders were used—as a substitute for a check.

Less specialized contemporary dictionaries with very brief definitions sometimes described a "money order" as an "order to pay money." The 1971 edition of the *American Heritage Dictionary of the English Language*, for example, defined a money order as an "order for the payment of a specified amount of money, usually issued and payable at a bank or post office." App.382. The 1972 edition of *Webster's Seventh New Collegiate Dictionary* similarly defined a money order as "an order issued by a post office, bank, or telegraph office for payment of a specified sum of money at another office." App.383. These definitions, however, are "rather threadbare," Antonin Scalia & Bryan A. Garner, *A Note on the Use of Dictionaries*, 16 Green Bag 2d 419, 421 (2013), offering little insight into whether the term "money order" refers to *all* orders to pay money or a specific subset of commercial products. Even these dictionaries, moreover, describe *where*

money orders are sold, suggesting that the term "money order" refers to a particular commercial product, rather than every order to pay money.

2. Contemporary Publications

Contemporary journals and treatises confirm that the term "money order" referred to discrete commercial products. A 1950 article by a Western Union executive explained that "*Telegraph Money Orders* provide a rapid, accurate service for transferring money quickly and safely from one point to another." App.416. In 1956, the American Bankers Association released a comprehensive report on "Money Order Services," which explained that money orders are instruments sold at a variety of locations—including drugstores and supermarkets—and used by consumers without bank accounts as a small-dollar substitute for a personal check. *See id*. at 384-385.

The 1956 report stated that "bank money orders" have the technical "legal status" "of an official check or instrument of the issuing bank, the same as Cashier's or Treasurer's checks." *Id.* at 389. The report described bank money orders, however, as a separate commercial product. *Id.* at 389-393. The same report described "personal money orders" as a new money order product signed by the purchaser, "an attractive feature" that "has considerable customer appeal" because these money orders resemble personal checks. *Id.* at 396-397. Personal money orders were cheaper than bank money orders, and banks did not record addresses for personal money orders. *See id.* at 396-397, 400. The report included several images of money orders, each prominently labeled "money order." *Id*. at 391, 393, 399, 405, 407. That label was no aberration. In this case, the historic examples of money orders

bear that label. *See id*. at 303-308, 334, 381, 550, 555-558.

The 1956 report distinguished personal money orders from official checks, stating that "[i]n the occasional instances where instruments for amounts that are in excess of the limit" for a personal money order "are required, the use of an official check, where more complete records such as a payee's and purchaser's names and addresses would be made, may be more satisfactory." *Id.* at 400.

Other contemporary sources describe money orders as "a checking account substitute" for consumers without bank accounts. *Id.* at 491 (*The Law of Bank Deposits*); *see id.* at 485 (*The Law of Bank Checks*). These sources characterized bank money orders as distinct products from bank checks, such as cashier's checks. *See id.* at 483-485, 489; *e.g.*, George Wallach, *Negotiable Instruments: The Bank Customer's Ability to Prevent Payment on Various Forms of Checks*, 11 Ind. L. Rev. 579, 579 (1978) (differentiating between "the popular personal check, money orders (both bank money orders and personal money orders), cashier's checks, certified checks and traveler's checks"); Lawrence, *supra*, at 285 n.31 (explaining that "[c]ashier's checks should not be confused with personal money orders" because the "two instruments are purchased for different reasons").

3. Contemporary Litigation

The litigation before this Court in *Western Union Telegraph Co.* and *Pennsylvania* v. *New York* provides another source of contemporary understanding for the term "money order." Both cases involved the escheatment of Western Union telegraphic money orders, which this Court described in detail:

> A sender goes to a Western Union office, fills out an application and gives it to the company clerk * * * * [A] telegraph message is transmitted to the company's office nearest to the payee directing that office to pay the money order to the payee. The payee is then notified and upon properly identifying himself is given a negotiable draft * * * .

Western Union, 368 U.S. at 72; *Pennsylvania*, 407 U.S. at 208.

This description demonstrates that the Court used the term "money order" to refer to a specific commercial product, rather than as a generic term for all orders to pay money. The Special Master in *Pennsylvania* similarly used the term "money order" to refer to a specific commercial product, noting that Western Union's money orders "appear to be generally of small size," with the "vast majority being from $1.00 to $25.00." App.531 n.5. American Express filed an amicus brief in *Pennsylvania*, describing itself as "one of the largest issuers of travelers checks and commercial money orders in the nation." *Id.* at 496. Throughout its brief, American Express used the term "money order" to refer to a commercial product sold by American Express and "used for the most part to pay bills by persons who do not have checking accounts." *Id*. at 511.

In short, contemporary sources repeatedly describe "money orders" as specific commercial products, rather than all prepaid orders to pay money.

B. The Text And Structure Of The FDA Confirms That Congress Used The Term "Money Order" To Refer To Specific Commercial Products.

The text and structure of Section 2503 confirm that Congress used the term "money order" to refer to specific commercial products. That provision refers to four different kinds of products: a "money order," "traveler's check," "other similar written instrument," and "third party bank check." 12 U.S.C. § 2503. Under the plain text of the statute, a "money order" must thus be *different* from a "traveler's check," "other similar written instrument," and "third party bank check." If the term "money order" refers to *all* prepaid orders to pay money, however, it would sweep in *both* traveler's checks and third party bank checks, and it would afford no meaning to the phrase "other similar written instrument."

1. "A statute should be construed so that effect is given to all its provisions," and "no part will be inoperative or superfluous, void or insignificant." *Hibbs* v. *Winn*, 542 U.S. 88, 101 (2004) (alterations and internal quotation marks omitted). A broad definition of the term "money order" would render the terms "traveler's check," "third party bank check," and "other similar written instrument" superfluous.

Many contemporary sources define a traveler's check as an order to pay money. *See, e.g.*, App.382 (*American Heritage*) (defining a traveler's check as a type of "draft"); *id.* at 363 (*Black's* 4th) (defining traveler's check as a "bill of exchange"). A third party bank check—such as a cashier's check, teller's check, or certified check—is also an order to pay money. *See*

infra pp. 36-42.[3] And if the term "money order" encompasses all orders to pay money, it would stretch so broadly that the phrase "other similar written instrument" would have no meaning. Nothing would be similar to a money order; everything *would be* a money order. This Court should thus reject Defendants' proposed interpretation of "money order" as a prepaid order to pay money, and instead hold that a "money order" is a commercial product *separate* from a traveler's check and third party bank check.

To avoid this surplusage problem, Defendants argued below (and the Special Master agreed) that the term "money order" could refer to *drafts*, while the term "traveler's check" could refer to *notes or drafts*. App.52. For support, Defendants cited the modern Uniform Commercial Code, which in 1990 added a new comment stating that a traveler's check "may be in the form of a note or draft." U.C.C. § 3-104 cmt. 4. A note is a promise to pay; a draft is an order to pay. *See id*. § 3-104(e).

But neither Defendants nor the Special Master cited any contemporary source equating a traveler's check with a "note," and nearly every dictionary defines a traveler's check based on its label and how it is signed, rather than its status as a note or a draft. *See infra* p. 25. Historic sources indicate, moreover, that money orders could sometimes be notes or drafts. *See, e.g.*, App.489, 492 (*The Law of Bank Deposits*) (characterizing bank money orders as "notes" and personal money orders as "an order," or draft). The Special Master's attempt to distinguish between "money

[3] If a "third party bank check" is a personal check, as the Special Master concluded, App.76, a third party bank check is also an order to pay money.

orders" and "traveler's checks" based on their status as "drafts" or "notes" is thus atextual and ahistoric. If Congress meant Section 2503 to apply to all "prepaid drafts and notes" and to abrogate the common law so broadly, it would have used those technical terms of art—not "money order" and "traveler's check."

2. The *noscitur a sociis* canon holds that a word is known by the company it keeps. *See Dole* v. *United Steelworkers of Am.*, 494 U.S. 26, 36 (1990). Here, Congress used the term "money order" alongside "traveler's check" and "third party bank check." Both "traveler's checks" and "third party bank checks" are commercial products. While no sources define the term "third party bank check," *infra* p. 39, a wealth of information confirms that the term "traveler's check" had a clear meaning in 1974: A traveler's check was a small-dollar instrument sold at a variety of locations for a specific purpose: to use while traveling. *See* App.376-378 (*Munn's*); 382 (*American Heritage*); 503 & n.2 (American Express Br.). Traveler's checks had a unique form: the purchaser signed the instrument twice. *See id.* at 376-378 (*Munn's*); 366 (*Black's* 5th); 382 (*American Heritage*). And because the term "traveler's check" carried such strong connotations to purchasers and payees alike, traveler's checks were "self-identifying"—that is, they were identified by the label on the front of the instrument. *Id.* at 425-427 & n.3 (*Negotiability of Traveler's Checks*); *see id*. at 480-481 (*American Travelers Checks*) (providing examples of an instrument labeled "Travelers Cheque"); U.C.C. § 3-104(i) (stating that a traveler's check "is designated by the term 'traveler's check' or by a substantially similar term").

Given this clear definition of "traveler's check," the neighboring term "money order" should also be

understood as a specific commercial product—identified by the label "money order"—rather than as a generic term for all orders to pay money.

This interpretation of "money order" is consistent with how Congress used that term in other contemporary statutes. For instance, in 1970, the text of 26 U.S.C. § 6311 referred to "any certified, treasurer's, or cashier's check or any money order," demonstrating that Congress used the term "money order" to refer to a commercial product that is distinct from a certified check, treasurer's check, and cashier's check. App.592. Likewise, in 1982, Congress described "a personal or corporate surety bond," a "certified check," a "bank draft," a "post office money order," and "cash" as separate commercial products—likewise demonstrating that the term "money order" does not encompass every order to pay. *Id.* at 594 (31 U.S.C. § 9303(c) (1988)). Other statutes take the same approach. *See, e.g.*, *id.* at 595 (31 U.S.C. § 5325(a) (1988)) (listing "a bank check, cashier's check, traveler's check, or money order").

Nor was Congress alone in understanding money orders to be a distinct product. Other contemporary sources distinguished between money orders, traveler's checks, and other bank products that ordered the payment of money. Most notably, shortly after Congress passed the FDA, the Uniform Law Commission issued a new draft of its uniform unclaimed property act, which distinguished between money orders and bank checks. *See* Uniform Law Commission, Uniform Unclaimed Property Act (1981); App.340-348. The Act recommended a 15-year dormancy period for traveler's checks; a 7-year period for money orders or similar instruments; and a 5-year period for "a check, draft, or similar instrument * * * on which a banking

or financial organization is directly liable, *including a cashier's check and a certified check*."[4] App.347 (§ 5) (emphasis added); *see id*. at 345 (§ 4). In the ensuing years, numerous states adopted the Act, further reinforcing the conclusion that the term "money order" had a specific ordinary meaning and did not refer to all orders to pay money or encompass all bank checks.[5]

C. The FDA's Preamble And History Explain Why Congress Narrowly Focused On "Money Orders" and "Traveler's Checks."

The FDA's preamble and legislative history show that Congress was focused on a specific problem: Money orders and traveler's checks were relatively inexpensive products used for small-dollar transactions, and as a way to keep costs down, the companies who sold them did not maintain the addresses of purchasers. Following this Court's decision in *Pennsylvania*, Congress was concerned that States would pass laws requiring companies that sold money orders and traveler's checks to keep those addresses, which would ultimately increase the cost of those products and hurt

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[4] The 1981 Act recognized that money orders and traveler's checks were escheated under the FDA's place-of-purchase rule. *See* App.345-347 (§ 4(d)-(e) and cmt.). In contrast, the 1981 Act recognized that bank checks, including cashier's checks and certified checks, were escheated under the common-law rules. *Id*. at 347-348 (§ 5 and cmt.). This provides persuasive evidence that the FDA was not understood at the time of its enactment to apply to bank checks.

[5] *See, e.g.*, 1983 Wis. Sess. Laws 1731-41 (distinguishing between a "travelers check, money order or similar written instrument" and "a cashier's check and a certified check"); 1983 Haw. Sess. Laws 57-58 (same); 1985 N.D. Laws 1834-36 (same).

the very consumers who used them—in the case of money orders, low-income consumers without bank accounts who needed a small-dollar-value instrument. Congress accordingly enacted the FDA to address this specific problem, demonstrating that Congress was focused narrowly on the escheatment of money orders and traveler's checks, rather than more broadly on all instruments ordering the payment of money.

1. The FDA's preamble confirms this narrow reading.

Congress adopted the FDA in 1974 following this Court's 1972 decision in *Pennsylvania* v. *New York*, which applied the common-law rule to the escheatment of Western Union money orders. 407 U.S. at 214; *see id*. at 222 (Powell, J. dissenting) (noting that the decision would impact the escheatment of "money orders and traveler's checks"). In that decision, the Court stated that nothing in its opinion "prohibits the States from requiring Western Union to keep adequate address records," *id.* at 215, which would require escheatment to the State of the purchaser's address under the common-law rule.

In the FDA's preamble, however, Congress expressed concern that States would force sellers of money orders and traveler's checks to record addresses. *See* 12 U.S.C. § 2501; Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 217 (2012) ("A preamble, purpose clause, or recital is a permissible indicator of meaning."). Congress stated in the preamble that "the books and records of [entities] issuing and selling money orders and traveler's checks do not, as a matter of business practice, show the last known addresses of purchasers of such instruments," and that "the cost of

maintaining and retrieving addresses of purchasers of money orders and traveler's checks is an additional burden on interstate commerce." 12 U.S.C. § 2501(1), (5).

Congress thus enacted the FDA to address a specific problem: the cost of keeping addresses for money orders and traveler's checks, which are small-value instruments for which addresses are not typically kept. That same concern does *not* apply to other orders to pay money—such as teller's checks, cashier's checks, certified checks, and other bank checks—which involved larger amounts of money and where sellers had in the past recorded customers' addresses. App.400. The FDA's preamble thus confirms that Congress meant the term "money order" to govern discrete products for which sellers lacked records—not every instrument used to transmit money.

2. Legislative history confirms this narrow reading.

Individual legislators expressed this same concern during the passage of the FDA. Pennsylvania's senator introduced the FDA in 1973, explaining that recorded "addresses do not generally exist" for "travelers check and commercial money orders." App.589. He further explained that the FDA prevented the need for "complicated record-keeping laws and regulations," which would otherwise impose "a serious burden" on "issuers and sellers of travelers checks and money orders." *Id.* at 590-591. The Senate Committee report reproduced a letter from the Chairman of the Federal Reserve, which likewise confirmed that sellers did not usually record "the addresses of creditors" for money orders and traveler's checks. *Id.* at 571. And when the bill returned to the Senate floor, the co-chairman

of the Senate committee that proposed the bill explained the problem the FDA was intended to address:

> [T]he legislation is intended to do equity while avoiding unnecessarily cumbersome record-keeping requirements that would drive up the cost of these instruments to the consumer. *We know that many low-income families use money orders instead of checking accounts to pay their bills, because they are readily available and because of their low cost*. I believe that [the FDA] will do the job without impairing the usefulness of these instruments.

Id. at 580-581 (emphasis added).

These statements echo what American Express had told this Court in *Pennsylvania*: that imposing "additional state record-keeping laws for escheat purposes" would create "monumental administrative burdens" for sellers of money orders and traveler's checks. *Id.* at 517.

3. The 1966 Revised Uniform Disposition of Unclaimed Property Act confirms this narrow reading.

Defendants' preferred statutory history also shows that Congress did not intend Section 2503 to cover all orders to pay money. Defendants argued before the Special Master that Congress modeled the FDA on the Uniform Law Commission's 1966 Revised Uniform Disposition of Unclaimed Property Act. The FDA's Section 2502 and the 1966 Act share nearly identical definitions of banking organizations, business associations, and financial organizations. *See* App.335.

Congress did not, however, adopt all of the 1966 Act's language. That Act would empower States to escheat a broad class of instruments, including

> [a]ny sum payable *on checks certified* in this state or on written instruments issued in this state on which a banking or financial organization or business association is directly liable, including, *by way of illustration but not of limitation, certificates of deposit, drafts, money orders, and traveler's checks*.

Id. at 336 (emphases added).

When Congress drafted Section 2503, it used much narrower language. Congress did not refer to certified checks, certificates of deposit, and drafts for which banks are directly liable (*e.g.*, a cashier's check) in the FDA. And it did not include the phrase "by way of illustration but not of limitation." To the extent the 1966 Act is relevant to interpreting the FDA, it shows that Congress used much narrower language in the FDA to refer to specific commercial instruments.

D. Statutes In Derogation Of The Common Law Should Be Narrowly Construed.

Finally, the canon against derogation of the common law counsels in favor of interpreting the term "money order" narrowly. As Delaware has explained, text, structure, and history all demonstrate that Congress intended the term "money order" in the FDA to refer to specific commercial products, rather than all orders to pay money. To the extent there is any doubt on this issue, however, the Court should resolve that doubt in favor of Delaware.

"[W]hen a statute covers an issue previously governed by the common law, [this Court] interpret[s] the

statute with the presumption that Congress intended to retain the substance of the common law * * * ." *Samantar* v. *Yousuf*, 560 U.S. 305, 320 & n.13 (2010). For example, in *United States* v. *Texas*, this Court narrowly construed the Debt Collection Act of 1982 so that it would not abrogate the federal government's common law right to recover prejudgment interest against States. 507 U.S. 529, 534 (1993). The statutory provision at issue empowered agency heads to "charge a minimum annual rate of interest on an outstanding debt on a United States Government claim owed by a person." 31 U.S.C. § 3717(a)(1). The definition of a "person" under the Act expressly excluded state and local governments. *Id.* § 3701(c) (1988). Accordingly, Texas asserted that the Act evidenced Congress's "intent to relieve the States of their common-law obligation to pay prejudgment interest." 507 U.S. at 534-535. The Court rejected that argument, explaining that Congress's "obvious desire to enhance the common law in specific, well-defined situations does not signal its desire to extinguish the common law in other situations." *Id.* at 535 n.4.

So too here. The FDA abrogates the common-law rules established by this Court. But Congress did not express a clear intent to subject *all* prepaid instruments ordering the payment of money to the FDA's escheatment rules.[6] Instead, the term "money order" can refer to a much narrower set of products commercially marketed as money orders. Applying the canon of construction that statutes in derogation of the

[6] Indeed, if Defendants' broad reading is correct, the FDA could apply to all prepaid obligations of any kind, including prepaid cards—a conclusion plainly at odds with the specific text chosen by Congress.

common law should be narrowly construed, the Court should thus interpret "money order" in accordance with Delaware's narrower definition.

E. This Court Should Define A "Money Order" As A Specific Commercial Product, Rather Than Any Order To Pay Money.

The text, structure, and history of the FDA—and canon of construction that counsels in favor of narrow construction of statutes to avoid derogation of the common law—demonstrate that Defendants' interpretation of a "money order" is wrong. When Congress adopted the FDA in 1974, the term "money order" did not refer to all prepaid orders to pay money. It instead referred either to the telegraphic service for sending money or a commercial product labeled "money order" and typically sold by a post office or companies such as Western Union or American Express to consumers without bank accounts in small denominations to serve as a substitute for a personal check. Numerous sources confirm that at the time of the FDA's enactment, a "money order" was *different* from other commercial products such as a traveler's check, certified check, and cashier's check. This Court should thus reject Defendants' overbroad interpretation of "money order."

The Special Master's interpretation of "money order" in the Interim Report is similarly wrong. The Special Master rejected as "superficial" the very characteristics of money orders that contemporary sources relied on when defining that commercial product. App.41. As those sources demonstrate, a "money order" *is* defined by how it is marketed and used by consumers. Indeed, the Special Master's deep struggle to identify unique financial characteristics of a money

order—rather than acknowledging that a money order is a commercial product labeled "money order" and marketed to consumers as a "money order"—is what led the Special Master to initially adopt an overbroad definition, and later to refuse to adopt any definition at all. A money order shares the same general financial characteristics as many other commercial products that order the payment of money. A money order has nevertheless been considered a distinct commercial product for decades because it is labeled as a separate product and marketed to a subset of consumers for specific purposes.

This Court should thus hold that the term "money order" in the FDA refers to specific commercial products. The most straightforward way to determine whether a commercial product is a money order is to look at its label: As both contemporary and modern sources demonstrate, the words "money order" are printed on the face of money orders. *See* App.212, 217, 222, 225, 230, 303-308, 334, 381, 391, 393, 399, 405, 407, 550, 555-558. This label signals to consumers that they are purchasing a specific commercial product, and it provides a straightforward way to determine how that product should be escheated. *See Delaware*, 507 U.S. at 510 (expressing a preference for administrable, bright-line rules of escheatment). MoneyGram teller's checks and agent checks are not labeled "money order," and they should thus not be treated as money orders for purposes of escheatment.

Even if this Court looks beyond the product's label, however, it is clear that MoneyGram teller's checks and agent checks do not share the common characteristics of money orders, as that term was understood in 1974. They are sold primarily to consumers and companies with bank accounts, rather than to consumers

without bank accounts. Indeed, agent checks are used primarily *by banks* to pay their own bills, rather than by consumers. *See* App.274-276. MoneyGram teller's checks and agent checks are typically sold in large denominations, unlike most money orders which are often capped at $1,000. And MoneyGram teller's checks and agent checks are purchased exclusively at financial institutions, rather than at the Post Office, drug stores, or supermarkets. MoneyGram teller's checks and agent checks are signed, moreover, by bank employees, unlike money orders, which are signed by consumers (making them look like a personal check). *See supra* pp. 9-11.

As the Special Master correctly recognized, these distinctions between money orders and MoneyGram teller's checks and agent checks are not always true. A consumer with a bank account can purchase a money order to pay her utility bill, and a few banks may sell money orders in large denominations on some occasions. But that does not make a MoneyGram teller's check or agent check a money order; it simply demonstrates that there is some overlap in how these different commercial products could be used. Under a facts-and-circumstances approach, MoneyGram teller's checks and agent checks do not share the same characteristics as typical money orders, and thus should not be treated as money orders for purposes of escheatment.

Applying either a bright-line rule—which examines whether the term "money order" is printed on the front of the product—or a facts-and-circumstances approach that examines how a commercial product is typically sold and used, it is clear that MoneyGram teller's checks and agent checks are not "money

orders" and should not be escheated under the FDA as "money orders."

II. MONEYGRAM TELLER'S CHECKS AND AGENT CHECKS DO NOT OTHERWISE FALL WITHIN THE FDA.

MoneyGram teller's checks and agent checks are not "money orders," as that term is used in the FDA. This Court must thus determine whether they are "third party bank checks," which are excluded from the FDA; "other similar written instruments," which are subject to escheatment under the FDA; or another category of instrument that is not mentioned in the FDA and thus subject to the common-law rule of escheatment. This Court should hold that the term "third party bank check" encompasses bank checks paid through third parties, and thus includes MoneyGram teller's checks and agent checks. However, if this Court holds that the term "third party bank check" refers only to personal checks, as the Special Master held, it should interpret the term "other similar written instrument" narrowly in light of that definition, and conclude that MoneyGram teller's checks and agent checks are not "similar written instruments" and are thus subject to escheatment under the common-law rule.

A. MoneyGram Teller's Checks And Agent Checks Are "Third Party Bank Checks."

1. A bank check is a check effective on the signature of a bank officer.

A "check" is "a bill of exchange drawn on a bank, payable on demand." App.369 (*Munn's*). The term "bank check" can be defined broadly to include *all* checks drawn on a bank, which would include commercial products such as cashier's checks, certified checks, and teller's checks, in addition to personal

checks. *See* App.483 n.1 (*The Law of Bank Checks*) (using the term "bank check" interchangeably "with the term 'check,' " rather than limited to "a direct bank obligation, such as a cashier's check, certified check, or bank draft"). Under this broad definition of "bank check," some money orders and traveler's checks offered through banks would qualify as bank checks because they are "a bill of exchange drawn on a bank, payable on demand." App.369 (*Munn's*).[7]

Section 2503, however, refers to money orders and traveler's checks as *different* commercial products than third party bank checks. The term "bank check" should thus be interpreted more narrowly. According to contemporary sources, three instruments—"cashier's, certified, and teller's checks"—were all "collectively" "known as bank checks." Lawrence, *supra*, at 278; *see* Wallach, *supra*, at 579 (bank checks include "cashier's checks and certified checks"). All three were easily identified by the fact that they became effective when signed by a bank employee and typically transmitted large amounts of money. In most cases, a bank officer signed a bank check as the drawer of the instrument. *See* App.360 (*Black's* 4th) (defining "bank draft" as a "check, draft, or other order for payment of money, *drawn by an authorized officer of a bank* upon either his own bank or some other bank in which funds of his bank are deposited" (emphasis added)); *id.* at 371 (*Munn's*) (noting that a "signature is the final touch without which the check is

[7] If the Court were to adopt this broad definition of "bank check," it would not change the outcome here. This Court could hold that instruments that are labeled "money order" or "traveler's check"—but otherwise meet the broadest definition of "third party bank check"—are not "third party bank checks" under the FDA.

valueless"). For other bank checks, such as certified checks, an individual signed the check as a drawer, after which a bank officer signed the check to certify the check. *See id.* at 368-369 (*Munn's*).

In 1974, in addition to providing prepaid "cash substitutes" for ordinary consumers, bank checks could also "serve as the personal checks of banks." Lawrence, *supra*, at 340. For instance, a financial institution might use a cashier's check to pay its "own obligations, money transfers, etc." App.367 (*Munn's*).

MoneyGram teller's checks and agent checks are bank checks. Like all bank checks, MoneyGram teller's checks and agent checks become effective on the signature of a bank employee, *supra* p. 11, and thus meet the core definition of "bank check."[8] Additionally, teller's checks and agent checks serve the core commercial function of bank checks. MoneyGram teller's checks are traditional teller's checks that allow customers to transmit large amounts of money from their bank account. *See supra* p. 5 & *infra* pp. 39-40. Agent checks are traditional bank checks, outsourced to MoneyGram, that banks typically use to pay their own obligations, although they can also be sold to "a customer" who "comes in * * * asking for a bank check." App.274-275.

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[8] The selling bank signs MoneyGram teller's checks as a drawer. *See* App.259, 272. According to the face of some agent checks, the bank employee signs the instrument as an agent for MoneyGram. *See* App.237. For other agent checks, the bank officer is listed as an authorized signature without denoting agent status. *See* App.295-296. Regardless of that difference, agent checks—like all bank checks—become effective only when signed by a bank employee.

2. A "third party bank check" is a bank check paid through a third party.

There is no accepted definition of the term "third party bank check." *See* App.74. This Court should thus interpret that term in accordance with its text: A "third party" bank check is a bank check that is *paid through* a third party.[9] MoneyGram teller's checks and agent checks are bank checks paid through third parties, namely MoneyGram and a clearing bank, and should thus be subject to escheatment under the common-law rule. For those products, MoneyGram and the clearing bank, rather than the originating bank, handle the transfer of funds. *See supra* p. 11.

Other bank checks, such as teller's checks, are also paid through third parties. Shortly before the FDA's passage, teller's checks were invented as a way for savings and loan institutions—which historically could not provide checking accounts—to allow customers to transmit large sums from their savings account through a third party commercial bank. *See* App.459-460 & n.92 (67 Colum. L. Rev. 524); Wallach, *supra*, at 586 n.33 (describing teller's checks as "official

[9] This Court could also interpret third party bank check to mean a bank check *sold to* a third party. Nearly all bank checks—including cashier's checks, teller's checks, and certified checks—are sold to third parties. Thus, for example, when a consumer walks into a bank and requests a cashier's check to make a down payment on a house, the consumer is a third party purchasing a bank check, which is signed by a bank employee. MoneyGram teller's checks are sold to third parties, namely the bank's customer who needs a bank check. MoneyGram agent checks are typically sold to banks—which in this situation are third parties using MoneyGram to conduct the bank's business—or less commonly to third-party consumers. *See supra* p. 11. Under this definition too, MoneyGram teller's checks and agent checks are third party bank checks.

looking checks" that served the purpose of a cashier's or certified check at a savings and loan institution). Teller's checks, as well as other bank checks paid through third parties, are thus "third party bank checks."

3. The historical meaning of the term "third party bank check" is obscure, but the Special Master's interpretation does not make sense.

Prior to the FDA's passage, the General Counsel of Treasury sent a letter to Congress stating that "the language of the bill is broader than intended," and that it "could be interpreted to cover third party payment bank checks." App.575. Treasury thus recommended excluding "third party payment bank checks" from the FDA. *See id.* Congress, however, ultimately chose the phrase "third party bank check" rather than "third party payment bank check." 12 U.S.C. § 2503. As the Special Master recognized, "[b]oth 'third party bank check' and 'third party payment bank check' are obscure terms with no established legal meaning." App.74.

Rather than interpret the term "third party bank check" in accordance with its plain meaning—as a bank check paid through a third party—the Special Master interpreted that phrase to encompass *only* personal checks. *See id.* at 76. That interpretation makes no sense. It is inconsistent with the text of the FDA, which refers to written instruments "on which a banking or financial organization or a business association is directly liable." 12 U.S.C. § 2503. Banks (and other organizations) are *not* directly liable on personal checks; that is precisely why consumers purchase bank checks such as cashier's checks, certified checks, and teller's checks. *Supra* pp. 4-5. And there

is no evidence that Congress was concerned about the escheatment of personal checks in 1974. There is simply no reason to believe that Congress would have included personal checks in the FDA at all, much less as the sole category of instruments that are exempted from the FDA's scope.

The Special Master interpreted the term "third party bank check" to mean "personal check" based on the Hunt Commission's 1972 report, which defined the term "third party payment services" as "any mechanism whereby a deposit intermediary transfers a depositor's funds to a third party or to the account of a third party upon the negotiable or non-negotiable order of the depositor." App.77 (quoting App.350 & n.1). There is no evidence, however, that Congress used the Hunt Commission's definition of a different term as its inspiration for the term "third party bank check."

In any event, if the Special Master is correct that "third party bank check" is synonymous with "third party payment service[ ]," as that term was used by the Hunt Commission, that does not mean that a "third party bank check" is *only* a personal check. The Hunt Commission stated that "[c]hecking accounts are *one type* of third party payment service." *Id.* at 350 n.1 (emphasis added). That means there are *other types*. The Hunt Commission describes a "third party payment service" to include "credit cards," *id.* at 358-359, as well as "services using customers' interest bearing accounts" at savings and loan associations, *id.* at 357—also known as teller's checks, *supra* pp. 5, 39-40. The Hunt Commission thus used the phrase "third party payment service" to describe a range of services where a financial institution allows a consumer to pay money to a third party from a bank

account, which includes personal checks, credit cards, *and* bank checks.

If a third party payment service is any mechanism where a deposit intermediary transfers a depositor's funds to a third party upon an order of the depositor, then *MoneyGram teller's checks and agent checks meet that definition*. With both MoneyGram teller's checks and agent checks, there is a "deposit intermediary"—the bank—that transfers the depositor's funds, through MoneyGram and a routing bank, to a third party at the depositor's request. MoneyGram is simply an additional party that acts on behalf of the first bank to facilitate the transaction. Even under the Special Master's preferred approach to defining "third party bank check," MoneyGram teller's checks and agent checks qualify.

In sum, under nearly any definition of "third party bank check," the MoneyGram products at issue in this case qualify, and they should be subject to escheatment under the common law.

B. The Court Should Read The Phrase "Other Similar Written Instrument" Narrowly.

If the Court interprets the term "third party bank check" to mean *only* personal checks, as the Special Master did, the Court should also conclude that the term "similar written instrument" is too narrow to encompass MoneyGram teller's checks and agent checks.

By referring to "a money order, traveler's check, or other similar written instrument (other than a third party bank check)," 12 U.S.C. § 2503, Congress indicated that the term "similar written instrument" refers to instruments that share similar features to a

"money order" and a "traveler's check." *See, e.g.*, *Similar*, *Black's Law Dictionary* (rev. 4th ed. 1968) (defining "similar" to mean "[n]early corresponding" or "exactly corresponding (at least in all essential particulars)"); *Rousey* v. *Jacoway*, 544 U.S. 320, 329-331 (2005) (holding that similarity turns on "[t]he common feature of all [the enumerated items]").[10]

Money orders, traveler's checks, and personal checks all share an important feature: They typically become effective when signed *by the purchaser*, distinguishing them from a bank check, which typically becomes effective when it is signed *by an employee of the bank*. *See supra* pp. 20, 25, 37-38.[11] All three instruments thus resemble personal checks. In addition, all three instruments can be used for relatively small-value and routine transactions, *supra* pp. 18-22, 25.

Bank checks, in contrast, are *not* similar to money orders, traveler's checks, and personal checks. Bank checks include commercial products such as cashier's checks, certified checks, and teller's checks, as well as MoneyGram teller's checks and agent checks. These products are signed by a bank employee, not by the purchaser. And they are typically used for relatively

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[10] Given the legislative history—where Treasury expressed concern about a possible broad but unintended reading of "other similar written instrument," *supra* p. 40—it is unclear whether Congress viewed "third party bank checks" as "other similar written instruments" or instead wanted to make doubly sure that they were not subject to the FDA.

[11] A traveler's check can include a bank officer's signature, but it only becomes effective when countersigned by the purchaser at the point of payment. *See supra* p. 25. Although bank money orders were signed by bank employees, personal money orders—including all MoneyGram money orders—are signed by purchasers. *See supra* pp. 9, 20.

large purchases, rather than small ones. If this Court defines a "third party bank check" as a personal check, it should hold that MoneyGram teller's checks and agent checks are not "other similar written instruments."

Whatever definition this Court adopts of "third party bank check," however, it should interpret the phrase "other similar written instrument" narrowly to exclude the MoneyGram products at issue. If Congress had wanted to include well-known financial products—such as cashier's checks, certified checks, and the bank's own checks—within the scope of the FDA, it would have referred to those products by name. At the time of the FDA's passage, those products were considered distinct financial products from both money orders and traveler's checks, and they were typically used by different consumers for different purposes. *See supra* pp. 18-27, 30-31. The concerns motivating the FDA—the cost of keeping addresses for low-dollar-value traveler's checks and money orders—did not apply to bank checks, and they are not described in the FDA's preamble. *See* 12 U.S.C. § 2501. Even the title of the FDA—the Federal Disposition of Abandoned Money Orders and Traveler's Checks Act—demonstrates that the Act is narrowly focused on money orders and traveler's checks.

This Court should thus read the phrase "other similar written instrument" narrowly to exclude the MoneyGram products here. Congress likely intended the term "other similar written instrument" to capture alternate spellings of "money order" and "traveler's check," such as the American Express "Travelers Cheque." App.481. That narrow interpretation is particularly appropriate because the FDA is a statute in derogation of the common law. *See supra* pp. 31-33.

There is no clear intent from the text of the FDA that MoneyGram teller's checks and agent checks—or any other bank check—should be subject to escheatment under the FDA. As a result, these instruments should be subject to the common-law rules.

III. DELAWARE'S INTERPRETATION OF THE FDA PROVIDES CLARITY AND PREDICTABILITY, AND IT IS CONSISTENT WITH LONGSTANDING PRACTICE.

Construing the terms "money order" and "similar written instrument" to exclude MoneyGram teller's checks and agent checks—and construing "third party bank check" to include them—serves the two goals that this Court has consistently underscored in its escheatment cases: "ease of administration" and "equity." *Texas*, 379 U.S. at 683. Delaware's interpretation of Section 2503 provides clarity for both consumers and sellers of financial products, and it results in predictable expectations for holders reporting this abandoned property among the States. The Special Master's approach, on the other hand, will create uncertainty for sellers and ultimately will require this Court's frequent intervention in future escheatment disputes among States.

A. Delaware's Position Provides Clarity.

This Court has repeatedly emphasized the importance of bright-line rules for determining which State can escheat abandoned intangible property. Bright-line rules prevent disputes from arising, allowing companies and States alike to easily determine where abandoned property should be escheated. *See, e.g.*, *Texas*, 379 U.S. at 681 (adopting rules that are "simple and easy to resolve"); *Pennsylvania*, 407 U.S.

at 215 (declining "to decide each escheat case on the basis of its particular facts or to devise new rules of law to apply to ever-developing new categories of facts" (internal quotation marks omitted)); *Delaware*, 507 U.S. at 510 (refusing "[t]o craft different rules for the novel facts of each case" because it would result in "so much uncertainty and threaten so much expensive litigation" as to frustrate the power to escheat (internal quotation marks omitted)).

Delaware's test for identifying money orders and traveler's checks—by the label on the instrument—is precisely the type of bright-line rule that this Court prefers for escheatment. It "govern[s] all types of intangible obligations like these." *Texas*, 379 U.S. at 678. Limiting the phrase "other similar written instrument" to products labeled with alternate spellings of "traveler's check" and "money order" is similarly administrable. It permits the Court to "avoid[] * * * decid[ing] each escheat case on the basis of its particular facts or to devise new rules of law to apply to ever-developing new categories of facts." *Pennsylvania*, 407 U.S. at 215 (internal quotation marks omitted). And it eliminates the "threat[] [of] so much expensive litigation." *Delaware*, 507 U.S. at 510 (internal quotation marks omitted). Because no other rule "is available which is more certain and yet still fair," *Texas*, 379 U.S. at 680, this Court should adopt Delaware's approach.

B. Delaware's Position Is Predictable And Equitable.

This Court has also repeatedly emphasized the importance of crafting escheatment rules that are "fair[] * * * and in the long run will be the most generally acceptable to all the States." *Texas*, 379 U.S. at

683; *see Pennsylvania*, 407 U.S. at 211; *Delaware*, 507 U.S. at 510. Delaware's approach meets this standard because it gives the Defendant States, and others in their position, the right to determine where MoneyGram teller's checks and agent checks should be escheated.

When financial institutions sell a MoneyGram teller's check or agent check, the selling institution (which is always a bank) can choose to record the customer's information. *See* App.599. This makes sense: MoneyGram teller's checks and agent checks are typically used for large-value transactions where a bank would want to keep a more detailed record of the customer making the purchase. The selling institutions do not transmit that information to MoneyGram. MoneyGram thus currently escheats its teller's checks and agent checks to its state of incorporation. *See id*. at 332. It is therefore up to individual States to require MoneyGram to obtain and keep these addresses going forward. *See Pennsylvania*, 407 U.S. at 215 ("[N]othing * * * prohibits the States from requiring [debtors] to keep adequate address records."). Given that "the creditor's State" could readily "assert its predominant interest" through the common law by requiring these addresses, there is "no inequity" in applying the common-law rule in this case. *Delaware*, 507 U.S. at 507.

There is no evidence, moreover, that MoneyGram chose to incorporate in Delaware because of that State's escheatment laws, rather than the many other benefits provided by Delaware law. Instead, the record reflects that MoneyGram reincorporated in Delaware after a spinoff of its parent corporation and subsequent corporate reorganization. *See* App.601. There is similarly no evidence in this case that

MoneyGram labels its products to benefit from a rule of escheatment, rather than to identify those products for consumers. Money orders and traveler's checks are labeled "money order" and "traveler's check" because they are sold to consumers who are seeking those products. Similarly, MoneyGram teller's checks and agent checks are *not* labeled "money order" or "traveler's check" because they are sold to consumers who are seeking different products for a different purpose. It is equitable—rather than inequitable—to escheat these products in accordance with how they are labeled by the companies that sell them and understood by the consumers who buy them.

C. The Special Master's Approach Will Create Significant Uncertainty, Including For Other Kinds Of Financial Instruments Escheated To Other States.

Reading the terms "money order" and "other similar written instrument" in Section 2503 narrowly will prevent upsetting settled expectations with respect to previously escheated funds. This result is not only fair, but it will also further one of the FDA's stated purposes: To protect States such as Delaware that relied in good faith on the common law of escheat.

When Congress enacted Section 2503, Congress applied Section 2503's rules retroactively to sums abandoned after 1965. However, Section 2503 did not apply "to the extent that such sums have been paid over to a State prior to January 1, 1974." *See* Pub. L. No. 93-495, § 604, 88 Stat. 1525, 1526 (1974). That provision protected States who had relied on this Court's escheat decisions from unexpectedly needing to redistribute large sums to sister States—potentially

forgoing necessary public spending or raising taxes as a result.

Delaware is in a similar position to the States that Congress sought to protect in 1974. Since 2005, Delaware has accepted escheated funds from MoneyGram in good faith based on Section 2503's plain language and this Court's precedent. Congress's stated preference to avoid upsetting a State's settled reliance interests counsels in favor of a narrow construction of Section 2503. By contrast, if this Court accepts Defendants' or the Special Master's definition of money order, this Court might radically upset long-settled expectations. In the worst-case scenario, this Court could potentially force many States—not just Delaware—to redistribute five decades' worth of funds.[12] That would pose an unnecessary burden to taxpayers and would enmesh this Court in endless litigation.

Recent lawsuits allege that major financial institutions, including J.P. Morgan and U.S. Bank, improperly escheated cashier's checks to Ohio under the common-law rule instead of Section 2503. *See, e.g.*, *Illinois ex rel. Elder* v. *JPMorgan Chase Bank, N.A.*, No. 21-Civ-85, 2021 WL 3367155 (N.D. Ill. Aug. 3, 2021); *California ex rel. Elder* v. *J.P. Morgan Chase Bank, N.A.*, No. 21-cv-00419-CRB, 2021 WL 1217944 (N.D. Cal. Mar. 31, 2021); Second Amended Complaint, *Dill* v. *JPMorgan Chase Bank, N.A.*, No. 1:19-cv-10947-KPF (S.D.N.Y., Sept. 15, 2020). If the term "money

[12] Because of this case's procedural posture, the parties have not litigated whether the Court should impose a statute of limitations or other equitable restriction on a remedy for incorrectly escheated products. If this Court rules for Defendants, the Court should nonetheless limit Defendants to prospective relief only, protecting Delaware's good-faith reliance on the FDA's plain language.

order" is so broad that it includes all prepaid orders to pay money, it would sweep in cashier's checks and call into question the practices of these financial institutions. The same is true of the many other financial instruments that the Special Master recognized could be considered "money orders" under the broadest definition of that term. *See* App.55. Without a clear rule of decision, this Court may soon find itself enmeshed in highly fact-specific disputes over the status of other written instruments. Delaware's proposed approach avoids that result.

CONCLUSION

The Court should decline to adopt the Special Master's recommendation, grant Delaware's motion for summary judgment on liability, and hold that MoneyGram teller's checks and agent checks do not fall within the FDA and are subject to escheatment under the common-law rule.

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APPENDIX

APPENDIX A

STATUTORY PROVISIONS INVOLVED

1. **12 U.S.C. § 2501 provides:**

§ 2501. Congressional findings and declaration of purpose

The Congress finds and declares that—

(1) the books and records of banking and financial organizations and business associations engaged in issuing and selling money orders and traveler's checks do not, as a matter of business practice, show the last known addresses of purchasers of such instruments;

(2) a substantial majority of such purchasers reside in the States where such instruments are purchased;

(3) the States wherein the purchasers of money orders and traveler's checks reside should, as a matter of equity among the several States, be entitled to the proceeds of such instruments in the event of abandonment;

(4) it is a burden on interstate commerce that the proceeds of such instruments are not being distributed to the States entitled thereto; and

(5) the cost of maintaining and retrieving addresses of purchasers of money orders and traveler's checks is an additional burden on interstate commerce since it has been determined that most purchasers reside in the State of purchase of such instruments.

2. **12 U.S.C. § 2502 provides:**

§ 2502. Definitions

As used in this chapter—

(1) "banking organization" means any bank, trust company, savings bank, safe deposit company, or a private banker engaged in business in the United States;

(2) "business association" means any corporation (other than a public corporation), joint stock company, business trust, partnership, or any association for business purposes of two or more individuals; and

(3) "financial organization" means any savings and loan association, building and loan association, credit union, or investment company engaged in business in the United States.

3. **12 U.S.C. § 2503 provides:**

§ 2503. State entitlement to escheat or custody

Where any sum is payable on a money order, traveler's check, or other similar written instrument (other than a third party bank check) on which a banking or financial organization or a business association is directly liable—

(1) if the books and records of such banking or financial organization or business association show the State in which such money order, traveler's check, or similar written instrument was purchased, that State shall be entitled exclusively to escheat or take custody of the sum payable on such instrument, to the extent of that State's power under its own laws to escheat or take custody of such sum;

(2) if the books and records of such banking or financial organization or business association do not show the State in which such money order, traveler's check, or similar written instrument was purchased, the State in which the banking or financial organization or business association has its principal place of business shall be entitled to escheat or take custody of the sum payable on such money order, traveler's check, or similar written instrument, to the extent of that State's power under its own laws to escheat or take custody of such sum, until another State shall demonstrate by written evidence that it is the State of purchase; or

(3) if the books and records of such banking or financial organizations or business association show the State in which such money order, traveler's check, or similar written instrument was purchased and the laws of the State of purchase do not provide for the escheat or custodial taking of the sum payable on such instrument, the State in which the banking or financial organization or business association has its principal place of business shall be entitled to escheat or take custody of the sum payable on such money order, traveler's check, or similar written instrument, to the extent of that State's power under its own laws to escheat or take custody of such sum, subject to the right of the State of purchase to recover such sum from the State of principal place of business if and when the law of the State of purchase makes provision for escheat or custodial taking of such sum.