

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

DELAWARE,)
)
) Plaintiff,)
)
) v.) No. 145, Orig.
)
PENNSYLVANIA AND WISCONSIN,)
)
) Defendants.)
)

ARKANSAS, ET AL.,)
)
) Plaintiffs,)
)
) v.) No. 146, Orig.
)
DELAWARE,)
)
) Defendant.)
)

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P R O C E E D I N G S

(11:53 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Delaware versus Pennsylvania and Wisconsin and the consolidated case.

Mr. Katyal.

ORAL ARGUMENT OF NEAL K. KATYAL
ON BEHALF OF DELAWARE

MR. KATYAL: Thank you, Mr. Chief Justice, and may it please the Court:

This case concerns a piece of statutory text from 1974 in Section 2503, which is found in the blue brief appendix at page 2a. That provision exempts from the common law a narrow set of instruments, a money order, traveler's check, or other similar written instrument other than a third-party bank check.

The question today is whether two products, MoneyGram agent checks and MoneyGram teller's checks, fall within that exemption. For many years, the defendant states answered that question "no." However, after engaging some creative consultants, they changed their mind.

They were right the first time for

1 four separate reasons. First, when Congress
2 adopted that language in 1974, the term "money
3 order" referred to specific commercial products
4 labeled "money order" and typically sold to
5 unbanked consumers to pay small debts. Neither
6 of those apply to the two disputed instruments
7 here. They're not labeled "money order," and
8 they are sold to consumers with bank accounts
9 who are transferring larger sums of money.

10 Second, the FDA was a surgical fix to
11 this Court's 1972 decision with a key purpose
12 behind it, to prevent the price of small-dollar
13 instruments from increasing due to address
14 collection requirements that states might adopt
15 in reaction to this Court's 1972 decision. That
16 rationale does not apply here, and the two
17 instruments are outside of the FDA altogether.

18 Third, even if you thought these
19 products were within the FDA, the two
20 instruments here fall within the third-party
21 bank check exception. Like all bank checks,
22 they are signed by bank employees, not
23 purchasers.

24 And, fourth, while we believe that our
25 reading is the best reading of the FDA's text,

1 structure, and purpose, we don't deny one could
2 read the statute differently, but importantly,
3 if you found things in equipoise, two things
4 would independently break any tie for us.

5 One is the doctrine of reading
6 statutes to avoid derogation of the common law,
7 and the other is this Court's repeated emphasis
8 on the need for bright-line rules and
9 predictability in this space.

10 The defendants' interpretation would
11 upend all that, as their own amici acknowledge.
12 Our view of the statute, by contrast, is
13 predictable, reflects longstanding practice, and
14 provides a bright line for the escheatment of
15 financial products in the future.

16 JUSTICE THOMAS: Mr. Katyal, how much
17 weight do you put on this money order
18 designation? What if, tomorrow morning, they
19 simply stamp the top of these, the two disputed
20 instruments, "money order," "commercial money
21 order"? Would that solve your problem?

22 MR. KATYAL: So, Justice Thomas, that
23 would -- if they changed the label, we do think
24 that it would mean it's not a money order or
25 traveler's check. So we do think you look to

1 the label for that. And, indeed, I think that's
2 what they say about traveler's checks. But we
3 don't think it would be true for other similar
4 instruments.

5 So we think that in your hypothetical,
6 in which you have the exact same instrument, but
7 it has just a different name on it, that is an
8 other similar written instrument.

9 Notably, you know, that's never
10 happened, and the reason is because money orders
11 and those labels are important for consumers and
12 for banks. They want to know what they're
13 getting. They want to know what they're
14 selling. And that's why they can't point to a
15 single example where that label has ever been
16 stripped off.

17 But I agree with you, Justice Thomas,
18 if that happened, that would fall within the
19 FDA, your hypothetical.

20 JUSTICE THOMAS: Well, the -- can you
21 point to any reason in the past why this would
22 be -- this definition of "money order" is so
23 narrow? It would seem to me that with its --
24 over time, it's not necessarily, as you say it
25 is, a discrete set of instruments.

1 MR. KATYAL: So we don't doubt,
2 Justice Thomas, that there is a way to define
3 "money order" as broadly as my friends on the
4 other side do.

5 If you do that, it blows up things
6 like cashier's checks, certified checks, all the
7 stuff that the American Bank Association is
8 warning you about and that Judge Leval couldn't
9 get around because he just said I'm not going to
10 define it, but --

11 JUSTICE THOMAS: One -- one final
12 question, and I'm sure my colleagues will have
13 more. But how do you get around "similar," the
14 -- the similarity language? It seems as though
15 all of these are drafts and that if you say,
16 well, it's not a money order, it looks like a
17 money order in many other ways.

18 So why is -- is it -- does it not fall
19 into the similarity category?

20 MR. KATYAL: Yes, Justice Thomas. We
21 don't think it falls into the similarity --
22 similarity category. We think that's for things
23 like what you were talking about before in your
24 first question to me, where the -- where the
25 name isn't there and possibly some other things.

1 But, here, there are three things
2 about these disputed instruments which aren't
3 true about money orders.

4 First, you can only buy disputed
5 instruments at a bank. Money orders are sold
6 typically at retailers, CVS, Walmart, and the
7 like.

8 Second, you will have a bank account
9 when you buy them.

10 And -- and, third, the third point is
11 that the money order -- the -- that -- that
12 money orders aren't signed by the bank, but
13 these two disputed instruments are.

14 Now I know that sounds formalistic.
15 Here's why that matters: Because Congress and
16 the FDA was worried about what this Court
17 invited states to do in 1972, which is impose
18 address collection requirements on money orders
19 and traveler's checks.

20 And what they said is these are small
21 denomination instruments. If you do that, it's
22 going to increase the price of them. The
23 disputed instruments, because there is that bank
24 account and because you're going into the bank,
25 that address information is already being

1 collected now.

2 So, if you're worried about my
3 friend's point about equity and the windfall to
4 a particular state with respect to these
5 disputed instruments, the states have the
6 easiest fix in the world, a fix they didn't have
7 in 1972, which is to say whenever you're one of
8 those banks dealing with MoneyGram, you just
9 have to transmit the address information that
10 you're already collecting.

11 JUSTICE JACKSON: But, counsel, you
12 suggest that Congress's concern was the
13 collection of address information. If that was
14 so, they certainly did a weird thing in terms of
15 the statute that they wrote.

16 I mean, the statute did not just say
17 collect the information, which would have solved
18 the problem directly. The statute seemed to
19 take into account the fact that there were going
20 to be circumstances in which that information
21 was not collected, and Congress appeared to be
22 trying to override the common law with respect
23 to what happened because it was really concerned
24 about inequitable escheatment.

25 And so my question is, to what extent

1 do these disputed instruments present that
2 problem? Because, if we believe that that's
3 what Congress really cared about, then why would
4 they have crafted a statute that excluded
5 certain instruments that presented that same
6 problem?

7 MR. KATYAL: Yeah, Justice Jackson, we
8 don't think that that windfall concern, that
9 equity concern, applies to the two disputed
10 instruments. So Congress in '74 was worried
11 about address collection requirements. They
12 said we want to head that off because that's
13 going to increase the price of traveler's checks
14 and money orders. That's why they didn't write
15 the statute that you were saying, which is to
16 impose address requirements.

17 The findings in 2501 say no, we want
18 the reverse, because, if you -- if states start
19 doing that, it's going to increase the cost of
20 those instruments. And so that concern doesn't
21 apply to the two disputed instruments here
22 because the address information is already being
23 collected. And then, when you're concerned
24 about the equity that still exists with respect
25 to these two disputed instruments, because

1 Delaware has them, not for all bank checks,
2 obviously, Bank of Americas of the world and
3 Citibanks are really the large escheators in
4 this space.

5 But, with respect to the two disputed
6 instruments, to the extent that states,
7 including my friend's states, if they're worried
8 about the equity, they have the simplest and
9 easiest fix in the world, which is to just
10 require that the information, when you go in and
11 buy a teller's check or an agent check is
12 issued, it just has to be transmitted to
13 MoneyGram.

14 And if that happens, Justice Jackson,
15 then you avoid this whole equity about state of
16 incorporation because then the primary rule of
17 the common law would apply, which is the
18 creditor's last address.

19 JUSTICE JACKSON: But you can only do
20 that with respect to your own state, right? I
21 mean, every state would have to adopt that rule
22 in order to solve the problem. And Congress, it
23 appears, wanted to solve the problem in a
24 different way.

25 MR. KATYAL: So Congress -- certainly,

1 Congress could solve it nationally. And this
2 Court and Justice Thomas's opinion in Delaware
3 invited Congress to do that with respect to the
4 inequities and windfall that it said wasn't
5 enough to -- to justify this Court departing
6 from the common law.

7 And then you're absolutely right,
8 Justice, any state that is concerned about the
9 inequity can pass a law. And I think it's
10 probably a pretty easy law for them to pass
11 because, quite honestly, they're just getting
12 extra money. And so it's up to them.

13 What my friends are asking you to do
14 is to basically break from the common law and
15 because of their policy concern -- and that is
16 exactly what this Court has said every time,
17 most recently in the Delaware case, that you
18 don't do, and here is why it's so dangerous.

19 My friend pitches this as a case about
20 the secondary -- dueling secondary rules about
21 place of incorporation versus principal place of
22 business. That's what happens if you don't have
23 addresses. But, if you adopt his
24 interpretation, you're also blowing up the --
25 the primary rule.

1 So the primary rule, there's a big
2 dispute between -- a big -- or a big gulf
3 between the FDA, this Act, which uses -- which
4 uses -- which uses the -- it moves away from the
5 last creditor's address, which is the rule of
6 the common law.

7 And so --

8 JUSTICE JACKSON: And so you're not
9 reading that to be Congress's attempt,
10 Congress's attempt to break from the common law?
11 You're suggesting that what we do here is going
12 to blow up the common law. But I had understood
13 that the statute itself was trying to set out a
14 different set of parameters than what existed in
15 the common law.

16 MR. KATYAL: Oh, absolutely. We don't
17 doubt that they did that with respect to
18 traveler's checks and money orders, but there's
19 no indication that they went beyond that. And
20 we think you should read that narrowly because
21 the entire reason they wanted to move away from
22 the common law with respect to these two
23 instruments is because of the inequity and the
24 addresses not being collected, which would
25 increase the cost of those items.

1 Those don't apply. Those policy
2 rationales don't apply here. And, notably,
3 Justice Jackson, Congress in 1974 knew exactly
4 how to write the statute that you're asking for
5 to get rid of the common law for a broader set
6 of instruments.

7 If you look at our blue brief at page
8 31, it quotes the 1966 Model Act, Uniform Act
9 for the disposition of unclaimed property, and
10 that text is "any sum on which a banking or
11 financial organization or business association
12 is directly liable, including by way of
13 illustration but not of limitation CDs, drafts,
14 money orders, and traveler's checks."

15 Now the first part of that statute
16 that I just read to you is exactly the language
17 from 2503. Indeed, Judge Leval below said it
18 would be the most extreme coincidence that you'd
19 use all of the same language from 1966 and the
20 FDA.

21 But what isn't in there? Everything
22 about by illustration, by -- by the -- the -- by
23 way of illustration but not of limitation, the
24 enumeration of other financial products, like
25 certificates of deposits and the like.

1 And so Congress is telling you here in
2 this statute we mean traveler's checks, we mean
3 money orders. And, Justice Thomas, absolutely,
4 we mean other similar written instruments. But
5 that can't be everything that is prepaid the way
6 my friends would have it.

7 JUSTICE ALITO: If someone purchases
8 an agent check or a teller check, what
9 information about that purchaser does the bank
10 transmit to MoneyGram?

11 MR. KATYAL: None. That's what the
12 record says.

13 JUSTICE ALITO: Nothing?

14 MR. KATYAL: They collect the
15 information, but it's not transmitted. And so
16 the record like at our appendix page 599 says
17 the information is collected.

18 JUSTICE ALITO: Well, they have to
19 tell MoneyGram something.

20 MR. KATYAL: They tell -- they -- they
21 don't tell the actual name, the name of the
22 payee or the address of the payee, the relevant
23 information here. And, Justice Alito, your
24 opinion in the Yee case talked about the
25 concerns about escheatment and about people not

1 getting due process and the like.

2 And to the extent you're concerned
3 about that, our rule, the common law rule,
4 incentivizes precisely that state solution
5 because states will then say: Look, if you
6 want, MoneyGram, if you want to come into our
7 state, you've got to transmit that information
8 and close this informational hiccup. That's
9 what our sur-reply at pages 22 to 23 goes down
10 -- goes through.

11 So that means MoneyGram will now be
12 under a duty to go and find those people and
13 say: You know, here, there's this abandoned
14 check. And if they can't find them even with
15 the address, then the information all goes into
16 the state unclaimed database, and then you can
17 search by name and address.

18 CHIEF JUSTICE ROBERTS: Mr. --

19 JUSTICE ALITO: Well, you make the --

20 CHIEF JUSTICE ROBERTS: I'm sorry, go
21 ahead.

22 JUSTICE ALITO: You make the fair
23 point that the states could require the banks to
24 transmit this information to MoneyGram. But
25 just out of curiosity, why doesn't MoneyGram ask

1 for this information? Would that cost a lot of
2 money?

3 MR. KATYAL: Right. The -- the record
4 doesn't say. I suppose it probably does cost a
5 little bit of money. And MoneyGram's
6 indifferent to this whole question and the
7 American Bar Association -- the American Bank
8 Association brief at page 1 says that, look,
9 that these companies are generally indifferent
10 to these things.

11 So it's a very easy statutory fix
12 because states will get money that they
13 otherwise wouldn't get. And that wasn't
14 available in 1974. That's what makes this case
15 so different from the 1974 FDA, because there,
16 and Congress specifically, as I was saying to
17 Justice Jackson, in 2501 made a specific
18 finding, address information is not being
19 collected for traveler's checks, not being
20 collected for money orders, and if you impose
21 that requirement on those small-dollar
22 instruments, it's going to increase the cost.

23 These are, of course, large-dollar
24 instruments, and so the money is much larger.
25 And so there's a much better -- you know, a much

1 better incentive, particularly for the reasons,
2 Justice Alito, you wrote about in Yee, to try
3 and collect and find the rightful owners of this
4 property.

5 CHIEF JUSTICE ROBERTS: How much --
6 what's the comparison in terms of total value?
7 I mean, I understand your point that the
8 traveler's checks, the money orders, small,
9 small amounts, the official checks, the agent
10 checks, and the teller checks not limited, but
11 how many of each are there? Where -- where is
12 -- where is all the money? Is it the money
13 orders in traveler's checks or the big bank
14 check -- checks?

15 MR. KATYAL: Yeah, Your Honor,
16 unfortunately, the record I don't believe gives
17 us any quantification of that. We do know that
18 in 1974 the typical money order was between \$1
19 and \$25. And there's other evidence about that.
20 And even up to today, MoneyGram, for example,
21 limits money -- money orders to a thousand
22 dollars and the like.

23 CHIEF JUSTICE ROBERTS: Yeah, but the
24 question there I guess is how many of them there
25 are.

1 MR. KATYAL: Correct. And I -- we
2 don't have information about that. I think
3 Congress wasn't concerned as much with overall
4 dollars as they were with the small
5 denominations and the fact that address
6 requirements would impose a much bigger burden
7 compared to the benefit you'd get, whereas here,
8 you know, I think, for these things, teller's
9 checks existed in 1974. Bank checks and, you
10 know, agent checks existed just by a different
11 name in 1974.

12 Congress pointedly didn't enumerate
13 any of that in the statute. They used, to use
14 Justice Gorsuch's convoluted -- phrase from the
15 first argument, convoluted.

16 (Laughter.)

17 MR. KATYAL: Sorry, Justice. You --
18 you called -- you called Congress's action in
19 the last argument "convoluted." And I think
20 that's right here, that if -- if their argument
21 is right, Congress chose a really weird way of
22 going about it.

23 JUSTICE GORSUCH: All right. I was
24 sitting here quietly.

25 (Laughter.)

1 JUSTICE GORSUCH: But now you've drawn
2 me out, Mr. Katyal.

3 Other similar instruments, the
4 language Justice Thomas -- I've got a question,
5 fine, I'll come up with one, all right. What
6 does it mean on your account?

7 And on page 44 of your brief, it says
8 that Congress likely intended the term "other
9 similar written instrument" to capture alternate
10 spellings of money order and traveler's check,
11 such as American Express traveler's cheque.
12 Q-U-E.

13 Okay. Now I am familiar with various
14 spellings of "traveler's check." I am not
15 familiar with various spellings of money order.
16 Help me out.

17 MR. KATYAL: Yes. So exactly -- one
18 category is exactly what Justice Thomas began
19 the argument with, which is a money order in
20 every way, shape, and form, except it doesn't
21 have the label on it. So our argument is not
22 limited, Justice Gorsuch, to different
23 spellings.

24 Same product without the label is what
25 an other similar instrument is. That's one

1 category. Another category are things, I think
2 generic products, so just like a copy is called
3 a Xerox, I think Congress in 1974 was worried
4 that a traveler's check might be called an AMEX
5 or worried that a money order might be called a
6 Western Union. That's a second category.

7 And then a third category of other
8 similar instruments are some of the things that
9 have been bandied about in this litigation and
10 in the briefs. So there's something called an
11 agent check money order. There's something
12 called a personal money order. That's in our
13 appendix at page 381. There's something called
14 a bank money order. There's something --

15 JUSTICE GORSUCH: I take your point.
16 Okay. But does it underline another point that
17 may be problematic, and that is that labels
18 cannot control substance in our analysis here?
19 We -- can we agree on that?

20 MR. KATYAL: We do.

21 JUSTICE GORSUCH: Okay.

22 MR. KATYAL: And so our point is
23 labels are very good at deciding traveler's
24 check, money order. And they're good not just
25 for courts.

1 JUSTICE GORSUCH: Well, I guess I'm
2 wondering why -- why they're good for some
3 purposes but not others?

4 MR. KATYAL: Because I think it
5 reflects, Justice Gorsuch --

6 JUSTICE GORSUCH: I mean, you like --
7 you don't like labels when it comes to this
8 little language -- this little exception here.

9 MR. KATYAL: Oh, it's not that we
10 don't like them, Justice --

11 JUSTICE GORSUCH: Well, but if I -- if
12 I might just finish, and then have at it, okay?
13 But you -- you admit that labels can control for
14 some purposes, but yet you do ask us to place
15 quite a lot of weight on "money order" versus
16 "traveler's check" otherwise. And so I'm just
17 -- I'm -- I'm -- I'm stuck there. So help me
18 out.

19 MR. KATYAL: Yeah. So we -- we think
20 the labels matter because they matter -- they're
21 not just for courts. They're, after all, for
22 banks and consumers. Banks have to figure out,
23 you know, what is this product and where do
24 we -- which state do we escheat it to? And
25 labels are a really good way to do that, as

1 opposed to some convoluted eight-factor test
2 where you've got to have law professors
3 testifying about experts, about what -- whether
4 something is a money order or not.

5 So we think labels in general work,
6 but Congress was concerned about more than that.
7 And that's what I was saying to Justice Thomas.
8 And so that's what "other similar written
9 instrument" does. It's labels for the first
10 part but not for the second part.

11 And I think Congress in 1974 had
12 examples of statutes in which other products
13 were enumerated. So our brief cites, for
14 example, 26 U.S.C. 6311, which is a 1970 statute
15 which refers to "any certified treasurer's or
16 cashier's check or any money order," I think
17 demonstrating that Congress knew -- thought
18 money orders were distinct from these other
19 products.

20 If you adopt my friend's
21 interpretation, cashier's checks, certified
22 checks, all of those become money orders because
23 they are all instruments -- instruments that
24 prepay money. And as the American Bar
25 Association brief says, that's going to be a

1 disaster because millions and millions of
2 dollars, and there's a little -- at least
3 there's some hyperbole -- or not hyperbole.
4 There's some subjective quantification of this
5 in the ABA brief saying that that is incredibly
6 damaging and destabilizing to the financial
7 sector because this has all been around and done
8 a certain way since 1974.

9 JUSTICE KAGAN: So I guess I didn't
10 understand until argument that you're saying
11 that "money orders" is an only label test, is
12 that right? And then the "similar instruments"
13 is where the characteristics of money orders
14 come in, is that right?

15 MR. KATYAL: Correct.

16 JUSTICE KAGAN: And then what are the
17 characteristics of money orders that you're
18 pointing to? Like, what -- what -- what -- what
19 does some other non-labeled instrument have to
20 comply with in order to be determined to be a
21 similar instrument?

22 MR. KATYAL: Well, I do think it would
23 be would be a transfer of information in which
24 address information isn't being collected and a
25 small denomination kind of instrument. And so,

1 here, there's a wide gulf, however you define
2 "similar," between the two disputed instruments
3 and -- and agent checks -- excuse me -- and
4 teller's checks -- traveler's checks and money
5 orders.

6 And the three things are, number one,
7 in order to get a disputed instrument, you've
8 got to go to a bank to get it. Second, you will
9 have a bank account when you do so. And, third,
10 it's got to be signed by a bank employee.

11 And that's a pretty important
12 distinction because, when something is signed by
13 a bank employee, it makes the bank liable for
14 the piece of paper, as opposed to money orders,
15 which are limited recourse documents and you
16 can't sue the issuer of a money order the way
17 you can the two disputed instruments.

18 So we think those are three hallmarks.
19 Does that solve it?

20 JUSTICE KAGAN: So, I mean, it feels
21 as though you're picking things that, you know,
22 as you should, that -- that -- that make you
23 succeed in the case. But I could pick three
24 other things that make Arkansas succeed.

25 MR. KATYAL: We're -- we're not just

1 randomly picking these, Justice Kagan. It goes
2 to, I think, Justice Jackson's question to me
3 earlier, which is the purpose behind this, which
4 is the address information isn't being
5 collected. It's burdensome to do so. That's a
6 statutory finding. And the equity windfall
7 considerations.

8 Here, for these disputed instruments,
9 the states have the easy fix available to them
10 that wasn't available to them in 1974 because,
11 if states did what this Court invited them to do
12 in 1972 in response to the windfall concern, it
13 would increase the cost of those instruments and
14 be problematic. And so that's why Congress
15 said, uh-uh, we're heading it off for those
16 instruments but not for these.

17 And these factors that I'm referring
18 to you are relevant to that because they show
19 address information is being collected for the
20 disputed instruments, not being collected for
21 traveler's checks and money orders. That's the
22 key difference between the two.

23 JUSTICE SOTOMAYOR: Counsel, the --
24 MoneyGram treats one of its other official
25 checks, the agent check money orders, as subject

1 to the FDA. Justice Thomas asked you what
2 happens if they remove that tomorrow.

3 Under your test that you just
4 articulated to Justice Kagan, then it would go
5 back to not being a money order?

6 MR. KATYAL: No, Your Honor. If I
7 understand your question, it's the same
8 instrument. It just doesn't have the label
9 "money order" on it.

10 JUSTICE SOTOMAYOR: They take it off.

11 MR. KATYAL: Yeah. If they take it
12 off --

13 JUSTICE SOTOMAYOR: It's issued by --

14 MR. KATYAL: -- that is an other --

15 JUSTICE SOTOMAYOR: -- it's issued by
16 a bank --

17 MR. KATYAL: Right.

18 JUSTICE SOTOMAYOR: -- not a retail
19 operator. They do collect information, don't
20 they?

21 MR. KATYAL: For agent check money
22 orders, I think some information is collected,
23 yes.

24 JUSTICE SOTOMAYOR: All right. And
25 what was your third criteria?

1 MR. KATYAL: That -- that you have to
2 have an account at the bank and --

3 JUSTICE SOTOMAYOR: And they have an
4 account at the bank.

5 MR. KATYAL: -- and they may have an
6 account at the bank.

7 JUSTICE SOTOMAYOR: So --

8 MR. KATYAL: So, with respect to that,
9 you know, limited universe, we do -- even there,
10 I guess I should say, let's look at that,
11 Justice Sotomayor. It's at page 230 and 231, is
12 an agent check money order.

13 And so what it says on the front is
14 that -- there's a picture of it, and it says on
15 the front that -- you know, that it's labeled
16 agent check money order. And then, on the back,
17 it says, if the instrument is designated on its
18 face as a money order, then the following
19 applies, and it says it's limited recourse.

20 Now, if you strike that off from the
21 back, then you might be -- then I think you are
22 fundamentally changing the nature of the
23 document because you're making it now not a
24 limited recourse document; you're making it
25 something else.

1 And so that actually is a substantive
2 change. I think it's a -- and the reason --
3 that's why I'm going through this, because it's
4 different very much --

5 JUSTICE SOTOMAYOR: That's not the
6 example I gave.

7 MR. KATYAL: -- than Justice Thomas's
8 hypothetical. So our view on this is generally
9 labels will control. In some circumstances, if
10 you have the very same product, just not the
11 label, then that is an other similar instrument.

12 But, for your question, which is
13 actually changing the meaning of the document
14 itself, then that isn't one that is an other
15 similar written instrument.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Justice Thomas, anything further?

19 JUSTICE THOMAS: No questions.

20 CHIEF JUSTICE ROBERTS: Justice Alito?

21 JUSTICE ALITO: You say that a
22 third-party bank check is a check that is
23 effective on the signature of a bank officer.
24 But isn't it the bank's liability and not the
25 signature that makes an instrument a bank check?

1 The signature merely indicates that the bank is
2 liable?

3 MR. KATYAL: No, Your Honor, I think
4 the signature is the thing that does make the
5 bank check actually effective. And we point you
6 to Munn's, which we cite to in our brief, for
7 exactly that. And I think your question's
8 really important because Judge Leval said, well,
9 I'm going to look to the Hunt Commission to
10 determine what a third-party bank check is, and
11 a third-party bank check, he says, according to
12 the Hunt Commission, is a personal check.

13 But, actually, the Hunt Commission
14 says that's just one example. And, notably,
15 really importantly, at page 41 of our brief, we
16 say, if you go on and read what the Hunt
17 Commission says, it actually says teller's
18 checks are third-party bank payment systems.

19 So the Hunt Commission invocation
20 boomerangs on them. It underscores that the
21 types of disputed instruments here, these
22 teller's checks, are third-party bank checks.
23 Congress was worried about these larger-dollar
24 products, like teller's checks, and they
25 specifically exempted them.

1 And so even if you didn't buy anything
2 that I've been saying for the last 25 minutes
3 about we're not falling within the FDA at all,
4 we would fall within the third-party bank
5 exception. We don't think you have to get
6 there, of course.

7 JUSTICE ALITO: Whether a bank
8 employee signs the check or not is a formality.
9 What -- what is the effect of that?

10 MR. KATYAL: We think it's more than a
11 formality. We think that is actually the
12 relevant characteristic that Munn's, Wallach,
13 and Lawrence all say that makes something a bank
14 check, is you look to that.

15 Now, admittedly, it's not the clearest
16 of phrases, but we think that's the one that
17 gives it some meaning and reflects Congress's
18 1974 knowledge. Teller's checks were around in
19 '74, and yet Congress didn't enumerate them in
20 2503, much more marrow statute than the 1966
21 one.

22 JUSTICE ALITO: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Sotomayor?

25 Justice Gorsuch?

1 JUSTICE GORSUCH: Nothing. Thank you.

2 JUSTICE KAVANAUGH: Just to pick up
3 quickly on Justice Kagan's earlier question on
4 "similar written instrument," that's kind of a
5 statutory version -- version of ejusdem generis,
6 I suppose, and we're always trying to figure out
7 what the key features are.

8 Why aren't the key features here a
9 prepaid money transmission product, it doesn't
10 show last known address of purchaser, and the
11 windfall purpose is implicated? So you have
12 arguments, but why aren't those the better
13 features to focus on when we're figuring out
14 what "similar" means here?

15 MR. KATYAL: Because, if you do that,
16 you blow up the statute to include cashier's
17 checks, certified checks, and all sorts of stuff
18 that Congress knew exactly how to name or to
19 write open-ended statutes and didn't.

20 And so, to us, you know, going back to
21 the statutory interpretation question, it's like
22 a statute that said, you know, rubber bands,
23 paper clips, or other similar items. You know,
24 yes, could you find some commonalities? Sure,
25 but I don't think it means other -- all office

1 products, like desk chairs or paper or things
2 like that.

3 You're looking for something more
4 narrow. And as I said to Justice Jackson, the
5 statutory findings give you what Congress was
6 thinking about here in terms of address
7 collection and the burdens.

8 JUSTICE KAVANAUGH: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice
10 Barrett?

11 JUSTICE BARRETT: No.

12 CHIEF JUSTICE ROBERTS: Justice
13 Jackson?

14 JUSTICE JACKSON: Yes, just one
15 question that is confusing me.

16 You keep suggesting that larger-dollar
17 products are exempted from the statute, things
18 that would be covered by -- like the disputed
19 instruments, they deal with larger dollar and
20 money order, smaller dollar.

21 What I don't understand is why that's
22 the case. I've heard you said -- say that there
23 would be an incentive to include address
24 information for larger-dollar products, but if
25 that's true, then, under the common law, we

1 wouldn't have the inequitable escheatment
2 problem.

3 So the fact that the states are
4 fighting about these disputed instruments
5 indicates to me that the disputed instruments
6 don't have addresses on them, which undermines
7 your argument that larger-dollar products would
8 necessarily carry with them the address
9 information.

10 Do you understand what I'm saying?

11 MR. KATYAL: Absolutely, Justice
12 Jackson.

13 JUSTICE JACKSON: Yes.

14 MR. KATYAL: So the record is clear on
15 this, and I don't think my friends on --
16 disagree, that for the disputed instruments,
17 address and payee information is being found.
18 That's our appendix at page 599. It's the ABA
19 brief at page 22. Our appendix also at page 400
20 and quoting even from 1956 the ABA report.

21 The reason why it's being collected
22 has everything to do with money laundering
23 requirements and the like. 31 C.F.R. 1010
24 requires collection of this information for
25 anything over \$3,000.

1 The informational hiccup is the
2 information is being collected, it's just not
3 being transmitted to MoneyGram, and that's where
4 the states have a simple statutory fix. They're
5 asking you to do their hard work for them.

6 And if they did that statutory fix, it
7 would be prospective. It wouldn't jeopardize
8 everything that's happened since 1974 in which a
9 state like Delaware has collected, you know,
10 money under a certain set of escheatment rules
11 and they want to unwind all of that.

12 And that would be very destabilizing
13 not just for the products at issue here but
14 certified checks, cashier's checks, as the ABA
15 says.

16 JUSTICE JACKSON: Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Mr. Bronni.

20 ORAL ARGUMENT OF NICHOLAS J. BRONNI
21 ON BEHALF OF ARKANSAS, ET AL.

22 MR. BRONNI: Mr. Chief Justice, and
23 may it please the Court:

24 This case presents the problem the FDA
25 was enacted to solve. In Pennsylvania versus

1 New York, this Court concluded that unclaimed
2 financial instruments escheat to a purchaser's
3 state of residence or, if that's unknown, to an
4 issuer's state of incorporation.

5 Because issuers of certain financial
6 instruments rarely kept purchaser addresses,
7 that meant a windfall for an issuer's state of
8 incorporation at the expense of its fellow
9 states.

10 Just two years later, Congress
11 responded to that inequity by enacting the FDA.
12 That statute says that where addresses aren't
13 typically kept for a class of instruments, those
14 instruments escheat to the state of purchase.

15 Now, 50 years later, Delaware claims
16 that it's entitled to the exact same sort of
17 windfall that led to the enactment of the FDA.

18 To justify that, it argues that the
19 FDA doesn't cover instruments that function
20 precisely like other money orders but are
21 marketed differently. But marketing strategies
22 do not define commercial instruments and they
23 don't justify \$250 million windfalls.

24 Recognizing the weakness of that
25 argument, Delaware alternatively claims that

1 MoneyGram official checks are excluded from the
2 FDA as third-party bank checks. That argument
3 fares no better because MoneyGram is not a third
4 party as that term was used in 1974, and
5 MoneyGram's official checks are absolutely not
6 bank checks.

7 Nor, for that matter, does Delaware
8 explain why Congress would have chosen to
9 exclude instruments that present precisely the
10 windfall problem that the FDA targeted.

11 So it's hardly surprising that all
12 three payment systems experts in this case,
13 including Delaware's own expert, agreed that
14 under any ordinary understanding of the phrase
15 "third-party bank check," MoneyGram official
16 checks are not third-party bank checks.

17 So we would ask this Court to overrule
18 the exceptions and adopt the Special Master's
19 recommendation.

20 JUSTICE THOMAS: Mr. Bronni, would you
21 spend a few minutes on the -- Mr. Katyal's
22 parade of horribles if we accept your argument?

23 MR. BRONNI: Sure, Your Honor. I
24 think it's probably easiest to begin with the
25 example of cashier's checks because there's been

1 a lot of ink spilled on the cashier's check at
2 issue in this case. And -- and, for that one,
3 we don't believe that cashier's checks are
4 necessarily covered by our definition.

5 So, to -- to begin with, our
6 definition requires that an instrument be
7 prepaid. A cashier's check as a class of
8 instrument is not necessarily a prepaid
9 instrument. Instead, as the ABA's amicus brief
10 argues at length, there are many frequent,
11 common, ordinary, everyday situations where
12 cashier's checks are not prepaid.

13 So, for instance, if a bank needs to
14 pay its own obligations, say it needs to pay an
15 electrician or meet a tax bill, it will issue a
16 check drawn on its own accounts. That's a
17 cashier's check. That is not a prepaid
18 instrument.

19 If the bank needs to disburse loan
20 proceeds, it will issue a check drawn on its own
21 account.

22 JUSTICE KAGAN: So does that mean we
23 determine cashier's checks one by one by one
24 depending on whether it's prepaid?

25 MR. BRONNI: No, Your Honor. I think

1 this is one of the reasons why we're judging
2 things sort of on a class of instruments, and as
3 a class of instruments in contrast to official
4 checks and money orders, these are not always
5 prepaid, so that it's a class-wide distinction.

6 But, even aside from that, there are
7 other reasons why we believe that cashier's
8 checks, even aside from our definition, would
9 not be swept in under the term "money order."

10 And one of those reasons is I think,
11 as, Justice Thomas, your question reflects, you
12 know, there are instruments in the world that
13 people would not describe as money orders even
14 if they share some of the common core features,
15 and a cashier's check is a good example of that.

16 We would not in ordinary parlance call
17 a cashier's check a money order because it is a
18 unique instrument in that it's issued by the
19 same bank, drawn on that same bank, which makes
20 it a uniquely secure instrument that is
21 different.

22 So, in ordinary English, it's a
23 well-known instrument, as Delaware agrees, as
24 the American Bankers Association agrees, and
25 that's a justification for carving it out.

1 And then, finally, another reason why
2 we would think it wouldn't be covered is
3 because, in 2501, when Congress is describing
4 money orders as a class of instruments, it
5 describes them as a class of instruments for
6 which addresses are not ordinarily kept as a
7 business practice.

8 That does not describe cashier's
9 checks in 1974 and it doesn't describe them
10 today.

11 JUSTICE JACKSON: Why does it describe
12 the disputed instruments? Your opposing counsel
13 says the disputed instruments are a class in
14 which the addresses are typically kept.

15 MR. BRONNI: So I -- I -- I think that
16 sometimes the addresses -- I think what the
17 record actually reflects is that sometimes the
18 addresses are collected by the selling financial
19 institution, as could be true, frankly, of a
20 retail money order. So that the statute my
21 friend was referring to is a requirement that if
22 you sell at least \$3,000 worth of these
23 instruments or a retail money order, you're
24 required to collect information and maintain it
25 as the seller.

1 That information, however, is not
2 transmitted to MoneyGram. MoneyGram has a
3 policy it will not accept that information. It
4 will not keep it. So what that means is the
5 issuer, which is the actual holder of the funds
6 here, because it's not the selling bank that
7 holds the money, the day after a transaction
8 takes place, that money is transferred from the
9 selling financial institution to MoneyGram, and
10 it's MoneyGram that holds that.

11 CHIEF JUSTICE ROBERTS: Well, but
12 MoneyGram can -- can -- you can require
13 MoneyGram to ask for that information. I mean,
14 that would -- and that would solve your problem
15 just like that because just like with respect to
16 the others that you say have to be covered and
17 keep the existing or keep the address and
18 purchaser information, MoneyGram would, and then
19 all of that stuff would escheat to your state
20 rather than Delaware.

21 MR. BRONNI: I think, Your Honor, that
22 the reason why our states have -- have not
23 necessarily done that is because I think
24 Congress really when it passed this statute put
25 its thumb on the scale and suggested that

1 keeping that kind of information and having to
2 maintain that information, which my friend on
3 the other side admitted would be a burden,
4 Congress decided that was an unnecessary burden.

5 Now Delaware suggests it would only be
6 an unnecessary burden for low-dollar
7 instruments. But that's not actually what
8 Congress said. What my friend on the other side
9 is referring to are things like floor statements
10 where certain members of Congress expressed a
11 concern that by requiring address-keeping you
12 could affect the utility of these instruments by
13 driving up their cost. And there are floor
14 statements that reflect that for low-dollar
15 instruments.

16 But what Congress actually said, all
17 of Congress in 2501 in the findings of facts,
18 was not that. Instead, it said address
19 collection and maintenance would be an
20 additional burden that is not justified because
21 most of these instruments are -- are purchased
22 in one's home state. And that --

23 CHIEF JUSTICE ROBERTS: Well, just to
24 be clear, there's nothing in the law that
25 prevents you from requiring MoneyGram to ask for

1 that information.

2 MR. BRONNI: That's correct, Your
3 Honor. Our states could --

4 CHIEF JUSTICE ROBERTS: And that would
5 give you everything you're looking for here?

6 MR. BRONNI: It would potentially for
7 prospective relief but not necessarily for --
8 for --

9 CHIEF JUSTICE ROBERTS: You -- you --
10 you said in your opening that the difference
11 between the instruments that we know are
12 covered, money orders and traveler's checks and
13 the others, is simply a matter of marketing
14 strategy?

15 MR. BRONNI: Yes, Your Honor.

16 CHIEF JUSTICE ROBERTS: But your
17 friend points out that money orders and
18 traveler's checks, on the one hand, are low
19 value, high volume, purchased anonymously.

20 On the other hand, the agent and
21 teller's checks are high value or at least not
22 limited generally. They're not anonymous.
23 They're drawn on an existing bank account. And
24 they're signed by the bank.

25 Now that seems to be very different

1 than just a marketing strategy.

2 MR. BRONNI: So, Your Honor, I -- I
3 think what Delaware has described there when
4 it's describing money orders is really one
5 segment of the money order market. I don't
6 think that it's accurately described the money
7 order market certainly as it existed in 1974.

8 So Delaware's own sources that are
9 reproduced in the appendix, for instance, the
10 American Bankers Association report on money
11 orders from the late 1950s or the Compton's
12 Encyclopedia, which is also reproduced in their
13 appendix, they do discuss money orders, yes, as
14 a product that was frequently sold in low-dollar
15 amounts at retailers oftentimes to unbanked
16 customers. Although, again, low-dollar amounts
17 and things like that, there is some quibblings
18 over that because, as Judge Leval pointed out,
19 going back to 1939, Western Union, in fact, sold
20 money order products denominated up to
21 approximately \$3500, which, if we adjust for
22 inflation, is about \$25,000 today, so hardly a
23 low-dollar instrument.

24 CHIEF JUSTICE ROBERTS: Well --

25 MR. BRONNI: But that --

1 CHIEF JUSTICE ROBERTS: -- what --
2 what was the value of the -- typical value of
3 the agent and teller's checks?

4 MR. BRONNI: These products did not
5 exist in -- these specific products did not
6 exist in 1974. So teller's checks is a class of
7 instruments. A traditional teller's check did.
8 But the instruments that MoneyGram labeled --

9 CHIEF JUSTICE ROBERTS: I'm sorry. I
10 slipped -- they didn't exist in 1974?

11 MR. BRONNI: They -- the MoneyGram
12 products that we are talking about here today,
13 correct, did not exist in 1974.

14 But, if I can return to the
15 distinction about the category of money orders
16 for a moment, they describe them again -- their
17 sources do describe them oftentimes as low- --
18 low-dollar instruments. But those same sources
19 also describe money orders as instruments that
20 were also sold at financial institutions in the
21 1970s without those low-dollar limits and
22 obviously weren't aimed primarily at unbanked
23 customers.

24 So their -- their description of the
25 category of what constituted a money order in

1 1974 is simply not accurate even on their own
2 sources. Yes, they describe one segment of the
3 market, but that's not the entirety of the
4 market.

5 Congress did not say personal money
6 orders or low-dollar money orders. Congress
7 said money orders. And that category in 1974
8 included financial -- instruments sold at
9 financial institutions, and today the agent
10 check money order, which operates precisely like
11 the instruments at issue here yet is only sold
12 at financial institutions in high-dollar
13 amounts, primarily to banked customers, they
14 admit that's a money order. But it lacks all of
15 the things that they say define what a money
16 order is, except the label.

17 So this was Justice Thomas's question.
18 If you -- their argument is essentially, if you
19 take the label off, it's no longer a money
20 order, even if you change nothing about the
21 instrument. So a -- a good example of this
22 would be the Western Union example. If Western
23 Union tomorrow made a decision that it was going
24 to relabel its Western Union money order as the
25 Western Gram, it would be Delaware's position

1 that that's no longer a similar written
2 instrument -- or that's no longer a money order.

3 CHIEF JUSTICE ROBERTS: I -- I -- I
4 guess I'm not quite sure I understand. Do you
5 disagree that the agent checks and the teller's
6 checks are typically, generally, whatever, for
7 significantly higher value than a traveler's
8 check?

9 MR. BRONNI: Just like the agent check
10 money order could be, Your Honor, because it
11 doesn't have a limit. So, yes, they are
12 typically bought in higher amounts, but we don't
13 think that that -- that's really a substantive
14 --

15 CHIEF JUSTICE ROBERTS: Okay. But
16 that is suggesting that as a distinction. Do
17 you disagree that the agent checks and the
18 teller checks are typically drawn on existing
19 accounts while the traveler's checks are not?

20 MR. BRONNI: Again, because they're
21 bought at financial institutions, people will
22 oftentimes buy them where they do their banking.
23 I agree with that. But the -- the "drawn-on"
24 language is -- is not actually correct there.
25 Instead, what you're doing is you're prepaying

1 for an instrument. You may deduct the money
2 from your account, but it's a separate financial
3 instrument. So it's not like a -- an ordinary
4 check, for instance, is drawn on your bank
5 account. These instruments are not drawn on
6 anybody's bank account.

7 JUSTICE KAGAN: If "money order" is as
8 broad as you're saying it is, what's left for
9 "similar instrument"?

10 MR. BRONNI: I -- I think, Your Honor,
11 when -- when Congress uses phrases like "money
12 orders," "traveler's checks" and then follows it
13 by a catch-all, I think what that oftentimes
14 reflects, as this Court has said, is Congress is
15 -- is concerned with covering the field and not
16 leaving any loopholes. So it may very well be
17 that in 1974 there wasn't a product that existed
18 that wouldn't meet the core definition of what a
19 money order is.

20 JUSTICE KAGAN: It was just like an
21 "in case"?

22 MR. BRONNI: I -- I think --

23 JUSTICE KAGAN: Just in case something
24 comes up or we missed something or whatever?

25 MR. BRONNI: That's one way of looking

1 at it. The other option is it's to ensure -- if
2 you accept Delaware's front-line argument, to
3 ensure that you can't simply change the label on
4 an instrument and have it be something else.

5 JUSTICE KAGAN: Yeah, but it might be,
6 right? I mean, I think that this is the -- the
7 strength of Mr. Katyal's argument, that they
8 were thinking of something called traveler's
9 checks, they had used traveler's checks, and
10 they were thinking of something called money
11 orders, like the prototypical things that the
12 Chief Justice was talking about, they had seen
13 money orders, they had used money orders, and
14 then they said, you know, maybe there's some
15 stuff that functions in the same way that does
16 pretty much the same thing, that has similar
17 characteristics, whatever the relevant
18 characteristics are, so we'll put that third
19 thing in, you know, other similar things.

20 So that seems to me a -- a more likely
21 way of drafting. It's like you have a
22 particular product in mind and another
23 particular product in mind, and then you realize
24 that there are products you don't know about
25 that might function in the same way.

1 MR. BRONNI: And that -- that is -- we
2 don't disagree that that's a possibility for
3 what happened here. I just think that the way
4 Congress used the -- when it used the term
5 "money order" in '73, yes, we might now today
6 typically think of -- of an instrument that's
7 sold at a retailer. But the fact is Delaware's
8 own sources describe money orders as instruments
9 sold at financial and non-financial institutions
10 and that did not have low-dollar limits.

11 So I -- I think they are money orders,
12 as Judge Leval said, under any common ordinary
13 understanding, but I agree that, at a minimum,
14 they are certainly similar written instruments
15 because they operate precisely like the
16 instruments that we all agree are money orders.

17 And if I can address briefly one of
18 the labeling points that I think the -- the
19 other side made, that they pointed out, you
20 know, people -- generally, things are labeled
21 consistent with what you would think they would
22 be. And I think that's right. You know,
23 most -- they can't -- they don't identify
24 another product sold by another institution that
25 works like these.

1 And that's because this is basically a
2 product where money order had a business model
3 of selling money orders, and it didn't want to
4 alter the structure of how it does things. So
5 it put a different label on it and sold it
6 somewhere else in order to appeal to a different
7 end of the market without fundamentally altering
8 the product itself because they still operate
9 exactly like money orders.

10 Just like a retail money order, you --
11 you go in, you -- you prepay for it, you get a
12 written instrument in response. The -- the
13 selling financial institution is merely an agent
14 of MoneyGram. It's not a party to the
15 instrument. It's an agent of MoneyGram. And
16 the -- the day after a transaction takes place,
17 it forwards the money to MoneyGram. The selling
18 financial institution does.

19 At that point, whether we're talking
20 about their so-called teller's checks or agent
21 checks, that selling financial institution is
22 entirely out of the transaction. It has no more
23 role. That is the same role that Western Union
24 played on classic money orders in the 1970s.

25 JUSTICE ALITO: Can I mention a -- a

1 number of different things and ask you to tell
2 me whether you think they are subject to the
3 FDA?

4 So the first one is a conventional
5 cashier's check or a teller's check issued by a
6 local bank and used to pay its own obligations.

7 MR. BRONNI: I -- so I would say,
8 under our definition, it doesn't meet our
9 definition of a money order. We have not taken
10 a position necessarily on whether it's a similar
11 written instrument, but I -- I think that there
12 are reasons for believing that it is not
13 because, again, that is not an instrument that
14 would present the windfall problem, as Your
15 Honor framed it.

16 JUSTICE ALITO: And what about a cash
17 -- a conventional cashier's check or teller's
18 check issued by a local bank and sold to a bank
19 customer? Same thing?

20 MR. BRONNI: Yeah, again, Your Honor,
21 they would typically keep addresses in -- in
22 1974, certainly, for cashier's checks and
23 classic teller's checks.

24 If I can briefly just add to that,
25 because we've talked about teller's checks a

1 lot, these instruments -- I know I've said this,
2 but to make clear, these instruments are not
3 traditional teller's checks. They label them as
4 teller's checks, but they do not operate like a
5 traditional teller's check.

6 So a traditional teller's check as it
7 existed in the 1970s was an instrument, yes,
8 signed by a -- a bank officer. They're right
9 about that part, and they stop reading,
10 basically, at that point. But the rest of the
11 definition is signed by a bank officer drawing
12 on funds of his bank at a -- another financial
13 institution.

14 The difference with these items is
15 that's not what's happening here. The -- the
16 signing officer is not drawing on funds of his
17 own bank anywhere, which also indicates that
18 they -- they don't even meet the definition of a
19 bank check.

20 JUSTICE JACKSON: But are they still
21 liable in the teller's check realm?

22 MR. BRONNI: They -- they -- so there
23 is some jumbling of the record on this point,
24 unfortunately, Your Honor, but I think what
25 Delaware's expert ultimately said is, at most,

1 they might be secondarily liable. But the --
2 the ultimate liability with the so-called
3 teller's check instrument is MoneyGram because
4 MoneyGram is the issuer.

5 JUSTICE ALITO: How about a prepaid
6 cash card? Some grandparents always used to
7 send their grandchildren a MoneyGram -- a
8 MoneyGram for Christmas. And now they want to
9 become more modern, so they send them a prepaid
10 Visa cash card.

11 MR. BRONNI: Not covered either as a
12 money order or a similar written instrument
13 because it has to have a named payee, and gift
14 cards do not have named payees.

15 JUSTICE ALITO: How about a gift
16 certificate that does have a named payee?

17 MR. BRONNI: A -- a -- I -- I suppose
18 it -- it's possible if that instrument were a
19 draft. There's not really any record
20 development on this point, that -- that we could
21 quibble about that. And I know that there are
22 some states that do cover instruments like --
23 that have statutes that would cover escheatment
24 for instruments like that.

25 The reason why I'm struggling with

1 that one is I don't know all the characteristics
2 of a gift certificate as opposed to a gift card.

3 JUSTICE KAGAN: You seem to be trying
4 very hard to exclude various kinds of products.
5 Why is that? Why not just say, okay, they're
6 all included, that's good?

7 MR. BRONNI: Well, I -- I think, Your
8 Honor, that when Congress uses -- to -- to go
9 back to the language of the statute, when it
10 says money orders, traveler's checks, or similar
11 written instruments, it's -- it's referring to
12 two things that had -- traveler's checks and
13 money orders that had understandings in 1974
14 that we can rely on.

15 And by using that terminology and
16 using those two instruments as an example, it --
17 other similar written instruments must share
18 some of the core characteristics of what those
19 two instruments share. So I think Congress
20 decided to limit it.

21 I -- I -- one point of agreement is I
22 think there's -- it's probably true, and the
23 American Bankers Association says this as well,
24 if Congress wanted to include cashier's checks,
25 classic cashier's checks, it probably would have

1 said that. It knew what that instrument was.
2 They were well-known instruments at the time,
3 but they -- they didn't present the windfall
4 problem because, again, addresses were kept
5 typically for cashier's checks just as they are
6 today.

7 JUSTICE BARRETT: I assume that gift
8 cards don't escheat, even if they fall outside
9 of the FDA, as you say, they're not subject to
10 the common law rule of escheat, of -- are they?
11 So that the -- does anyone get them? I thought
12 the reason why stores like them is because a lot
13 of times people don't use them and they just get
14 to keep the money.

15 MR. BRONNI: I -- I think, Your Honor,
16 there's been a development over time in the law
17 as states have realized that there are these
18 things out there that certain states have passed
19 statutes. I don't believe that all states have,
20 and I think Arkansas does not have such a
21 statute, but I think it's just been a
22 development as these things become more popular.

23 JUSTICE GORSUCH: Can I ask you a
24 question that kind of goes sideways? At -- at
25 -- at places in your brief, you indicate that

1 you're after not just a declaration of rights
2 here under the Disposition Act, but you actually
3 want money damages for past wrongful takings of
4 monies you think belong to your states.

5 What -- what is the -- what is the
6 cause of action that permits that? Is that an
7 implied cause of action under the Disposition
8 Act? What -- I'm just curious, if -- if -- if
9 we were to agree with you, what happens next and
10 on what theory?

11 MR. BRONNI: So I think it is an
12 implied cause of action under the statute, but I
13 would add that we have not litigated the damages
14 issue or the question, those kinds of arguments
15 haven't been presented to Judge Leval because
16 the parties agreed to bifurcate the proceedings
17 here. So we haven't addressed any of the
18 damages issues.

19 But, as for things -- I know Delaware
20 discusses in its brief, you know, the
21 possibility that -- that it could need to repay
22 this money. But what I would -- I would
23 highlight is, you know, anytime we're dealing
24 with unclaimed property, the state is
25 essentially holding it in trust.

1 It's not the State of Delaware's
2 money. It's not -- not really our state's
3 money. We hold it in trust for our -- for
4 the -- the true owners. So requiring it to pay
5 that money to the appropriate state which will
6 hold it in trust for the actual owners, Delaware
7 really doesn't have any reliance interest there
8 that would be upset.

9 JUSTICE GORSUCH: But whether there's
10 such an implied cause of action under the
11 Disposition Act would be something that the
12 Special Master would have to resolve after this?

13 MR. BRONNI: For the -- for the
14 damages issue --

15 JUSTICE GORSUCH: Yeah.

16 MR. BRONNI: -- yes, Your Honor, I
17 think that's something that could be resolved
18 there.

19 JUSTICE GORSUCH: All right. Thank
20 you.

21 MR. BRONNI: There's one other point I
22 wanted to -- or a couple points I wanted to
23 briefly address. I mentioned briefly the bank
24 check thing, but I want to make sure I -- I -- I
25 make this clear.

1 You know, Delaware's definition of a
2 third-party bank check, setting aside whether an
3 issuer or processor could be a third party in
4 1974, and it can't for the reasons the experts
5 explain, but these instruments don't even meet
6 Delaware's own definition of a bank check. So
7 Delaware says that in order to be a third-party
8 bank check, something must first be a bank
9 check.

10 As I mentioned earlier when we were
11 discussing teller's checks, a -- a bank check --
12 and this is -- is really you've only been
13 offered two sort of reasonable readings of what
14 that term meant in the 1970s or even today, one
15 of which I'll call the sort of technical
16 definition.

17 This is at page 37 of their exceptions
18 where they say that a -- a bank check is an
19 instrument that's signed by a bank officer, and,
20 as I said before, they stopped reading at that
21 point, but it actually says drawing on funds
22 deposited in the officer's own bank, that's a
23 classic cashier's check, or drawing on funds of
24 the officer's bank deposited in another
25 financial institution. That's a classic or

1 traditional teller's check.

2 Again, that does not describe these
3 instruments here. When the bank officer signs,
4 one, he's signing as an agent of MoneyGram. To
5 the extent that's not already obvious as a
6 functional matter, the contracts between
7 MoneyGram and the financial institutions make
8 very clear the financial institution is an agent
9 of MoneyGram.

10 So it doesn't -- there -- these
11 instruments don't meet that definition because
12 it's -- it's not signing to draw on any funds
13 that are in any control of the selling bank.

14 Instead, it's MoneyGram that has the
15 money, and it's MoneyGram that is responsible
16 for paying the drawee bank or for reporting the
17 unclaimed property.

18 The other definition of bank check
19 that you've been given is a broader definition
20 than that, and it's the -- the definition that
21 Brady's Law of Bank Checks, which is again
22 reproduced in Delaware's appendix, gives for
23 bank checks where it describes a bank check as
24 both those -- that technical definition that I
25 just mentioned but also ordinary checks.

1 In -- in the 1970s going all the way
2 back until World War I, bank check had been used
3 as a terminology -- used as a term under Brady's
4 Law of Bank Checks to both mean those -- those
5 specific instruments issued by banks but also
6 ordinary checks, and that's part of why a
7 third-party bank check ultimately, what that
8 phrase means if we're in the similar written
9 instrument provision, is an ordinary check.

10 CHIEF JUSTICE ROBERTS: The impression
11 I got reading your arguments and your friend's
12 argument is that nobody has much of an idea what
13 a third-party bank check is.

14 Is that -- is that a fair --

15 MR. BRONNI: That's fair, Your Honor.

16 I -- I think that we're --

17 (Laughter.)

18 MR. BRONNI: -- we are -- we are,
19 however, stuck with -- with two things. We have
20 to at least try and figure out what the
21 terminology could have meant using similar
22 phraseology in the 1970s, and, you know, again,
23 they've agreed that it has to at least be a bank
24 check. We're in agreement there. Something
25 must at least be a bank check, and these don't

1 meet that definition.

2 But, in -- in -- in terms of what the
3 entire phrase could have meant, again, you --
4 this is another example where I think you've
5 only been offered two realistic options based in
6 the way similar phraseology was used in the
7 1970s, neither one of which would describe these
8 instruments.

9 So Delaware says that a -- that in the
10 phrase third-party bank check, the third party
11 refers to an outside issuer or payer.

12 The problem with that is that that's
13 not the way "third party" is used on a financial
14 instrument. It wasn't used that way in the
15 1970s. All the experts agreed on that.

16 Instead, when -- when somebody
17 referred to the third party on a check or third
18 party in a financial instrument, that
19 third-party reference was always a reference to
20 a payee or the party that ultimately got paid on
21 an instrument.

22 So sometimes, for instance, it was
23 used like in the twice endorsed check
24 definition, where a third-party check is a
25 common enough phrase then and today that it's

1 actually defined in Black's Law Dictionary as a
2 twice endorsed check. So the third party on
3 that instrument is the endorsee, the third party
4 to the original transaction who is the payee on
5 that instrument.

6 The other way the phrase third party
7 and check got used in the 1970s was in the
8 context of third-party payment services or
9 third-party services, and there again, the
10 reference was always to the party that
11 ultimately got paid, the payee.

12 So a third-party payment service, as
13 the Hunt Commission explains, but it's not the
14 only example, is a mechanism whereby a deposit
15 intermediary transfers funds to a third-party
16 payee, a third-party account holder upon the
17 orders of the depositor. So, again, there, the
18 phraseology is used to reference the ultimate
19 payee.

20 It's never been used and Delaware
21 doesn't cite a single source where it was used
22 in the 1970s to refer to an outside issuer or
23 processor. And what that means is they've
24 offered a definition that is no way anchored
25 with the way the terminology was used in the

1 1970s.

2 JUSTICE JACKSON: And don't we also
3 have the legislative history that suggests that
4 the inclusion of third-party bank check was
5 supposed to be a technical or minor change?

6 The thing that is a little concerning
7 to me is that if it is used to exclude
8 instruments that function like money orders,
9 then we're talking about a huge carveout to a
10 statute that was designed to solve the
11 inequitable escheatment problem in a way that
12 doesn't seem technical or minor.

13 MR. BRONNI: I absolutely agree with
14 that, Your Honor, that Treasury, when it
15 requested this, and it's undisputed, yes, it's
16 legislative history in some sense, but it's
17 really drafting history. Nobody disputes that
18 -- that Treasury requested this exception.

19 And Treasury characterized it as a
20 clarifying amendment that was designed to cure
21 an ambiguity in the statute, which suggests that
22 it was -- it was -- it was sort of the -- the
23 narrow change to the statute to make something
24 doubly clear.

25 And I think defining a third-party

1 bank check as an ordinary check really fits that
2 characterization of a clarifying amendment and a
3 narrow sort of belt-and-suspenders approach to
4 make sure that ordinary checks, which obviously
5 do not present the windfall problem because,
6 one, we have addresses because we have account
7 information, right, but also aren't prepaid.

8 So that -- that is entirely consistent
9 with that -- that sort of legislative history.

10 JUSTICE KAGAN: I -- I guess they
11 failed in that endeavor to make things doubly
12 clear.

13 (Laughter.)

14 MR. BRONNI: Well, I -- so the
15 generous version of this, I think, Your Honor,
16 is that -- that the way the -- the phraseology
17 was just sort of used at the time, you know,
18 we're -- we're sitting here 50 years on and, you
19 know, banking regulators have their own
20 terminology, but the -- the thing that I would
21 emphasize is that, you know, third-party payment
22 was, in fact, as -- as pointed out in Arkansas's
23 appendix at 177, so common that The Washington
24 Post said that a third-party payment today means
25 essentially a checking account.

1 So that was ordinary phraseology
2 that -- that maybe has gone by the wayside, but
3 it is phraseology that was used at the time.

4 Unless --

5 JUSTICE ALITO: Your argument is that
6 in 1974 everybody would have known what a
7 third-party bank check means? I actually do
8 remember 1974.

9 (Laughter.)

10 MR. BRONNI: I think banking
11 regulators might have known what it meant.
12 Maybe not ordinary people. But --

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Justice Thomas, anything further?

16 JUSTICE THOMAS: Nothing.

17 CHIEF JUSTICE ROBERTS: Justice Alito?

18 JUSTICE SOTOMAYOR: Do you think we do
19 more harm or less harm if we take the Special
20 Master's suggestion that we decide this case
21 without adopting a firm definition of money
22 order?

23 MR. BRONNI: So I -- I think --

24 JUSTICE SOTOMAYOR: That's what he
25 tried to do, correct?

1 MR. BRONNI: Correct. I think, Your
2 Honor, that -- that Judge Leval's approach made
3 sense in that, under any ordinary understanding
4 of the term "money order" as the sources,
5 Delaware's sources -- again, the ABA report on
6 money orders from the late 1950s, the Compton's
7 Encyclopedia define money order. It includes
8 instruments sold by financial institutions, not
9 in low-dollar amounts, and it includes
10 instruments like the agent check money order
11 here.

12 And I think that is -- when Congress
13 adopted the term "money order," it --

14 JUSTICE SOTOMAYOR: You haven't
15 answered my question.

16 MR. BRONNI: I -- I think that it
17 meets any ordinary definition. So I -- I -- I
18 don't think that it does any harm to define it
19 that way. I know they present -- we started
20 with a parade of horribles, for instance --

21 JUSTICE SOTOMAYOR: Do we do less
22 parade of horribles if we define it your way?
23 Because you take care of cashier's checks and, I
24 presume, certified checks by calling them a
25 prepaid -- a prepaid draft, correct?

1 MR. BRONNI: Correct. I -- the reason
2 why I struggle with this is -- is I think both
3 things are sort of -- neither one does that much
4 harm because, again, they're alluding to this
5 possibility of a parade of horrors, but they
6 don't point to anything that would present that
7 -- that parade of horrors. You know,
8 cashier's checks, even if you --

9 JUSTICE SOTOMAYOR: Well, you waited
10 how long to sue? They're afraid of all the guys
11 who are going to come after -- come and sue now.
12 And they have good reason to worry because, once
13 we write a decision, the world will have the
14 roadmap.

15 MR. BRONNI: So what I would say to
16 that, Your Honor, is that -- that at least
17 outside of the context of this case, I'm not
18 aware of a situation where anybody -- they
19 allude, for instance, to private realtors, not
20 to states having brought suits over cashier's
21 checks, and even in those cases, nobody that I'm
22 aware of is arguing that a cashier's check is a
23 money order. Instead, those cases are all about
24 the "similar written instruments" clause.

25 But either way, I don't think that our

1 definition, as I started by saying, necessarily
2 requires treating them that way. I think
3 they're well-known instruments. And if Congress
4 had intended to include them, it probably would
5 have used that language because they were
6 well-known instruments at the time and they just
7 don't fit what Congress describes in 2501 as --
8 as a money order because they're not instruments
9 for which addresses weren't kept as a business
10 practice.

11 JUSTICE SOTOMAYOR: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice Kagan?

13 Justice Gorsuch? No?

14 Justice Barrett?

15 Justice Jackson?

16 JUSTICE JACKSON: Just one final

17 question.

18 So Justice Kagan pointed out that
19 Congress might have been intending to cover the
20 field with this statute. And I guess my
21 question is, so what -- what is the field? It
22 seems as though your friend says that really
23 Congress was worried about no addresses, and, as
24 a result, large-money instruments wouldn't fit
25 in the statute because there was an incentive to

1 have addresses.

2 And I understood you to be focusing on
3 Congress's concern about inequitable
4 escheatment, in which case these instruments
5 would be covered. So can you just, as a final
6 word here, talk about what the purpose of this
7 statute is?

8 MR. BRONNI: I -- I -- I -- well, I'll
9 start with the purpose of the statute is to
10 address those instruments that presented the
11 windfall inequity problem associated with the
12 Court's common law rule.

13 I think what they're suggesting is
14 there would be an incentive to keep addresses
15 for larger-dollar instruments. However, this
16 case is a prime example of that hasn't happened.
17 These are larger-dollar instruments, and
18 MoneyGram does not keep addresses.

19 And it's the -- the point here is that
20 it's the issuer. It's the party that is
21 actually responsible for paying these
22 instruments. It's the party that holds the
23 unclaimed property. And it hasn't kept those --
24 address information. So, I mean, to the extent
25 you all were suggesting that that somehow makes

1 a difference here, the record just doesn't bear
2 that out.

3 But, again, going back to the other
4 point about -- you know, Congress's actual
5 concern was not just the low-dollar instruments.
6 Congress's concern was that requiring addresses
7 to be kept for money orders as a class of
8 instruments and other similar written
9 instruments would be an additional burden that
10 is not justified in light of the fact that
11 people buy these instruments where they do their
12 banking. They buy them in their home state.

13 So, if you required addresses and all
14 the burdens that go along with that, it's simply
15 going to reflect the same place. So what
16 Congress is saying in 2501 is, to use Learned
17 Hand's phrase, the game is not worth the candle
18 here. Congress just decided it was easier just
19 to have these instruments escheat to the state
20 of purchase, regardless of what their value
21 would be.

22 JUSTICE JACKSON: Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Rebuttal, Mr. Katyal?

1 REBUTTAL ARGUMENT OF NEAL K. KATYAL
2 ON BEHALF OF DELAWARE

3 MR. KATYAL: Thank you, Mr. Chief
4 Justice. Five points.

5 First, as the Chief Justice said, they
6 can solve this problem easily by saying
7 MoneyGram has to have the information. The
8 information's already being collected by the
9 banks. The only question is closing that
10 informational hiccup. And that's a lot better,
11 Justice Sotomayor, than the
12 instrument-by-instrument litigation that will be
13 invited by their approach.

14 His answer to that was -- to say to
15 the Chief Justice, was, well, Congress put its
16 thumb on the scale. They did with respect to
17 those two instruments. The question in this
18 case is, did they do so for anything more than
19 that? And the reasons why Congress isolated
20 those two instruments don't apply here.

21 The other point is Congress is the
22 solution to this. Even if you don't think
23 states will have this easy fix, which I can't
24 understand to this day why they haven't done it,
25 but Congress can, of course, do that. That's

1 what you said in the Delaware case in 1993. If
2 you're worried about equity concerns, Congress
3 should fix it. And what did you point to in
4 that -- in that decision? You literally pointed
5 to 2503 and said that's the solution if you're
6 worried about equity concerns.

7 Second, with respect to third-party
8 banks, my friend says that there's no expert
9 testimony that supports our position. That's a
10 misreading of the record. The expert, Ron Mann,
11 just didn't support our position on the words
12 "directly liable" back down below. As this case
13 comes to the Court, we agree Professor Mann was
14 wrong with that.

15 But, with the definition of
16 "third-party bank check," I think, Mr. Chief
17 Justice, you said, well, nobody really knows
18 what it means. We actually think the Hunt
19 Commission does know what it means, and they
20 told you what it means in that report, and that
21 says teller's checks are included.

22 Now my friend says -- this is our
23 third point -- that cashier's and certified
24 checks are different. Well, first of all, I'll
25 note that he doesn't necessarily -- he doesn't

1 disclaim them. He says, well, we're not
2 necessarily saying it.

3 There's already litigation about
4 cashier's checks and certified checks, as the
5 ABA brief points out. There have been qui tam
6 lawsuits that have been filed. He says, well,
7 cashier's checks aren't prepaid. Most cashier's
8 and certified checks are prepaid. The only ones
9 that aren't prepaid are the ones in which banks
10 are paying their own expenses, and our brief
11 explains why we think those types of checks are
12 covered under the statute.

13 Fourth thing, Justice Sotomayor, you
14 -- you had said -- or, excuse me, Justice --
15 Justice Jackson, you had said the question in
16 this case is, what is the field that Congress
17 occupied? Congress knew exactly how to write
18 the statute they want. They had the 1966
19 example. They didn't do that here. They wrote
20 a much more narrow statute.

21 And if you define, Justice Jackson, a
22 money order as anything that transmits money
23 that is prepaid, you blow up the statute. It
24 means you can't explain what traveler's checks
25 means. You can't explain what is left for

1 "other similar written instruments." Everything
2 would be a money order. Nothing would be
3 similar to a -- nothing would be similar to it.

4 And that's why Congress -- we think
5 you should look to the rationales behind what
6 Congress did. You pointed to the legislative
7 history and the Treasury Department, but the
8 Treasury Department just says essentially that
9 this is a belt-and-suspenders fix. It doesn't
10 say that -- it doesn't say that -- that
11 something like teller's checks, which the Hunt
12 Commission defined as being a third-party
13 payment system, wouldn't be included.

14 And, finally and last, if you adopt
15 our solution, the common law, it incentivizes
16 exactly the kind of concerns that Justice Alito
17 was worried about in Yee. It avoids any
18 questions about these other instruments, from
19 gift cards to cashier's checks to bearer's bonds
20 and the like, and it avoids threatening the
21 common law primary rule because a primary rule
22 is creditor addresses. And, Justice Thomas,
23 your opinion in Delaware said that has
24 venerable, old roots going all the way back to
25 old England.

1 If they win, forget about place of
2 incorporation. If they win, the primary rule of
3 the FDA will control, which is to move away from
4 last creditors' addresses. That is something
5 that there has been zero support that my friend
6 has offered on the other side for, and that's
7 why the old presumption that you read statutes
8 to avoid derogation of the common law has
9 special force here.

10 We don't doubt, can you read the
11 statute the way my friend does? You can. But,
12 if you do so, it doesn't make sense of the
13 statute and threatens all sorts of other
14 financial instruments. And as the ABA says,
15 that's something you should be really, really
16 concerned about in this unique area,
17 particularly because, as Justice Sotomayor
18 points out, this litigation can go all the way
19 back to 1974 and unwind not just the two
20 disputed instruments here but every other
21 financial instrument.

22 The safe thing to do is what you've
23 done in case after case, which is to say, if
24 we're concerned about equity, that's something
25 for Congress. It's something for the states.

1 It's not for this Court.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel. The case is submitted.

4 (Whereupon, at 1:02 p.m., the case was
5 submitted.)

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