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

EXCEPTIONS OF DEFENDANTS IN NO. 145 AND PLAINTIFFS IN NO. 146 TO SECOND INTERIM REPORT OF SPECIAL MASTER AND SUPPORTING BRIEF

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EXCEPTIONS

Plaintiffs Arkansas et al. and Defendants Pennsylvania and Wisconsin respectfully submit the following exceptions to the Second Interim Report of the Special Master issued December 13, 2022:

1. Plaintiffs Arkansas et al. and Defendants Pennsylvania and Wisconsin except to, and this Court should decline to adopt, the Special Master's report and recommendation to grant partial summary judgment to Delaware as to the products that MoneyGram labels Teller's Checks and to deny Plaintiffs Arkansas et al. and Defendants Pennsylvania and Wisconsin's request for summary judgment as to what the Special Master called "Unlabeled Agent Checks."

2. Plaintiffs Arkansas et al. and Defendants Pennsylvania and Wisconsin take exception to, and this Court should decline to adopt:

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

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

c. the Special Master's conclusion that MoneyGram Teller's Checks meet his definition of "third party bank check," and that "Unlabeled Agent Checks" might meet that definition.

PARTIES TO THE PROCEEDINGS

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

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

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INTRODUCTION

This case returns to the Court in an unusual posture. After full briefing and oral argument in this Court, the Special Master became persuaded that the Federal Disposition of Abandoned Money Orders and Traveler's Checks Act, or the FDA, does not cover instruments on which a bank is liable—and, consequently, that his First Interim Report was largely in error. In hearings and a draft revised report, the Special Master proposed two different readings of the statute that excluded instruments on which banks were liable, and in his final Second Interim Report recommended a third such reading. The Second Interim Report recommends that some of the disputed instruments are—and others might be—neither money orders nor covered similar written instruments, but rather are excluded third party bank checks because they bear bank liability. But far from arriving at a better reading of the statute, the Second Report and the proposals leading up to it only show that there is no viable path to a decision for Delaware.

Initially, at a post-argument conference, the Special Master proposed recommending that the Court hold instruments on which a bank is liable are excluded from the FDA based on the reasoning that banks don't issue money orders. On that basis, the Special Master said, a guaranty of payment by a bank was such a profound dissimilarity from money orders that any instrument with such a guaranty fell outside the FDA's "similar written instrument" catchall. This new interpretation, however, had numerous fatal defects; the greatest was Delaware's immediate concession that there are bank-issued money orders and that the FDA covered them.

Following that conference, the Special Master provided the parties with a draft of a revised report. That draft concluded that bank-liable instruments issued at the instance of a third party, rather than a bank itself, were "third party bank checks," excluded from coverage under the catch-all's parenthetical unless they were money orders or traveler's checks. Thus, under the draft report's proposed approach, any prepaid instrument that was not itself a money order or traveler's check, but was similar to those instruments, would fall outside the FDA if a bank was liable for it.

In the final Second Interim Report, the Special Master expanded that interpretation of "third party bank check" to include all bank checks, reasoning that the draft report's interpretation of "third party" was unadministrable. The Second Report also amended his recommendation on whether the disputed instruments were themselves money orders or instead only "similar written instruments," to which the "third party bank check" exception applies. That report adopted a pair of distinctions that the Special Master had dismissed as superficial both in his original report and at the post-argument conference—that unlike many, but concededly not all, money orders, MoneyGram's instruments are often sold to customers of banks for large amounts.

None of these rationales is persuasive. The Special Master's ultimate bases for concluding the instruments in dispute are not money orders are marketing characteristics that the Report did not even say distinguish all money orders. If the features described in the Second Report were truly definitional, many of Western Union's money orders, or bank-issued money orders, wouldn't be money orders. Given that, the recommendation in the Second Report would mean

that instruments without dollar limits or sold to banked customers would not qualify as money orders unless they are labeled as money orders. But that would mean an issuer could escheat to just one State instead of 50 simply by giving its money orders a different name. Congress could not have intended that scheme.

The Second Report's new definition of "third party bank check" is even more infirm. Although the term derived from the financial-regulation terminology of the time—which principally used "third party payment" to refer to ordinary checks—the Special Master concluded that the phrase means any instrument on which a bank is liable. That's a definition no party has ever advanced in these proceedings.

The Special Master arrived at that sweeping definition because there was no "third party" subset of bank-liable checks the phrase could refer to; every possibility, he acknowledged, was unadministrable or drew arbitrary distinctions between covered and excluded instruments. Yet, as the Special Master acknowledged, under that reading, "third party bank check" simply means "bank check"—making the phrase "third party" an obscure nullity. And in reading all bank-liable instruments out of the catchall the Second Report contradicts the plain text of the statute, which says the FDA *covers*—not excludes—a "similar written instrument . . . on which a banking or financial organization . . . is directly liable." 12 U.S.C. 2503. Thus, the Second Report reads the FDA to say it covers similar written instruments on which a bank is liable, except for similar written instruments on which a bank is liable. That cannot be right.

Rather than select any of these new definitions, this Court should adopt the more sensible interpretation

the Special Master gave in his First Interim Report. First, MoneyGram Agent Checks and the products it calls Teller's Checks are money orders because, as the Special Master reaffirmed in his new report, there are no "differences [between] the legal rights and obligations inhering in th[ose] instruments" and in money orders. 2d Report 4. The only differences are labels and marketing strategies, neither of which justify ousting instruments that pose the same windfall problem labeled money orders do.

Second, even if not money orders, MoneyGram Agent Checks and Teller's Checks are "easily" similar written instruments, 2d Report 5, and they are not "third party bank checks." As the Special Master originally concluded, that exclusion merely clarifies that the FDA did not go so far as to abrogate this Court's common-law rules governing the escheatment of ordinary checks. It was a "minor change[]" made in response to Treasury's "technical" suggestion, Del.App.576, 579, to clarify that the FDA would not cover "third party payment bank checks," and the phrase "third party payment" was invariably used at the time to refer to ordinary checks and other *non*-prepaid means of transferring a bank depositor's funds. It was never used to describe the kinds of instruments the Second Report would exclude.

The reason the FDA does not sweep in all bank checks is not that they are "third party bank checks." It's that—unlike the instruments at issue here, and unlike money orders and traveler's checks—the banks that issue them keep records of their purchasers' addresses, meaning they are not "similar written instruments" to money orders and traveler's checks in the relevant sense. This Court need not adopt an overbroad definition of "third party bank check" to

prevent the FDA from swallowing the common-law rule. Instead, it need only apply the FDA to those instruments Congress said it enacted the statute to address: those whose issuers don't keep records of their purchasers' addresses, resulting in an inequitable windfall to a single State.

STATEMENT

I. The First Interim Report

On July 23, 2021, just shy of a year-and-a-half ago, and over two years after the close of summary-judgment briefing, the Special Master filed his First Interim Report. That comprehensive 93-page filing recommended that the Court grant the Claimant States' motion for partial summary judgment and deny Delaware's cross-motion. Report 1a. The First Report both concluded that MoneyGram Agent Checks and Teller's Checks are money orders under the FDA, and alternatively that they are, at minimum, similar written instruments and are not excluded under the third party bank check exception.

That Report first determined that MoneyGram Agent Checks and Teller's Checks are money orders. Report 34-56. As relevant here, it rejected the distinctions of those products from money orders that the Second Report embraces—reasoning that they relied on "superficial" differences that neither went to money orders' "fundamental nature," *id.* at 44, nor were even true of all money orders.

In particular, the First Report rejected Delaware's argument that "the mere absence of a [money order] label" transformed a product that functioned precisely like a money order into something else. *Id.* at 40. The First Report rejected its argument that the lack of dollar limits on MoneyGram Official Checks meant

they weren't money orders, noting that some of MoneyGram's own labeled money orders (MoneyGram's Agent Check Money Order product), as well as pre-FDA money orders, had no or very high limits. *Id.* at 42-43 & 43 n.30. And the First Report rejected Delaware's argument that marketing MoneyGram Official Checks to customers with checking accounts meant they weren't money orders, finding that instruments labeled money order—including MoneyGram's own instruments today and pre-FDA money orders sold by banks—were sometimes sold to banked customers too. *Id.* at 45-46 & 46 n.32.

Alternatively, the First Report recommended that the Court hold that MoneyGram Official Checks are similar written instruments to money orders and traveler's checks, and that they are not third party bank checks. *Id.* at 56. It defined similarity to money orders and traveler's checks in terms of what Congress said money orders and traveler's checks have in common: that their issuers, who held the unclaimed funds, did not keep records of their purchasers' addresses, resulting in a windfall under this Court's common-law rules. *Id.* at 60. Similarity, the Special Master reasoned then, wasn't only a question of whether an instrument shared many features in common with money orders and traveler's checks, but whether those features "are of significance to the purposes of the FDA." *Id.* at 59. MoneyGram Official Checks, the First Report explained, were not only, like money orders and traveler's checks, prepaid instruments for the transmission of money to named payees, but also, like those instruments, lacked the purchaser-address records on which this Court's common-law rule depended. *Id.* at 60.

Last, the Special Master recommended holding that Agent Checks and Teller's Checks are not "third party bank checks." *Id.* at 72-79. The First Report explained that the third party bank check exclusion was made at Treasury's request to exclude "third party payment bank checks" from the statute, *id.* at 72; that the phrase "third party payment service" was used at the time by the Hunt Commission to refer to non-prepaid checks and other methods of payment that transferred a depositor's funds at the order of the depositor, *id.* at 75; and that "at the time the FDA was enacted, the term 'bank check' could be used to refer generally to a check," prepaid or otherwise, *id.* Putting all this together, and noting that Delaware did not argue that MoneyGram Official Checks were "third party payment services," *id.* at 78 n.43, the Special Master concluded that "third party bank check" was best read to mean an ordinary check drawn on a checking account, *id.* at 74-75—the one instrument, as he saw it, that is both "third party payment" and "bank check."

II. Oral Argument and Subsequent Proceedings Before the Special Master

After the parties briefed Delaware's exceptions to the First Interim Report in the ordinary course, the Court heard oral argument on Delaware's exceptions on October 3, 2022. Notably, at that argument, Delaware not only conceded but affirmatively argued on rebuttal that "the Hunt Commission does know what [third party bank check] means, and they told you what it means in that report." Tr. of Oral Argument 74. It argued, however, unlike before the Special Master, that the Hunt Commission said teller's checks—and thus supposedly MoneyGram Official Checks—were third party payment services. *Id.*

Three weeks afterwards, the Special Master convened a video conference on October 26, 2022. Doc. 123.[1] At that conference, the Special Master informed the parties that he could no longer stand by the First Report. He explained that after reading Delaware's claim in the oral argument transcript that banks were liable on MoneyGram Official Checks, he reread the parties' summary-judgment briefing. Doc. 126 at 6. There the Special Master said he found an "entirely persuasive" argument he had missed, amidst Delaware's "numerous . . . unpersuasive" arguments about "marketing strategies or superficial appearances": that banks are liable on MoneyGram Teller's Checks because they sign them as drawers. *Id.* at 8. That asserted liability, the Special Master said, meant MoneyGram Teller's Checks were not money orders. Though acknowledging that dictionaries say money orders can be issued by banks, the Special Master stated that was "not the usual practice" and that the record contained "no instances of bank-issued money orders." *Id.* at 10. The Special Master stated that not only did bank liability mean MoneyGram Teller's Checks weren't money orders; the distinction was so "significant and important," *id.*, that they were not even "sufficiently similar to qualify as other similar instruments." *Id.* at 10-11.

Turning to MoneyGram's Agent Checks, the Special Master indicated he would "stand by [his] original recommendation." *Id.* at 14. All Agent Checks, he explained, identified MoneyGram as their drawer, and even those that banks did not expressly sign as MoneyGram's agent did not identify banks as co-

[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.

drawers. *Id.* at 12. Thus, banks were not liable on these instruments, and only Delaware's original "superficial" distinctions between Agent Checks and money orders remained. *Id.* at 13. Those distinctions, he reaffirmed, were "no true difference." *Id.* Agent Checks were still money orders, and at minimum similar to them. The Special Master did not propose a change to the First Interim Report's interpretation of "third party bank check."

The Special Master invited written comments on the propriety and substance of his proposed new report. Doc. 125. The day after the video conference, the Special Master separately emailed the parties requesting record citations, if any, of examples of bank-issued money orders. Doc. 126A. Both Defendant States and Delaware responded with numerous record citations where bank-issued money orders were reproduced and discussed in the years preceding the FDA's enactment. *Id.* After reviewing those submissions, the Special Master ordered the parties to re-brief the meaning of "third party bank check." Doc. 127.

The parties timely filed their comments. The Claimant States argued that submitting a new report after briefing and oral argument in this Court was improper and that the Special Master's new views were incorrect on the merits. Doc. 131. Delaware defended the propriety of his proposal, but diverged from it on the merits, instead presenting an alternative theory on which MoneyGram Teller's Checks were true teller's checks and therefore not money orders or similar to them, and, if similar, were third party bank checks. Doc. 133.

III. The Draft Second Interim Report

On November 30, 2022, the Special Master sent the parties his draft second report. Doc. 138. Though the draft report arrived at largely the same conclusions the Special Master had articulated during the video conference, its rationale was substantially different. The draft report now recognized that "bank-issued money orders" both existed and were "covered by the Act." *Id.* at 7 n.3. But the draft report still concluded that MoneyGram Teller's Checks were not money orders, and—in a change from the Special Master's video conference proposal—proposed finding that MoneyGram Agent Checks were not money orders either. *Id.* at 3-6.

In support of that conclusion, the draft report relied on two distinctions that the Special Master had dismissed as superficial a month prior. First, it said the disputed instruments differed from money orders because they were primarily sold to people with checking accounts, *id.* at 4-5; second, they differed from money orders because they lacked dollar limits, *id.* at 5. Though it acknowledged "the same rights and obligations arise" from instruments labeled "money order" and the disputed instruments, *id.* at 3, the draft report proposed that these "adjectival, customary differences" sufficed to distinguish the two, *id.* at 4.

On the questions of similarity and the third party bank check exclusion, the draft report concluded that "the similarities between the Disputed Instruments and money orders [we]re easily sufficient to make them 'similar instruments.'" *Id.* at 5 (alteration omitted). That was a change from the position the Special Master articulated at the video conference, but it was consistent with the First Report. Yet the draft report also now suggested that "cashier's checks and teller's

checks [we]re enormously similar to money orders," even though unlike money orders they escheat equitably under the common-law rule, and "Congress had not intended to include" them. *Id.* at 17-18.

But having read the FDA's residual clause to cover instruments the Special Master believed Congress did not intend to cover, the draft report read the "third party bank check" exclusion as exempting those instruments to remain consistent with the perceived legislative intent. So the draft report offered a new expansive definition of third party bank checks. Under this new interpretation, an instrument would be a third party bank check so long as (1) a bank is liable on it, making it a "bank check," and (2) it was issued "at the instance of a third party" customer, as opposed to the bank itself. *Id.* at 20 (emphasis omitted). Thus, the Special Master preserved his previous conclusion that MoneyGram Teller's Checks were not covered by the FDA because banks were (assertedly) liable on them.

Yet the draft report went further. Whereas a month prior the Special Master had said that banks were not liable on MoneyGram Agent Checks, even when banks did not expressly sign them as MoneyGram's agent, the draft report suggested the signing banks might be drawers on those Agent Checks, even though "the checks identify MoneyGram, and MoneyGram alone, as drawer." *Id.* at 23. The draft report thus proposed a trial or further summary-judgment proceedings in which new evidence might reveal whether banks were liable on these so-called "Unlabeled Agent Checks," thus excluding them from the FDA as third party bank checks. *Id.* at 25.

On December 5, 2022, the Special Master held a hearing on the draft report. Doc. 139. The Claimant

States argued that the draft report's definition of third party bank checks was unadministrable and couldn't have been intended by Congress because it turned on the identity of an instrument's purchaser—precisely the information that MoneyGram and other issuers of similar written instruments lack. *Id.* at 26-27. Delaware did not dispute that MoneyGram lacks the information necessary to apply the draft report's definition, and suggested the Special Master modify the draft to make its proposal workable. *Id.* at 43-52.

IV. The Second Interim Report

On December 13, 2022, the Special Master issued his Second Interim Report. It made the same recommendations as his draft report, with a critical modification to his definition of third party bank checks. Like the draft report, the Second Report concluded that the phrase referred only to checks on which a bank is liable. But it acknowledged that the draft's attempt to give meaning to "third party" would "not be administrable." 2d Report 19. And it rejected Delaware's definition, which turned on whether a check is paid through a third party, as "tailor-made to match the Disputed Instruments" and arbitrarily underinclusive. *Id.* at 18. Accordingly, the Second Report concluded that the best reading of the so-called "'third party' component of 'third party bank check'" was that it merely required a bank check to be "designed . . . for making payments to a third party." *Id.* at 19. Since all bank checks are designed for that purpose, the report acknowledged "the term 'bank checks' would mean the same thing as 'third party bank checks.'" *Id.* at 20 n.11.

SUMMARY OF THE ARGUMENT

The Court should sustain these exceptions and adopt the Special Master's recommendation in his First Interim Report that the FDA applies to the disputed products.

I. The Court should not entertain the Second Interim Report. This Court has held that to avoid confusion and conserve judicial resources, a district court may not revise its decision during an appeal. The same concerns apply to a Special Master's revising his report while this Court reviews it—and in fact they are magnified in that context.

II. MoneyGram Agent Checks and Teller's Checks are money orders. The Second Interim Report recognizes there are no differences between the rights and obligations arising from those instruments and ordinary money orders. The only distinctions that report draws are that the products MoneyGram markets as Agent Checks and Teller's Checks are often sold for larger sums than many money orders are, and that they are often sold to customers with bank accounts while other money orders are often not. Neither distinction distinguishes all money orders or is truly definitional. Indeed, they do not distinguish MoneyGram's own Agent Check Money Order product—which Delaware concedes is a money order. Rather, the Second Report's recommendation would essentially mean that if an instrument has the features the Report identifies *and* is not labeled as a money order, then it is not a money order. But that would make escheatment priorities turn on branding decisions that have no bearing on the purposes of the FDA.

III. If not money orders, Agent Checks and Teller's Checks fall within the FDA's coverage of "similar"

instruments. Both the First and Second Reports concluded those instruments are similar to money orders; the Second Report only recommended they were excluded from coverage because they are "third party bank checks." But the history and origins of that term demonstrate that it refers to an ordinary, non-prepaid check, as the First Report concluded.

The Second Report now recommends the Court hold that *all* bank checks, which it defined as checks on which banks are liable, are "third party bank checks," and therefore excluded from the "similar written instrument" clause. That is the logical consequence of reading the exclusion to target bank-liable instruments; as the Special Master recognized, there is no subset of those instruments that "third party" can pick out. But that proves the exclusion does not target bank-liable instruments, because it makes the phrase "third party" a nullity and contradicts the statute's unambiguous coverage of similar written instruments on which banks are liable.

Even were the Court to adopt the Second Report's definition of "third party bank check," Agent Checks and Teller's Checks would not qualify. A "bank check" is either an ordinary check, or a check drawn by a bank on itself or another bank at which it has an account. Agent Checks and Teller's Checks are neither; they are drawn on MoneyGram's clearing banks, which have no relationship with the instruments' selling banks. And Agent Checks bear even less resemblance to bank checks, as they solely identify MoneyGram (a non-bank) as their drawer.

IV. Adopting the Second Report's new interpretations of the FDA would read the key terms of the statute in a way that is disconnected from its stated purpose: to avoid inequitable escheatment. Instead of

mapping onto the classes of instruments that inequitably escheat under the common-law rule, the statute would capture instruments that escheat equitably and exclude others that escheat inequitably. And in this case, adopting the Second Report would lead to the precise outcome Congress enacted the FDA to avoid: a windfall to the State where a money-transmitting company happened to incorporate because that company fails to keep records of its purchasers' addresses.

ARGUMENT

I. The Court should decline to entertain the Second Interim Report.

The Second Interim Report ultimately illustrates why Delaware cannot prevail here, and if its substance were its only defect, the Claimant States would not object to the Court's considering it. But allowing special masters in original cases to submit new reports after briefing and oral argument risks making the adjudication of original cases less accurate.

As the Special Master acknowledged when first announcing his plan to submit a new report, were the Special Master a district judge in an ordinary case, he would be barred from issuing a new decision during this Court's review. Doc. 126 at 7. When a district court's decision is appealed, the appeal "divests the district court" of jurisdiction "over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) (per curiam).

The concerns underlying that rule are quite similar in the present context. The "divestiture of jurisdiction rule is not based upon statutory provisions or the rules of civil or criminal procedure. Instead, it is a judge made rule originally devised . . . to avoid confusion or

waste of time" from dual-track proceedings. *Rodriguez v. Cnty. of L.A.*, 891 F.3d 776, 790 (9th Cir. 2018) (internal quotation marks omitted); *see also United States v. Montgomery*, 262 F.3d 233, 239-40 (4th Cir. 2001) (same); *United States v. Rodgers*, 101 F.3d 247, 251 (2d Cir. 1996) (same). The same "interest[s] of judicial economy," *Rodgers*, 101 F.3d at 251, that led courts to craft that rule apply here. It is no less confusing, wasteful, or judicially uneconomic to brief and review two special master reports—one submitted after briefing and oral argument on the first—than it is to brief and review two district court opinions.

Further, this situation presents distinct concerns that ordinary appeals do not. This Court, unlike the courts of appeals, adheres with rare exceptions to the rule that cases are decided in the same Term that they are argued. Revising a report on that timeline requires unusual expedition for the parties, the Special Master, and this Court and thus does not permit the same comprehensive briefing and review that accompany an original report. For these reasons, the Claimant States respectfully suggest that this Court should decline to entertain the Second Interim Report.

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

In the 1970s when the FDA was written, money orders were sold in a variety of places to a variety of consumers. But all shared a set of core traits: they were prepaid drafts used to transmit money to a named payee. Reply 23-26. MoneyGram's Agent Checks and Teller's Checks share those traits, and they are not members of a well-known generic class of instruments, like cashier's checks or true teller's checks, that simply go by another name.

The Second Report acknowledges there are "very great similarities between [those instruments] and money orders." 2d Report 3. It acknowledges there is a total "absence of differences in the legal rights and obligations inhering in the instruments." *Id.* at 4. Yet it concludes that the disputed instruments are not money orders based on just two asserted "customary differences," *id.* at 3, that only a month prior, and originally in the First Report, the Special Master had dismissed as superficial non-distinctions. Those differences are that the disputed instruments are sold without dollar limits, and that they are often sold to people with checking accounts.

The Court should not adopt a legal definition of a class of financial instruments by reference to who tends to buy or sell them, or the varying caps that its various sellers tend to place on them, because those are "peripheral details and not . . . characteristics defining the rights and obligations inhering in use of the instruments." Report 42. But more importantly, the distinctions the Second Report identified do not actually distinguish many money orders. In particular, they do not distinguish MoneyGram's Agent Check Money Orders—which MoneyGram escheats to no objection from Delaware as money orders—or the bank money orders that the Second Report acknowledges exist.

Importantly, the Second Report does not conclude the "customary differences" it recognizes distinguish all or even nearly all money orders. In light of that, the Second Report's ultimate test for whether an instrument is a money order is whether it's labeled as one. That can't be right. And the fact that it was the only way the Second Report could say *these* instruments weren't money orders without claiming a class

of recognized money orders weren't, illustrates that the disputed instruments are money orders after all.

A. Dollar limits don't define money orders.

In part, the Second Report reasoned the disputed instruments are not money orders because they lack dollar limits and are "commonly used" in large purchases. 2d Report 5. This contrasted, it concluded, with instruments recognized as money orders, which the report said are "typically used for small payments" and which "[s]ome issuers" place dollar limits on. *Id.* Even by their terms, these observations don't state a definitional requirement. If only "some" issuers place limits on their money orders, and money orders are only "typically" used for small payments, it follows other money orders are uncapped and used for large payments.

The record bears that out. As the Special Master explained in his First Report, there's nothing unusual about high-dollar money orders. The Second Report's citation for how money orders are "typically" used was deposition testimony on how MoneyGram's Retail Money Orders are used. 2d Report 5 (citing Del.App.247). But as the Special Master previously observed, "Delaware does not even claim" that all of MoneyGram's money orders are used that way. Report 42. Its so-called Agent Check Money Orders are issued "for really any denomination." Del.App.255. And as the Special Master noted then, MoneyGram escheats those instruments as money orders under the FDA, to no objection from Delaware. Report 24.

Likewise, the Second Report's example of some issuers' dollar limits was 1970s postal money orders. 2d Report 5. But as the Special Master previously documented, samples of FDA-era money orders sold by

the MoneyGram of the time, Western Union, do not evidence dollar limits in any amount. Report 43 n.30. To the contrary, Western Union's 1939 money order protocols contemplated money orders of $3,500, *id.*, or over $74,000 in today's dollars.[2] In fact, in 1939 Western Union had a rule about the code used to wire a money order of $11,000 or more, which it illustrated with an example of a money order for $24,267, Doc. 86, Ex. X at 76, or over half a million today.

B. Use by unbanked customers does not define money orders.

The Second Report's other distinction between the disputed instruments and money orders is likewise incorrect. The report concluded that the disputed instruments "are sold primarily to the selling bank's customers," while money orders are "designed to serve persons" who are not customers of any bank. 2d Report 4. But there is an entire class of money orders that are sold by banks: "bank-issued money orders."[3] *Id.* at 6 n.5. Indeed, the FDA expressly contemplates bank money orders, listing "banking . . . organization[s]" first among the various entities that sell

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[2] *CPI Inflation Calculator*, Bureau of Labor Statistics, available at https://www.bls.gov/data/inflation_calculator.htm.

[3] Of course, some bank-issued money orders may be sold to unbanked customers. But it would be incorrect to assume that they are only or mostly purchased by customers without checking accounts. As the First Report explained, money orders are also useful to banked purchasers whose payees won't (or can't) accept a personal check. Report 45-46. For example, the Commodity Futures Trading Commission routinely bargains for payment by (among other methods) bank money order in its consent orders. *See, e.g.*, *CFTC v. Mason*, No. 4:21-cv-1902, 2022 WL 17687873, at *10 (S.D. Tex. Oct. 7, 2022). It does not accept personal or business checks.

money orders and may be "directly liable" on them. 12 U.S.C. 2503. And evidence throughout the record establishes that money orders were issued by banks at the time. *See* Doc. 126A (correspondence from Delaware and the Claimant States, collecting record evidence of bank money orders).

The Second Report acknowledged bank money orders exist, and it conceded "[t]here is no reason to think Congress would have wished to exclude bank money orders from escheating" under the FDA. 2d Report 6 n.5. Yet that Report's principal reason for concluding the disputed instruments are not money orders is that they are primarily sold to bank customers—just like bank money orders. *Id.* at 4. The only difference between the two is that bank money orders are labeled money orders and the disputed instruments are not.

The Second Report's differing treatment of bank money orders and the disputed instruments thus ultimately turns on their label. Indeed, under the Second Report's interpretation of the FDA, whether an instrument is labeled a money order would determine whether it's covered by the FDA altogether. For example, bank money orders would fall out of the FDA if they were relabeled. That's because under the Second Report's definition of third party bank check, bank money orders would be third party bank checks. *See id.* at 6 n.5. The only thing keeping them in the FDA is the (correct) conclusion, retained from the First Report, that the "third party bank check" exclusion modifies only "similar written instrument." *See id.* Were they to lose the label, they would become mere similar written instruments and be excluded as third party bank checks.

Indeed, the record demonstrates as much. For example, MoneyGram's Agent Check Money Orders, which are sold at banks without dollar limits, would be money orders under the Second Report. But "Agent Checks," which are functionally identical to Agent Check Money Orders, Reply 28-29, may fall out of the FDA's scope as third party bank checks because they bear a different legend. And whereas bank money orders are money orders on the Second Report's view, functionally indistinguishable MoneyGram "Teller's Checks" fall out of the FDA altogether because of what's at most secondary bank liability.

As those examples illustrate, the Second Report's rule allows issuers to control whether they escheat to one State or 50 by simply relabeling their products. Just as "[t]here is no reason to think Congress would have wished to exclude bank money orders from escheating" under the FDA, 2d Report 6 n.5, there is no reason to think Congress would have wished to exclude rebranded bank money orders from escheating under the FDA.

MoneyGram Agent Checks and Teller's Checks, like MoneyGram Agent Check Money Orders and other issuers' money orders, are prepaid drafts used to transmit money to a named payee. The only difference is their label. The Court should hold MoneyGram Agent Checks and Teller's Checks are money orders.

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

The Second Report agreed with the Claimant States that MoneyGram Agent Checks and Teller's Checks have "very great similarities" to money orders. 2d

Report 3. But it concluded they were nevertheless excluded from the FDA as third party bank checks. Under its interpretation, the FDA's residual "similar written instrument" clause would sweep in every well-known class of bank draft, and its "third party bank check" parenthetical exclusion would kick them back out.

The Court should decline to adopt that approach and instead conclude that the residual clause embraces novel or post-FDA instruments that may not quite be money orders or traveler's checks, but function the same way and present the same escheatment problems. The third party bank check exclusion then clarifies for avoidance of doubt that ordinary checks are not within the catch-all. This reading makes sense of the statute's structure and Congress's characterization of the exclusion as a technical amendment. And that cautious approach makes perfect sense given that this Court's decision creating the common-law rule, which Congress sought to partially abrogate, concerned ordinary checks.

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

The Claimant States agree with the Second Report that, at minimum, there are "very great similarities between [the disputed instruments] and money orders," 2d Report 3, and that those "similarities . . . are easily sufficient to make them 'similar instruments.'" *Id.* at 5 (alteration omitted). After all, the only differences between them and money orders identified in the Second Report are distinctions that the Second Report acknowledges do not distinguish all money orders, and that have no bearing on the rights and obligations of their purchasers and sellers.

The Court could simply stop there. But if it chooses to give a definition of "similar written instruments," the Claimant States would discourage one that, as the Second Report suggests, sweeps in all prepaid drafts. *See* 2d Report 15 (stating "prepaid cashier's checks and teller's checks bear great similarity to money orders" because they are all "prepaid checks purchased from banks or financial institutions"); *id.* at 15 n.8 ("the certified check is also very similar to a money order"). Such a broad interpretation of "similar written instruments" might lead the Court, as it did the Special Master, to craft an equally broad interpretation of "third party bank check" that excludes instruments that escheat equitably under the common-law rule.

Textually, that would be an odd interpretation of the FDA, reading the statute to sweep in the universe of prepaid instruments through a residual clause and then exclude most of them through a parenthetical. *Cf. Boechler, P.C. v. Comm'r*, 142 S. Ct. 1493, 1498 (2022) ("[A] parenthetical . . . is typically used to convey an 'aside' or 'afterthought.'" (quoting Bryan Garner, Modern English Usage 1020 (4th ed. 2016))). And because, as the Second Report ultimately concluded, there is no good way to read "third party bank check" to capture only those prepaid instruments that do not pose a windfall problem, an overbroad interpretation of similar written instruments—when paired with an equally overbroad reading of "third party bank check"—risks excluding instruments that pose the very problem the FDA was enacted to solve.

If, then, the Court chooses to define "similar written instruments," we submit the place to look for guidance is in Congress's findings, which tell us what it thought money orders and traveler's checks had in common.

As the Special Master previously 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.'" Report 59 (citing *Rousey v. Jacoway*, 544 U.S. 320, 329-31 (2005)). And Congress's findings say what it thought those characteristics were: their issuers, who held unclaimed funds, did not keep records of purchasers' addresses, frustrating the application of this Court's common-law rule. 12 U.S.C. 2501(1).

Looking to that shared characteristic is consistent with how this Court understands similarity in the law generally. As the Court has recently said, the question in "all analogical reasoning" is whether things are "relevantly similar," not just whether they share a number of common traits. *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2132 (2022) (internal quotation marks omitted). And the relevant similarity for Congress's purposes between money orders, traveler's checks and the disputed instruments is not just that they are prepaid drafts, but that they are prepaid drafts with a recordkeeping problem that results in inequitable escheatment under the common-law rule.[4]

[4] A further reason that a proper interpretation of the "similar written instrument" clause would not sweep in cashier's checks and teller's checks is that unlike money orders and traveler's checks, those instruments are not, as a class, all prepaid. *See* Reply 39. Rather, banks sometimes issue them to pay their own bills. *See id.* They do not, by contrast, write their creditors a bank money order or traveler's check.

B. Money-Gram Official Checks are not "third party bank checks."

Where the Second Report's reading of "similar written instrument" would bring every form of bank check into the FDA, its reading of "third party bank check" would take them all out again. According to the Second Report, that phrase excludes any check—which it defined as "an instrument that is designed for making payments to third parties"—"on which a bank has assumed liability." 2d Report 20.

The defects in that interpretation are numerous and fatal. It would nearly repeal, parenthetically no less, the catch-all. It "would mean the same thing" as bank check, *id.* at 20 n.11, begging the question why Congress wouldn't have simply excluded bank checks instead of adding an "obscure" modifier, *id.* at 6. Paradoxically, it would mean the FDA never applies to similar written instruments on which a bank is liable, even though the FDA says it applies to a "similar written instrument . . . on which a banking or financial organization . . . is directly liable." 12 U.S.C. 2503. It has never been advanced by any party. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) ("[A]s a general rule, our system is designed around the premise that parties represented by competent counsel know what is best for them, and are responsible for advancing the facts and argument entitling them to relief." (internal quotations and alterations omitted)). And tellingly, it was contradicted by Delaware's own expert, who testified that none of the MoneyGram products at issue here "fit[] with any ordinary sense of what [the] term[]" third party bank check should mean. App.283.

These defects are the logical consequence of reading the exclusion as targeting checks on which banks are

liable. As the various alternate readings the Special Master considered and rejected show, there is no subset of bank checks, as traditionally understood, that the phrase can apply to. Delaware's interpretation, which would only exclude bank checks "paid through a third party," is transparently "tailor-made to match the Disputed Instruments" and has no historical support. 2d Report 18 (emphasis omitted). An interpretation that looked to whether a bank check was purchased by a third party or paid to a third party would "not be administrable" because MoneyGram lacks records of either. *Id.* at 19. And excluding *all* bank checks leads to the incongruities outlined above. The Court should adopt the Special Master's original interpretation and read "third party bank check" to mean ordinary check.

1. A "third party bank check" is a non-prepaid check drawn on a checking account.

The Special Master originally concluded that the third party bank check exclusion covered "ordinary checks drawn on a checking account." Report 78. That interpretation may not strike a reader as obvious in 2023, but it's the best reading of what a member of Congress or a regulated entity would have understood the phrase to mean in 1974. The Court should adopt it here.

Everyone agrees that the third party bank check exclusion was added at Treasury's suggestion. 2d Report 7. Treasury asked Congress to exclude "third party payment bank checks." Del.App.575 (Treasury letter). Congress agreed to this "technical correction[],"stating in the lead committee report on the bill that it "adopted the technical suggestions of . . . Treasury." Del.App.576 (Senate Report). Sponsors

agreed in floor statements that they had "accept[ed]" Treasury's "minor change[]." Del.App.579. So although Congress omitted the word "payment" from Treasury's suggestion, perhaps thinking it redundant,[5] and excluded "third party bank checks," there's no evidence that Congress intended to exclude anything more or less than what Treasury asked. Nor has Delaware argued otherwise.

The phrase "third party payment," in turn, had an understood meaning at the time the FDA was enacted: ordinary checks and other methods of payment that transferred depositor funds on a depositor's order. The Hunt Commission defined the phrase "third party payment services" in 1972 as "any mechanism whereby a deposit intermediary transfers a depositor's funds to a third party . . . upon the . . . order of the depositor," including "[c]hecking accounts." Del.App.350 n.1 (Hunt Commission Report). Treasury published a summary of the Commission's report in 1973 that repeated that definition and wrote that "[c]hecking accounts are the most common type of third-party payment services." App.178 (emphasis omitted).

General publications, courts, and academics all used "third party payment" the same way. In 1973, The Washington Post wrote that "'Third party payment' today means essentially a checking account," though it could also include "bank credit cards." App.177 (emphasis omitted). In 1972, The Wall Street Journal described "third party payment privileges" as "checking accounts, automatic bill payment, credit cards." *Id.* (emphasis omitted). Courts and academics shared their understanding. *See, e.g.*, *U.S. League of Sav. Assocs. v. Bd. of Govs. of Fed. Rsrv. Sys.*, 463 F. Supp.

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[5] *See infra* at 36 n.9

342, 347 (D.D.C. 1978) (glossing the then-existing prohibition on check-writing from interest-bearing accounts as a ban on "third-party payments"); Paul R. Verkuil, *Perspectives on Reform of Financial Institutions*, 83 Yale L.J. 1349, 1355 (1974) (discussing proposals to let savings banks "offer third party payment services (such as checking accounts and credit cards)").

Given that understood meaning, Treasury's proposal to exclude "third party payment bank checks" is best read as excluding a subset of third party payment services: those that are "bank checks," namely ordinary checks.[6] Though some post-FDA law review articles defined "bank check" to exclude ordinary checks, *see* 2d Report 12-13 (citing articles from 1978 and 1980), a leading pre-FDA treatise defined "bank check" to include them. Report 75-76 (citing 1969 treatise). Thus, Treasury's proposal excluded a subset of "bank checks" from the scope of the statute: those that were "third party payment," namely ordinary checks.

By contrast, no source describes prepaid bank checks banks *sold*—whether teller's checks, cashier's checks, bank money orders, or traveler's checks—as a third party payment. Such instruments, unlike ordinary checks, transfer bank funds on a bank's order, not a depositor's funds on a depositor's order.

At oral argument, Delaware agreed with Claimant States that "the Hunt Commission does know what

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[6] Illustrating that, in 1983, when Washington State amended its state escheatment laws to match the FDA's coverage, it replicated the FDA's "third party bank check" exclusion and defined "third party bank check" as an ordinary check. 1983 Session Laws of the State of Washington, ch. 179, secs. 1(15), 4. And several dozen States also used the phrase after the FDA's enactment in their unclaimed-property laws.

[third party bank check] means, and they told you what it means in that report." Tr. of Oral Argument 74. That waives reliance on definitions, like that in the Second Report, that reject the Hunt Commission as a source for the meaning of the term. *See* 2d Report 11.[7]

Rather than reject the Hunt Commission as guide, Delaware's only contention at oral argument was that the Commission's report "says" teller's checks were third party payment services. Tr. of Oral Argument 74. It "says" no such thing. Delaware's only support for that claim is an obscure sentence in the report stating that some savings banks "offer non-negotiable third party payment services using customers' interest bearing accounts." Del.App.357.

There's no reason to read that as a reference to teller's checks. In the first place, the very next sentence says that "[a] number of states permit mutual savings banks to offer checking accounts." *Id.* That might well be all the previous sentence contemplates. Second, the sentence describes the savings banks' unnamed third party payment services as non-negotiable; teller's checks are negotiable. *See* U.C.C. 3-104. Third, teller's checks flunk the Commission's own definition of third party payment

[7] Should the Court determine that the phrase "third party bank check" does not derive from then-common "third party payment" terminology, the other way the term could have been understood when the FDA was enacted is a reference to checks drawn by a bank on a bank that have been endorsed to a new (or "third party") payee. Reply 44-45. That interpretation is supported by the testimony of Claimant States' expert witness and other legal authorities. App.212; *United States v. Thwaites Place Assocs.*, 548 F. Supp. 94, 95 (S.D.N.Y. 1982)). The Second Report's interpretation lacks any such support.

services, Del.App.350 n.1; they transfer the drawing bank's money on its order, not their customer's money on his. Last, there is no reason to assume the unnamed service must have been a teller's check, as opposed to services savings banks offered that were actually described as third party payment at the time, such as "automatic bill payment." App.177 (emphasis omitted); *see also Am. Bankers Ass'n v. Connell*, 686 F.2d 953, 954 n.1 (D.C. Cir. 1979) (per curiam) (holding FDIC rule permitting savings banks to provide automatic fund transfer violated prohibition on savings "transfers to third parties").

That leaves us where we began. Treasury's proposal to exclude "third party payment bank checks," and thus Congress's exclusion of "third party bank checks," was a "minor change" that excluded those forms of third party payment that were bank checks. The only forms of third party payment that could also be described as bank checks were ordinary checks drawn on personal or business checking accounts.[8]

[8] As late as 2001, the Department of Justice used "third party bank check" or "third party check" to refer to ordinary checks in criminal indictments. *See, e.g.*, Superseding Indictment ¶ 7, *United States v. Joyeros*, No. 00-cr-960, 2000 WL 35598634 (E.D.N.Y. Dec. 13, 2001) ("[Defendants] established and utilized several methods by which they knowingly received and transacted business with drug proceeds, including coordinating and receiving drug proceeds from cash pick ups, receipt of wire transfers, cashier's checks, and third party bank checks."); *id.* ¶ 11 (charging receipt of "numerous third party checks," i.e., checks "issued . . . on [defendant's] business account").

2. The Second Report's rationales for rejecting this definition are unpersuasive.

Though the First Report embraced this definition and persuasively explained why the Hunt Commission's definition of similar terminology was relevant, Report 76-77, the Second Report now calls the same interpretation "strained" and "shaky." 2d Report 11. The Second Report offers two reasons for this change: ordinary checks are not "bank checks," and Congress and Treasury would have seen no need to clarify that ordinary checks weren't covered by the FDA. Neither is persuasive.

First, the Second Report concluded that only checks on which a bank is liable are "bank checks," citing two post-FDA law review articles. 2d Report 12-13. It rejected a leading contemporaneous treatise's definition of "bank check" as including ordinary checks on the grounds that definition was unique to the treatise and would have been unnecessary if it were typical of ordinary usage. *Id.* at 12. But the treatise's usage of "bank check" merely illustrates that at the time of the FDA and going back to at least the First World War, the phrase bank check had been used to refer to ordinary checks. App.212-13; *see also, e.g.*, *Little v. City of L.A.*, 117 Cal. App. 3d 938, 941 & n.5 (Cal. Ct. App. 1981) (holding that personal checks are bank checks and noting that "[i]n virtually every other instance in which a court has had occasion to define the word 'bank check' no distinction between checks drawn by banks and checks drawn by individuals or corporations was made"). Moreover, it is just as likely the case that the two post-FDA law review articles that the Second Report relied upon felt compelled to spell out their narrow definitions of "bank check" because it had also been used to refer to ordinary

checks. So at best, the Second Report merely shows that different commentators understood the term differently.

But even if using "bank check" to include ordinary checks were non-standard usage in 1974, that wouldn't counsel in favor of reading "third party bank check" as the Second Report did. *No* contemporaneous sources use "third party payment," the source of the exclusion's "third party" language, to include the instruments the Second Report read "third party bank check" to cover: teller's checks, cashier's checks, and the like. That Report cited none.

The only source that Delaware has ever offered is the Hunt Commission's statement that some savings banks offered an unspecified form of non-negotiable third party payment service—which, as discussed, cannot be read as obliquely referencing teller's checks. And every contemporaneous gloss of the phrase only read it to include ordinary checks, not others.

The Second Report also reasoned that "Congress would have perceived no need" to exclude ordinary checks from the FDA because they are dissimilar to money orders and traveler's checks. 2d Report 14. But everyone agrees that whatever Congress meant to exclude wasn't something the original bill was best read to cover, and the original bill could have been misunderstood to reach ordinary checks.

To begin with, whatever Treasury and Congress intended to exclude wasn't something that the catchall was best read to cover in the first place. Treasury's letter stated that in its view the bill was not "intended by the drafters" to include third party payment bank checks, and that it only "could be interpreted" to cover them. Del.App.575. Likewise, when Congress acceded

to Treasury's request, no one suggested that in doing so they were actually reducing the statute's coverage. Instead Congress called the change "clarifying" and "technical." Del.App.568, 576 (Senate Report). Thus, the Second Report ultimately did not conclude that absent the exclusion the FDA would cover cashier's checks and teller's checks either. In fact, it said that "it can be assumed with confidence" that Congress did not intend to cover them because Congress did not mention those well-known instruments by name. 2d Report 17. So there's no need—and it would be incorrect—to read the exclusion to exclude instruments the catchall otherwise would not cover.

But even if "third party bank check" must refer to instruments that were arguably "similar," ordinary checks fit the bill. As the Special Master explained, "[s]imilarity is a highly flexible concept," and the bill as originally drafted "gave no clue *how similar* an instrument needed to be" to be covered. *Id.* at 16. Ordinary checks are certainly dissimilar from money orders in some ways, but they're similar in others. And Treasury had reason to think fairly little similarity might suffice. A memorandum accompanying the bill by its lead sponsor, which Treasury quoted in its letter, said the bill would cover "similar instruments for transmission of money." Del.App.574, 588-89. So Treasury could have thought that any instrument for the transmission of money counted. And the very case that created the common-law rule the FDA sought to abrogate, which its lead sponsor mentioned in his memorandum, Del.App.589, concerned ordinary business checks. *See Texas v. New Jersey*, 379 U.S. 674, 675 (1965). It therefore would have been quite natural for Congress to clarify that the FDA did not abrogate *Texas*, but only its extension to money orders in *Pennsylvania v. New York*, 407 U.S. 206 (1972).

3. The Second Report's new definition is an incorrect reading of the statute.

In place of the Special Master's prior narrow interpretation of third party bank check, the Second Report offered a sweepingly broad one, capturing any instrument "designed for making payments . . . on which a bank has assumed liability." 2d Report 20. The most fundamental problem with this interpretation has already been discussed: though everyone agrees the exclusion was intended to capture a form of what was then known as third party payment, no contemporaneous source ever used "third party payment" to refer to prepaid bank checks, *id.* at 21, rather than ordinary ones.

Indeed, the Second Report's interpretation proves that "third party bank check" can't be a reference to prepaid bank checks. The Special Master suggested multiple interpretations that read the exclusion to target prepaid bank checks, and considered and rejected several more. Ultimately, the Special Master found that the only tenable reading was one that excluded *all* prepaid bank checks; any other would be unadministrable or draw arbitrary and textually unsupported distinctions between instruments. Yet having arrived at that conclusion, the Second Report arrived at an interpretation that read "third party bank check" as nothing more than an obscure synonym of "bank check." Worse yet, the Second Report read the statute to contradict itself. On that Report's reading, the statute covers similar written instruments on which a bank, financial organization, or business association is directly liable—except similar written instruments on which a bank is directly liable. If that's the consequence of reading "third party bank

check" to mean prepaid bank check, and it is, "third party bank check" can't mean prepaid bank check.

a. *The Second Report's interpretation is implausibly redundant.*

One of the Special Master's concerns about the First Report's interpretation of "third party bank check" is that it was surplusage; ordinary checks were already outside the FDA because they obviously were not similar written instruments. But if surplusage is the yardstick, the Second Report's new interpretation falls far shorter. As the Special Master acknowledged, under the Second Report's interpretation of "third party bank check," "third party bank checks" and "'bank checks' would mean the same thing." 2d Report 20 n.11. After all, every "bank check," however that phrase is defined, is "designed for making payments to third parties," *id.* at 20, "regardless of whether it was actually used to pay a third party," *id.* at 21. And on the Second Report's interpretation, that's all "third party" means. By contrast, under the Special Master's former interpretation, and ours, "third party" does enormous work: it narrows the very broad class of "bank checks" to include only those that were understood in 1974 as a form of third party payment—just ordinary checks.

Claimant States do not disagree with the Special Master's statement that "[t]he canon disfavoring surplusage should not be applied with a rigor that would . . . distort[] Congress's purpose." *Id.* at 20 n.11. But if the canon has any force, it has to preclude an interpretation like the Second Report's. On the Second Report's reading, *see id.* at 17, Treasury asked Congress to exclude "third party payment bank checks" as a needlessly wordy—and given third party payment's well-understood meaning, extraordinarily

misleading—way of simply excluding "bank checks". Then Congress, which was fastidious enough in its drafting to omit the redundant word "payment,"[9] nevertheless chose to retain the prefix "third party," which on this view does no work at all. That is not a plausible interpretation. After all, "[a]djectives like 'third-party' 'modify nouns—they pick out a subset of a category that possesses a certain quality.'" *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1755 (2019) (Alito, J., dissenting) (quoting *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 368 (2018)).

Implausible as the Second Report's reading is, it follows necessarily from the conclusion that the exclusion excepts at least some kinds of prepaid bank checks. As the Second Report and the proposals leading up to it show, it is either all prepaid bank checks or none.

To begin with, the Special Master repeatedly and correctly rejected Delaware's attempt to square this circle, which would only exclude prepaid bank checks "paid *through a third party*." 2d Report 18. As he explained, that interpretation is transparently "tailor-made to match the Disputed Instruments," which happen to be paid through a third party, MoneyGram. *Id.* All the experts in payment systems, including Delaware's, rejected it. Report 73. It has no textual

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[9] In the Hunt Commission's phrase "third party payment services," or in the then-common phrase "third party payment," "payment" does work; it would not be remotely clear what kind of services "third party services" were without it. But it goes without saying that "bank checks" are for "payment," and only "third party" was needed to specify what kind of payment they were for—those that, on the order of a depositor, transfer his deposits to third parties.

support; not a source supports reading "third party" that way. *Id.* And perhaps most importantly, there is no conceivable rationale for why Congress would have focused on excluding bank checks paid through third parties, but not ones paid by the issuing bank itself, like cashier's checks. *Id.*; 2d Report 18.

The other way the Special Master proposed to read "bank check" as a prepaid bank check while still giving "third party" some meaning could not be administered, as the Second Report acknowledged. The Special Master's draft proposed reading the exclusion to only target bank checks issued "at the instance of a third party," thereby excluding bank checks a bank sold but not ones a bank issued to pay its own debts. Doc. 138 at 20. The Special Master ultimately concluded that that reading would "not be administrable," because the unclaimed instruments' holder, MoneyGram, "would not possess the crucial information" under that rule; it doesn't know who uses its instruments. 2d Report 19. Indeed, the issuers' choice not to keep that information is the reason the FDA was enacted in the first place. Nor, the Special Master rightly reasoned, could "third party" target "the subset of bank checks actually made payable to a third-party payee," because "the identity of the payee on an abandoned instrument is not something that the issuer is likely to know." *Id.* at 21.

In light of that conclusion, the Second Report ultimately read "third party bank check" to cover all, not just a "subset of bank checks." *Id.* And as explained above, that results in a fatal surplusage problem.

b. The Second Report's reading makes the statute a contradiction in terms.

The Second Report concludes that the third party bank check exclusion carves out similar written instruments that are (a) "instrument[s] that [are] designed for making payments to third parties" and (b) are instruments "on which a bank has assumed liability" from the FDA's coverage. 2d Report 20. As any "similar written instrument" to money orders and traveler's checks is an "instrument that is designed for making payments to third parties," *id.*, the Second Report would except all similar written instruments on which a bank has assumed liability. But the FDA expressly says just the opposite: similar written instruments on which a bank is liable are *covered*, not excluded.

The FDA's escheat rules apply 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.[10] That is a problem for the Second Report's reading. "Banking organization" is one of the few terms in the statute Congress chose to define, and it includes anything that could be called a "bank": "any bank, trust company, savings bank, safe deposit company, or a private

[10] Aside from grammar, the phrase "on which a banking or financial organization . . . is directly liable" must modify "similar written instrument" as well as "money order" and "traveler's check" because the FDA's escheat rules look to the location of "the banking or financial organization," 12 U.S.C. 2503(2)-(3), and the only "banking or financial organization" that could refer to is the one "directly liable" on the instrument. *See* Report 70-71. Indeed, Delaware originally argued that the clause modified only "similar written instrument." *Id.* at 69-70.

banker." 12 U.S.C. 2502(1). The Second Report's reading of the exclusion, however, excludes similar written instruments on which a bank is liable.

Putting this together, the Second Report would read "similar written instrument (other than a third party bank check) on which a banking or financial organization or a business association is directly liable" to mean the statute covers a "similar written instrument (other than one on which a bank is liable) on which a bank or financial organization or a business association is directly liable." But that is a self-contradiction, like saying one likes "sandwiches (except ones with ham) with ham, tuna, or roast beef." And this Court does not read a "statute, in a significant sense, to contradict itself" if it can avoid it. *Liteky v. United States*, 510 U.S. 540, 552-53 (1994) (declining to read one provision as "implicitly eliminating a limitation explicitly set forth" in another); *cf. Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1141 (2018) (courts may even depart from an "ordinary . . . reading" to avoid a "'contradiction in terms'" (quoting *Huidekooper's Lessee v. Douglass*, 7 U.S. (3 Cranch) 1, 67 (1805))).

Congress could have enacted a statute that means what the Second Report says it does. But to do so it would have had to phrase the FDA very differently. To say that banks could be liable on money orders and traveler's checks but not similar written instruments, Congress would have written a statute that covered "a money order or traveler's check on which a banking or financial organization or a business association is directly liable, or a similar written instrument on which a financial organization or a business association is directly liable." Congress did nothing of the sort. Instead, it wrote a statute where bank liability

was a basis for inclusion under the catchall, not a basis for exclusion from it.

4. Money-Gram Teller's Checks and Agent Checks are not third party bank checks under the Second Report's definition.

"Third party bank check" cannot mean all bank checks. "Adjectives like 'third-party' . . . pick out a subset" of the nouns they modify. *Home Depot U.S.A.*, 139 S. Ct. at 1755 (Alito, J., dissenting). But if it did mean all bank checks, neither MoneyGram Teller's Checks nor Agent Checks would qualify. Neither are checks drawn by banks on their own funds.

When the FDA was enacted, an ordinary check could be described as a "bank check." *Supra* at 28, 31. But setting aside ordinary checks, which the instruments here are not, "bank check" meant a check drawn by a bank on a bank—either itself or another bank at which it had an account. Delaware itself offered this definition in its earlier briefing in this Court. Exceptions 37 (bank checks were either "drawn by an authorized officer of a bank upon either his own bank or some other bank in which funds of his bank were deposited" (quoting Black's Law Dictionary (4th ed. 1968)) (emphasis omitted)). Its expert offered this definition, citing, among other sources, a definition in the 1987 draft of the UCC (which outside that draft has never defined bank check). App.135 n.12 (Mann). So did the Claimant States' expert. App.212 (Gillette). There is no third category of bank checks that are "drawn" by banks on a bank with which it has no relationship, as is at most the case for some of the products that MoneyGram markets as Teller's Checks and Agent Checks.

Delaware and the Second Report, however, circularly conclude that an instrument is a bank check so long as it is "drawn by a bank in the capacity of drawer," and that there need not be a relationship between the drawer and drawee banks. 2d Report 14. In particular, Delaware claims that an instrument can be a teller's check even if the drawer bank "outsources" "coordinat[ing] with a drawee bank" to MoneyGram. Doc. 133 at 11.

But Delaware's own contemporary sources for this supposed definition of teller's checks say the opposite. One says teller's checks were drawn by banks on other banks "with which they maintain checking accounts." Del.App.459 (1967 student note). The other says "[t]he drawer bank . . . is a customer of the drawee bank." Lary Lawrence, *Making Cashier's Checks and Other Bank Checks Cost-Effective*, 64 Minn. L. Rev. 275, 333 (1980). Nor is that mere historical practice; it's what "drawing" means. A bank can't "draw" funds on a bank at which it has no account—unless it's doing so as a mere agent of an entity like MoneyGram that does have an account there.

Because bank checks (excepting ordinary checks) are by definition drawn by a bank on that bank's own funds, neither MoneyGram Teller's Checks nor Agent Checks are bank checks. Starting with MoneyGram Teller's Checks, though they nominally list the selling bank as a drawer and the clearing bank as drawee, the selling bank has no account or relationship with the clearing bank. App.330-31, 393-94. Rather, "[a] clearing bank is a bank that MoneyGram has a relationship with" for the purpose of clearing its Teller's Checks. App.330. Far from acting as a drawer in any real sense, the selling bank's only role is to

sell the Teller's Checks and report their sale to MoneyGram. App.433 (MoneyGram witness testimony).

That's even clearer for Agent Checks. Like MoneyGram Teller's Checks, they are drawn on "MoneyGram's clearing bank," Report 27, with which the selling bank has no relationship. App.400-01. But unlike MoneyGram Teller's Checks, they do not even identify the selling bank as a nominal drawer. Instead, as the Special Master explained in the October 26 video conference, where he originally concluded banks weren't liable on any of MoneyGram's Agent Checks, "all of them identify MoneyGram as the drawer," and "[n]o other entity is identified as drawer of the check." Doc. 126 at 12. Unsurprisingly, MoneyGram's own documentation identifies MoneyGram as both sole issuer and sole drawer of its Agent Checks. App.493.

By contrast, the Second Report states that it is unclear whether banks are liable on some Agent Checks, because bank employees sign some without expressly stating that they do so as MoneyGram's agent. 2d Report 25. The Special Master thus proposed further factfinding on "whether the selling bank is a drawer" on those Agent Checks. *Id.* at 26. But there is no "genuine issue of material fact," *id.*, on whether the selling banks are drawers, and it's unclear what further evidence either side could offer on the subject.

It's undisputed that "the checks identify MoneyGram, and MoneyGram alone, as drawer." *Id.* at 25. It's undisputed that MoneyGram's own documentation also "lists MoneyGram as the sole drawer of Agent Checks." *Id.* at 26. It's undisputed that the checks are drawn on MoneyGram's clearing bank, not on an account of the selling bank—which means the selling bank isn't a drawer. It's undisputed that no selling

bank will ever actually be held liable so long as "MoneyGram remains solvent." *Id.* at 23 n.13. And of course, it's undisputed that these checks *are Agent Checks*, even though they are not labeled as such. App.25 (Delaware statement of undisputed facts) (describing them as a "second variety of MoneyGram Agent Check"). That's why the Second Report called them "Unlabeled Agent Checks." 2d Report 25. A trial isn't necessary to determine that's what they are.

IV. The First Interim Report faithfully applied the FDA's text and codified purpose, but the Second Interim Report does not.

The FDA's text states its purpose: it cures a defect in the application of this Court's common-law rule. Though that rule looked to purchasers' addresses, Congress found that money orders' and traveler's checks' issuers and sellers did not keep records of purchasers' addresses, 12 U.S.C. 2501(1), frustrating the rule's application and resulting in a windfall for the State of incorporation. It found that a substantial majority of purchasers reside in the State of purchase, 12 U.S.C. 2501(2). And it declared the FDA's purpose was to ensure that, "as a matter of equity among the several States," "the States wherein the purchasers of money orders and traveler's checks reside" receive "the proceeds of such instruments in the case of abandonment." 12 U.S.C. 2501(3). Accordingly, in cases where a money order, traveler's check, or similar written instrument's issuer held unclaimed funds and did not keep purchasers' addresses, it said the State of purchase would keep their proceeds when they went unclaimed. 12 U.S.C. 2503(2). Thus, the State where the purchaser most likely resided would receive those instruments' proceeds, as this Court's common-law rule intended.

The First Report was, within the limits of the FDA's text, appropriately sensitive to those purposes. Finding the text did not compel Delaware's label- and marketing-characteristic-based definition of "money order," the First Report observed that definition might "foster the type of 'inequity' that the FDA was designed to prevent by allowing issuers" to opt for escheating to one State instead of 50 "by making . . . cosmetic changes to the face of the instrument." Report 48. In interpreting "similar written instrument," it read the catchall to reach those instruments that "share with money orders features identified by Congress as motivating enactment of the FDA," *id.* at 60, but did not read it to reach instruments that lack those motivating features. And when the Special Master found the text did not compel Delaware's definition of "third party bank check," the First Report observed that the distinctions Delaware would read into the FDA weren't "material to the purposes of the FDA." *Id.* at 73.

The Second Report, by contrast, did not discuss the FDA's stated purposes. That Report's new definitions of money order and third party bank check give issuers a roadmap to market and label their way out of the FDA and more conveniently escheat to a single State. Under those definitions, a bank money order, or even a MoneyGram Agent Check Money Order, can turn into an excluded third party bank check simply by being given a new name. The report's interpretation of "similar written instrument" would sweep in any prepaid instrument, whether it posed the problems the FDA was intended to solve or not. The report's reading of "third party bank check" would exclude any instrument on which a bank is liable, even if only secondarily—a rule with only tangential bearing at best on the FDA's purposes. And the FDA would fail

to cover instruments—including MoneyGram Teller's Checks and potentially some MoneyGram Agent Checks—that present the windfall and recordkeeping problems that statute was enacted to solve.

Of course, Claimant States recognize that "no legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam). And perhaps one day some issuer will create an instrument that presents the same escheatment problem the FDA was designed to solve, yet plainly falls outside the FDA. But this is not that case. The rationales the Second Report gave for reading the disputed instruments out of the FDA are not supported—let alone compelled—by the statutory text. To the contrary, they suggest the text is self-contradictory—that despite its expressly covering instruments on which a bank is liable, banks can't be liable on FDA-covered instruments. The Court should reject the Second Report's new interpretations of the statute and adopt the Special Master's original ones, which were faithful to both the text and stated purpose of the FDA.

CONCLUSION

The Court should sustain the exceptions to the Special Master's Second Interim Report.

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