Nos. 22O145 & 22O146

IN THE
Supreme Court of the United States

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

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

On Exceptions To The Report Of The Special Master

SUR-REPLY OF THE STATE OF DELAWARE IN SUPPORT OF EXCEPTIONS

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INTRODUCTION

Defendants advance a sweeping, ahistorical definition of "money order" that includes all prepaid drafts used to transmit money to a named payee. But Defendants' own sources disprove their argument. None of Defendants' six non-legal dictionaries actually states that money orders are "prepaid." None refers to money orders as "drafts." And most make no reference to "named payees." Moreover, Defendants' reading of "money order" is hopelessly overbroad. If a "money order" is *any* prepaid draft payable to a named

payee, then "money order" would include both a "traveler's check" and any conceivable "other similar written instrument," rendering the rest of the Federal Disposition of Abandoned Money Orders and Traveler's Checks Act (FDA) superfluous. Yet numerous contemporary authorities differentiate between money orders and other prepaid drafts, such as cashier's checks and certified checks.

Defendants offer no response to this problem—other than to suggest that these questions would need to be resolved by future litigation. *See* Defs.' Br. 38-39, 55-56. Even Defendants' *amicus* states that ruling for Defendants would require "expand[ing] the scope of this case" to revisit the status of *every* previously escheated instrument, stretching back to 1974. Amicus Br. of Unclaimed Property Professionals Organization (UPPO Br.) 19. As the American Bankers Association explains, Defendants' definition would upend settled expectations and spark numerous original jurisdiction lawsuits. *See* Amicus Br. of American Bankers Association (ABA Br.) 2-5, 16-17, 24. This Court should reject "[a]ny rule leaving so much for decision on a case-by-case basis * * * unless none is available which is more certain and yet still fair." *Texas* v. *New Jersey*, 379 U.S. 674, 680 (1965).

By contrast, Delaware's bright-line rule avoids further litigation and is faithful to the FDA's text, purpose, and history. In 1974, everyone knew what a "money order" was. It was a specific commercial product typically sold in small denominations by a variety of retailers to consumers without bank accounts as a substitute for a personal check. That remains true today. The most straightforward way to determine whether a financial instrument is a money order is to look at its label: As contemporary and modern sources

demonstrate, the words "money order" are printed on the face of money orders. This label provides an easy way to determine how that product should be escheated.

MoneyGram teller's checks and agent checks are not money orders; they are not labeled "money order" and, unlike money orders, they are usually sold by banks to consumers with bank accounts seeking to transfer large sums. Individuals use MoneyGram teller's checks to make large transactions. Banks use MoneyGram agent checks primarily to pay the bank's own bills. And both teller's checks and agent checks are signed by a bank employee and paid through third parties. They are thus "third party bank checks" exempted from the FDA's reach. This approach is predictable, administrable, and reflects longstanding practice. The Court should adopt it.

ARGUMENT

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

Defendants define "money order" as any "prepaid draft issued by a post office, bank, or business entity used to transmit money to a named payee." Defs.' Br. 22. That definition is stunningly broad, enveloping any kind of prepaid bank check, including cashier's checks, certified checks, and teller's checks. If Congress had intended to include all prepaid bank checks within the FDA, it would have said so. But Congress used the term "money order"—which in 1974 and today refers to a specific commercial product marketed as a "money order" and typically sold in small denominations by a variety of retailers to consumers without bank accounts as a substitute for a personal check.

A. Defendants' Dictionaries Do Not Support Their Position.

Defendants fail to engage with Delaware's extensive analysis of the ordinary meaning of "money order." *See* Del. Br. 17-22. Instead, Defendants cite six non-legal dictionaries that they claim support their broad reading. But none defines a "money order" as any "prepaid draft issued by a post office, bank, or business entity used to transmit money to a named payee." *See* Defs.' Br. 22. None actually states that money orders are "prepaid," which Defendants claim is "the 'essential characteristic' of a money order." *Id.* at 24. None refers to money orders as "drafts." And most don't even refer to a "named payee." The *Oxford English Dictionary* (1932) specifies that a "money order," at least in British use, need not be payable on its face to a "name[d] * * * payee." Del.Supp.App.1a.[1] Defendants' idiosyncratic definition of "money order" is found nowhere outside their brief.

Defendants' dictionaries primarily define a "money order" as a *postal* money order. *Webster's New International Dictionary of the English Language* (2d ed. 1934) defines a "money order" as "[a]n order for the payment of money," specifically "a government nonnegotiable order for the payment of money, issued at one post office and payable to a designated individual or firm at some specified office; — called also, in the United States, *postal money order*." Del.Supp.App.4a. *Webster's Third New International Dictionary of the English Language* (1961) similarly defines a "money order" as "an order for the payment of money," specifically "an order issued at a post office upon application

[1] Defendants' dictionary definitions are appended to this brief as a supplemental appendix.

by a person making a remittance and payable at another post office." Del.Supp.App.5a. *Webster's Seventh New Collegiate Dictionary* (1967) likewise defines a "money order" as "an order issued by a post office, bank, or telegraph office for payment of a specified sum of money at another office." Del.Supp.App.6a. And the *Oxford English Dictionary* (1932) defines a "money-order" as "an order for payment of a specified sum, issued at one post-office and payable at another." Del.Supp.App.1a. The *Shorter Oxford English Dictionary on Historical Principles* (3d ed. rev. with addenda 1959) offers a nearly identical definition. Del.Sup.App.2a.

MoneyGram teller's checks and agent checks are not government orders, are not issued at post or telegraph offices, and are not payable at other such offices. If this Court defines "money order" in accordance with any of those dictionaries, the MoneyGram products at issue here do not meet that definition.

The only dictionary that Defendants cite that even arguably supports their position is the *American Heritage Dictionary of the English Language* (1969), which defines 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." Del.Sup.App.3a. Even that definition, however, indicates that, contrary to Defendants' position, a money order is a product with specific commercial characteristics—it is issued and paid in particular locations.

Defendants' definition of "money order" is also inconsistent with contemporary sources that distinguished between money orders and other prepaid instruments. *See* Del. Br. 20-21, 26-27, 30-31; ABA Br. 20. Contemporary industry and legal publications

treated money orders and other prepaid instruments, such as cashier's checks, as separate products. *See* Del. Br. 21. Federal statutes made the same distinction. *See id.* at 26. So, too, did the 1966 Revised Uniform Disposition of Unclaimed Property Act and the 1981 Uniformed Unclaimed Property Act; the latter incorporated the FDA's unique rules for money orders and traveler's checks and was adopted by dozens of states. *See id*. at 26-27 & n.4, 30-31; Del.App.336, 345-347; ABA Br. 10-11, 27-28. Defendants have no response to this convincing evidence that the contemporary meaning of "money order" did not include *every* prepaid draft.

Delaware's definition of "money order," in contrast, is well-supported by contemporary authorities. *See* Del. Br. 17-24. According to *Black's Law Dictionary* (5th ed. 1979), a money order is "used by the purchaser as a substitute for a check." Del.App.365. The typical purchaser of a money order is, per *Munn*'s *Encyclopedia of Banking and Finance* (7th ed. 1973), a "person[] not having checking accounts." *Id*. at 373; *see also id*. at 379 (*Compton's*); 491 (*The Law of Bank Deposits*); 511 (American Express Br.). A 1956 banking industry report explains that money orders are typically sold in small denominations, often with a $100 or $250 limit. *Id*. at 400; *see id*. at 379-380 (*Compton's*); 374 (*Munn's*).[2] And many sources indicate that money orders were available at a variety of retailers—not exclusively at banks. *See, e.g.*, *id*. at 511 (American Express Br.); 411 (1956 Report); 374

[2] Defendants argue (at 33) that Western Union "issued money orders without any limit on their face value." But, in 1974, most Western Union money orders were between "$1.00 to $25.00." Del.App.531 n.5.

(*Munn's*); 380 (*Compton's*); 365 (*Black's* 5th); 382 (*American Heritage*); 383 (*Webster's Seventh New Collegiate*).

Defendants have no way to explain these contemporary descriptions of a "money order." Instead, they contend that Delaware's definition does not account for the formal "rights and duties" of negotiable instruments, and that consumers may use money orders in atypical ways. Defs.' Br. 33 (quoting Del.App.43). But a "money order" is a commercial product used in everyday life. Like any commercial product, it can be used atypically at times. That does not nullify the ordinary meaning of "money order." Congress referred in the FDA to a commercial product that everyone understood in 1974 to be a "money order"—not abstract "rights and duties" shared with a broad swath of financial instruments. *See* Del. Br. 35.

B. Defendants' Interpretation Renders The Rest Of The FDA Superfluous.

If a "money order" is *any* prepaid draft payable to a named payee, it would swallow both "traveler's check[s]" and any conceivable "other similar written instrument." *See* Del. Br. 23-24. Defendants' only response is to argue that a "money order" is a "draft," whereas a "traveler's check" can be *either* a "draft" or "note." *See* Defs.' Br. 35-37.[3] But nothing indicates that Congress distinguished between notes and drafts in the FDA; the statute uses neither term.

In any event, the sources Defendants cite do not support their argument. *American Travelers Checks* states that a traveler's check is a "draft drawn on the

[3] Drafts are orders to pay; notes are promises to pay. *See* Del. Br. 24.

drawer" which "is *effective* as a note"—not that it is a note. William D. Hawkland, *American Travelers Checks*, 15 Buff. L. Rev. 501, 510 (1966) (emphasis added). *Negotiability of Travelers Checks* describes "the dual aspect of the travelers check, as comprising both a letter of credit and a draft." Note, *Negotiability of Travelers Checks*, 47 Yale L.J. 470, 474 (1938). And *Negotiable Instruments* states that a traveler's check can be regarded as "a combination of a traveler's letter of credit and a draft." Samuel Williston, *Negotiable Instruments* 289 (Am. Inst. of Banking 1931). At most, these sources suggest that "traveler's checks" were *both* notes and drafts in 1974. If "money order" meant all drafts, it would have included traveler's checks.

Moreover, some money orders, called "bank money orders," *are* notes, not drafts. *See* Del. Br. 24. Defendants' apparent suggestion (at 36-37) that bank money orders are not included within the FDA because they are notes is inconsistent with the FDA's text, which refers simply to "money orders." In short, Defendants' supposed distinction between notes and drafts holds no water.

C. Defendants' Discussion Of Congressional Purpose Is Unsupported.

Unable to support their position with text or structure, Defendants argue that Congress's purpose must have been to subject a broad range of financial products to escheatment under the FDA. *See* Defs.' Br. 30. But they offer no support for that theory, and the statute and its history say otherwise.

Both the preamble to the FDA and the legislative context demonstrate that Congress intended the FDA to apply narrowly. The preamble mentions only two

products—"money orders" and "traveler's checks." 12 U.S.C. § 2501. It does not refer to other instruments, such as cashier's checks, certified checks, teller's checks, or agent checks. Indeed, the preamble does not even mention "other similar written instruments." This suggests that Congress was narrowly focused on specific commercial products, rather than all prepaid drafts.

The preamble states that Congress was concerned that the "records" of "issu[ers] and sell[ers]" did not "show the last known addresses of purchasers," and that "maintaining and retrieving addresses" would place an undue burden on interstate commerce. *Id.* § 2501(1), (5). In 1974, neither of those concerns applied to cashier's checks, certified checks, teller's checks, and other kinds of prepaid bank checks. When these bank checks were sold to customers, banks recorded "payee's and purchaser's names and addresses." Del.App.400 (1956 Report). And as the American Bankers Association explains, when banks use bank checks to pay the bank's own bills, "the bank's creditor is the payee, and that creditor's last known address is ordinarily maintained by the bank." ABA Br. 22. In contrast, in 1974, the companies selling money orders and traveler's checks did *not* ordinarily keep address information. *See* Del.App.400 (1956 Report); 504 (American Express Br.).[4] Nor does it unduly burden interstate commerce to keep address information for prepaid bank checks, which are typically used for

[4] American Express explained in a contemporary brief that customers occasionally provided addresses for traveler's checks. Del.App.504. But it was "physically impossible to sort out the millions of application forms to find the names and addresses." *Id.* at 517.

large transactions where the bank would keep records anyway and where the purchaser is less cost-sensitive.

The FDA seeks to equitably distribute escheated money orders and traveler's checks among the States. *See* 12 U.S.C. § 2501. That makes sense: In 1974, traveler's checks were primarily sold by American Express, whereas telegraphic money orders were primarily sold by Western Union; neither company kept address records, and the funds were escheated to those companies' state of incorporation. *See* Del.App.570-572. In contrast, bank checks were issued by banks across the country, which were generally incorporated in the same State where they operated and usually recorded addresses.[5] As a result, bank checks were likely to escheat more evenly among the States, preventing any "massive windfall to a single State," ABA Br. 25, and obviating any need for congressional intervention.

The legislative history, to the extent the Court considers it, also supports Delaware. The co-chair of the relevant Senate committee explained that the "legislation is intended to do equity" while protecting "low-income families [who] use money orders instead of checking accounts to pay their bills." Del.App.580. This suggests that Congress used "money order" to refer to a product commonly purchased in small denominations by low-income consumers without bank accounts—not all prepaid drafts.

After analyzing text, context, and history, if there is any doubt about the FDA's meaning, the Court should

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[5] Banking laws effectively prohibited interstate banking. *See generally* David L. Mengle, *The Case for Interstate Branch Banking*, Econ. Rev., Nov.-Dec. 1990, at 3.

read that statute narrowly to avoid derogation of the common law. *See* Del. Br. 31-33. Defendants insist that this canon does not apply where "Congress's intent to abrogate the common-law rules is clear." Defs.' Br. 38. But here, Congress's intent to derogate the common law for all prepaid drafts is *not* clear. In any event, this Court has held that even where statutes "*invade* the common law," the "presumption favoring the retention of long-established and familiar principles" applies. *United States* v. *Texas*, 507 U.S. 529, 534 (1993) (emphasis added and internal quotation marks omitted). This canon strongly favors Delaware's interpretation.

D. The Court Should Adopt A Bright-Line Test For Defining "Money Order" And Hold That MoneyGram Teller's Checks And Agent Checks Do Not Qualify.

The Court should adopt a bright-line rule and hold that a "money order" is a financial instrument that is labeled "money order." *See* Del. Br. 34.

This approach is administrable and consistent with the statute's text—which uses the term "money order"—as well as the historical understanding of a money order as a product marketed to consumers as a "money order." Delaware's approach is also consistent with the definition of a traveler's check, which Defendants do not dispute is determined by the instrument's label. Del. Br. 25.[6] It is consistent with the Uniform Commercial Code, which defines a money or-

[6] Indeed, Defendants offer almost no response (at 37) to the argument that "money order" should be read congruently with the nearby term "traveler's check." *See* Del. Br. 25-26.

der as a "term" applied to the "face" of an "instrument." U.C.C. § 3-104(f). And it is consistent with historical examples of money orders, which are labeled "money order." *See* Del.App.303-308, 334, 381, 391, 393, 399, 405, 407, 550, 555-558. *Defendants' own amicus* agrees that if "an instrument bears the label 'money order,' then it is a money order." UPPO Br. 12.

Regardless of whether the Court relies on the label alone or considers other characteristics, *see* Del. Br. 34-35, the Court should hold that MoneyGram teller's checks and agent checks are not "money orders." They are not labeled "money order," and they do not share the common characteristics of money orders. They are not sold in low-dollar denominations at retail locations to unbanked consumers as a substitute for a personal check. Instead, customers with bank accounts use teller's checks for major purchases. *See* Del.App.260. Financial institutions use agent checks to pay their own bills. *Id*. at 274-276. And because MoneyGram teller's checks and agent checks are bank checks, financial institutions typically record creditors' information. *See id*. at 599.[7]

Defendants attempt to conflate MoneyGram agent checks with "agent check money orders," a separate product sold by MoneyGram. *See* Defs.' Br. 28-29. An agent check money order is a money order sold at a bank and printed on a MoneyGram machine. *See*

[7] Defendants seek to reach back nearly 20 years. Records of creditor addresses that old may no longer exist. And in any event, Defendants have never raised a common-law claim under the first priority rule to the funds at issue here either before the Special Master or in their briefing before this Court. Defendants have thus forfeited any claim under the common law.

Del.App.271. Per MoneyGram's contracts with financial institutions, agent check money orders must "be called a money order" and must not be called "a bank check or an official check." *Id*. at 270. Like all MoneyGram money orders, and unlike agent checks, agent check money orders contain terms limiting recourse. *Id*. Despite Defendants' efforts to confuse them, "they are two distinctly different product categories." *Id*. MoneyGram sells these two products to different customers, for different purposes, under different labels, and escheats them differently as a result.

Defendants also suggest (at 31) that MoneyGram teller's checks and agent checks "share the key feature of money orders" because MoneyGram does not collect creditors' addresses. But financial institutions typically collect addresses for these products. Del.App.599. That means MoneyGram teller's checks and agent checks possess a key feature of bank checks—not money orders.

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

Teller's checks and agent checks are "third party bank checks" exempt from the FDA—and, at the very least, are not "similar" to money orders and traveler's checks. 12 U.S.C. § 2503.

A. Third Party Bank Checks Are Bank Checks Paid Through A Third Party.

The best interpretation of "third party bank check" is its plain meaning: a bank check paid through a third party. Defendants offer two alternative definitions; neither makes sense.

1. Defendants first claim that a "third party bank check" is a bank check "indorsed over to a new" payee. Defs.' Br. 45. But even the Special Master rejected this definition, because to determine whether a check has been indorsed, the holder must "look[] at the instrument itself." Del.App.75. When a check is abandoned, the holder cannot examine the instrument. *Id*. Indeed, the only time a holder knows that a bank check is indorsed is when it is presented for payment—and thus not subject to escheatment.

Relying on the Hunt Commission's discussion of "third party payment services," Defendants claim that a "third party bank check" could also mean an ordinary check drawn on a checking account. Defs.' Br. 45-46. But the Hunt Commission does not define "third party payment services" as *only* ordinary checks. It uses that term broadly to include any kind of payment service offered to customers, including credit cards and teller's checks. *See* Del. Br. 41-42. If this Court accepts Defendants' argument that "third party bank check" is drawn from the Hunt Commission, it must also accept that this term refers to *all* payment services, including MoneyGram teller's checks and agent checks. And Defendants cannot save their theory with speculation (at 46) that Congress meant to exclude credit cards from the FDA when it substituted the term "bank checks" for "payment services." Even if that is correct, it would mean that the term "third party bank check" still includes *bank checks*—and MoneyGram teller's checks and agent checks are bank checks.

Defendants' definition of "third party bank check," moreover, is irreconcilable with the FDA's structure. The FDA applies to "similar written instrument[s]" on which banks are "directly liable." 12 U.S.C. § 2503.

But no bank is "directly liable" on an ordinary personal checking account. *See* Del. Br. 40. Although Defendants suggest (at 47) that "third party bank checks" include "checks drawn by businesses on their business checking accounts," that doesn't help. The FDA applies to instruments that are "purchased" and for which a "business association" is liable. 12 U.S.C. § 2503(1)-(3). Ordinary business checks are not "purchased" (*i.e.*, prepaid). When a business writes an ordinary check, the funds are withdrawn *after* the payee cashes the check. *See* Defs.' Br. 24. That is why ordinary business checks can bounce. *See* Del. Br. 40-41. Defendants' alternative definitions of "third party bank check" cannot be right.

2. This Court should define "third party bank check" as a bank check paid through a third party. *See* Del. Br. 36-40. Defendants assert (at 44) that "no payment-systems experts" agreed with this definition. However, as Defendants acknowledge (at 44), "none of the experts had heard the term 'third party bank check' used outside the FDA." The statute's text, then, is the best evidence of its meaning.

Delaware's interpretation is consistent with the FDA's structure: Bank checks such as cashier's checks, certified checks, and teller's checks are "purchased" (unlike ordinary personal and business checks). It is also consistent with the FDA's purpose because the selling bank usually keeps records for these MoneyGram products, and recordkeeping requirements would not impose the same burdens on low-income consumers, who rarely buy these products.

Delaware's definition also squares with the FDA's history, contrary to Defendants' assertions. Defs.' Br.

48. The FDA's first draft determined escheat priority based on where an instrument was "issued." Del.App.587. The Chairman of the Federal Reserve noted, however, that banks do not "issue" traveler's checks. *See id.* at 572. To ensure that the FDA would apply to traveler's checks, Congress changed "issued" to "purchased." *Id.* But that legislative choice was focused on a specific problem posed by traveler's checks. Nothing suggests that Congress intended the FDA to apply any time a bank sold instruments paid through third parties—such as teller's checks.

In short, this Court should hold that a third-party bank check is a bank check sold through a third party.[8]

B. MoneyGram Teller's Checks and Agent Checks Are Third Party Bank Checks.

A bank check is easily identified on its face by a bank employee's signature. Like all bank checks, MoneyGram teller's checks and agent checks are signed by bank employees. *See* Del. Br. 37-38. MoneyGram teller's checks and agent checks are thus bank checks paid through a third party—in this case, MoneyGram and its routing bank—and thus are "third party bank check[s]."

Defendants incorrectly define "bank checks" to mean *only* checks "drawn by a bank on a bank." Defs.' Br. 49. But in 1974, bank checks referred to a category of checks that transmitted large sums or paid the bank's own bills. *See* Del. Br. 37-38. One well-known bank

[8] The Court could adopt an alternative plain-meaning interpretation of "third party bank check" as a bank check sold to a third party; MoneyGram teller's checks and agent checks meet that definition, too. *See* Del. Br. 39 n.9.

check, the certified check, is *not* drawn by the bank. Instead, a certified check is an ordinary personal check drawn by a customer and subsequently certified by the bank employee's signature. *See* Del.App.368-369 (*Munn's*).

Even if Defendants are correct that bank checks must be drawn by a bank, *all* MoneyGram teller's checks are drawn by a selling bank on a clearing bank. *See* Del. Br. 38 & n.8. All agent checks are likewise drawn by a bank because MoneyGram, in this particular context, may qualify as a "bank." *See Bank*, *Webster's New International Dictionary of the English Language* (2d ed. 1934) (defining bank to include "an institution incorporated for" "facilitating the transmission of funds by drafts or bills of exchange"). Even setting aside MoneyGram's status as a bank, many MoneyGram agent checks are likewise drawn by a selling bank on a clearing bank. *See* Del. Br. 38 n.8. At a minimum, these products qualify as "third party bank checks."

Citing the modern Uniform Commercial Code, Defendants argue (at 49) that MoneyGram teller's checks are not true teller's checks because they have two drawers: the selling financial institution and MoneyGram. But the Code merely requires a teller's check to be "drawn by a bank." U.C.C. § 3-104(h). The Code never says a teller's check cannot have another drawer.[9] Nor is there any indication that Congress intended to subject checks to different escheatment rules based on the number of drawers.

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[9] Defendants are simply incorrect (at 49) that one of MoneyGram's contracts eliminates banks as drawers on teller's

Finally, Defendants' position (at 49) that MoneyGram teller's checks and agent checks cannot be bank checks "because the drawee bank simply functions as a clearing bank" is specious. Teller's checks are either drawn "(i) on another bank, or (ii) *payable at or through a bank*." U.C.C. § 3-104(h) (emphasis added). MoneyGram teller's checks and agent checks are payable at or through the clearing bank that contracts with MoneyGram to process the check. *See* Del.App.28, 30. They are thus "third party bank checks."[10]

C. The Court Should Interpret Similar Written Instruments Narrowly.

The Court should interpret "other similar written instrument" narrowly to mean an alternate spelling of "money order" or "traveler's check," such as "Travelers Cheque." *See* Del. Br. 44-45. A narrow interpretation

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checks. The contract states that "Teller's Checks" are "drawn by Financial Institution and MoneyGram" and that the "Financial Institution is designated the 'drawer.' " Defs.App.484.

[10] If the Court applies the Hunt Commission's definition of a "third party payment service," teller's checks and agent checks qualify. *See* Del. Br. 41-42. Defendants (at 50) point to the Hunt Commission's statement that third party payment services "*include* any mechanism" transferring funds at the "order of the depositor." Del.App.350 n.1 (emphasis added). Defendants interpret the word "order" to mean that all third party payment services *must* involve a purchaser drawing the instrument. But this is wrong because the Hunt Commission elsewhere described "third party payment services" to include teller's checks, which are never drawn by the purchaser. *See id.* at 357 (explaining that "[s]ome savings and loan associations and mutual savings banks currently offer non-negotiable third party payment services using customers' interest bearing accounts"—*i.e.*, teller's checks); Del. Br. 39-42.

is appropriate given this Court's preference for bright-line rules that holders and States can readily apply.

Even under a broad interpretation of "other similar written instrument," MoneyGram teller's checks and agent checks would not qualify. If this Court agrees with Delaware's description of a money order—a commercial product typically sold in small denominations at a variety of retail locations to consumers without bank accounts—MoneyGram teller's checks and agent checks do not share similar features. *See id.* at 42-45.

If this Court adopts a different definition of "money order," the Court should still hold that these MoneyGram products are not "other similar written instruments." MoneyGram teller's checks and agent checks are ordinary bank checks—just like teller's checks, cashier's checks, certified checks, and a bank's own checks. They are simply processed through a third-party to save overhead costs. *See id.* at 10. There is no indication in the text, structure, purpose, or history of the FDA that Congress intended that statute to apply to ordinary bank checks, where addresses typically are kept, and where there is less of a concern that recordkeeping requirements will pose an undue burden on low-income consumers. *See supra* pp.9-11. If Congress meant to include these well-known products in the FDA, "it surely would have said so explicitly." ABA Br. 20.

The Court should hold that whatever the meaning of "money order," "third party bank check," and "other similar written instrument," the MoneyGram products at issue are *most like* the bank checks that Congress did not include within the FDA.

III. DEFENDANTS' INTERPRETATION OF THE FDA IS UNADMINISTRABLE AND UNFAIR.

Defendants concede that their rule will lead to endless and destabilizing litigation over the escheatment of other instruments that may fall under the FDA. This Court should reject "[a]ny rule leaving so much for decision on a case-by-case basis * * * unless none is available which is more certain and yet still fair." *Texas*, 379 U.S. at 680; *see Pennsylvania* v. *New York*, 407 U.S. 206, 215 (1972); *Delaware* v. *New York*, 507 U.S. 490, 510 (1993). Delaware's interpretation avoids further litigation, provides necessary clarity, upholds the FDA's purpose, and protects holders and States who relied on the FDA in good faith.

1. Defendants urge this Court to adopt the Special Master's report—despite the Special Master's refusal to define key terms in the FDA. And Defendants refuse to address whether their interpretation would sweep many other financial instruments into the FDA. *See* Defs.' Br. 56 (conceding that the escheatment of "other types of instruments," including cashier's checks, would need to "be determined in future cases").

That uncertainty will lead to endless litigation before this Court, as Defendants' *amicus* recognizes. *See* UPPO Br. 6-7 ("[A]ny ambiguity over the scope of the Disposition Act will likely result in repetitious, burdensome, and expensive fact-specific litigation over specific types of property."). Defendants therefore ask the Court to do what it has repeatedly said it will not do: "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." *Texas*, 379 U.S. at 679.

As the American Bankers Association explains, "holders of unclaimed financial instruments need clear, certain rules so they can deliver such property to the proper State." ABA Br. 16. Banks "face penalties, administrative burdens, and potential liability if ambiguities in the priority rules permit States and others to challenge the banks' good faith determinations of the proper recipient." *Id.* at 1; *see* UPPO Br. 16-19. Indeed, banks *already* face numerous suits claiming that they incorrectly escheated cashier's checks. *See* Del. Br. 49.

This Court should not adopt Defendants' case-by-case approach, which poses undue costs and uncertainty on holders, States, and this Court.

2. Delaware's interpretation of the FDA is the only path out of the thicket. Under that interpretation, a holder can look at the face of the instrument to determine whether it is a money order or traveler's check, and if so, escheat it in accordance with the FDA. Other instruments should be escheated in accordance with the common law. That is a clear rule that holders and States can inexpensively and easily apply, without further litigation.

Delaware's approach is consistent with the FDA's text: It classifies "money orders" and "traveler's checks" based on those instruments' labels and the terms' ordinary meaning in 1974. It is also consistent with the FDA's purpose. The FDA's preamble makes clear that Congress worried that if States imposed recordkeeping requirements for money orders and traveler's checks, it would increase the cost of those

instruments—posing a problem for low-income families that use money orders in lieu of checking accounts to pay bills. Those concerns are not present for other financial instruments for which banks keep address records.

Contrary to Defendants' suggestion, issuers are unlikely to change how they label their products "to choose which State will have escheat priority." Defs.' Br. 54 (quoting Del.App.49). Financial institutions "are indifferent as to which State is entitled to escheat" abandoned property. ABA Br. 1. Issuers do, however, face strong commercial incentives to accurately market their products to customers. Indeed, companies label their products "money orders" precisely *because* they are targeting those products at particular customers—customers without bank accounts seeking a lower-cost instrument for small-dollar transactions.

Defendants are similarly wrong to suggest that their approach will "make recovery of unclaimed property easier and more predictable for its owners." Defs.' Br. 53. The opposite is true. The common law incentivizes States to require holders to collect owners' information and transmit it to States. That incentive has two positive ramifications:

First, when holders have owners' information, there is a greater chance the property will be returned before it must be transferred to a State. "Most [S]tates require that a written notice be sent via first-class mail" before holders escheat property.[11] By contrast, if the FDA governs, financial institutions will have

[11] *Due Diligence Basics*, UPPO (Feb. 1, 2018), https://www.uppo.org/blogpost/925381/293957/Due-Diligence-Basics.

fewer incentives to record contact information—and fewer funds will be returned prior to escheatment.

Second, when States have owners' information, owners may search lost property registries using their name and address. By contrast, if Defendants prevail under the FDA, registries will likely contain only limited data, such as the instrument's value (*e.g.*, $150)—and fewer owners may locate and recover their property as a result.

3. Defendants cannot plausibly deny that Delaware's rule offers more certainty than the rule they advance, so Defendants attempt to convince the Court that their interpretation of the FDA is fairer. But this Court values both "equity" *and* "ease of administration" when determining escheatment rules. *Texas*, 379 U.S. at 683. Delaware's rule is far easier to administer. *See supra* pp.21-22. And in any event, Delaware's rule is fair to Defendants, too.

MoneyGram escheats teller's checks and agent checks to Delaware because MoneyGram does not maintain address records for those products. As this Court has explained, "nothing * * * prohibits the States from requiring [debtors] to keep adequate address records." *Pennsylvania*, 407 U.S. at 215. It is not unfair to require a State to achieve its ends through legislation rather than litigation. States are free to adopt rules that govern this issue on a going-forward basis, instead of asking this Court to change the rules and apply those changes retroactively.

MoneyGram teller's checks and agent checks, moreover, are just two kinds of instruments sold by one company. Delaware may benefit in this case, but another State may benefit in a future case. Contrary to Defendants' contention (at 52) that this case should

not turn on "MoneyGram's choice to incorporate in Delaware," the Court has held that "[w]hen the creditor's State cannot assert its predominant interest," there is "no inequity in rewarding a State whose laws prove more attractive to firms that wish to incorporate." *Delaware*, 507 U.S. at 507.

Defendants' approach, moreover, has problems of its own: Delaware has accepted funds from MoneyGram in good faith for years based on a reasonable interpretation of the FDA. It would be deeply unjust to require Delaware's taxpayers to subsidize States that for years neither disputed that interpretation nor sought to remedy their current complaints through legislation. Defendants' approach would also unfairly harm the interests of other holders who have escheated other financial instruments—including cashier's checks—for more than 50 years in accordance with the common-law rule. Congress did not intend for the FDA to result in the radical redistribution of funds already escheated. *See* Del. Br. 48-49. Even if this Court were to adopt Defendants' interpretation of the FDA, it should apply that interpretation only prospectively to protect these reliance interests.

CONCLUSION

The Court should hold that MoneyGram teller's checks and agent checks are subject to escheatment under the common-law rule.

Respectfully submitted,

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JANUARY 2022

SUPPLEMENTAL APPENDIX

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OXFORD ENGLISH DICTIONARY

(1932)

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money-order, an order for payment of a specified sum, issued at one post-office and payable at another (in British official use restricted to what is popularly called a *post-office order*, in which the name of the payee does not appear on the order, but is transmitted from the issuing to the paying office in a 'letter of advice'; thus distinguished from the *postal order*)

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THE SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES (Vol. 1)

(3d ed. rev. with addenda 1959)

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* * *

Money-order, an order for payment of a specified sum, issued at one post-office and payable at another (in British use restricted to what is pop. called a *post-office order*, as dist. from a *postal order*)

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THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE

(1969)

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* * *

money order. *Abbr.* **m.o., M.O.** An order for the payment of a specified amount of money, usually issued and payable at a bank or post office.

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WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE

(2d ed. 1934)

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Money order. An order for the payment of money; as, an express *money order;* specif., a government non-negotiable order for the payment of money, issued at one post office and payable to a designated individual or firm at some specified office; — called also, in the United States, *postal money order*. In British official use, an order in which the name of the payee does not appear, but is given in a letter of advice, as in case of international money orders; — popularly called a *post-office order*, that in which the name of the payee appears being called a *postal order*.

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WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE

(1961)

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money order *n* **:** an order for the payment of money; *specif* **:** an order issued at a post office upon application by a person making a remittance and payable at another post office

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WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY

(1967)

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money order *n* **:** an order issued by a post office, bank, or telegraph office for payment of a specified sum of money at another office

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