Nos. 145, 146, Original

IN THE

Supreme Court of the United States

DELAWARE,

Plaintiff,

v.

PENNSYLVANIA and WISCONSIN,

Defendants.

ARKANSAS, *et al.*,

Plaintiffs,

v.

DELAWARE,

Defendant.

On Exceptions to Report of Special Master

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

TIM GRIFFIN
Arkansas Attorney General
NICHOLAS J. BRONNI
Solicitor General
Counsel of Record
DYLAN L. JACOBS
Deputy Solicitor General
ASHER L. STEINBERG
Senior Assistant
Solicitor General
HANNAH L. TEMPLIN
Assistant Solicitor General

OFFICE OF THE ARKANSAS
ATTORNEY GENERAL
323 Center St., Ste. 200
Little Rock, AR 72201
(501) 682-6302
nicholas.bronni@
arkansasag.gov

Counsel for Defendants in No. 145 and Plaintiffs in No. 146

[Additional Counsel Listed on Inside Cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

ROB BONTA
California Attorney General
MICHAEL J. MONGAN
Solicitor General
JONATHAN L. WOLFF
Chief Assistant Attorney General
TAMAR PACHTER
Senior Assistant Attorney General
JOSHUA PATASHNIK
Deputy Solicitor General
CRAIG D. RUST
Supervising Deputy Attorney General
MICHAEL SAPOZNIKOW
Deputy Attorney General
CALIFORNIA DEPARTMENT OF JUSTICE
1300 I STREET
Sacramento, CA 95814

CHRISTOPHER B. CRAIG
PENNSYLVANIA TREASURY
127 Finance Building
Harrisburg, PA 17120

JOSHUA L. KAUL
Wisconsin Attorney General
KARLA Z. KECKHAVER
Assistant Attorney General
WISCONSIN DEPARTMENT OF JUSTICE
P.O. Box 7857
Madison, WI 53707

KEN PAXTON
Texas Attorney General
RYAN D. WALTERS
Special Counsel for the Special Litigation Unit
OFFICE OF THE TEXAS ATTORNEY GENERAL
P.O. Box 12548 (MC 001)
Austin, TX 78711

[Additional Counsel Listed After Signature Page]

QUESTIONS PRESENTED

The questions presented by Delaware's exceptions are:

1. Whether the use of a money order by a bank to pay its own bills transforms that instrument into a non-money order under the Federal Disposition Act.

2. Whether the use of an instrument by a bank to pay its own bills means that instrument is not a "similar written instrument" to money orders and traveler's checks under the Act.

3. Whether the use of an instrument by a bank to pay its own bills means that instrument is a "third party bank check" under the Act, even where that instrument is not drawn by a bank.

4. Whether the Court should summarily deny Pennsylvania's alternate request to modify the common law without a recommendation from the Special Master.

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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES Page(s)

INTRODUCTION

Every party and amicus the American Bankers Association agree about one thing: the Special Master's Second Interim Report does not correctly interpret the Federal Disposition Act (FDA). Delaware, for its part, disputes the Special Master's interpretations of "money order," "similar written instrument," and "third party bank check."

The focus of Delaware's exceptions is MoneyGram's Agent Checks. Although MoneyGram's "Teller's Checks" (which are not traditional teller's checks) and MoneyGram's Agent Checks are virtually identical, the Special Master ruled that they should be treated differently. Here, again, the parties are in agreement: those extremely similar instruments should be treated the same way. This brief will spotlight Agent Checks because Delaware's exceptions focus on those instruments, but the arguments presented apply equally to MoneyGram's Teller's Checks.

Delaware argues that Agent Checks are neither money orders nor similar to money orders because, it says, they are really the bank's own checks, primarily used to pay the bank's own bills. But that's not accurate.

First, Agent Checks aren't the bank's own checks. Rather, as Delaware concedes, they are "substitutes for . . . bank checks," 2d Exceptions 23, not actually bank checks. Indeed, MoneyGram Agent Checks are purchased and operate just like MoneyGram's other money order products, no matter who uses them: a buyer (be it a bank or a retail customer) prepays the Agent Check's face value plus an applicable fee and receives a prepaid MoneyGram instrument that the purchaser can use to pay a named payee. And Delaware's attempt to obscure that fact by claiming

that, when Agent Checks are purchased by banks, they are only "'purchased' in the loosest sense," 2d Exceptions 37, underscores the weakness of Delaware's argument. So this Court should hold that Agent Checks are money orders or, at a minimum, similar.

Second, Delaware's claim that Agent Checks are primarily used by banks to pay their own bills rests on a single line of deposition testimony in which MoneyGram's witness said that when bank customers *ask for a bank check*, banks rarely sell them Agent Checks because Agent Checks lack next-day availability. That doesn't show that Agent Checks are rarely sold to customers more broadly. Rather, the single line of testimony that Delaware relies upon is ambiguous at best, isn't supported by any other evidence, and—if Delaware's characterization of that testimony is correct—is contradicted by Delaware's own expert's testimony about Agent Checks. Indeed, this dispute exists precisely because MoneyGram does not know who—a bank or retail customer—purchased Agent Checks.

Third, at most, Delaware's argument mistakes a description of instruments' typical purchasers for a definition of an instrument. The law defines instruments by what they do, not by who buys them, let alone how a buyer uses them. Otherwise, instruments would change stripes upon sale. Again, Agent Checks do what money orders do: they are prepaid instruments that transmit money with the backing of a money-transfer business that does not generally maintain purchaser addresses. If MoneyGram primarily sells its Agent Checks to banks, that merely shows MoneyGram has found an untraditional market for money orders.

Delaware's third party bank check argument suffers from the same fallacy. The FDA, it agrees with the

Special Master, excludes all bank checks; "third party" is just an unnecessary curlicue. Bank checks, it then argues, are sometimes used to pay a bank's own bills, and Agent Checks are typically used to pay a bank's own bills, so Agent Checks must be bank checks too. Again, the law does not define instruments that way. Banks are liable on bank checks; only MoneyGram is liable on Agent Checks. The fact that Agent Checks may serve as substitutes for bank checks doesn't make them bank checks. To the contrary, when a bank hires a money order business to take care of its bank checks, as Delaware stresses is the case here, what it gets is money orders that serve as substitutes for its bank checks.

In sum, all of Delaware's arguments reduce to the syllogism that because the FDA does not apply to bank checks, and Agent Checks can serve one of bank checks' traditional functions, the FDA must not apply to Agent Checks either. We agree that, as a general matter, the FDA does not apply to well-known classes of bank checks, but that is because those well-known classes of bank checks do not present the windfall problem that Congress identified in the FDA. But Agent Checks do. Like traditional money orders, they are issued by a money order company that doesn't keep records of purchaser addresses. That remains true however they are used—whether the purchaser is a bank (for its own use) or a retail customer (for his or her use); indeed, MoneyGram has no idea whether the purchaser is a bank or retail customer. Consequently, if the common law governs their escheatment, their unclaimed proceeds will be captured by a single State. Congress enacted the FDA to prevent that kind of outcome, and Agent Checks are controlled by the FDA.

SUMMARY OF THE ARGUMENT

The Court should overrule Delaware's exceptions and hold that Agent Checks are either money orders, or similar written instruments that are not excluded from the FDA's coverage as third party bank checks.

I. Agent Checks are money orders—indeed, prototypical money orders. They are prepaid drafts that transmit money to a named payee, and like the most common money orders, they are issued by a money-transfer business, MoneyGram, which is the sole party liable on them. And like money orders, MoneyGram does not keep records of Agent Checks' purchasers. Delaware claims they are not money orders because they are primarily used by banks. The record does not support that claim. But even if it were accurate, money orders, like other financial instruments, are not defined by who their purchasers are. They are defined by the rights and obligations of the parties to the instrument. And as the Special Master found, and Delaware does not dispute, there are no differences between the rights and obligations conferred by other money orders and by Agent Checks.

II. If not money orders, Agent Checks are easily similar written instruments. Like money orders and traveler's checks, they are prepaid instruments for the transmission of money whose issuers do not keep records of creditor addresses, leading to inequitable escheatment to a single State under the common law. Delaware argues they are dissimilar because they ostensibly share a function—paying bank bills—with a class of instrument that does equitably escheat, bank checks. But merely sharing a use with a class of dissimilar instruments does not make Agent Checks dissimilar too. The fact that Agent Checks are prepaid instru-

ments that present the windfall problem identified by Congress in the FDA is far more important.

III. Agent Checks are not excluded from the FDA as third party bank checks. Delaware does not argue that Agent Checks can satisfy the Second Report's definition, which defines the phrase to include any bank check, but found that Agent Checks are not bank checks. Instead, Delaware claims Agent Checks are bank checks because they are bank check "substitutes." 2d Exceptions 23. That argument refutes itself; by definition, a substitute is not the thing it replaces.

IV. Delaware's appeals to various tie-breaking principles fail. The canon against derogation of the common law does not help Delaware because the FDA unambiguously abrogates the common law. Delaware's appeals to administrability cut in the Claimant States' favor; where the Claimant States offer a simple rule that matches the FDA's stated purposes, Delaware would exclude instruments on the basis of headcounts of their purchasers and rough analogies between instruments the FDA does not cover and their "modern substitutes." 2d Exceptions 23. And Delaware's suggestion that a windfall for Delaware is more equitable than an equitable division of Agent Check proceeds is illogical and contrary to Congress's stated intent.

V. If the Court rules for Delaware on any of the disputed instruments under the FDA, it should remand Pennsylvania's request for modification of the common law to the Special Master. Were the Court to interpret the FDA in Delaware's favor, that request would raise serious questions, not only about the continued equity of the common-law rules, but about their application in situations where—as the Second Report concludes of at least MoneyGram Teller's

Checks—there are multiple liable parties on a single instrument. Because the existing common-law rule looks to the debtor's State of incorporation and presumes a single debtor, that rule would likely need to be refined were the Court to adopt the Second Report.

ARGUMENT

I. MoneyGram Agent Checks are "money orders" under the FDA.

Although Delaware and the Second Interim Report both conclude that Agent Checks are not money orders, Delaware disagrees with how the Second Report reached that conclusion, saying it "incorrectly focuses" on Agent Checks' use by retail customers. 2d Exceptions 28. Rather than focus on the amounts in which Agent Checks are sold or the types of retail customers who purchase them, as the Second Report did, Delaware would distinguish Agent Checks on an entirely different ground: that Agent Checks are typically sold to banks.

But financial instruments are defined by their structure and function, not by who their users are. As Delaware observes, an "atypical use . . . does not transform [an instrument] into something else." 2d Exceptions 28. Rather, as the Special Master reasoned in the First Report, the law defines classes of instruments by "the rights and obligations that inhere in them." Report 46. And from that perspective, Agent Checks are no different from money orders: they are purchased, prepaid drafts, issued by a money-transfer business, to transfer money to a named payee. That is why even in his Second Report, the Special Master concluded there were no "differences in the legal rights and obligations inhering in the instruments." 2d Report 4. Moreover, Agent Checks are nearly identical

to Agent Check Money Orders, which everyone agrees are money orders. The Court should hold Agent Checks likewise are money orders.

1. Agent Checks are textbook money orders. A purchaser pays a bank the Agent Check's value; the bank transmits those funds to MoneyGram. Report 27. Or, if the bank itself is using the Agent Check, "the bank transmits the face value of the agent check to MoneyGram." 2d Exceptions 37; *see also* App.545-46. In return, the purchaser receives an instrument for transferring money to a named payee on which MoneyGram—the world's second largest money-transfer company, App.55—is liable. Though the selling bank is listed on the instrument, often expressly as an agent, that bank "is not liable on the Agent Check"; only MoneyGram is. App.504 (MoneyGram fact sheet). When the payee cashes the Agent Check, that instrument is cleared just as MoneyGram's Retail and Agent Check Money Orders are; MoneyGram's clearing bank reimburses the bank where the Agent Check is cashed, and MoneyGram reimburses its clearing bank. *Compare* Report 27 *with id.* at 23, 26. It is no wonder that the Second Report found no "differences . . . in the rights or liabilities arising from the use" of Agent Checks and money orders. 2d Report 5.

2. In spite of that "absence of differences," *id.* at 4, the Second Report recommended concluding that Agent Checks (and MoneyGram Teller's Checks) are not money orders because of two "adjectival, customary" distinctions, *id.* at 3: that they are sold in larger amounts than many money orders, and that unlike many money orders, they are sold to bank customers. *Id.* at 4-5. Delaware doesn't defend either of these distinctions, probably because they don't distinguish many money orders.

It does fleetingly defend, in a footnote, the implication of the Second Report: that less prototypical money orders only cease to be money orders if they're labeled something else. But its defense, that "[t]here is little concern that issuers will deliberately mislabel money orders," 2d Exceptions 27 n.1, gives this "label-based approach" away, *id.* If it is possible, even if unlikely, for issuers to "mislabel money orders," then labels are not truly definitional. Claimant States agree that most money orders are labeled as such. But there are reasons to call money orders other things. Besides potentially streamlining escheat obligations—if an instrument isn't deemed a money order, an issuer may only have to escheat to one State—rebranding money orders as "Agent Checks" or the like may help issuers reach a richer market. *See* 2d Report 5 (noting that MoneyGram's customers sometimes use its instruments to buy cars or houses).

3. Rather than defend the Second Report's rationale, Delaware defends "[t]he Special Master's conclusion" on an alternative ground: that Agent Checks are typically used by banks, not retail customers. 2d Exceptions 28. That argument, which Delaware devoted all of one sentence to in its original Exceptions,[1] rests on a dubious factual premise and wouldn't distinguish money orders even if it were supported. Whether an issuer sells a money order to a retail customer or to a bank, it's still a money order.

On nearly every page of its Exceptions, Delaware asserts that Agent Checks are rarely sold to individuals. The only piece of evidence it offers for its assertion that retail customers rarely use agent checks is one

[1] 1st Exceptions 35 ("Indeed, agent checks are used primarily by *banks* to pay their own bills, rather than by consumers.").

ambiguous line of testimony from the deposition of MoneyGram's corporate witness, which it cites over a dozen times. That line, which Delaware never quotes in full, doesn't clearly say what Delaware says it does.

MoneyGram's witness testified that customers don't "com[e] in and ask[] for an agent check" by name. Del.App.275. Instead, they may "ask[] for a bank check." *Id.* If they ask for a bank check, "agent checks might be an item that [banks are] offering." *Id.* But, the witness added, "it's definitely not a next day availability item, so they aren't often used to issue checks for customers." *Id.*

Read in context, all that means is that *when a customer asks for a bank check*, they aren't often sold an Agent Check. After all, the bulk of MoneyGram's business is selling items that lack next-day availability to retail customers—the instruments it calls money orders or Agent Check Money Orders. App.493. But when a customer asks for a bank check, it makes sense that banks wouldn't usually sell their customers an instrument that lacks next-day availability, as bank checks usually are next-day available. Otherwise, there's no evidence that Agent Checks are generally used only by banks. To the contrary, Delaware's own expert said that Agent Checks "would be purchased by a consumer from a bank selling the product." App.113 (Mann).

But more critically, even if Agent Checks were primarily purchased by banks, that would not mean they are not money orders. It would merely mean that MoneyGram had found a new market for money orders. It's always possible to generalize about what kind of consumer or business tends to use different kinds of instruments. But those generalizations don't *define* instruments. The U.C.C., for example, doesn't define cashier's checks, teller's checks, or traveler's

checks in terms of who uses them, even in part. U.C.C. 3-104(g)-(i). It defines them in terms of who their drawers and drawees are, how they are payable, and whether they're notes or drafts. Money orders should be defined the same way.

Delaware itself makes the point aptly. It writes that if a consumer "use[d] a leftover traveler's check to buy groceries," that wouldn't "transform a traveler's check into something else." 2d Exceptions 28. Delaware thinks that shows the supposedly "infrequent sale of agent checks to retail customers" doesn't make them money orders. *Id.* But the point cuts just the other way: Agent Checks' use by banks doesn't make them non-money orders. For as the example illustrates, the way an instrument is used can't retroactively change it into something else. An instrument is whatever kind of instrument it is before it's used. Even if a certain issuer's traveler's checks were exclusively used at the grocery store, they'd still be traveler's checks, and even if MoneyGram's Agent Checks were exclusively used to pay bank bills, they'd still be money orders. And the fact that Delaware ultimately resorts to claiming that Agent Checks used by banks are only "'purchased' in the loosest sense," 2d Exceptions 37, to distinguish them further illustrates the weakness of Delaware's argument.

4. Delaware also labors to show—again on different grounds than those given by the Second Report—that Agent Checks that are sold to retail customers aren't money orders. Its distinctions of those Agent Checks are paper-thin. Citing MoneyGram's witness, Delaware says that Agent Checks are sold to customers who request bank checks. 2d Exceptions 28-29. MoneyGram's witness didn't say that Agent Checks are sold *only* to customers who request bank checks, Del.App.275, but

even if they were, a bank check isn't what the customer gets. Instead, it gets a *MoneyGram* check, an instrument on which MoneyGram is liable and "MoneyGram's bank customer is not liable." App.504 (MoneyGram fact sheet). Indeed, MoneyGram's witness said as much, explaining that banks don't often sell Agent Checks to customers who request bank checks because Agent Checks lack next-day availability. Del.App.275.

Delaware also offers a laundry list of cosmetic distinctions: bank employees sign Agent Checks, Agent Checks aren't labeled "money orders," and unlike the instruments MoneyGram labels "money order," they don't contain a limited-recourse provision. 2d Exceptions 29; *see also id.* at 30 (attempting to distinguish MoneyGram Agent Check Money Orders on the same grounds). The Special Master persuasively explained in the First Report why these distinctions fail: "Delaware . . . has simply pointed to every observable feature of MoneyGram's instruments that bear a printed legend 'money order' that is not also true of those it sells under the name[] 'Agent Check' . . . no matter how inconsequential . . . treating them as if they served to define the essence of money orders." Report 43-44. And the Second Report does not suggest these distinctions are any more relevant. Indeed, Delaware does not cite a single source that treats any of these distinctions as definitional. The only one that could even conceivably be is limited recourse. But Delaware does not claim that all money orders are limited recourse, and in fact courts have held that provisions similar to MoneyGram's are unenforceable. *See Triffin v. Dillabough*, 716 A.2d 605, 609-10 (Pa. 1998) (citing *Hong Kong Importers, Inc. v. Am. Express Co.*, 301 So. 2d 707 (La. Ct. App. 1974)).

II. MoneyGram Agent Checks are at minimum "similar written instruments" to money orders and traveler's checks.

In his First Report, the Special Master concluded that if Agent Checks were not money orders, they were "undoubtedly" covered similar written instruments. Report 64. In his Second Report, recognizing the narrowness of his distinctions between money orders and Agent Checks, the Special Master still concluded that "the very great similarities between them and money orders" were "easily sufficient to make them 'similar . . . instrument[s]'" under the FDA. 2d Report 3, 5 (alterations in original).

Delaware's view is the complete opposite. Not only are Agent Checks not similar written instruments to money orders and traveler's checks, they are "nothing like money orders or traveler's checks." 2d Exceptions 31. The reason Delaware says they are so dissimilar is an argument it did not advance in this Court before the oral argument on October 3, 2022: its unsupported claim that Agent Checks are overwhelmingly used by banks that only "'purchase[]' [them] in the loosest sense," 2d Exceptions 37.

Questions of waiver and factual accuracy aside, whether Agent Checks are primarily sold to retail customers or banks has no bearing on whether they're relevantly similar to money orders and traveler's checks. Whoever their purchasers are, the instruments are—just like money orders and traveler's checks—prepaid instruments whose holder doesn't keep records of purchaser addresses, resulting in the windfall problem the FDA states in its codified findings it was enacted to solve.

Delaware argues that purchaser identity matters through a flawed two-step chain of logic. First, according to Delaware, Congress did not include prototypical bank checks, such as cashier's checks and teller's checks, in the FDA because banks record creditor addresses on those instruments, making them materially dissimilar to money orders and traveler's checks. Second, Agent Checks, like bank checks, are used by banks to pay their own bills, so they must not be similar written instruments.

It is obvious where this argument goes astray. The distinction Delaware draws between money orders and true bank checks is a relevant and valid one. But the alleged similarity Delaware points to between Agent Checks and bank checks is irrelevant. The critical distinction between bank checks and Agent Checks for the FDA's purposes is this: bank checks are issued by banks, which keep records of creditor addresses. Agent Checks are *sold to* banks (and retail customers) by MoneyGram, a money-order seller, which does not keep purchaser addresses for Agent Checks. That makes them, if not money orders, similar to them in every relevant respect.

1. Delaware contends, and the Claimant States agree, that the "similar written instrument" clause does not broadly cover "financial instruments that were well-known in 1974 but are not included in the FDA's text, such as cashier's checks [and] teller's checks." 2d Exceptions 34. Though Delaware insists we disagree, Claimant States have told the Court exactly the same thing. *See, e.g.*, Tr. of Oral Argument 70 ("[I]f Congress had intended to include [cashier's checks], it probably would have used that language because they were well-known instruments at the time."); Claimant States' Exceptions 23-24.

As Delaware and the Second Report explain, there are a number of reasons to not read the FDA's catch-all to cover unenumerated classes of instruments that—unlike Agent Checks—"were well-known in 1974." 2d Exceptions 34. First, the "well-known categories of bank checks" were so familiar in 1974 that had Congress intended to cover them it would likely have "mentioned them by name." 2d Report 17; *see also* 2d Exceptions 36. Second, those well-known categories of bank checks lacked the critical feature Congress said money orders and traveler's checks had in common: that their issuers, who held unclaimed funds, did not keep records of purchaser addresses. 2d Exceptions 33 (citing 12 U.S.C. 2501(1)); *id.* at 35 ("[W]hen banks sold bank checks . . . in 1974, banks recorded creditors' addresses.").

2. This is not to say that Delaware offers a satisfactory definition of "similar written instrument." First, though Delaware faults the Special Master for "declining to define" the term, *id.* at 40, it doesn't define the term either, or identify a single instrument that would qualify. It only identifies instruments that lack the "relevant common features" money orders and traveler's checks share. *Id.* at 31 (alteration and internal quotation marks omitted). The correct approach to defining the term—though one Delaware understandably does not advance, as it would lose—is that instruments that *have* those common features are similar.

Second, Delaware embroiders on what Congress said those common features were in Section 2501, adding others that Congress never mentioned and are factually inaccurate—for example, that money orders and traveler's checks were usually sold in small amounts. *Id.*; *but see* Claimant States' Exceptions 18-

19 (documenting large-dollar money orders).[2] Shorn of these flaws, however, Delaware's arguments point the way to the correct definition of the term: like money orders and traveler's checks, a similar written instrument is a prepaid instrument for transmitting money whose purchasers' addresses are not recorded by their issuers.

3. Though Delaware's (non)definition of "similar written instrument" is problematic, the real flaw in its arguments is its application of that definition to Agent Checks. Having shown that true bank checks are dissimilar to money orders and traveler's checks, it illogically leaps to the conclusion that Agent Checks are dissimilar to them too. But all its strained analogies between bank checks and Agent Checks show is that the two aren't much alike, and that Agent Checks and money orders are.

First, Delaware accurately observes that when a bank writes its own cashier's or teller's check to pay its own bills, the FDA by its terms does not apply, because the FDA only applies to instruments that are prepaid, *i.e.*, "purchased." Exceptions 36 (quoting 12 U.S.C. 2503). It then attempts to extend this line of

---

[2] Delaware attempts to argue that Congress would not have objected to States' imposing recordkeeping requirements on issuers of large-dollar instruments, because doing so would not meaningfully increase their cost—and therefore that the FDA does not apply to such instruments. 2d Exceptions 35. This unsupported speculation regarding Congress's intent is belied both by the fact that Congress applied the FDA to *all* money orders and traveler's checks, large and small, and by the lack of any congressional finding to this effect. All that Congress said about costs in its codified findings is that mandating recordkeeping of purchaser addresses was an unnecessary "burden on interstate commerce since . . . most purchasers reside in the State of purchase." 12 U.S.C. 2501(5).

reasoning to Agent Checks, which it says are only "'purchased' in the loosest sense." *Id.* at 37. That is nonsense. As Delaware explains, when a bank uses Agent Checks to pay its own debts, it "transmits the face value of the [A]gent [C]heck to MoneyGram." *Id.* And it pays MoneyGram a fee for each Agent Check. App.439, 486, 492. In return, the bank receives a prepaid draft on which MoneyGram is solely liable to the bank's chosen payee. That's a purchase in any sense of the word. Indeed, it looks just like the sale of a money order.

Second, Delaware observes that when banks sell bank checks, or pay their own debts with bank checks, they record purchaser or creditor addresses. 2d Exceptions 38. Delaware conflates that recordkeeping practice with the purchaser-address records for Agent Checks, which might be kept at the bank level, *but are never transmitted to MoneyGram*, the only party liable on the instruments and the holder of unclaimed funds. *Id.* Unlike bank checks, Agent Checks therefore present the windfall problem Congress was concerned with when it adopted the FDA.

Delaware says the two situations are materially similar because Claimant States could mandate banks to transmit their records to MoneyGram. *Id.* Yet Congress stated that the purpose of the FDA was to avoid the costs of mandating money order sellers like MoneyGram to "maintain[]" such records. 12 U.S.C. 2501(5). Indeed, the same argument could be made for traditional money orders, where—just like Agent Checks—addresses might be kept at the bank or retailer level, but are never transmitted to MoneyGram. *See* 31 C.F.R. 1010.415 (mandating recordkeeping of purchaser identities in instances where $3,000 or more in money orders is sold to a single purchaser); App.342-

43 (MoneyGram testimony regarding its compliance with that requirement). Thus, if anything, Delaware's argument merely underscores once again that Agent Checks are money orders under a different label.

Third, Delaware argues that checks banks use to pay their own bills escheat equitably under the common-law rules. 2d Exceptions 38. That's generally true, but Agent Checks do not escheat equitably, as Delaware concedes. *Id.* Delaware says it's "misleading" to "focus[] exclusively" on Agent Checks, as opposed to "the entire universe of checks that financial institutions use to pay bank bills." *Id.* But the FDA doesn't include or exclude "entire universes" of instruments. It asks whether an "instrument" is similar to money orders and traveler's checks. 12 U.S.C. 2503. And Agent Checks are their own bespoke class of instrument; Delaware doesn't argue they're anything more generic. As Delaware says, when a bank uses them, "they *replace* a financial institution's bank checks." 2d Exceptions 36-37 (emphasis added). They are not some traditional class of bank checks themselves.

It is entirely appropriate, therefore, to "focus exclusively" on Agent Checks in deciding whether Agent Checks are similar written instruments. And because the holder of unclaimed Agent Checks, MoneyGram, lacks purchaser records, Agent Checks are similar to money orders and traveler's checks.[3]

---

[3] To the extent that Delaware suggests that Agent Checks purchased by banks and Agent Checks purchased by retail customers should be treated differently, *see* 2d Exceptions 45 (suggesting possibility that Agent Checks sold to retail customers are similar written instruments), Delaware's suggestion would be unadministrable. Indeed, as the Special Master acknowledged in ultimately rejecting that approach, 2d Report 19, MoneyGram does not know whether any particular instrument was purchased

III. MoneyGram Agent Checks are not "third party bank checks."

The Special Master's Second Report concluded that "third party bank check" and "bank check" "mean the same thing"—in other words, the "third party bank check" exclusion excludes all bank checks. 2d Report 20 n.11. But the Second Report did not conclude that Agent Checks are third party bank checks, because Agent Checks are not bank checks. In response, Delaware does not attempt to argue that Agent Checks are bank checks as it has in the past.[4] Instead, it argues the Second Report's definition of "third party bank check" is not broad enough. Rather than merely embrace all bank checks, Delaware says "third party bank check" should also include instruments that aren't bank checks, but are instead "way[s] that smaller banks use MoneyGram to save money on bank checks." 2d Exceptions 44.

Delaware's novel every-bank-check-plus-bank-check-substitutes reading of "third party bank check" has no merit. Like the Second Report's interpretation, it gives no meaning to "third party." But unlike the Second Report's interpretation, it gives no limiting meaning to "bank check" either. Instead, it simply reads the phrase to mean whatever Delaware needs it to mean to cover Agent Checks. The Court should hold that third party bank checks are the subset of bank

---

by a bank or a retail customer. It only knows the date an instrument was sold, its value, its serial number, and its selling location—not who purchased it. *Id.*; App.436-38.

[4] *See id.* at 26 (discussing Delaware argument that selling banks are liable on Agent Checks, making them bank checks); Sur-Reply 17 (contending Agent Checks are bank checks because "MoneyGram . . . may qualify as a 'bank'").

checks described in the 1970s as third party payment, i.e., ordinary personal checks and business checks.

1. The Second Report concluded that all "bank checks," as it defined the term, were "third party bank checks." 2d Report 20 n.11. Delaware defends that conclusion, Exceptions 41-42, abandoning its prior proposed definitions that at least attempted to give some meaning to the words "third party" in the phrase "third party bank check," *id.* at 42 n.4.[5] However, Delaware makes no attempt to defend reading "third party" out of the statute or explain why Congress didn't simply write "bank check" if that's what it meant.

All Delaware says in support of the Second Report's reading of "third party" is that the Hunt Commission defined "third party payment services" in a supposedly similar way, "to mean 'any mechanism' to transfer 'a depositor's funds to a third party.'" *Id.* at 42 (emphasis omitted) (quoting 2d Report 20). That quotation omits key parts of the Hunt Commission's definition, which applied only to mechanisms that transferred a depositor's funds to a third party "upon the . . . order of the depositor." 2d Report 20 (quoting Del.App.350 n.1). That omitted language excludes bank checks on which

---

[5] Delaware inaccurately claims that it previously offered the Second Report's definition of "third party," which includes any instrument that is merely designed to make payments to a third party, whether or not it is actually so used—a definition that captures all bank checks. *Id.* (citing 1st Exceptions 41-42). But it actually argued that "third party" either meant a bank check must be "*paid through* a third party" like MoneyGram, 1st Exceptions 39, or "*sold to* a third party," *id.* at 39 n.9. It then argued that if the Hunt Commission's use of "third party payment service" were relevant, which it said it wasn't, *id.* at 41, that phrase captured any instrument that in fact "transfers a depositor's funds to a third party upon an order of the depositor," *id.* at 42—not any instrument merely "designed" to.

a bank is liable, because such instruments transfer money on the bank's order, and illustrates the limiting work the phrase actually does in the FDA.

2. Compounding the problems with the Second Report's interpretation of "third party bank check," Delaware adds more of its own. Observing that bank checks can "serve as the personal checks of banks," 2d Exceptions 44 (quoting Lary Lawrence, *Making Cashier's Checks and Other Bank Checks Cost-Effective*, 64 Minn. L. Rev. 275, 340 (1980)), Delaware proposes that any check that serves this "separate function" "meet[s] the plain meaning of the term 'bank check,'" *id.* Whether such checks are "drawn by a bank" or not, Delaware says, is irrelevant. *Id.*

Like Delaware's other arguments, this conflates function with instrument definition. A bank check can certainly serve as a bank's personal (or business) check. But that doesn't mean that every check a bank uses is a bank check—any more than the fact bank customers use bank checks means that "bank checks" include every check a bank customer uses. Rather, as the sole source Delaware cites says and the Second Report concluded, a bank check is a check (setting aside personal checks) on which a bank is liable. Lawrence, *supra*, at 278; 2d Report 12-13. The fact that Agent Checks may "replace a financial institution's bank checks," 2d Exceptions 36-37, or are "substitutes for a financial institution's bank checks," *id.* at 23, does not make them bank checks. It makes them exactly what Delaware says they are: non-bank check substitutes.

Delaware also suggests the Court read "third party bank check" to include Agent Checks because Congress didn't intend for the FDA to cover such checks; if it had, it would have listed bank checks. *Id.* at 44. But this circularly assumes that Agent Checks are bank

checks. "Bank checks existed in 1974" and were well-known classes of instruments, *id.*, so it is fair to draw an inference from the FDA's silence on them. Agent Checks, which Delaware admits are not bank checks in the traditional sense, did *not* exist in 1974, so congressional silence on them shows nothing. Rather, Congress spoke to then-undeveloped instruments like Agent Checks through the "similar written instrument" clause, which captured future instruments that presented the same escheatment problems as money orders and traveler's checks. Reading "third party bank check" to exclude such instruments would subvert the catch-all and undermine the declared purpose of the statute—eliminating inequities in escheatment of prepaid instruments.

IV. No tie-breaking principle cuts in Delaware's favor.

Delaware also reprises its arguments from past briefing that various "tie-breaking principles" resolve any ambiguity in the FDA's coverage in Delaware's favor. Exceptions 45. We have addressed these arguments at length before, Reply 38-39, 52-56, so our response will be brief.

1. Delaware argues that if the FDA's scope is ambiguous, the Court should favor an interpretation that abrogates the common law in fewer cases. Exceptions 45. But the Court has held the canon against derogation does not apply to the "question whether, when a statute's coverage is ambiguous, Congress intended the statute to govern a particular field." *Samantar v. Yousuf*, 560 U.S. 305, 320 (2010). Rather, the canon only resolves ambiguities in a statute's substantive rules, i.e., whether to read those rules "consistently with the common law" or inconsistently. *Id.* The FDA's *rules* are unambiguously a

departure from this Court's common-law rules; any ambiguity is in the FDA's coverage. So the canon does not apply.

2. Delaware says its interpretation is more administrable than ours. 2d Exceptions 45-46. That's incorrect. The only administrability problem Delaware says our interpretation has is that the Court's decision might sweep in bank checks that are not at issue in this case. *Id.* at 46. That argument is based on a mischaracterization of our reading of the statute.

By contrast, Delaware's reading of the statute is unadministrable in multiple respects. It defines money orders in terms of the kinds of purchasers who tend to buy a particular instrument, excluding instruments whose purchasers don't fit what Delaware sees as the traditional mold of money order users. But how many of an instrument's purchasers have to fit Delaware's stereotype for an instrument to qualify? Delaware never says. Its other arguments for distinguishing Agent Checks from money orders rest on a multi-factor toting up of various cosmetic distinctions, none of which Delaware claims is truly definitional in isolation. On similar written instruments, Delaware still has never offered a definition. And its rule for what isn't covered seems to be that if an instrument is similar enough to a bank check, then it's dissimilar to money orders. Its interpretation of third party bank check is much the same, drawing a vague penumbra around true bank checks to capture their "modern substitutes." 2d Exceptions 23. As virtually any instrument is capable of "substituting" for bank checks, that could mean almost anything. Ultimately, all that is clear about Delaware's position is that it would exclude Agent Checks.

3. Delaware claims that preserving its windfall "promotes 'equity.'" *Id.* at 46. To the contrary, an equitable result, as Congress itself declared in the FDA, is one that would distribute unclaimed funds in proportion to where the underlying instruments were purchased. *See* 12 U.S.C. 2501(3). Delaware argues that Claimant States could solve that inequity by enacting legislation mandating banks to transmit purchaser addresses to MoneyGram. 2d Exceptions 46. But even if that hypothetical approach were workable (which is not clear), as Delaware notes, such legislation would only "operate prospectively," *id.*, thus doing nothing to cure the inequity Delaware has enjoyed so far. And it would contradict Congress's expressed intention that private business *not* be required to maintain purchaser addresses. Nor is it at all clear how such legislation would work since—as the record here illustrates—MoneyGram might attempt to avoid compliance by simply relabeling its products.

As for its suggestion that a ruling against us would "preserve Delaware's and holders' good-faith reliance on the FDA's plain text," *id.*, if the text were plain in Delaware's favor it would not need to invoke reliance. And the claim the text is so plain, or that holders have relied on it, is undermined by the fact that until 2005, MoneyGram escheated its Teller's Checks—on which the Special Master thought Delaware's arguments were strongest—to the State of purchase or State of the selling *bank*'s incorporation, not MoneyGram's. App.585-88.

V. If Claimant States do not prevail under the FDA, the Court should remand Pennsylvania's common-law claim to the Special Master.

The Second Report recommended that if the Court ruled in Delaware's favor as to any of the disputed instruments under the FDA, it should remand Pennsylvania's common-law claim, which would no longer be moot, to the Special Master. 2d Report 27. Delaware, however, argues the Court should summarily deny that claim without the benefit of the Special Master's recommendation or any real opportunity to be heard on that claim.[6] The Court should not follow that approach.

Pennsylvania argued before the Special Master that in the event the disputed instruments are not covered by the FDA, the secondary common-law rule should be modified to match the FDA's. Pennsylvania would need to carry a "heavy burden" to prevail on that argument. *Delaware v. New York*, 507 U.S. 490, 506 (1993). But should the Court adopt the Second Report or Delaware's even broader arguments, there would be at least two "special justification[s]" for modifying precedent that would at least merit the Special Master's review. *Allen v. Cooper*, 140 S. Ct. 994, 1003 (2020).

---

[6] Delaware understandably has a financial motive to avoid the common law claim: unclaimed property is Delaware's third largest source of budget revenue, Special Master Doc. 11 at ¶ 97; Doc. 18 at ¶ 97, making it a "'vital element' in the state's operating budget." *Temple-Inland, Inc. v. Cook*, 192 F. Supp. 3d 527, 532 (D. Del. 2016). And as relevant here, less than one half of one percent of all sums payable on the MoneyGram instruments at issue was actually generated in Delaware. App.85.

First, were the FDA read to not cover some or all of the disputed instruments, it would mean that issuers could evade Congress's preferred policy of equitable escheatment for money orders by relabeling their instruments or co-drawing money orders with nominal bank drawers that don't truly draw funds. The Court tolerated such windfalls in the past on the basis of administrability, *see Pennsylvania v. New York*, 407 U.S. 206, 214-15 (1972), but that was before Congress acted in this area, and before the Court had the FDA to draw on as a guide.[7]

Second, the rationale of the Second Report is that multiple entities are liable on MoneyGram Teller's Checks—MoneyGram and the selling bank—and may be liable on some Agent Checks. But if accepted, that would raise multiple unsettled questions about the secondary common-law rule. Absent address records, the secondary rule says "the State of the debtor's incorporation" may escheat. *Pennsylvania*, 407 U.S. at 210. But who is "the debtor" on an instrument on which two different entities are liable? This is not a simple question (particularly where only one of the parties possesses the escheatable funds); much of this Court's opinion in *Delaware* concerned how to define a security's debtor. *Delaware*, 507 U.S. at 501-05. Next, if the answer turned out to be that some MoneyGram instruments have two debtors, this Court would need to craft a new rule for such multi-debtor situations; the existing common-law rule assumes only one debtor. These issues would have to be remanded to the Special Master were the Second Report adopted in part or whole.

---

[7] MoneyGram admitted it records the state in which each purchase occurs. App.69 ¶ 56. It further admitted it could as easily remit unclaimed property to all states as it could to one. App.83-84 ¶ 100.

Delaware says that any reconsideration of the common law would create such uncertainty that it isn't even worth receiving the Special Master's recommendation on the subject. 2d Exceptions 48-49. That's just wrong. Pennsylvania's position on the common law is simply this: the FDA already modified the common-law rules for money-order-like instruments that escheat inequitably. But if it did not do so, the Court should. A modification in Pennsylvania's favor would not invite a parade of follow-on suits over other instruments, such as cashier's checks. It would merely adopt Claimant States' bright-line reading of the FDA—which has no application to cashier's checks or other bank checks—as a matter of common law. That simple request does not merit summary disposition, and should be remanded if Claimant States do not prevail under the FDA.

CONCLUSION

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

Respectfully submitted,

TIM GRIFFIN
Arkansas Attorney General
NICHOLAS J. BRONNI
Solicitor General
Counsel of Record
DYLAN L. JACOBS
Deputy Solicitor General
ASHER L. STEINBERG
Senior Assistant
Solicitor General
HANNAH L. TEMPLIN
Assistant Solicitor General

OFFICE OF THE ARKANSAS
ATTORNEY GENERAL
323 Center St., Ste. 200
Little Rock, AR 72201
(501) 682-6302
nicholas.bronni@
arkansasag.gov

Counsel for Defendants in No. 145 and Plaintiffs in No. 146

[Additional Counsel Listed on Following Pages]

ROB BONTA
California Attorney General
MICHAEL J. MONGAN
Solicitor General
JONATHAN L. WOLFF
Chief Assistant Attorney General
TAMAR PACHTER
Senior Assistant Attorney General
JOSHUA PATASHNIK
Deputy Solicitor General
CRAIG D. RUST
Supervising Deputy Attorney General
MICHAEL SAPOZNIKOW
Deputy Attorney General
CALIFORNIA DEPARTMENT OF JUSTICE
1300 I STREET
Sacramento, CA 95814

CHRISTOPHER B. CRAIG
PENNSYLVANIA TREASURY
127 Finance Building
Harrisburg, PA 17120

JOSHUA L. KAUL
Wisconsin Attorney General
KARLA Z. KECKHAVER
Assistant Attorney General
WISCONSIN DEPARTMENT OF JUSTICE
P.O. Box 7857
Madison, WI 53707

KEN PAXTON
Texas Attorney General
RYAN D. WALTERS
Special Counsel for the Special Litigation Unit
OFFICE OF THE TEXAS ATTORNEY GENERAL
P.O. Box 12548 (MC 001)
Austin, TX 78711

STEVE MARSHALL
Alabama Attorney General

KRISTIN K. MAYES
Arizona Attorney General

PHILIP J. WEISER
Colorado Attorney General

ASHLEY MOODY
Florida Attorney General

RAÚL LABRADOR
Idaho Attorney General

TODD ROKITA
Indiana Attorney General

BRENNA BIRD
Iowa Attorney General

KRIS KOBACH
Kansas Attorney General

DANIEL CAMERON
Kentucky Attorney General

ELLEN F. ROSENBLUM
Oregon Attorney General

ALAN WILSON
South Carolina Attorney General

JEFF LANDRY
Louisiana Attorney General

ANTHONY G. BROWN
Maryland Attorney General

DANA NESSEL
Michigan Attorney General

AUSTIN KNUDSEN
Montana Attorney General

MIKE HILGERS
Nebraska Attorney General

AARON D. FORD
Nevada Attorney General

DREW H. WRIGLEY
North Dakota Attorney General

DAVE YOST
Ohio Attorney General

GENTNER F. DRUMMOND
Oklahoma Attorney General

BOB FERGUSON
Washington Attorney General

PATRICK MORRISEY
West Virginia Attorney General

SEAN D. REYES
Utah Attorney
General

BRIDGET HILL
Wyoming Attorney
General

JASON MIYARES
Virginia Attorney
General

[Counsel for Plaintiffs in No. 146 and Wisconsin]

MATTHEW H. HAVERSTICK
MARK E. SEIBERLING
JOSHUA J. VOSS
LORENA E. AHUMADA
KLEINBARD LLC
Three Logan Square
1717 Arch Street
Fifth Floor
Philadelphia, PA 19103

CHRISTOPHER B. CRAIG
JENNIFER LANGAN
PENNSYLVANIA TREASURY
OFFICE OF CHIEF COUNSEL
127 Finance Building
Harrisburg, PA 17120

[Counsel for Pennsylvania]