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

BRIEF OF *AMICUS CURIAE* UNCLAIMED PROPERTY PROFESSIONALS ORGANIZATION IN SUPPORT OF THE DEFENDANT STATES

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INTEREST OF *AMICUS CURIAE*

The Unclaimed Property Professionals Organization ("UPPO"), which was established in 1992, is the premier national organization concentrating on all aspects of unclaimed property compliance and education, and advocating for the interests of both the holders and owners of unclaimed property.[1] UPPO is a nonprofit organization currently composed of over 370 members who represent nearly all segments of the U.S. economy. In furtherance of its mission, UPPO identifies ambiguities in multistate unclaimed property laws and practices, as well as issues that interfere with the legal rights of owners and holders of unclaimed property, and works with state regulators, legislators and other interested parties to resolve those issues. To its knowledge, UPPO is the only private trade association singularly dedicated to these goals.

As a result, UPPO is in a unique position to provide the perspective of the holder community on the important issues presented by this dispute between Delaware, Moneygram's State of corporate domicile, and the various other States in which Moneygram conducts business (the "Defendant States"). Although this case involves a dispute between States, it also implicates the interests of holders—the private businesses that bear the burden of complying with escheat laws. Accordingly, UPPO believes that the Court should also take into account these interests in

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[1] Pursuant to Supreme Court Rule 37, UPPO states that no counsel for any party authored this brief in whole or in part, and that no entity or person other than UPPO, its members, and its counsel made any monetary contribution toward the preparation and submission of this brief. Counsel for the parties to this action have consented to the filing of this brief.

resolving this dispute. *See Marathon Petrol. Corp. v. Sec'y of Fin. for Del.*, 876 F.3d 481, 493–95 (3d Cir. 2017) (recognizing the important role of holders in interstate disputes over unclaimed property).

STATEMENT OF THE CASE

This case involves a dispute over which State is entitled to escheat unclaimed official checks that were issued by Moneygram. Moneygram issues several types of official checks, but the checks in dispute in this case are "Agent Checks" and "Teller's Checks." Delaware asserts that it has the right and jurisdiction to escheat these official checks under federal common law on the basis that the Disposition of Abandoned Money Orders And Traveler's Checks Act, 12 U.S.C. §§ 2501–2503 (the "Disposition Act"), is inapplicable and the last known address of the owner of the official checks is unknown and Delaware is Moneygram's State of incorporation. Dkt. No. 79.[2] The Defendant States assert that the Disposition Act does apply to the official checks and, under that Act, the State in which the official checks were purchased have the right and jurisdiction to escheat. Dkt. Nos. 58, 89.

On May 26, 2016, Delaware initiated this case by filing a motion for leave to file a bill of complaint. The Court granted Delaware's motion, and appointed a Special Master with authority "to fix the time and conditions for the filing of additional pleadings, to direct subsequent proceedings, to summon witnesses, to issue subpoenas, and to take such evidence as may

[2] The "Dkt. No." 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.

be introduced and such as he may deem it necessary to call for." Dkt. No. 31.

In the interest of efficiency, the Special Master bifurcated proceedings into a liability stage (*i.e.*, to determine which State is entitled to Moneygram's official checks) and a damages stages (*i.e.,* to determine how much of Moneygram's official checks each State is entitled to recover). Dkt. No. 43. Delaware had sought leave to amend its bill of complaint to expand the scope of this case to include instruments that are similar to Moneygram's official checks. Dkt. No. 122 at 30, n. 20. The Special Master denied Delaware's request for leave to amend, noting that amending the bill of complaint would "delay resolution of the case." *Id.*

After the close of discovery for the liability stage, the States filed motions for partial summary judgment. Dkt. No. 87. The Special Master issued a First Interim Report of the Special Master ("Report") on July 23, 2021. Dkt. No. 122. The Report recommended that the Court deny partial summary judgment to Delaware and grant partial summary judgment in favor of the Defendant States. Report at 5. The Report found that Moneygram's official checks should be considered either money orders or other similar written instruments for purposes of the Disposition Act, such that the Defendant States had jurisdiction to escheat. Report at 55–56, 63–64. However, the Report declined to recommend a specific definition of the terms "money order" or "similar written instrument" out of concern that "adopting a firm definition . . . could have consequences for the escheat of various categories of abandoned instruments" that were not before the Court. Report at 54–55. The Special Master further suggested that not defining these terms "will

not lead to future adjudications that are incompatible with the decision here proposed." Report at 55.

The Court received the Report and ordered the Report filed on October 4, 2021. Delaware filed exceptions to the Report on November 18, 2021.

SUMMARY OF ARGUMENT

The Court should take the opportunity to provide much-needed clarity regarding the Disposition Act by defining the phrase "money order . . . or other similar written instrument" for purposes of the Act. By defining this phrase, the Court may be able to forestall future litigation over the scope of the Disposition Act.

UPPO suggests that the best definition for a "money order . . . or other similar written instrument" is "a paper instrument that is purchased from an issuer for the transmission of money." This definition is consistent with the ordinary public meaning of the Disposition Act's terms at the time that Congress enacted it. This definition is also supported by the statute's legislative history and purpose, and it is easy to administer. Moneygram's official checks would be "money order[s] . . . or other similar written instruments" under this definition, so could be escheated by the Defendant States pursuant to the Disposition Act.

Finally, UPPO urges the Court to ensure that the decision in this case does not allow the States to impose unfair burdens (such as audits, interest, or penalties) on Moneygram or similarly-situated holders. In order to minimize the burdens on Moneygram and similarly-situated holders, the Court should remand to the Special Master with instructions to expand the scope of this case to include any disputes

regarding the application of the definition of "money order . . . or other similar written instrument" for any instruments that have been remitted to a State.

ARGUMENT

I. IN ORDER TO AVOID REPETITIOUS, BURDENSOME, AND EXPENSIVE FACT-SPECIFIC LITIGATION, THE COURT SHOULD DEFINE THE PHRASE "MONEY ORDER . . . OR OTHER SIMILAR WRITTEN INSTRUMENT."

In UPPO's view, the Report reaches the correct conclusion—that Moneygram's official checks are subject to the Disposition Act as "a money order . . . or other similar written instrument." However, UPPO respectfully disagrees with the Special Master's recommendation that the Court should not define these terms. Unless the Court defines the phrase "money order . . . or other similar written instrument," future litigation regarding the application of the Disposition Act to other types of instruments is inevitable. The States have a strong financial incentive to assert claims to unclaimed property, as a State is allowed to use unclaimed property in its possession until and "[u]nless the forgotten property's rightful owner can be located." *See Taylor v. Yee*, 577 U.S. 1178, 1178 (2016) (Alito, J., concurring in the denial of certiorari); *Plains All Am. Pipeline L.P. v. Cook*, 866 F.3d 534, 536 (3d Cir. 2017).[3] As a result of this financial incentive, and

[3] These financial incentives have, at times, led the States to take aggressive positions regarding unclaimed property. For example, in a recent case a federal district court characterized a State's escheat practices as "a game of 'gotcha' that shocks the conscience." *Temple-Inland, Inc. v. Cook*, 192 F. Supp. 3d 527, 550 (D. Del. 2016).

the fact that many unclaimed funds are never claimed by the owners as a practical matter, multiple States may assert duplicative claims over the same items of unclaimed property to the extent that there is any remaining ambiguity over the scope of the Disposition Act.

Indeed, the States have already begun to identify unclaimed property that is potentially similar to Moneygram's official checks. *See* Letter Brief to Special Master, Dkt. No. 59 (Defendant States agreed to provide Delaware with "[t]he identities of the holders who have reported unclaimed property" under the National Association of Unclaimed Property Administrators' standard codes for Cashier's Checks, Certified Checks, Registered Checks, Treasurer's Checks, Money Orders, and Outstanding Official Checks).[4] And Delaware, by proposing a narrow definition of the phrase "other similar written instrument," has implicitly signaled its intention to escheat other, slightly different instruments if the Court does not adopt a different definition.

In other words, any ambiguity over the scope of the Disposition Act will likely result in repetitious, burdensome, and expensive fact-specific litigation

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[4] In addition, technological advancements in the past few decades have enabled the creation of novel types of products that can be used to transmit money to others. *See, e.g.,* Marc L. Roark, *Payment Systems, Consumer Tragedy, and Ineffective Remedies,* 88 St. John's L. Rev. 39, 40–41 (2014); Note, Cassie B. Arnsten, *Who Stole My Bitcoin?! A Look into the Problems Associated with State Custodial Taking of Unclaimed Cryptocurrencies*, 106 Iowa L. Rev. 1923 (2021). Unless the Court provides a clear definition of the phrase "money order . . . . . or other similar written instrument" for purposes of the Disposition Act, disputes could also arise over these types of novel products, as well as new products that have yet to be invented.

over specific types of property. The best way to forestall this type of litigation is to provide a clear definition for "money order. . . or other similar written instrument." Indeed, in the context of prior interstate disputes over the right to escheat, this Court has repeatedly shown a preference for articulating clear rules that minimize uncertainty and avoid future fact-specific disputes. This preference originated in *Texas v. New Jersey*, where the Court created a set of rules for determining escheat jurisdiction as a matter of federal common law. 379 U.S. 674 (1965). The primary rule provides that the State of the creditor's last known address, as shown on the books and records of the holder, has the sole right and jurisdiction to escheat abandoned intangible property. *Id.* at 681-82. If the holder has no record of the creditor's last known address, the secondary rule provides that the state of the debtor's incorporation has sole jurisdiction to escheat. *Id.* at 682. The Court explained that these bright-line rules were necessary in order to avoid

> decid[ing] each escheat case on the basis of its particular facts or [] devis[ing] new rules of law to apply to ever-developing new categories of facts, [which] might in the end create so much uncertainty and threaten so much expensive litigation that the States might find that they would lose more in litigation expenses than they might gain in escheats.

Id. at 679.

The Court reaffirmed the need for such bright-line jurisdictional escheat rules in both unclaimed property cases that it decided after *Texas*. In *Pennsylvania v. New York*—which involved which state had jurisdiction to escheat money orders—the Court rejected the argument that the escheat rules should "vary"

according to the adequacy of the debtor's records because such an inquiry would require the Court to decide each escheat case on the basis of its particular facts; as the Court observed, this was "precisely what [it] said should be avoided" in *Texas*. 407 U.S. 206, 215 (1972). In *Delaware v. New York*, the Court again "declared [its] unwillingness 'either 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.'" 507 U.S. 490, 510 (1993) (quoting *Texas v. New Jersey*, 379 U.S. 674, 679 (1965)).

This case asks the Court to construe a federal statute—the Disposition Act—rather than create or interpret federal common law, but the same rationale in favor of clarity applies. *See Texas*, 379 U.S. at 677 (Court has responsibility of "adopt[ing] a rule which will settle the question of which State will be allowed to escheat" property when an "interstate controversy" arises). And as this Court has long held, statutory interpretations should favor "maintaining a clear, administrable rule" and avoid "line-drawing problems." *Republic of Sudan v. Harrison*, 139 S. Ct. 1048, 1061 (2019) (holding that Foreign Sovereign Immunities Act has a bright line rule for effecting mail service on a foreign minister); *see, e.g., Apple Inc. v. Pepper*, 139 S. Ct. 1514 (2019) (restating bright line rule that Clayton Act "authorizes suits by direct purchasers but bars suits by indirect purchasers") (emphasis omitted); *Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 52 (2008) (finding that Bankruptcy Code establishes a bright line rule exempting a transfer of securities from stamp tax when transfer is "made pursuant to a Chapter 11 plan that has been confirmed").

II. THE COURT SHOULD DEFINE THE PHRASE "A MONEY ORDER . . . OR OTHER SIMILAR WRITTEN INSTRUMENT" IN THE DISPOSITION ACT TO MEAN "A PAPER INSTRUMENT THAT IS PURCHASED FROM AN ISSUER FOR THE TRANSMISSION OF MONEY."

The Disposition Act creates unique jurisdictional escheat rules applicable to "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. The ultimate question here is whether certain Moneygram official checks are "money order[s] . . . or other similar written instrument[s]" for purposes of the Disposition Act. The key to answering that question is for the Court to define the phrase "money order . . . or other similar written instrument."

Delaware argues that when Congress enacted the Disposition Act, the "term 'money order' referred to specific commercial products labeled 'money order.'" Del. Br. at 3, 17–36. Under Delaware's reading of the Disposition Act, Moneygram's official checks are not money orders because they are not labeled "money order." Even if Delaware is correct that Congress intended to refer "to specific commercial products" when it used the term "money order," construing the term "money order" in line with Delaware's argument does not answer the question of whether Moneygram's official checks are subject to the Disposition Act. In particular, Delaware's proposed construction of the term "money order" still leaves open the question of whether Moneygram's official checks are "other

similar written instruments" that would still be subject to the Disposition Act.[5]

Consistent with the longstanding canon of *noscitur a sociis*, the term "other similar written instruments" should be construed "by the company it keeps." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995); *see also Dole v. United Steelworkers of Am.*, 494 U.S. 26, 36 (1990). In the context of the Disposition Act, *noscitur a sociis* means that the statutory phrase "other similar written instrument" is best construed in light of the statute's earlier use of the term "money order." As the Special Master explained, the term "other similar instruments" seems to refer "to an instrument . . . that is not a money order . . . but is sufficiently similar to warrant being treated the same way under" the Disposition Act. Report at 53. Therefore, to ascertain the meaning of the phrase "money order . . . or other similar written instrument," the Court should identify the essential characteristics of a "money order."

To determine the essential characteristics of a "money order," the Court should look to "the ordinary public meaning of [this] term[] at the time" that the Disposition Act was enacted. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020). The Special Master's Report contains a thorough study of the ordinary public meaning of the term "money order" based on

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[5] Delaware seems to recognize this weakness in its argument when it suggests that an "other similar written instrument" should be limited to an instrument bearing an alternative spelling of "money order," but without citing any authority for this proposition or offering any alternative spellings of these words. Del. Br. at 34, 44. As explained *infra*, this construction would be inconsistent with the *noscitur a sociis* canon and the legislative history and purpose of the Disposition Act.

sources contemporaneous with the Disposition Act. *See* Report at 36–54. The contemporaneous entry in Black's Law Dictionary defined a "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." Brief in Support of Defendants' Motion for Summary Judgment on liability, Dkt. No. 89 at 21; Report at 39 (quoting Black's Law Dictionary from 1968).[6] Webster's New Collegiate Dictionary contained a slightly broader definition, to mean "an order issued by a post office, bank, or telegraph office for payment of a specified sum of money at another office." Similarly, the American Heritage Dictionary of the English Language defined a "money order" as "[a]n order for the payment of a specified amount of money, usually issued and payable at a bank or post office." Report at 39, n. 27 (quoting the American Heritage Dictionary of the English Language 847 (1st ed. 1969)). In the same footnote, the Special Master offered another definition: "an order for the payment of a specified sum of money, as one issued for a fee at one post office or bank and payable at another." Report at 39, n. 27.[7]

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[6] As noted by the Special Master, "draft" meant, at the time, "'a direction to pay' someone that 'must identify the person to pay with reasonable certainty.'" Report at 39.

[7] Delaware offered a few sources that noted that money orders are typically used by customers without bank accounts. Report at 44–45 (citing F.L. Garcia, *Munn's Encyclopedia of Banking and Finance* 458 (6th ed. 1962); Barkley Clark & Barbara Clark, *Law of Bank Deposits*, *Collections*, *and Credit Cards* ¶ 24.02[4] (2010); 72 Fed. Rsrv. Bull. 149 n.5 Feb. 1986). But this is not a characteristic of a money order; at best, it is a characteristic of the typical purchaser of a money order. Furthermore, defining a

These definitions suggest several essential characteristics: (1) an order or direction to transmit money; (2) a purchase of the instrument;[8] (3) the instrument is issued by a person other than the purchaser or the payee; and (4) a paper instrument. Based on these essential characteristics of money orders, UPPO proposes that Congress intended for the phrase "money order . . . or other similar written instrument" to mean "a paper instrument that is purchased from an issuer for the transmission of money."[9] If such an instrument bears the label "money order," then it is a money order; if it does not bear the label "money order," then it is an "other similar written instrument."

This proposed definition is not only consistent with the canon of *noscitur a sociis* and the ordinary public meaning of the term money order at the time Congress

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money order by reference to whether a customer has a bank account would be impossible to administer as a practical matter.

[8] This essential characteristic is supported by the plain language of Disposition Act, which repeatedly mentions "purchasers" and gives the right to escheat to the State where an instrument "was purchased." *See* 12 U.S.C. §§ 2501, 2503; *see also* Brief of Amicus Curiae American Bankers Association in Support of Neither Party at 22.

[9] Of course, the Disposition Act, by its terms, would only apply to such a written instrument if (1) it is not a third party bank check; and (2) a banking or financial organization or a business association is directly liable for the instrument. UPPO agrees with the Special Master's analysis that for purposes of the Disposition Act a third party bank check is an "ordinary check[] drawn on a checking account," Report at 78, and that an entity is "directly liable" for an instrument if it is "ultimately liable" on the instrument, Report at 71. Under this analysis, Moneygram's official checks are not third party bank checks, and Moneygram is a business association that is directly liable for the official checks for purposes of the Disposition Act. Report at 71–72, 78–79.

enacted the Disposition Act, but is also supported by the legislative history and purpose of the statute. Congress enacted the Disposition Act to achieve a specific goal: to legislatively abrogate the decision in *Pennsylvania v. New York,* 407 U.S. 206, (1972). Memorandum in Support of Proposed Disposition of Unclaimed Property Act of 1973, Cong. Rec. 17047 (May 29, 1973). In *Pennsylvania*, the Court had held that unclaimed money orders issued by Western Union were escheatable under the federal common law rules; as Western Union did "not regularly record the addresses of its money order creditors," the bulk of the money orders were escheatable by New York as Western Union's state of corporate domicile. 407 U.S. at 214.

The Congressional sponsors of the Disposition Act were concerned that *Pennsylvania* resulted in "a windfall to the state of corporate domicile" because a last known address was not typically available for certain types of instruments, including "travelers checks and commercial money orders." *Id.; accord* 12 U.S.C. § 2501. Congress thus enacted the Disposition Act to create "equitable and uniform rules" to distribute an "equitable share" available to "all of the states" for these types of instruments for which the creditor's last address was typically unknown. Memorandum in Support of Proposed Disposition of Unclaimed Property Act of 1973, 119 Cong. Rec. 17047 (May 29, 1973). In achieving this Congressional goal, it is important to avoid either construing the statutory terms so broadly that the Disposition Act's exception swallows the federal common law rules, *see Knight v. Comm'r*, 552 U.S. 181, 191 (2008) (statutory exceptions should be construed so as to avoid "swallow[ing] the general rule"); *Robert C. Herd & Co v. Krawill*, 359 U.S. 297, 304 (1959) (statutes "in

derogation of the common law" should "be strictly construed"), or so narrowly that the Disposition Act's reference to "other similar instruments" is rendered surplusage, *see Duncan v. Walker*, 533 U.S. 167, 174 (2001). Defining a "money order . . . or other similar written instrument" to mean "a paper instrument that is purchased from an issuer for the transmission of money" strikes a balance between these competing interests while simultaneously achieving the Congressional goal underlying the Disposition Act. *See Pub. Citizen v. U.S. Dep't of Just.*, 491 U.S. 440, 454 (1989).

The Special Master suggested that Congress intended "other similar written instrument" to cover instruments not existing in 1973 but that "come into existence in the future." Report at 52. It is unclear which instruments would be swept within this construction of the Disposition Act, and, as noted above, Congress enacted the Disposition Act to cure an inequity that it perceived in the federal common law rules as applied to specific types of unclaimed property. This runs contrary to the Special Master's suggestion that Congress intended for the Disposition Act to adapt to future changes. *See MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 297 (1994) (a statute "cannot be divorced from the circumstances existing at the time it was passed, and from the evil which Congress sought to correct and prevent"); *cf. McBoyle v. United States*, 283 U.S. 25, 26 (1931) (holding that a reference to "vehicles" in a 1919 statute did not include airplanes). Accordingly, the Court should not presume that Congress intended to adopt a sweeping rule that would apply to instruments used to transmit money that were not in use at the time that Congress enacted the Disposition Act. To the extent that Congress does not agree with this result, it has

the power to amend the Disposition Act. *See Microsoft Corp. v. AT&T Corp.,* 550 U.S. 437, 457 (2007) (Congress is best suited to determine whether a statute should extend to novel situations that result from technological advances).

UPPO's proposed definition of "money order . . . or other similar written instruments" also has the benefit of being easy to administer. A holder should usually be able to determine whether an instrument fits within (or outside) this definition, as these elements look to facts in the holder's possession. It is also a simple, straightforward definition that does not require complex factual inquiries, balancing tests, or other factors that are likely to give rise to factual disputes.

Under UPPO's proposed definition, Moneygram's official checks would be subject to the Disposition Act. Moneygram's Agent Checks "are prepaid financial instruments" that "are offered to sale to customers at financial institutions as a means to transmit funds to a. . . ." Report at 26. Moneygram's Teller's Checks are similarly "prepaid written instrument[s]" that are purchased. *Id.* at 28–29. Both Moneygram's Agent Checks and Teller's Checks are issued as paper instruments. *See* Affidavit of Jennifer Whitlock, Dkt. No. 82 (Oct. 3, 2017) (authenticating printing specifications for Agent Checks and Teller's Checks).

III. THE COURT SHOULD ENSURE THAT ITS DECISION DOES NOT ALLOW STATES TO IMPOSE UNFAIR BURDENS ON MONEYGRAM OR SIMILARLY-SITUATED HOLDERS.

UPPO is concerned that, in the aftermath of the Court's decision in this case, the States may commence audits of Moneygram or similarly-situated holders that have erroneously remitted instruments to the wrong State based on a mistaken belief that the instruments were subject to the Disposition Act. If this were to happen, it would expose holders to the burdens of defending against the audit, which can be extremely time-consuming and expensive. This could also expose holders to the risk of interest and penalties. This would be unfair.

To understand why this would be unfair, it is important to look at unclaimed property from a holder's point of view, rather than a State's point of view. A holder must determine in the first instance which State has the right and jurisdiction to escheat specific items of unclaimed property. Although the Court's federal common law rules usually provides a holder with a clear answer, *see Texas,* 379 U.S. at 680-81, federal law contains some ambiguities that allow two States to assert jurisdiction to escheat over the same property.[10] This case presents another similar

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[10] For example, one potential ambiguity is whether a zip code or state code identifier alone constitutes a "last-known address" for purposes of federal common law, *compare* N.J.A.C. 17:18-12 (zip code is sufficient to constitute a last known address) *with* Conn. Gen. Stat. § 3-56a(8) (address must be sufficient for mailing to constitute a last known address). Another is whether the domicile of an LLC, partnership or other non-corporate entity (including a bank) is its principal place of business, *see, e.g.*,

ambiguity, which is whether the property at issue is subject to the Disposition Act or the federal common law rules.

Such ambiguities present "an obviously troubling proposition" to a holder because the holder may "be at risk of facing competing escheatment claims to that property." *Marathon Petrol. Corp.*, 876 F.3d at 489.[11] A holder faced with this dilemma has to choose between three bad options: remit the property to no State, remit the property to one State, or remit the property to both States. Under the first option, the holder faces potential claims by both States, including possible interest and penalties. The third option is clearly unworkable, as it would result in multiple liability to the holder.

The only realistic option for the holder is thus to make a decision as to which State the holder believes has the stronger claim, and then remit the property to that State. That is precisely what Moneygram did. When faced with the ambiguity in the Disposition Act, it remitted its official checks to Delaware as its state of incorporation. Del. Br. at 2, 12. But other holders, faced with the same language in the Disposition Act,

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N.J.S.A. 46:30B-6(e), or its state of organization, *see, e.g.,* Del. Code Ann. tit. 12, § 1198(7). States have split in their interpretations of federal common law on these issues, with holders stuck in the middle.

[11] Ordinarily, a party faced with the risk of "double liability or to vexation of conflicting claims" regarding entitlement to a single piece property would be able to deposit the property in a district court's custody and institute an interpleader. *See* 28 U.S.C. § 1335; *Indianapolis Colts v. Mayor of Baltimore*, 741 F.2d 954, 957 (7th Cir. 1984). Unfortunately, the ordinary mechanisms for interpleader are not available for interstate disputes. *Cory v. White*, 457 U.S. 85 (1982).

may have reached the opposite conclusion and escheated their official checks to the states in which the checks were purchased.

Holders that remit property to a single State where there is uncertainty whether that State has jurisdiction to escheat face potential exposure from another State that claims jurisdiction over the same property. Indeed, this is exactly what happened to Moneygram. Holders faced with this situation may inform the claiming State that the property was already remitted to another State, and tell the claiming State to contact the other State if it believes it has jurisdiction over the property. But unfortunately, some States have been unwilling to do that, and instead have attempted to impose the burden on the holder. The claiming State may also threaten the holder with interest and penalties if the holder does not comply.[12] In fact, some of the Defendant States have already demanded that Moneygram remit the unclaimed official checks that it already remitted to Delaware and pay interest and penalties. *See Wisconsin Department of Revenue v. Delaware State Escheator*, Case No. 16-cv-281, Doc. No. 1 (W.D. Wis. Apr. 27, 2016) (complaint against Moneygram seeking damages "plus interest at 18% per annum, penalties of $100/day (up to $5,000)[,] a 25% penalty on amounts for which required remittance was not made, and

[12] Some States have statutory indemnification provisions that may provide holders with some protection in this type of situation. However, such indemnities vary widely by State, and such indemnities generally do not cover claims for interest or penalties by another State. *See, e.g.,* Del. Code Ann. tit. 12, § 1153(c), (f). Accordingly, holders cannot necessarily rely on the States to which they originally escheated the property to defend and indemnify them against competing claims by other States.

attorneys' fees and costs"); *Treasury Department of the Commonwealth v. Delaware State Escheator*, Case 1:16-cv-00351-JEJ, Doc. No. 1 (M.D. Pa. Feb. 26, 2016) (complaint against Moneygram seeking damages "plus interest at 12% per annum, penalties of $1000 [sic] per day, and attorneys' fees and costs").

In light of the ambiguity over the scope of the Disposition Act, it would be unfair to place the burdens of audit defense, interest, or penalties on a holder that has erroneously remitted instruments to the wrong State based on what is, in hindsight, a mistaken reading of the undefined terms in the Disposition Act. As this Court has previously recognized, it is the States, not holders, that must bear the costs of determining which State has the jurisdiction to escheat property. *Pennsylvania*, 407 U.S. at 215. Additionally, holders should not be liable for interest or penalties where there is an open question of law as to which State had jurisdiction to escheat the property and the holder remitted the property to one State (and thus no longer has possession or use of the property). *See, e.g.,* C*onner v. Bank of Bakersfield,* 190 P. 801, 803–04 (Cal. 1920). *Cf. W. Union Tel. Co. v. Pennsylvania*, 368 U.S. 71, 75–76 (1961) (multiple liability for unclaimed property violates due process).

UPPO respectfully suggests that the best way to ensure that the States do not place these unfair burdens on holders is for this Court to (1) adopt the definition of "money order . . . or other similar written instrument" proposed *supra*, and (2) remand to the Special Master with instructions to expand the scope of this case to include any disputes regarding the application of this definition to any instruments that have been remitted to a State. *See Delaware*, 507 U.S. at 509–10 (remanding unclaimed property dispute for

further proceedings). This would allow the States to resolve all disputes about property similar to Moneygram's official checks in a single forum, while alleviating the burdens that could otherwise be placed on holders. With a clear definition of "similar written instruments" in hand, the Special Master will be able to conduct factfinding on the amount of property at stake, to make clear recommendations about which state is entitled to escheat specific instruments, and to sharpen the focus on any legal questions that remain for the Court. *See, e.g.*, Del. Br. at 49 n.12 (suggesting that the Court may need to address equitable restrictions on recovery and prospective application of the decision in this case). Consolidating all disputes about instruments that are similar to Moneygram's official checks in a single forum will also avoid the risk of inconsistent judgments, and could potentially "facilitate a global settlement" between the States. *Cf.* Manual of Complex Litigation § 20.132 (4th ed.).

CONCLUSION

For the reasons set forth above, the Court should deny Delaware's partial motion for summary judgment, grant Defendant States' partial motion for partial summary judgment, define the phrase "money order . . . or other similar written instrument" in the Disposition Act to mean "a paper instrument that is purchased from an issuer for the transmission of money," and remand to the Special Master with instructions to expand the scope of this case to include any disputes regarding the application of this definition to any instruments that have been remitted to a State.

Respectfully submitted,

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