Nos. 145, 146, Original

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 Report of Special Master

REPLY OF DEFENDANTS IN NO. 145 AND PLAINTIFFS IN NO. 146 TO DELAWARE'S EXCEPTIONS TO FIRST INTERIM REPORT OF SPECIAL MASTER AND SUPPORTING BRIEF

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QUESTIONS PRESENTED

Thirty States claim Delaware has unlawfully escheated funds payable on certain unclaimed instruments issued by MoneyGram. Under the federal Disposition of Abandoned Money Orders and Traveler's Checks Act, these funds should have escheated to the State in which the instruments were purchased, rather than to Delaware as MoneyGram's State of incorporation. The Act is designed to prevent one State from receiving a windfall because a large issuer of certain instruments happened to incorporate there, at the expense of many States which then receive no benefit from essentially local transactions. Thus, the Special Master recommended the Court hold the statute applies.

The Court should overrule Delaware's exceptions and remand this case for a damages proceeding. The questions presented by the exceptions are:

1. Whether certain MoneyGram products that are prepaid drafts issued by a business entity for safely transmitting money to a named payee are "money orders" under the Federal Disposition Act.

2. Whether, if those products are not "money orders," they are "similar written instruments" under the Act.

3. Whether, if those products are "similar written instruments," they fall within the Act's exclusion for "third party bank checks."

PARTIES TO THE PROCEEDINGS

In No. 145, the plaintiff is the State of Delaware; and the defendants are the States of Pennsylvania and Wisconsin.

In No. 146, the plaintiffs are 28 States: Arkansas, Texas, and California, along with Alabama, Arizona, Colorado, Florida, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, Utah, Virginia, Washington, West Virginia, and Wyoming; and the defendant is the State of Delaware.

In this brief, the two States that are defendants in No. 145, and the 28 States that are plaintiffs in No. 146 are collectively referred to as the Claimant States.

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INTRODUCTION

Congress has enacted rules to ensure that certain unclaimed financial instruments are escheated to the State of purchase and not to the State of the issuer's incorporation. More than 50 years ago, that enactment, the Disposition of Abandoned Money Orders and Traveler's Checks Act, overrode the common-law rule that had required unclaimed funds payable on those instruments to be remitted to the State of the owner's last-known address or, if that address was unknown, to the State of the issuer's incorporation. Congress concluded that the common-law priority scheme raised significant concerns: In practice, unclaimed funds payable on these instruments were mostly remitted to the issuer's State of incorporation because issuers of money orders and traveler's checks usually kept no record of the owners' last-known address. Given that a small number of large companies issued most of these instruments, the common-law rule meant one or two States would enjoy an enormous windfall. The effect of the rule was to channel unclaimed funds from the States of issuance to States that lacked a connection to the purchase.

To address these concerns, Congress adopted a new rule providing that "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" must be remitted to

the State of purchase when the instrument becomes unclaimed property. 12 U.S.C. 2503.

MoneyGram Payment Systems, Inc., has a line of products that it calls "Official Checks." The Official Check products relevant here fall within that Act's scope. All MoneyGram Official Checks are functionally the same. The purchaser prepays the value to the seller, an agent of MoneyGram, who then transfers the funds to MoneyGram. MoneyGram commingles these funds with funds payable on all its paper-based, money-transfer products. And MoneyGram does not receive information about the purchaser.

Despite these similarities, MoneyGram remits unclaimed funds differently for its various money-transmission products marketed as Official Checks. For one type, it remits funds to the State of purchase, as Congress statutorily required. For two others, it remits funds to Delaware, MoneyGram's State of incorporation. Simply because MoneyGram chose to incorporate there, Delaware today receives a windfall—a disproportionate share of the funds payable on unclaimed Official Checks. This recreates the inequity that Congress set out to correct in the Act.

Asking this Court to enforce Congress's corrective legislation, 30 States have brought claims against Delaware for return of the funds it wrongfully accepted from MoneyGram. The Court appointed Judge Pierre Leval as Special Master to consider these claims. After years of discovery, he now recommends partial summary judgment for the Claimant States.

MoneyGram Official Checks are "money orders," he concluded, or at the very least, "similar written instruments" within the Act's scope. And no Official Checks are excluded as "third party bank checks," a term that refers either to a bank check indorsed to a third-party payee, or to non-prepaid checks drawn on a normal checking account—not to prepaid instruments issued by an entity like MoneyGram.

Therefore, the statutory rule—and not the common law—applies. Applying the Act to MoneyGram Official Checks is consistent with its text and enumerated purposes. The Court should overrule the exceptions and adopt Judge Leval's recommendation.

STATEMENT

I. Legal Background

A. The Court's Common-Law Unclaimed, Intangible Property Rules

This case implicates each State's sovereign power to "acquire title to abandoned property." *Texas v. New Jersey*, 379 U.S. 674, 675 (1965). This power is commonly called escheatment. *See* Report 1 n.1; *see also Delaware v. New York*, 507 U.S. 490, 497 & n.9 (1993). It allows States to use abandoned property "for the general good rather than" leave it "for the chance enrichment of particular individuals or organizations." *Standard Oil Co. v. New Jersey*, 341 U.S. 428, 436 (1951); *see* Note, *Origins and Development of Modern Escheat*, 61 Colum. L. Rev. 1319, 1326-27 (1961).

Each Claimant State has a statutory regime under which it escheats unclaimed property. *See* Doc. 89[1] at 53-54 (Table A) (collecting citations).

For tangible property, "it has always been the unquestioned rule in all jurisdictions that only the State in which the property is located may escheat." *Texas*, 379 U.S. at 677. And this Court has long upheld the States' power to do so. *See* Report 7-8 (collecting citations). "But intangible property" is not "located on a map." *Texas*, 379 U.S. at 677. Thus, when States began escheating intangible property, disputes arose between States with competing claims. *Western Union Telegraph Co. v. Pennsylvania*, 368 U.S. 71 (1961), established this Court as the forum for interstate unclaimed-property disputes. *See id.* at 79-80.

Four years later, the Court started answering "the difficult legal questions presented" by such disputes. *Id.* In *Texas v. New Jersey*, the Court addressed which State could escheat "various small debts" owed by Sun Oil that its creditors had left unclaimed. 379 U.S. at 675. Lacking any "applicable federal statute," *id.* at 677, the Court looked "primarily [to] principles of fairness," *id.* at 680. It thus rejected a proposal that all funds escheat to Sun Oil's State of incorporation. That would focus too much on a "minor factor" (where "the debtor happened to incorporate") at the expense

[1] The "Doc." number for an item refers to its docket number on the Special Master's docket, available at https://ww2.ca2.uscourts.gov/specialmaster/special_145.html.

of other States. *Id.* The Court instead required the funds to escheat "to the State of the creditor's last known address as shown by the debtor's books and records." *Id.* at 680-81. That rule "tend[ed] to distribute escheats among the States in the proportion of the commercial activities of their residents" and would be easily administrable. *Id.* at 681. If there were no record of the creditor's address, the funds would escheat to the State of the debtor's incorporation "until some other State [came] forward with" a superior claim. *Id.* at 682.

In *Pennsylvania v. New York*, 407 U.S. 206 (1972), Pennsylvania sued New York for funds payable on unclaimed Western Union money orders purchased in Pennsylvania, which it said New York had wrongly escheated as the State of Western Union's incorporation. *See id.* at 207-08. Western Union did not keep purchaser addresses. *Id.* at 215. So "strict application of the *Texas v. New Jersey* rule" would send "almost all the funds to the State of incorporation." *Id.* at 212. That resulted in a "'windfall' for New York." *Id.* at 214; *see id.* at 221 (Powell, J., dissenting) ("the opinion appears to recognize that New York will reap the very 'windfall' that *Texas v. New Jersey* sought to avoid"). But the Court concluded that did not justify an "exception to the *Texas* rule." *Id.* at 214 (majority op.).

Three Justices dissented. For instruments like money orders, they argued the escheat power ought to

lie with "the State where the debtor–creditor relationship was established"—that is, the State of purchase. *Id.* at 219-20 (Powell, J., dissenting).

B. The Federal Disposition Act

In 1974, Congress abrogated *Pennsylvania* by enacting the Disposition of Abandoned Money Orders and Traveler's Checks Act (the "Federal Disposition Act" or "FDA"), Pub. L. No. 93-495, secs. 601-04, 88 Stat. 1500, 1525-26 (codified at 12 U.S.C. 2501-03). *See Delaware*, 507 U.S. at 510 ("Congress overrode *Pennsylvania* by passing [the FDA]").

For money orders, traveler's checks, and similar instruments, Congress displaced the *Texas* rule with a requirement that funds escheat to the State of purchase. Funds "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" must be remitted to the State of purchase when: "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"; and that State has "power under its own laws to escheat or take custody of such sum." 12 U.S.C. 2503(1). Congress did not define "money order," "traveler's check," or "third party bank check." *See id.* 2502.

Congress adopted this provision to assure a fairer distribution of unclaimed funds. Congress expressly

found that 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." *Id.* 2501(1). Congress further found that "a substantial majority of such purchasers reside in the States where such instruments are purchased." *Id.* 2501(2). Accordingly, "as a matter of equity," the States of purchase should "be entitled to the proceeds of such instruments in the event of abandonment." *Id.* 2501(3). Congress also found it "a burden on interstate commerce" that the proceeds were not distributed to the "States entitled thereto." *Id.* 2501(4). And "since it has been determined that most purchasers reside in the State of purchase," imposing new recordkeeping requirements on issuers would be "an additional burden on interstate commerce." *Id.* 2501(5).

In the final bill, Congress adopted "clarifying amendments" in response to a letter from the Treasury Department. Del.App.568.[2] That letter expressed a concern that the bill could be misconstrued to cover "third party payment bank checks." *Id.* at 575 (reprinting letter). Treasury thus recommended "this ambiguity be cured by defining [the FDA's] terms to exclude third party payment bank checks." *Id.* Congress adopted Treasury's "technical suggestion[]," *id.*

[2] Citations designated "Del.App." are to the appendix Delaware filed with its exceptions.

at 576, calling it a "minor change[]," *id.* at 579 (floor statements of Sen. Sparkman). The final legislation limited its coverage of "other similar written instrument[s]" by including an exception for "third party bank check[s]." 12 U.S.C. 2503.

II. Factual Background

This case is about unclaimed, intangible property held by MoneyGram Payment Systems, Inc., a subsidiary of MoneyGram International, Inc., the world's second largest money-transfer business. *See* App.55.[3]

MoneyGram markets two lines of prepaid, paper-based money-transfer products: "Retail Money Orders" and "Official Checks." *See id.* at 326-27, 351, 355-56; *see also id.* at 544-46. These products differ little. MoneyGram lacks information about the purchaser or payee, and MoneyGram—not the selling institution—holds the funds payable. Yet MoneyGram escheats Retail Money Orders and one type of Official Check to the State of purchase (as the FDA requires), while remitting two other types of Official Checks to the State of incorporation (per the *Texas* rule). *See id.* at 291-92, 597-98; *see also id.* at 70-71, 74, 82.

A. MoneyGram "Retail Money Orders"

Pursuant to the FDA, MoneyGram remits funds payable on unclaimed Retail Money Orders to the

[3] Citations designated "App." are to the simultaneously filed appendix in support of this brief.

State of purchase, a practice unchallenged by Delaware. *See id.* at 291-92; *see also* Report 22.

A purchaser buys a Retail Money Order by remitting the amount imprinted on the face of the instrument, plus any applicable fee, to the seller, "which could be a retail store," "a convenience store," or "a financial institution." App.335; *see id.* at 338; *see also id.* at 449-62 (exemplars). In return, the purchaser receives a written money order on which the purchaser can identify the desired recipient or payee. *Id.* at 334.

Each Retail Money Order designates MoneyGram as the "issuer/drawer." *See, e.g.*, *id.* at 449; *see also id.* at 334. These designations mean the same thing. *See* Report 22 n.13; *see also* App.220-21. The "drawer" is "a person who signs or is identified in a draft as a person ordering payment." Unif. Comm. Code ("U.C.C.") 3-103(a)(5) (Am. L. Inst. & Nat'l Conf. of Comm'rs on Unif. State L. 2002 amd.); *see id.* 3-104(e) (defining "draft" as "an order" to pay). And an "issuer" is "a maker or drawer of an instrument." *Id.* 3-105(c). The seller acts as MoneyGram's agent. *See* App.333-34.

When an agent sells a Retail Money Order, it reports four pieces of information to MoneyGram: (1) the instrument's dollar amount; (2) the serial number; (3) the sale date; and (4) the "agent ID or a customer number that indicates who *sold* it"—and where—but not who *bought* it. *Id.* at 434-36 (emphasis added). The agent does not convey information to

MoneyGram about the purchaser or the payee. *See id.* at 342-43, 594.

MoneyGram holds the funds payable on all its outstanding Retail Money Orders in its own portfolio of accounts—commingled with the funds payable on its other paper-based payment products, including Official Checks. *Id.* at 339-41, 443-44. MoneyGram remains the funds' holder until a Retail Money Order is presented for payment or remains dormant long enough to become subject to unclaimed-property laws. *Id.* at 341-42, 364. Retail Money Orders are processed through MoneyGram's "clearing bank," which allows MoneyGram to use its routing and transit numbers in the Federal Reserve's clearing process. *See id.* at 330-31, 347-48, 365-66.

If a Retail Money Order is presented for payment, MoneyGram pays it out of its commingled portfolio. *Id.* at 348. If not, then MoneyGram remains the holder of the unclaimed funds and is responsible for reporting them to the appropriate State. *Id.* at 310-12, 315-16, 320. It remits those funds for escheatment pursuant to the FDA. *Id.* at 291-92.

B. MoneyGram "Official Checks"

Since 1979, MoneyGram has offered another line of prepaid money-transfer products to financial institutions (both banks and credit unions) that in turn sell these products to their own customers; use them to pay their own obligations; or both. *See id.* at 56, 326,

374-76, 545. MoneyGram calls these products "Official Checks." *See id.* at 327-28. The term "official check" has no generic meaning, under the U.C.C. or otherwise. *See* Exceptions 10. It is simply MoneyGram's proprietary label for products processed through its "PrimeLink Official Check" platform. *See* App.570 (chart of products); *id.* at 360 (discussing category). This "product line" includes, as relevant here, Teller's Checks, Agent Checks, and Agent Check Money Orders. *Id.* at 332, 575.

Despite the similarities between these products, MoneyGram remits unclaimed Agent Check Money Orders pursuant to the FDA, but Agent Checks and Teller's Checks to Delaware under the *Texas* rule. Report 24 & n.15.

1. MoneyGram "Agent Check Money Orders"

An Agent Check Money Order is "the same product" as a Retail Money Order, except that "it's on [the] official check platform." App.351; *see id.* at 356, 369-70; *see also id.* at 463, 469 (exemplars). Indeed, "[t]here is no legal distinction between an Agent Check Money Order and one purchased from one of MoneyGram's retail agents." *Id.* at 14. For both, the seller acts only as MoneyGram's agent and is not a party to the instrument. *Id.* at 403; *see id.* at 483 (defining Agent Check Money Order). As with Retail Money Orders, MoneyGram is both the "drawer" and the "issuer." *Id.* at 356, 358; *see id.* at 463, 469.

An Agent Check Money Order is purchased and processed like a Retail Money Order. The purchaser prepays its value. *Id.* at 402-06, 545-46. The seller then submits to MoneyGram the same four pieces of information: (1) value, (2) purchase date, (3) serial number, and (4) seller's identification number. *Id.* at 436-39. The seller does not submit any information about the purchaser or payee. *Id.* at 371-72.

Finally, as with Retail Money Orders, MoneyGram holds the funds payable on Agent Check Money Orders in its commingled portfolio for all its paper-based payment products. *Id.* at 368-69, 438-39, 443-44. If the instrument is presented for payment, it goes through the same clearing-bank process. *Id.* at 356, 358-60, 370-71. If it is not, then, as above, MoneyGram remains the holder of the funds payable. *Id.* at 293. MoneyGram reports funds payable on unclaimed Agent Check Money Orders and Retail Money Orders in the same way—to the State of purchase under the FDA. *Id.* at 291, 568-70.

2. MoneyGram "Agent Checks"

MoneyGram markets a separate Official Check product called "Agent Checks." Agent Checks are interchangeable with Agent Check Money Orders. MoneyGram itself defines "Agent Check Money Orders" as "Agent Checks that are used as money orders." *Id.* at 483. At the "option" of MoneyGram's financial-institution customers, Agent Checks "may be used as money orders, but they are Agent Checks

for the purposes of" the agreement with MoneyGram. *Id.* at 476; *see id.* at 468, 472, 510 (exemplars); *id.* at 408-10 (discussing exemplar at App.472).

Agent Checks are purchased and processed in the same way as Retail Money Orders and Agent Check Money Orders. The purchaser remits the Agent Check's face value to the seller, *id.* at 545-46, who acts as MoneyGram's agent, while MoneyGram is again the drawer and issuer, *id.* at 397-98; *see id.* at 493 (chart of these relationships). The seller sends MoneyGram the same four pieces of information: (1) amount; (2) date; (3) serial number; and (4) seller number. *Id.* at 436-39. As Delaware acknowledges, though sellers may choose to collect purchaser information, "they do not transmit this information to MoneyGram." Exceptions 12; *see* App.371-72, 377-78. And MoneyGram holds the funds payable in the same commingled portfolio. App.368-69, 443-44; *see id.* at 73-74. When presented for payment, an Agent Check goes through the same clearing-bank process. *Id.* at 400-01.

Nevertheless, MoneyGram escheats unclaimed Agent Checks differently, following the *Texas* rule instead of the FDA. So it remits these funds to the State of its incorporation—Minnesota until 2005, and Delaware since 2005. *See id.* at 570, 587-88. MoneyGram's designee on this topic could not explain this singular treatment. *Id.* at 311-14.

3. MoneyGram "Teller's Checks"

Finally, MoneyGram offers instruments it calls "Teller's Checks," a proprietary MoneyGram term. Despite their name, these instruments are not "teller's checks" as defined by the U.C.C. Report 28 n.19; *see* App.220-25, 467, 470, 514 (exemplars).

MoneyGram Teller's Checks are purchased and processed in the same way as Retail Money Orders, Agent Check Money Orders, and Agent Checks. The purchaser remits the value to the seller. App.382-84; *see id.* at 78-79. MoneyGram is identified as the issuer, while the selling financial institution is described as a drawer. *See, e.g.*, *id.* at 514. On a check, "[t]here is no difference between the two terms" issuer and drawer, so "there are two drawers on MoneyGram Teller's Checks." *Id.* at 220-21. Consistent with that principle, MoneyGram's contracts provide that Teller's Checks are "drawn by" both the seller and MoneyGram. *See id.* at 497; *cf.* U.C.C. 3-105(c) (defining "issuer" and "drawer" as synonyms). And at least some of those contracts make the seller MoneyGram's agent for purposes of selling Teller's Checks. *See* App.484 (section entitled "Appointment").

In any event, the sellers' and MoneyGram's roles are the same as for Retail Money Orders, Agent Check Money Orders, and Agent Checks. The seller collects the purchaser's money and forwards it to MoneyGram along with four pieces of information (amount, date, serial number, and seller ID), but no purchaser information. *Id.* at 377-78, 392-94, 399, 436-37. And the

funds are held in MoneyGram's commingled portfolio. *Id.* at 391, 443-44.

Initially, MoneyGram reported unclaimed Teller's Checks either to the States of purchase or the State in which their financial-institution customer was incorporated. *Id.* at 585-88. But since 2005 it has reported unclaimed Teller's Check proceeds to Delaware. *Id.*; *see id.* at 290-93.

III. Procedural Background

A. Arkansas, Texas, and other States learned in 2014 that MoneyGram had been remitting funds payable on unclaimed Agent Checks and Teller's Checks to Delaware. *Id.* at 84. After corresponding with MoneyGram, Arkansas and a group of other States hired a firm to audit MoneyGram's unclaimed-property compliance. *See id.* at 246-53.

The audit revealed that, between 2002 and 2017, "[l]ess than one half of one-percent of all official check property escheated to the State of Delaware was actually purchased in Delaware." *Id.* at 527. In raw dollars, MoneyGram should have remitted to Delaware only around $1 million, but Delaware received $250 million. *Id.* The auditing States then wrote to Delaware, requesting that it re-allocate the funds payable on the relevant unclaimed MoneyGram products pursuant to the FDA. *See id.* at 253-55. Delaware refused.

B. Two separate lawsuits were filed in 2016 challenging Delaware's escheatment of MoneyGram Agent Checks and Teller's Checks. First, Pennsylvania sued Delaware and MoneyGram in federal district court. *See* Complaint, *Treasury Dep't of Pa. v. Gregor*, No. 1:16-CV-00351-JEJ (M.D. Pa. Feb. 26, 2016), ECF No. 1. Shortly thereafter, Wisconsin filed a similar lawsuit. *See* Complaint, *Wis. Dep't of Rev. v. Gregor*, No. 3:16-CV-00281-WMC (W.D. Wis. Apr. 27, 2016), ECF No. 1.

A month later, Delaware moved this Court for leave to file a bill of complaint against Pennsylvania and Wisconsin. Delaware sought a declaration that MoneyGram Official Check products are not covered by the FDA's unclaimed-property rules. *See* Report 30-31. The district courts put the previously filed lawsuits on hold pending resolution of Delaware's original action. *See* Order, *Treasury Dep't of Pa. v. Gregor*, No. 1:16-CV-00351-JEJ (M.D. Pa. Oct. 5, 2016), ECF No. 48; Order, *Wis. Dep't of Rev. v. Gregor*, No. 3:16-CV-00281-WMC (W.D. Wis. June 21, 2016), ECF No. 12.

Two weeks after Delaware's filing, a separate motion for leave to file a bill of complaint was filed by Arkansas, on behalf of itself and 20 other States. *See* Motion for Leave to File Bill of Complaint, *Arkansas v. Delaware*, No. 146, Orig. (June 9, 2016). These 21 States sought a judgment awarding them "the sums payable on unclaimed and abandoned MoneyGram official checks purchased in [these] States and unlawfully remitted to the State of Delaware," and "to future

sums payable on unclaimed and abandoned MoneyGram official checks purchased in [these] States." Prayer, Bill of Complaint at 17-18, *Arkansas v. Delaware*, No. 146, Orig. (June 9, 2016).

The Court granted the Arkansas coalition's motion for leave, consolidated that coalition's action with Delaware's action against Pennsylvania and Wisconsin, and appointed Second Circuit Judge Pierre N. Leval as Special Master for the consolidated cases. *See* Doc. 9; Doc. 31. Judge Leval subsequently bifurcated the proceedings. In the first phase, he would consider only liability—that is, "which State or States would have priority to take custody of the proceeds." Report 32. Only after determining liability would Judge Leval proceed to the second phase, the "litigation of damages due." *Id.*

Later, seven more States were granted leave to join the Arkansas coalition's bill of complaint. *See* Doc. 10; Doc. 19; Doc. 48; Doc. 49. Following discovery, which included testimony from MoneyGram designees and three experts in payment systems, the Claimant States and Delaware cross-moved for partial summary judgment on liability.

C. Judge Leval's report recommended that the Court grant the Claimant States' motion for partial summary judgment and deny Delaware's cross-motion. *See* Report 1a. He first concluded that MoneyGram Agent Checks and Teller's Checks are money orders under the FDA. *See id.* at 34-56. Delaware had, he said, "simply pointed to every observable

feature of MoneyGram's instruments that bear a printed legend 'money order' that is not also true of those it sells under the names 'Agent Check' and 'Teller's Check,' no matter how inconsequential and regardless of whether those features materially affect the rights and obligations of users, treating them as if they served to define the essence of money orders." *Id.* at 43-44.

Judge Leval credited the Claimant States' position that not only do MoneyGram Official Checks fall within the ordinary meaning of "money order," *see id.* at 39-40, but "the stated purposes of the FDA are served by treating the[m] as 'money orders,'" because "MoneyGram does not maintain records of the addresses of purchasers," *id.* at 49; *cf.* 12 U.S.C. 2501(1).

Alternatively, Judge Leval recommended that the Court hold that MoneyGram Official Checks are "other similar written instrument[s] (other than a third party bank check) on which a banking or financial organization or a business association is directly liable." Report 56. First, he explained the similarities between money orders and traveler's checks that led to their inclusion in the FDA, which are largely detailed in Congress's findings. *Id.* at 59-60; *see* 12 U.S.C. 2501. He concluded that even if MoneyGram Agent Checks and Teller's Checks "do *not* come within the FDA by *being* money orders, they undoubtedly come within the statute's coverage of 'other similar written instruments.'" Report 63-64.

Second, Judge Leval recommended that the Court hold that MoneyGram is "a business association [that] is directly liable" on its Agent Checks and Teller's Checks. *Id.* at 64-72.

Third, Judge Leval recommended holding that Agent Checks and Teller's Checks are not "third party bank checks." *Id.* at 72-79. Judge Leval credited the expert opinion of Barkley Clark that "third party bank check" was meant as a term of art for non-prepaid checks "drawn on a personal or business checking account at a bank." *Id.* at 76. And MoneyGram Official Checks fall outside that definition. *Id.* at 78-79. He rejected Delaware's proposed definition. Among other reasons, "Delaware's own expert," Professor Ronald Mann of Columbia Law School, "did not endorse [it]." *Id.* at 73. Mann, like the other payment-systems experts, said that he had seen no MoneyGram products that fit "any ordinary sense of what ['third party bank check'] should mean." *Id.* (quoting App.283).

Having concluded that the relevant MoneyGram Official Checks are covered by the FDA, Judge Leval faced a final question: whether the Claimant States have the state-law power to escheat them. He rejected Delaware's argument that ten of these States lack such power. *Id.* at 79-91. Delaware takes no exception to this recommendation.

Judge Leval recommended a judgment that Delaware is liable to the Claimant States for funds payable on unclaimed MoneyGram Agent Checks and Teller's

Checks that were purchased in those States yet remitted to Delaware. *Id.* at 93.[4]

SUMMARY OF THE ARGUMENT

The Court should overrule the exceptions and adopt Judge Leval's recommendation that the FDA applies to the disputed products.

I. MoneyGram Agent Checks and Teller's Checks are money orders. The ordinary meaning of "money order" in 1974 was a prepaid draft issued by a post office, bank, or business entity used to transmit money to a named payee. Agent Checks and Teller's Checks fit that description. And because MoneyGram maintains no records of their purchasers, applying the FDA here would further its express purposes. There is no textual or historical warrant for holding that only instruments bearing the label "money order" qualify, as Delaware primarily argues.

II. If not money orders, Agent Checks and Teller's Checks would still fall within the FDA's coverage for "similar" instruments. Like money orders and traveler's checks, these MoneyGram instruments are prepaid money-transmission products. And they

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[4] Judge Leval separately denied as moot Pennsylvania's motion for partial summary judgment on its counterclaim seeking a modification of the common law. Report 91-92. He noted the Court could address this counterclaim at a later stage, if necessary. *Id.* Delaware did not except to this recommendation; thus, Pennsylvania's counterclaim remains unresolved.

share a key feature that motivated Congress: "the [issuer's] books and records . . . do not, as a matter of business practice, show the last known addresses of purchasers." 12 U.S.C. 2501(1). Delaware does not dispute that MoneyGram lacks such information, instead primarily claiming Congress meant to capture instruments with alternate spellings of "traveler's check," like "cheque." Delaware cites no evidence that Congress's primary concern was spelling.

Instruments similar to money orders and traveler's checks are within the FDA, unless excluded as "third party bank checks." These MoneyGram instruments are not so excluded, as Judge Leval concluded, because the history of this term demonstrates that it refers to a non-prepaid check, drawn on an ordinary personal or business checking account. Nor would they be excluded under the term's ordinary meaning, as explained by Professor Gillette. Delaware's alternative position lacks support, and Delaware's own expert disagreed with it.

III. Adopting Judge Leval's approach would create none of the practical problems suggested by Delaware or *amicus* the American Bankers Association. To the contrary, it calls for application of the test that Congress itself set out in the FDA. And it would lead to the precise result Congress intended: escheating the proceeds of unclaimed funds to the State of purchase, thereby avoiding a windfall to the State where the money-transmitting company happened to incorporate.

ARGUMENT

The Court should adopt Judge Leval's recommendation and grant partial summary judgment for the Claimant States. *See* Fed. R. Civ. P. 56(a); Sup. Ct. R. 17.2; *see also Montana v. Wyoming*, 577 U.S. 423 (2016) (granting partial summary judgment); *Nebraska v. Wyoming*, 507 U.S. 584, 590, 603 (1993) (same). The undisputed facts show that each disputed MoneyGram product is "a money order"; or at least a "written instrument (other than a third party bank check)" that is "similar" to money orders and traveler's checks. 12 U.S.C. 2503; *see* Report 21. Therefore, the Claimant States are "entitled to judgment as a matter of law" that the FDA—and not the common-law rule—determines which State receives funds payable on unclaimed Agent Checks and Teller's Checks. *Alabama v. North Carolina*, 560 U.S. 330, 344 (2010) (quoting current Fed. R. Civ. P. 56(a)).

I. MoneyGram Agent Checks and Teller's Checks are "money orders" under the FDA.

The FDA applies to "any sum [that] is payable on a money order." 12 U.S.C. 2503. Congress did not define the term "money order," but the term's ordinary meaning at the time of the FDA's enactment covers MoneyGram Agent Checks and Teller's Checks. A money order was understood to be a prepaid draft issued by a post office, bank, or business entity used to transmit money to a named payee. Because Money-

Gram Agent Checks and Teller's Checks fit this ordinary meaning, the FDA controls here—a conclusion consistent with the Act's express purposes. In response, Delaware principally asserts that only instruments with "the words 'money order' . . . printed on the face" are money orders. Exceptions 34. But Delaware cites no evidence that such labeling concerns motivated the FDA. The Court should overrule its exceptions.

A. In 1974, a "money order" was a prepaid draft issued by a post office, bank, or business entity and payable to a named payee.

At the time of the FDA's enactment, the ordinary meaning of "money order" was a prepaid draft issued by a post office, bank, or business entity used to transmit money to a named payee. *See* Report 37-41, 48-49, 54-56.

Dictionaries make this clear. *See, e.g.*, *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013) (relying on dictionary definitions). They define "money order" simply as "[a]n order for the payment of money." *Money order*, Webster's Second New International Dictionary (1934); *accord Money order*, Webster's Third New International Dictionary (1961). The American Heritage Dictionary provided that a "money order" is "[a]n order for the payment of a specified amount of money, usually issued and payable at a bank or post office." *Money order*, American Heritage Dictionary of the

English Language (1st ed. 1969); *see, e.g.*, *Money order*, Webster's New Collegiate Dictionary (7th ed. 1967) ("an order issued by a post office, bank, or telegraph office for payment of a specified sum of money at another office"). And contemporaneous versions of the Oxford English Dictionary also highlight that a money order is for payment "of a specified sum," though they focused on postal money orders. *See Money order*, Oxford English Dictionary (1st ed. 1933); *accord Money order*, Shorter Oxford English Dictionary (3d ed. 1959 reprint).

As an order for the payment of money, a money order is a "draft." *See* Unif. Comm. Code 3-104(2)(a) (Am. L. Inst. & Nat'l Conf. of Comm'rs on Unif. State L. 1972) (defining draft).

Money orders are also prepaid, and prepayment is the "essential characteristic" of a money order. *Money order*, Black's Law Dictionary (5th ed. 1979). A money order "is purchased for [the] purpose of paying a debt or to transmit funds *upon credit of the issuer of the money order*." *Id.* (emphasis added). Delaware has acknowledged "that money orders are at a minimum pre-paid instruments." Doc. 79 at 17. Prepayment distinguishes them from many other instruments that qualify as drafts under the U.C.C. A check, for example, is a type of draft that is not necessarily prepaid. *See* Del.App.452 n.76, 456 (reprinting Note, *Personal Money Orders and Teller's Checks: Mavericks Under the UCC*, 67 Colum. L. Rev. 524 (1967) (hereinafter,

"*Mavericks*")). Professor Clayton Gillette, whose opinions are part of the summary-judgment record, agreed: "A money order is a prepaid draft, or payment order, that the seller provides to a purchaser in a specified amount that is typically imprinted on the face of the instrument." App.191.

Because the purchaser prepays the value to the issuer, and the issuer then holds the funds, the issuer is responsible for paying once the money order clears—not the purchaser. Prepayment allows the market to treat money orders as "more reliable" than ordinary checks. Del.App.436 n.28 (*Mavericks*, *supra*, 67 Colum. L. Rev. 524). For example, licensed check cashing agencies will sometimes cash money orders, although they "are often reluctant to take ordinary personal checks." Henry J. Bailey, *Bank Personal Money Orders as Bank Obligations*, 81 Banking L.J. 669, 671 (1964).

Additionally, money orders are payable to a named payee. The 1968 edition of Black's Law Dictionary discusses this characteristic in the context of postal money orders, which are drawn "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*." *Money order*, Black's Law Dictionary (4th ed. rev. 1968) (emphasis added). The 1979 edition discusses all money orders, similarly defining them as a "[f]orm of credit instrument calling for payment of money to [a] named

payee." Black's 5th ed., *supra*, *Money order*.[5] To be sure, the payee need not be named at the time of purchase. *See* Del.App.433 (*Mavericks*, *supra*, 67 Colum. L. Rev. 524). But a payee is named at some point prior to presentment.[6]

Money orders present unclaimed-property problems because they are prepaid and issuers generally do not have information about the purchaser or payee. App.192-93 (Gillette report). With a money order, "[t]he transaction is in the nature of a sale." *Rose Check Cashing Serv., Inc. v. Chem. Bank N.Y. Tr. Co.*, 244 N.Y.S.2d 474, 477 (N.Y. Civ. Ct. 1963). "The funds to pay the instrument," therefore, "immediately come within the [issuer's] exclusive control." *Id.*

Taken together, the sources above show that, at the time the FDA was enacted, a "money order" was understood to be a prepaid draft issued by a post office, bank, or business entity and used by a purchaser to safely transmit money to a named payee.

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[5] *Amicus* dubs it "improper" to discuss a dictionary published five years after the FDA's enactment. *See* Br. of *Amicus Curiae* Am. Bankers Ass'n 19-20. But this ignores that "[d]ictionaries tend to lag behind linguistic realities." Antonin Scalia & Bryan Garner, *Reading Law* 419 (2012).

[6] Money orders must have a named payee, which distinguishes them from gift cards, for example. This fact undermines Delaware's claim that prepaid cards, like gift cards, would fall within the ordinary definition of "money order." *See* Exceptions 32 n.6.

B. MoneyGram Agent Checks and Teller's Checks are money orders within the meaning of the FDA.

MoneyGram Agent Checks and Teller's Checks are money orders, because they are prepaid drafts issued by a trusted business entity for safely transmitting money to a named payee. Indeed, Delaware never argues that they do not fit this definition. *See, e.g.*, Exceptions 33-36.

1. MoneyGram Agent Checks and Teller's Checks are prepaid drafts issued by a business entity for transmitting money to a named payee.

Agent Checks and Teller's Checks fit the ordinary definition of "money order." In fact, these instruments function just like other MoneyGram products that Delaware concedes are money orders.

An Agent Check is a draft, because it is an order to pay a named payee. *See, e.g.*, App.510 (exemplar). The purchaser of an Agent Check prepays its value plus a fee, and the selling institution (who acts only as MoneyGram's agent) then sends the funds to MoneyGram, which deposits them in its commingled account. *Id.* at 545-46; *see id.* at 368-69, 390-91, 443-44. The selling agent does not transmit any information about the purchaser. Exceptions 12; *see* App.370-72, 436-38. And MoneyGram holds the funds payable on an Agent Check in a commingled account with funds from Retail Money Orders and Agent Check Money

Orders until the Agent Check is presented for payment. *See id.* at 397-401, 443-44. Therefore, Agent Checks fit the ordinary definition of "money order."

The same is true for MoneyGram Teller's Checks. They, too, are drafts, because they are orders to pay a named payee. *See id.* at 467, 470, 514 (exemplars). The purchaser prepays the instrument's value plus any fee. *Id.* at 381-83. MoneyGram is the issuer. *See, e.g.*, *id.* at 497. The seller transfers the funds payable to MoneyGram, which keeps them in the same commingled investment portfolio as the funds from its other paper-based payment products until presentment. *Id.* at 390-91, 443-44. The seller does not send MoneyGram any information about the purchaser. *See id.* at 377-78, 392-94, 399, 436-37. Therefore, Teller's Checks satisfy the ordinary meaning of "money order."

In addition to meeting the ordinary definition of "money order," Agent Checks and Teller's Checks are materially similar to Agent Check Money Orders, which Delaware conceded "fall into the 'money order' category of the FDA." Doc. 79 at 22; *see* App.14-15; *see also* Report 46 n.31. With no objection from Delaware, MoneyGram already remits funds payable on unclaimed Agent Check Money Orders pursuant to the FDA. App.291-92; *see id.* at 474, 570.

Agent Check Money Orders and Agent Checks are so similar that MoneyGram allows its customers to use them interchangeably. *See id.* at 483 ("Agent Check Money Orders [are] Agent Checks that are used

as money orders by Financial Institution."). And Teller's Checks, in turn, are so similar to Agent Checks that either type of instrument sometimes bears only the generic label "Official Check." *Id.* at 406-09; *see id.* at 470-72 (exemplars).

Delaware attempts to find a functional distinction between Agent Check Money Orders and Agent Checks, but this distinction is unsupported. Citing testimony from one of MoneyGram's designees, Delaware asserts that Agent Checks are used by banks "to pay the bank's bills." Exceptions 11 (citing Del.App. 274-76). But as Judge Leval noted, this designee "expressly acknowledged that distributing financial institutions might be offering such checks to their customers." Report 26 n.18 (citing testimony reproduced at Del.App.275). "The evidence cited by Delaware does not support" its attempt to distinguish Agent Checks from Agent Check Money Orders. *Id.*

2. Holding that Agent Checks and Teller's Checks are money orders furthers the FDA's purposes.

"[T]he stated purposes of the FDA are served by treating the Disputed Instruments as 'money orders,'" as Judge Leval found. Report 49. Congress expressly identified the characteristics of money orders and traveler's checks that motivated the FDA. First among those characteristics, "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." 12 U.S.C. 2501(1). Because MoneyGram maintains no address records for Agent Checks and Teller's Checks, they fall within the description of the instruments that concerned Congress. This fact supports the conclusion that they are money orders under the FDA. *Cf. Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43-45 (1989) (referring to congressional findings to help define statutory term).

This conclusion is reinforced by the legislative history. *See* Exceptions 29-30. Congress "enacted the FDA to address" the fact that purchasers' "addresses are not typically kept" for money orders and traveler's checks. *Id.* For instance, the FDA's lead proponent, Senator Hugh Scott, introduced a memorandum explaining Congress's practical concerns: Because purchasers' "addresses do not generally exist" for money orders, "large amounts of money will, if [*Pennsylvania*] applies to such instruments, escheat as a windfall to the state of corporate domicile and not to the other 49 states." Del.App.589. And the Chair of the Senate Banking Committee described this as an important feature of instruments covered by the FDA. *See id.* at 579 ("It is worth pointing out that no records of purchasers' addresses are currently kept in the case of money orders and traveler's checks.").

The same unclaimed-property problem that motivated the FDA applies here. It is undisputed "MoneyGram does not maintain records of the addresses of

purchasers (or payees) of" Agent Checks or Teller's Checks. Report 49. Delaware acknowledges that MoneyGram's financial-institution customers do not transmit such information about purchasers to MoneyGram. Exceptions 12; *see* App.69-71, 73-74, 78, 83 (same concession before Judge Leval); *see also id.* at 370-71, 377-78, 393-94, 399, 436-37. Agent Checks and Teller's Checks therefore share the key feature of money orders that drove the FDA's enactment.

Applying the FDA to MoneyGram Agent Checks and Teller's Checks is also consistent with Congress's finding that "a substantial majority" of purchasers of money orders and traveler's checks "reside in the States where such instruments are purchased." 12 U.S.C. 2501(2). As Judge Leval explained, "there is no contention that purchasers of [MoneyGram Agent Checks and Teller's Checks] are any more likely to reside outside the State of purchase than what Congress noted with respect to purchasers of money orders." Report 49. Congress concluded "the States wherein 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." 12 U.S.C. 2501(3). The same considerations apply here.

C. Delaware's contrary arguments fail.

Rather than argue the ordinary definition of "money order" outlined above excludes Agent Checks and Teller's Checks, Delaware offers an alternative

definition: Money orders are "specific commercial products" that bear "the label 'money order' on their face." Exceptions 17. Its arguments elevate form over substance and lack support in the FDA's text.

1. Delaware's definition of a money order as a "specific commercial product" labeled "money order" lacks support.

Delaware's proposed definition is contrary to the ordinary meaning of "money order." The U.C.C. notes that money orders "vary in form." U.C.C. 3-104 cmt. 4. For example, they "are sold both by banks and non-banks." *Id.* The form of money orders "determines how they are treated." *Id.* The key questions for determining whether an instrument is a money order, both in 1974 and today, are whether it is a prepaid draft and whether it is issued by a trusted entity.

Delaware claims that a money order is defined by "*where* it is purchased," or a limit on its "*amount*," or, perhaps, *who* uses it and *how*. Exceptions 18-19. But none of these features determines whether an instrument is a money order. As to *where*, Delaware says money orders are "typically sold by a post office or companies such as Western Union or American Express." *Id.* at 33. Yet it elsewhere acknowledges that money orders are sold "at a variety of retailers, such as drug stores and supermarkets"—even at "banks." *Id.* at 5. Thus, focusing "on *where* money orders were sold" is no help. *Id.* at 19.

Nor is it helpful to focus on "their *amount*." *Id.* at 18. Delaware claims only that issuers "*often* limited their amount." *Id.* (emphasis altered). It nowhere claims that issuers always—or even usually—limited their value. And there was "no legal reason why a money order [could] not be issued in any amount desired." Bailey, *supra*, 81 Banking L.J. at 681. Western Union, which Delaware notes was a leading issuer in 1974, *see* Exceptions 33, issued money orders without any limit on their face value, *see* Del.App.334 (exemplar); *see also* Report 43 n.30.

Similarly unhelpful is Delaware's attempt to define money orders in terms of *who* used them and *how*. *See* Exceptions 18-19, 21. Its cited sources simply observe that "money orders 'are especially helpful to persons who do not have checking accounts,' " not that money orders are used only by such persons. *Id.* at 18 (quoting Del.App.379-80). While "consumers without bank accounts" might find a money order to be a helpful substitute "for a personal check," Exceptions 33, no source limits the term "money order" to instruments used in that way. *See* Report 44-45.

In the end, Delaware fails to formulate an alternate definition of "money order" from these characteristics. *See* Exceptions 35. They "are marketing decisions that do not determine the rights and duties that arise from use of the instrument in commerce," and "surely do not determine whether the instruments are money orders." Report 42; *see id.* at 44-45.

Notably, the FDA "makes no reference to any of the characteristics identified by Delaware." *Id.* at 47.

The only feature Delaware says defines a money order without any qualification is that it be "labeled 'money order.'" Exceptions 33. Delaware points to instruments that in fact bear this label. *See id.* at 34. But there is no dispute that money orders are often labeled as such. *See* Report 40 (remarking that label "has some relevance").

If the label were the *sine qua non* of money orders, however, then we would expect Delaware to be able to cite support for that argument. *Cf. Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 569 (2012) ("Were the meaning of 'interpreter' that respondent advocates truly common or ordinary, we would expect to see more support for that meaning."). Yet there is none. *See* Exceptions 18-22, 33-34 (reciting a litany of historical definitions, none of which reduce the term "money order" to a question of labeling).

Where a particular category of instrument requires a particular label, such requirement is usually well documented. *Cf., e.g.*, U.C.C. 3-104(*i*) (requiring traveler's checks be "designated by the term 'traveler's check' or by a substantially similar term"). The absence of any documentation is strong evidence that there is no such requirement for money orders. *See Taniguchi*, 566 U.S. at 569.

Finally, nothing in this Court's common-law, unclaimed-property decisions supports Delaware's definition. Of course "this Court described in detail" in

Pennsylvania and *Western Union Telegraph Co.* the products Western Union sold as "telegraphic money orders." Exceptions 21. Those were the only products in dispute. *See Pennsylvania*, 407 U.S. at 208 (discussing *W. Union Tel. Co.*, 368 U.S. at 72). The Court's description of those "specific commercial products" is evidence only that those products were at issue in those cases.

2. No canon of construction supports Delaware's arguments.

Separately, Delaware argues that the Claimant States' definition of "money order" would render other terms in the FDA superfluous. *See* Exceptions 23-25. In particular, Delaware argues that traveler's checks are also prepaid drafts that would fall within the ordinary definition of "money order."

Judge Leval rejected this argument, citing evidence that, while money orders are drafts, traveler's checks can be notes or drafts. Report 51. Delaware claims that Judge Leval cited no historical evidence supporting this point. *See* Exceptions 24. But it ignores his citation to a 1966 article describing the functioning of traveler's checks, which includes an explanation for why traveler's checks can take the form of a note. Report 51 (discussing William D. Hawkland, *American Traveler's Checks*, 15 Buff. L. Rev. 501, 510 (1966)). Nor is this the only historical source that traveler's checks often take the form of something other than a standard draft. *See, e.g.*, Samuel

Williston, *Negotiable Instruments* 291 (Am. Inst. of Banking 1931) (describing operation of certain types of traveler's checks that function as promises to pay, accompanied by "an indication of a particular fund out of which reimbursement is to be made"); Note, *Negotiability of Travelers Checks*, 47 Yale L.J. 470, 474 (1938) (discussing "the dual aspect of the travelers check, as comprising both a letter of credit and a draft").

Thus, when the current U.C.C. language was added in 1990, it simply restated a historical principle: Traveler's checks "may be in the form of a note or a draft." U.C.C. 3-104 cmt. 4; *see* Richard A. Lord, 22 *Williston on Contracts 4th* sec. 60.3 (Nov. 2021 update) ("Like money orders, traveler's checks are issued both by banks and other entities. However, unlike money orders, they may be in the form of a note or draft.").

Delaware's related argument, "that money orders could sometimes be notes or drafts," is inconsistent with its position about the scope of the term "money order" in the FDA. Exceptions 24; *see id.* at 20 (discussing historical evidence that "bank money orders" are "a separate commercial product"). Historical sources characterize only "bank money orders as 'notes' "—not "personal money orders." *Id.* (citing Del.App.489, 492); *accord* Del.App.431 n.8 (*Mavericks*, *supra*, 67 Colum. L. Rev. 524). Banks that sell bank money orders typically maintain purchaser information. *See* Del.App.449 n.68 (*Mavericks*, *supra*,

67 Colum. L. Rev. 524). As Delaware argues elsewhere, "bank money orders" are "a separate commercial product" from personal money orders like those issued by Western Union. Exceptions 20 (citing Del. App.389-93). MoneyGram Agent Checks and Teller's Checks are drafts issued by a corporation—not a bank—and therefore have much more in common with Western Union personal money orders than bank money orders that may have taken the form of notes.

Delaware's new argument based on *noscitur a sociis* also is unconvincing. *See id.* at 25-26. According to Delaware, because the terms "traveler's check" and "third party bank check" refer to "commercial products," the Court must interpret "money order" similarly. *Id.* at 25. For one thing, Delaware does not explain why the Claimant States' definition of "money order" falls beyond the descriptor "commercial product." A prepaid draft issued by a company like MoneyGram would seem to fit that descriptor well.

For another, Delaware does not explain what "commercial products" are "third party bank checks." A "traveler's check" is, as Delaware says, a type of instrument with a longstanding, clear definition. But Delaware admits that "no sources define the term 'third party bank check.'" *Id.* So of the two types of instrument other than a money order named in the FDA, one has a clear definition, and the other does not. This mixed evidence proves very little—let alone that all money orders are "identified by the label 'money order.'" *Id.* at 26.

Delaware's third statutory canon offers no more support for definition. Delaware misunderstands the nature of the canon regarding interpretation of statutes that change the common law. *See id.* at 31-33. For Congress "to abrogate a common-law principle," it "must 'speak directly' to the question addressed by the common law." *United States v. Texas*, 507 U.S. 529, 534 (1993) (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)). In *United States v. Texas*, the Court held only that Texas had not "clearly establishe[d] Congress' intent" to abrogate the relevant common-law principle. *Id.* at 535. Here, by contrast, Congress's intent to abrogate the common-law rules is clear. *See supra* pp.6-8. Because the FDA "speaks directly to the question addressed by the common law," the cited canon is "no bar to a construction that conflicts with a common-law rule." *Pasquantino v. United States*, 544 U.S. 349, 359 (2005) (alteration and quotation marks omitted).

Finally, Delaware and *amicus* raise a variety of concerns mostly reducing to the idea that defining "money order" to include MoneyGram Agent Checks and Teller's Checks risks changing the escheatment rules of other types of instruments. These concerns rest on the incorrect premise that instruments like cashier's checks necessarily fall within the FDA's definition of "money order."[7] Critically, the Court need

[7] Regarding cashier's checks and the FDA, Delaware has changed positions. Before Judge Leval, it argued that "the

not address cashier's checks, because none are at issue here. And, in any event, Delaware and *amicus* both claim there are differences between money orders and cashier's checks. For example, *amicus* discusses different ways that cashier's checks are used, including in circumstances in which they are not prepaid, such as when a bank uses them to pay its own obligations. *See* Br. of *Amicus Curiae* Am. Bankers Ass'n 9. By contrast, it is undisputed that all the instruments at issue here are prepaid. *Amicus* and Delaware also state that cashier's checks may not present the same unclaimed-property concerns as money orders, Agent Checks, and Teller's Checks because—unlike the instruments at issue here—with some cashier's checks, "a bank customer (or the customer's estate) is the creditor" and, therefore, "the last known address for that creditor is ordinarily available." *Id.*; *accord* Exceptions 29. Thus, according to *amicus*, cashier's checks may not present the same worries about "a 'windfall' recovery by a single escheating State." Br. of *Amicus Curiae* Am. Bankers Ass'n 13.

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only common written instrument that would be covered under the FDA as a Similar Instrument is a cashier's check." Report 68; *see* Doc. 79 at 24.

II. Alternatively, MoneyGram Official Checks are "similar" to money orders and traveler's checks and are not "third party bank checks."

Even if Agent Checks and Teller's Checks "do *not* come within the FDA by *being* money orders, they undoubtedly come within the statute's coverage of 'other similar written instruments.'" Report 64. Judge Leval concluded they meet each of the FDA's three requirements: (1) they are "similar written instruments" to money orders and traveler's checks, *id.* at 57-64; (2) they are not "third party bank checks," *id.* at 72-79; and (3) a "business association is directly liable" on them, *id.* at 64-72. Delaware only excepts to Judge Leval's first two conclusions. *See* Exceptions 36-45. Because of "the absence of present controversy" on the third requirement, the Court should "accept the Special Master's recommendations on that issue." *United States v. Louisiana*, 446 U.S. 253, 261 (1980); *see id.* 261 n.1, 272.

Regarding whether MoneyGram Agent Checks and Teller's Checks are "similar" to money orders and traveler's checks, Delaware has no answer to Judge Leval's conclusion "that the Disputed Instruments share with money orders features identified by Congress as motivating enactment of the FDA." Report 60. Regarding "third party bank check," Delaware's expert witness, Mann, testified "he 'didn't study any [MoneyGram] products that [struck him] as fitting with any ordinary sense of what those terms should

mean.'" *Id.* at 73 (second alteration original) (quoting App.283). The Court should overrule both exceptions.

A. MoneyGram Agent Checks and Teller's Checks are, at a minimum, similar to money orders and traveler's checks.

This Court has said that "[s]imilarity is not identity, but resemblance between different things." *United States v. Raynor*, 302 U.S. 540, 547 (1938). And there is "undoubtedly" a resemblance between Agent Checks, Teller's Checks, money orders, and traveler's checks. Report 64.

As Judge Leval explained, "[t]he structure of the FDA . . . manifests a clear intent for the word 'similar' to refer to the shared characteristics of 'money orders' *and* 'traveler's checks.'" *Id.* at 59. When interpreting the word "similar" after an enumerated list, this Court looks for the "common feature" of the enumerated items. *Rousey v. Jacoway*, 544 U.S. 320, 331 (2005).

In general, money orders and traveler's checks are "instruments for the transmission of money." Del. App.579 (floor statement of Sen. Sparkman); *accord id.* at 569 (letter from Federal Reserve Chairman) (describing scope of FDA). Delaware itself describes money orders as a type of "prepaid instrument[] for the transmission of money." Exceptions 5. Like money orders and traveler's checks, Agent Checks and Teller's Checks are prepaid instruments for transmitting funds, considered to be "as good as cash." *See* App.338, 417-18; *see also id.* at 544.

Congress also expressly identified a common feature of money orders and traveler's checks "motivating enactment of the FDA." Report 60. Chiefly, "the books and records of" the issuer "do not, as a matter of business practice, show the last known addresses of purchasers." 12 U.S.C. 2501. Delaware concedes that Agent Checks and Teller's Checks share this key feature. *See* Exceptions 12. Yet Delaware fails to explain how Judge Leval erred by focusing on this similarity. *See id.* at 43-45.

Instead, Delaware argues that Congress singled out money orders and traveler's checks because the purchaser, rather than a bank employee, signs them. *Id.* at 43. Yet Delaware admits that it is not always true. *See id.* at 43 n.11. Delaware makes a similar concession about all its proposed "distinctions" between money orders and MoneyGram Teller's Checks and Agent Checks. *Id.* at 35. Those distinctions "are not always true," which "demonstrates that there is some overlap in how these different commercial products could be used." *Id.*

Beyond this, Delaware never explains how the signatory's identity relates to "the purposes Congress sought to achieve in enacting the FDA." Report 61; *see* 12 U.S.C. 2501. Things "can be similar and dissimilar in innumerable ways." Report 57. Judge Leval was correct to focus on "those features that are common to a 'money order' and a 'traveler's check,' and are of significance to the purposes of the FDA." *Id.* at 59. And those features show that Agent Checks

and Teller's Checks "are sufficiently similar to money orders and traveler's checks to qualify as 'other similar written instruments.'" *Id.* at 63.

Delaware likewise finds no support for its argument that "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.'" Exceptions 44. It cites nothing in support, only cross-referencing earlier portions of its brief arguing that the FDA must be narrowly interpreted. But none of those cross-referenced arguments suggests Congress thought there was a problem related to such alternate spellings. (Nor does Delaware explain what alternate ways there are to spell "money order.")

B. MoneyGram Official Checks are not "third party bank checks."

Because MoneyGram is directly liable on its Agent Checks and Teller's Checks and they are similar to money orders and traveler's checks, these instruments fall within the "other similar written instrument" provision as long as they are not "third party bank checks."[8] *See* 12 U.S.C. 2503. Three experts on American payment systems offered opinions on this

[8] As Judge Leval noted, if the Court holds that MoneyGram Agent Checks and Teller's Checks are money orders, then it need not address whether they are third party bank checks. Report 79 n.44.

issue. All three—including Delaware's expert—concluded MoneyGram Official Checks are *not* third party bank checks. *See* App.134-39 (Mann); *id.* at 169-85 (Clark); *id.* at 210-25 (Gillette). Thus Delaware parts ways with its expert and posits its own definition of "third party bank check," which Judge Leval correctly rejected. Report 72-73.

1. A "third party bank check" is either a bank check indorsed to a new payee, or a non-prepaid check drawn by a person or business on a checking account.

Delaware purports to advocate for the "plain meaning" of third party bank check. Exceptions 40. But no payment-systems experts agreed with Delaware's supposed plain meaning. And Judge Leval found the plain meaning of the term elusive enough that he relied on historical evidence to interpret it as a term of art referring to "an ordinary check drawn on a checking account," whether "a personal or business checking account." Report 76.

Although none of the experts had heard the term "third party bank check" used outside the FDA, Gillette explained its ordinary meaning based on customary understandings of the terms "third party check" and "bank check." "Third party check" was "commonly understood" to mean "a check indorsed by the payee to another person." App.212. And a "bank check" is a check drawn by a bank and on a bank; the drawee and drawer may be the same bank but need

not be. *See id.*; *id.* at 135 (Mann) (defining it as "a check issued by a bank"). Combining these well-defined phrases, the most natural meaning of a "third party bank check" is a check drawn by a bank on a bank that has been indorsed over to a new (or "third party") payee. *Id.* at 212 (Gillette). This is how the term was used in the only judicial decision to use it, though it did so "in passing," without any analysis on the point. Report 74 (citing *United States v. Thwaites Place Assocs.*, 548 F. Supp. 94, 95 (S.D.N.Y. 1982)).

Judge Leval adopted the definition of Pennsylvania's expert, Barkley Clark, a prolific author on the topic of payment systems. Clark explained that "third party bank check" most likely referred to "ordinary bank checks that are drawn on ordinary checking accounts with no prepayment." App.184.

This explanation starts with the committee report on the FDA. The Senate committee report reprints a letter from Treasury recommending that Congress "defin[e] [the FDA's] terms to exclude third party payment bank checks." Del.App.575. The Senate ultimately adopted this "technical suggestion[]." *Id.* at 576. But it did not explain why it used the term "third party bank check" instead of Treasury's "third party *payment* bank check."

Clark detailed evidence from the early 1970s that financial regulators, including those in contact with the Senate, used "third-party" terminology to describe an ordinary checking account. *See* App.174-85; *see*

also Report 75-76 (recounting evidence). One significant regulatory review effort, usually called the Hunt Commission, published a report that made recommendations about, among other topics, "third party payment services." App.174-78. It defined "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." Del.App.350 n.1. This includes checking accounts. *Id.* Treasury and Congress's substitution of "bank check" for "services" indicates a desire not to address third party payment services other than checks, like credit cards, for example. *See* App.178-79.

Treasury published a summary of the Hunt Commission report defining checking accounts as third party payment services. *Id.* at 177-78. Shortly thereafter, Treasury submitted its letter about the FDA. *Id.* Because the Senate adopted the phrase "third party bank check" in response, it is reasonable to interpret that phrase as Treasury would have interpreted it. And the evidence suggests that Treasury would have understood it to refer to ordinary checks.

Relying on this historical evidence, Judge Leval determined that a third party bank check is "an ordinary check drawn on a checking account," whether "personal or business checking account." Report 76. Delaware misstates this determination, claiming instead that he defined "a 'third party bank check' [to be] *only* a personal check." Exceptions 41. This is a

subtle but important distinction. Judge Leval's actual definition covers checks drawn by businesses on their business checking accounts. *See* Report 75-76. If the FDA had not excluded such checks, its coverage for instruments on which "a business association is directly liable" might have been misunderstood to cover businesses' checks drawn on their checking accounts. At very least, Congress may have "wanted to make doubly sure that they were not subject to the FDA." Exceptions 43 n.10.

Judge Leval concluded, therefore, that a "third party bank check" is a "non-prepaid instrument[] drawn on a checking account." Report 76. The narrow scope of both this definition and the ordinary meaning explained by Gillette is consistent with Congress's description of the third-party-bank-check exclusion. Members of Congress described the exclusion as a "technical suggestion[]," Del.App.576, or a "clarifying amendment[]," *id.* at 568, or a "minor change[]," *id.* at 579. Excluding a large category of instruments from the FDA would be inconsistent with those descriptions.

Delaware responds by repeating its claim that the term "means a bank check that is offered through a third party." Report 72-73. But as Judge Leval explained, this interpretation lacks support. Indeed, not even Delaware's expert agreed with Delaware's interpretation. *See* App.134-39, 283. Nor is there any evidence that "third party bank check" has been used as Delaware proposes.

Beyond these flaws, "neither the text nor legislative history of the FDA suggests that Congress considered the difference between bank checks offered by third parties and bank checks issued directly by banks to be material to the purposes of the FDA." Report 73. The key language, that the relevant instrument be "*paid through* a third party," is entirely of Delaware's invention. Exceptions 39. Contrary to Delaware's insertion, the legislative history indicates that Congress intended to *include* instruments sold by banks yet paid through third parties. The committee report includes a letter from the Federal Reserve Board recommending changes to the FDA (ultimately adopted) to ensure that certain instruments sold by banks but issued by a third party were covered. *See* Del.App.572.

Finally, there is no reason to think that bank checks covered by Delaware's proposed definition are any less likely to be bought where purchasers live than any other covered instrument. *See* 12 U.S.C. 2501(2)-(3).

2. MoneyGram Agent Checks and Teller's Checks fit none of the proffered definitions of "third party bank check."

Whatever the definition of "third party bank check," it does not apply here. Delaware's expert said this explicitly: "I didn't study any [MoneyGram] products that strike me as fitting with any ordinary sense of what those terms mean." App.283.

If the Court adopts the plain meaning of "third

party bank check," as explained by Gillette, then the instruments at issue do not qualify largely because they are not bank checks. Delaware claims otherwise based on an incorrect definition of "bank check" that turns solely on the signatory. *See* Exceptions 4, 36-38. A "bank check" is a check drawn by a bank on a bank. App.135 (Mann); *id.* at 212 (Gillette). MoneyGram is not a bank, yet it is the drawer on its Agent Checks, *id.* at 510, and the co-drawer or issuer on its Teller's Checks, *id.* at 514. *See* U.C.C. 3-105(c) (defining "issuer" and "drawer" as synonyms). And at least some agreements with MoneyGram identify the seller as an agent for MoneyGram even on Teller's Checks. *See* App.484. Thus, these instruments are not drawn by a bank but by MoneyGram. Neither are they drawn on a bank in the usual sense, because the drawee bank simply functions as a clearing bank. It is not a party to the transaction. *See, e.g.*, *id.* at 330-31.

Agent Checks and Teller's Checks do not qualify as any type of bank check. This means that Agent Checks and Teller's Checks are not third party bank checks under Gillette's definition, because they are not "bank checks." Correspondingly, they would also not be third party bank checks under Delaware's unsupported definition since they are not bank checks. *See* Exceptions 36-38.

If the Court adopts the definition of "third party bank check" based on the legislative history, then the term still would not apply here. Delaware previously made no argument that "the Disputed Instruments

fall within the [Claimant States'] construction of 'third party bank check.'" Report 78 n.43. Although it now belatedly argues otherwise, *see* Exceptions 42, its new argument fails. As Delaware notes, a "third party payment service" is one "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*." Del.App.350 n.1 (emphasis added); *see* Exceptions 42. But MoneyGram is the drawer of its Agent Checks and a co-drawer of its Teller's Checks. *See* App.510, 514. And the drawer of a draft is "a person ordering payment." U.C.C. 3-103(a)(5). Here, funds are transferred upon the order of MoneyGram, not the purchaser.

MoneyGram is a trusted entity, and Official Checks are "purchased for purpose of paying a debt or to transmit funds *upon credit of the issuer*." Black's 5th ed., *supra*, *Money order* (emphasis added). MoneyGram is not just "an additional party that acts on behalf of the first bank to facilitate the transaction." Exceptions 42. As the issuer of all Official Checks, MoneyGram's reliability is central to their value. And because they are drawn by MoneyGram, they do not fit any definition of "third party bank check." The Court should overrule the exceptions.

III. Applying the FDA to MoneyGram Official Checks would promote equity and provide an administrable rule.

Adopting Judge Leval's recommendation would better serve the twin aims of unclaimed-property rules: "ease of administration" and "equity." *Texas*, 379 U.S. at 683. Here, Delaware has received $250 million in unclaimed MoneyGram products, when less than 0.5% of the underlying transactions occurred in Delaware. App.253-55, 527. Yet "there is no contention that purchasers of the Disputed Instruments are any more likely to reside outside the State of purchase than what Congress noted with respect to purchasers of money orders." Report 49.

Requiring MoneyGram to remit funds payable on these instruments to the State of purchase, therefore, is most likely to serve Congress's goal of distributing unclaimed funds "as a matter of equity among the several States." 12 U.S.C. 2501(3). And unlike Delaware's arguments for excluding Agent Checks and Teller's Checks from the FDA, Judge Leval's approach would not "allow[] issuers of money orders to choose which State will have escheat priority by making otherwise inconsequential, cosmetic changes to the face of the instrument." Report 48. Holding that the FDA's application hinges on business entities' marketing choices would undermine the predictability of its rules. Finally, Delaware has no legitimate reliance interest in the unclaimed funds here. As is usually true of unclaimed property, Delaware's claim to these

funds is always subject to a higher-priority claim by another State or the true owner.

A. Distributing funds payable on these unclaimed instruments to the States of purchase would promote equity and predictability.

As to Agent Checks and Teller's Checks, the current situation is exactly what the FDA was designed to prevent. By virtue of MoneyGram's choice to incorporate in Delaware, that State has received hundreds of millions of dollars in unclaimed property. "[I]t is a burden on interstate commerce that the proceeds of such instruments are not being distributed to the States" in which they were purchased. 12 U.S.C. 2501(4).

Congress determined that allowing "a relatively few States to claim these sums solely because the seller is domiciled in that State, even though the entire transaction took place in another State" was unacceptable. Del.App.577. And it worried that leaving this problem unaddressed might result in "unnecessarily cumbersome recordkeeping requirements." *Id.* at 580.

Delaware essentially argues that the Claimant States ought to protect their interests by requiring the very sorts of recordkeeping that Congress hoped to pretermit. *See* Exceptions 47. This is contrary to one of the express purposes of the FDA, which is to avoid the burden and expense of requiring businesses to

maintain and retrieve purchasers' addresses. *See* 12 U.S.C. 2501(5).

Delaware has not pointed to any evidence that this congressional determination is inapplicable to Agent Checks and Teller's Checks. *See* Report 49. Applying the FDA to these instruments would comport with Congress's express determination about how best to further equity.

Moreover, applying the FDA here would make recovery of unclaimed property easier and more predictable for its owners. States maintain registries of unclaimed property, and the owners of unclaimed property often seek its recovery many years after it has become legally abandoned. Someone who owns an Agent Check or Teller's Check that was purchased in Wisconsin is far more likely to look in a Wisconsin unclaimed property registry than one maintained by Delaware—a State that had no connection to the transaction other than being the place of MoneyGram's incorporation.

B. Delaware's position would lead to unpredictability.

Delaware argues that the FDA's application should turn on "the label" that a company gives an instrument. Exceptions 46. Adopting this approach "would do nothing to further the stated purposes of the FDA." Report 48. For Delaware points to nothing in the FDA or its legislative history showing that Congress was concerned about particular labels appearing

on money-transmission products. Congress worried about issuers' recordkeeping practices—not their labeling choices. *See* 12 U.S.C. 2501(1).

Delaware's proposed test would also fail to provide predictability. *See* Exceptions 45-46. Because of Delaware's focus on an instrument's label, its approach would "allow[] issuers of money orders to choose which State will have escheat priority by making otherwise inconsequential, cosmetic changes to the face of the instrument." Report 48. And MoneyGram's own practices demonstrate how this might happen. As explained, MoneyGram defines "Agent Check Money Orders" as nothing more than "Agent Checks that are used as money orders." App.483. Selling institutions may choose how to market them. *See id.* at 476. Yet according to Delaware, that marketing choice makes the difference between the application of the common law or the FDA.

Announcing a rule that depends on such choices would not lead to predictable results. This is particularly true of instruments sold to consumers, who are more likely to look for unclaimed funds in the State of purchase—likely their home State, *see* 12 U.S.C. 2501(2)—than in the State where a company happens to incorporate.

C. Ruling for the Claimant States would not upset any reliance interests.

Delaware finally argues that applying the FDA to Agent Checks and Teller's Checks would upset reliance interests. *See* Exceptions 48-50. This argument misunderstands the nature of unclaimed-property law. Often the law requires a State to remit property that it has taken custody of to a different State or to the owner. This is true of the common law, the FDA, and state law.

Relatedly, Delaware requests that even if this Court rules for the Claimant States, the Court should award "prospective relief only," a request this Court generally disfavors. Exceptions 49 n.12; *see Harper v. Va. Dep't of Tax'n*, 509 U.S. 86, 97 (1993). This is effectively a request to limit damages. Yet Delaware acknowledges that "the parties have not litigated" any damages questions. Exceptions 49 n.12; *see* Report 32 (discussing bifurcation). For that reason, the Court should decline to consider Delaware's damages argument. And in any event, Delaware's argument carries considerably less force than it suggests since—in response to this case—in 2018, MoneyGram began remitting unclaimed funds to the registry of the Southern District of New York. *See Delaware v. Arkansas*, No. 1:18-MC-00064-PNL.

Finally, there is no danger that applying the FDA here would destabilize the escheatment of financial instruments that are not at issue, such as cashier's checks. *See* Exceptions 49. The evidence before Judge

Leval relates only to financial instruments issued by a corporation—not cashier's checks or any other type of instrument issued solely by banks. The unclaimed-property rules applicable to other types of instruments should be determined in future cases where the parties develop a record about how those financial instruments operate. For example, both Delaware and *amicus* assert that there are key differences between MoneyGram Official Checks and cashier's checks. *See supra* pp.38-39. In future cases, parties could litigate whether those differences in fact exist and, if so, what effect they have on the unclaimed-property rules applicable to other types of instruments.

But here, it suffices to hold—as Judge Leval recommended—that MoneyGram Agent Checks and Teller's Checks "conform to the fundamental nature of money orders (as that term was generally understood at the time of the passage of the FDA)." Report 44. Therefore, "the stated purposes of the FDA are served" by treating these instruments as money orders or, at very least, as similar to money orders and traveler's checks. *Id.* at 49.

CONCLUSION

Delaware's exceptions to the first interim report of the Special Master should be overruled.

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