No. 111 Original

In the Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF DELAWARE,
Plaintiff,

STATE OF TEXAS,
Plaintiff-Intervenor,

v.

STATE OF NEW YORK,
Defendant.

On the Report of the Special Master

OPPOSITION AND REPLY BRIEF FOR THE PLAINTIFF-INTERVENOR STATES OF ALABAMA, ALASKA, ARKANSAS, FLORIDA, GEORGIA, HAWAII, ILLINOIS, INDIANA, IOWA, KANSAS, LOUISIANA, MAINE, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NORTH DAKOTA, OHIO, OKLAHOMA, RHODE ISLAND, SOUTH DAKOTA, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, AND WYOMING, THE COMMONWEALTHS OF KENTUCKY AND PENNSYLVANIA, AND THE STATE OF CALIFORNIA IN RESPONSE TO MOTION OF THE STATE OF DELAWARE FOR LEAVE TO FILE BRIEF IN REPLY TO THE REPLY BRIEFS OF THE PLAINTIFF-INTERVENOR STATES AND ACCOMPANYING BRIEF IN REPLY

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The thirty-one undersigned States oppose the Motion of the State of Delaware for leave to file a surrebuttal brief in reply to the responsive briefs filed by the undersigned and by the States of Texas, *et al.* on July 27, 1992. The issues in this case have been exhaustively argued

pursuant to this Court's Order of February 24, 1992. There is no allowance in that Order or in this Court's rules for Delaware to initiate yet another round of briefing.

This Court's February 24 Order provided that each party in this proceeding may file Exceptions to the Report of the Special Master and supporting briefs, and Replies thereto. Pursuant to that Order,[1] Delaware submitted Exceptions and a supporting brief that collectively exceeded 90 pages (excluding appendix), and a 39-page Reply brief (excluding appendix). Delaware now requests that it be permitted to file yet another brief with this Court, on the ground that the Reply briefs filed by the undersigned States and by Texas, *et al.* "set out [their] primary case in chief."

In fact, as expressly stated in the Statement of the Plaintiff-Intervenor States of Alabama, *et al.* and the State of California in Support of the Report of the Special Master, it is the Report of the Special Master that sets forth our "primary case in chief" and that of Texas, *et al.* The State of Delaware had ample opportunity and extended time to dispute the Report, and indeed fully availed itself of that opportunity by filing an 86-page brief arguing profusely its several exceptions. The briefs thereafter filed by the undersigned and by Texas, *et al.* in reply undertook only to respond to Delaware's and New York's arguments.

The customary sequence of Report-Exceptions-Replies was obviously calculated to ensure that all parties had the fullest opportunity to address the several issues in the case. No new issues were introduced in the Reply briefs by the undersigned States and by Texas, *et al.* such as would warrant surrebuttal by Delaware. To the contrary, the sole purpose for the instant Motion is to pro-

[1] The Clerk of this Court subsequently revised the dates on which the briefs authorized by the Order were due.

vide Delaware yet another "bite at the apple," a chance to reiterate its earlier arguments in different rhetorical wrapping. Such a purpose offers no legitimate excuse for further briefing.

If the Court disagrees and is inclined to grant Delaware's Motion, the undersigned States respectfully request that they be given the opportunity to answer the brief attached to Delaware's Motion through the brief attached hereto. Fundamental fairness requires as much. If Delaware is to be allowed three opportunities to attack the conclusions of the Special Master's Report, surely plaintiff-intervenors should be afforded at least two opportunities to respond to those attacks in defense of the Report.

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This consolidated brief is submitted on behalf of thirty-one States in response to the further brief Delaware has sought leave to file with respect to the Report of the Special Master.[1] Although styled as a reply, Delaware's latest brief for the most part repeats contentions from its opening brief. Indeed, in crucial respects Delaware does not even respond to our arguments, but elects instead to reemphasize the three false premises on which it has rested its case. We accordingly limit our response to these three errors.

1. *The Backup Rule and Stare Decisis.* Delaware continues to assert that the doctrine of *stare decisis* requires this Court to resolve in Delaware's favor the central issue in this case—whether the State of the issuer or the State of the conduit intermediary is entitled to custody of unclaimed securities distributions subject to the backup rule of *Texas* v. *New Jersey*, 379 U.S. 678 (1965). *See generally* Del. Reply Br. 1-5. Nowhere does *Texas* v. *New Jersey* definitively dispose of that

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[1] Brief For Plaintiff, State Of Delaware, In Reply To The Briefs Of The Texas Group Intervenors, dated August 1992 ("Del. Reply Br.").

question, although both the parties and the Special Master derive support for their positions from that decision. Moreover, no one is suggesting that the backup rule fashioned by this Court in *Texas* v. *New Jersey* be overruled; at issue, instead, is its application in the context of securities distributions that become unclaimed in the course of transmission across the modern multiparty securities distribution network. To assert boldly "*stare decisis*" in such circumstances, as Delaware does, offers no helpful guidance.

2. *Original Jurisdiction and Federal Common Law.* The core premise of Delaware's backup rule argument, on the merits, remains its unsupported assertion that this Court intended *sub silentio* in *Texas* v. *New Jersey* to have all future escheat cases turn upon the vagaries of state debtor-creditor laws. We demonstrated at length in our initial response that this could not have been the Court's intention in formulating federal rules of escheat priority in that case. Ala. Br. 13-18. Delaware conveniently ignores our earlier discussion, and, without so much as a passing reference to, let alone any discussion of, the original jurisdiction decisions we cited,[2] flatly misstates that there exists "a presumption that state law will govern" in original jurisdiction cases such as this. Del. Reply Br. 15. In support of this proposition, Delaware offers only the non-original jurisdiction case of *Oregon ex rel. State Land Bd.* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977). That case concerned a private party's assertion of rights against a State, not rights claimed by one State against one or more other States. Moreover, the Court reaffirmed in its decision

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[2] Ala. Br. 17 (citing *Colorado* v. *New Mexico*, 459 U.S. 176, 184 (1982); *Connecticut* v. *Massachusetts*, 282 U.S. 660, 669-71 (1931); *California* v. *Texas*, 437 U.S. 601, 613 (1978) (Stewart, J., concurring)).

that "in the exercise of its original jurisdiction over suits *between States,* [the Court] has necessarily developed a body of *federal common law*" to resolve the rights of States *inter se. Id.* at 375 (emphasis supplied).

Delaware yet again devotes the bulk of its argument on the backup rule to defining the federal common law in terms of state laws dealing with creditors' rights. Although Delaware presses this approach on the theory that using state debtor-creditor labels would solve all problems in applying the backup rule to unclaimed securities distributions, Delaware's analysis is far more cumbersome than it pretends. Indeed, the complications and contradictions introduced under Delaware's state-law "solution" largely explain why this Court has refused to allow its federal common law rules in original jurisdiction cases to be confined by state-law concepts.

The point is brought home clearly with Delaware's attempt to reconcile state-law concepts of "debtor" and "trustee." Del. Reply Br. 19-20 n.22. As explained in our initial response to Delaware's Exceptions (Ala. Br. 19-20), this Court's reference to Sun Oil as a "debtor" in *Texas* v. *New Jersey* was descriptive only, because, among other reasons, Sun Oil was in fact a "trustee" (and *not* a "debtor") under state law when it established a special account for payment of cash dividends. Delaware casually dismisses the state "trustee" label as of no significance, arguing that the Court can nonetheless consider a "trustee" to be a "debtor" because it owes someone (the owner) something. Del. Reply Br. 19-20 n.22. In the same breath, however, Delaware asserts (*id.* 18 & n.21) that paying agents should not be considered "debtors" even when they are "trustees" under the Trust Indenture Act of 1939 and, like an issuer "trustee," may be said to owe someone (the owner) something. Ala. Br. 22 n.25. Such inconsistencies unavoidably come with an

analysis grounded on state-law definitions, as opposed to a developed body of federal common law.

Delaware's other arguments likewise expose the clumsiness of its approach. Even though an issuer (when not a "trustee") remains a "debtor" under state law until it raises and establishes an affirmative defense of "good faith" payment, *see* Ala. Br. 22-23, 30 (and cases cited), Delaware urges the Court to find that an issuer ceases to be a "debtor" as soon as it passes a distribution to an intermediary. Del. Reply Br. 21-22. Delaware also states that it is irrelevant that an issuer may be a "debtor" under a state escheat statute because the Court did not intend to incorporate these particular state-law definitions of "debtor" into its priority rules. *Id.* 15-16. It is only by such picking and choosing among potential state-law "debtors" that Delaware is able to arrive at its strained conclusion that the State of a conduit intermediary should have equitable priority under the federal common law rules of *Texas* v. *New Jersey*. In the end, Delaware is forced to choose among potential state-law "debtors" based upon their attributes. The result-oriented attributes that Delaware selects, however, unlike those relied on by the Special Master, are divorced from the federal policies underlying the Court's escheat rules. *See* Ala. Br. 23-34.

3. *Definition of an Issuer's Location.* Delaware again invokes *stare decisis* as a reason to reject the Special Master's proposed modification in the backup rule's use of "State of incorporation" as a proxy for an issuer's location. To be sure, adoption of this recommendation—unlike the Master's separate conclusion that the State of the issuer has priority—would result in an acknowledged change in one aspect of existing law.

Even so, *stare decisis* does not paralyze this Court from exercising its common law powers to modify an element of one of its own equitable rules when that element has become increasingly inequitable and the justi-

fication for it—the administrative infeasibility of any alternatives—no longer exists. Indeed, the doctrine, which is in no case an absolute bar to revisiting (and, where deemed appropriate, overturning) Supreme Court precedent, *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172 (1989), is accorded its most unyielding application only with respect to precedents interpreting acts of Congress. *Id.* When constitutional questions are involved, *stare decisis* traditionally receives less judicial respect. *United States* v. *Scott*, 437 U.S. 82, 101 (1978). The doctrine logically should carry even less force in the present context where the Court, in the exercise of its original jurisdiction, is called upon to resolve, *ab initio*, disputes between and among the several States under equitable principles of federal common law.

Delaware's much more wooden view is particularly unconvincing in the present circumstances. It rests upon a misunderstanding of *Texas* v. *New Jersey*, a total disregard for the dramatic technological developments in the securities industry during the past quarter century, and unsubstantiated hyperbole about the interests that would be affected by such a change.

First, Delaware erroneously states that this Court selected "State of incorporation" as a proxy for location in *Texas* v. *New Jersey* because the Court found that "the state of incorporation gives the benefit of its laws and the expertise of its judiciary to the corporations it incorporates." Del. Reply Br. 13. To the contrary, the Court discounted "State of incorporation" as a "minor factor" to be considered, 379 U.S. at 680, and fell back upon it as a proxy for location only because the Court believed that a "principal place of business" approach would be impracticable and that a "State of incorporation" proxy at least possessed "the obvious virtues of clarity and ease of application." *Id.* The Court further concluded that the State in which Sun Oil was headquartered, Pennsylvania, had a "more persuasive" claim

than Sun Oil's place of incorporation (New Jersey) since Pennsylvania was "probably foremost in giving the benefits of its economy and laws to the company whose business activities made the intangible property come into existence." *Id.* This conclusion makes irrelevant Delaware's rhetorical question whether "Texaco has found oil in Westchester County, New York, or Mobil in Fairfax County, Virginia (where their principal executive offices are recorded)." Del. Reply Br. 11. Pennsylvania had the superior equitable claim even though Sun Oil obviously had not discovered oil in Philadelphia, nor apparently elsewhere in Pennsylvania.

Second, Delaware's insistence (Del. Reply Br. 5-6) that there have been no developments since *Texas* v. *New Jersey* to justify the Special Master's proposal is nonsense. The fact that SEC forms containing "principal executive offices" information existed in 1965 (*id.* 9) is irrelevant. Holders of unclaimed securities distributions did not have at their disposal in 1965, as they do today, a variety of computer databases through which they can readily access such information. *See* Ala. Br. 50 & n.75, 52.[3] Since the "State of incorporation" proxy now operates in "quite unfair" ways (Report 47)—Delaware's halfhearted arguments to the contrary notwithstanding[4]

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[3] Delaware erroneously asserts (Del. Reply Br. 6-7) that experience under U.C.C. § 9-103 and the Federal Tax Lien Act foretells difficulties with a "principal executive offices" definition. Unlike those statutory definitions, however, the Special Master's "principal executive offices" definition looks to a definitive headquarters location—the "principal executive offices" identified by companies on their SEC filings (and which are accessible through computer databases).

[4] The only new argument Delaware makes is that the amounts involved in this case (and in the future with respect to unclaimed securities distributions) are insufficiently large to justify a refinement in the locational element of the backup rule. Del. Reply Br. 2-3 & n.4. To make this case, Delaware breaks down into average annual figures ($8.2 million per year) the total estimated amount New York seized from Delaware-incorporated brokerage firms from

—refining this proxy to take these developments into account would in fact far better serve the core holding of *Texas* v. *New Jersey*: that unclaimed intangible property should be apportioned among the States in accordance with principles of fairness and ease of administration.

Third, Delaware's argument—clothed yet again in the garb of *stare decisis* (Del. Reply Br. 3)—that the Court should not modify the locational definition because the Court in 1972, in *Pennsylvania* v. *New York*, 407 U.S. 206, refused to allow case-by-case litigation over exceptions to the backup rule itself misses the point.[5] Here, the specter of future case-by-case litigation is unwarranted. Delaware's contention that there exist "significant" "possibilities for dispute" as to the "principal executive offices" of companies both within and without the securities context, *e.g.*, Del. Reply Br. 4-5, 8 & n.11, is unfounded,[6] as is its assertion that changing the defi-

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1972 through 1988. But the total amount of these seizures remains $139 million, and recent annual figures are three times these earlier amounts. From 1986 through 1988, New York seized an average of $24 million annually from Delaware brokers. *See* Defendant's Response to Plaintiff State of Delaware's First Interrogatories Directed to Defendant, Schedule I (March 1989).

[5] So, too, does Delaware's argument (Del. Reply Br. 14-15) that granting escheat priority to the State of the issuer conflicts with the Court's disinclination in *Pennsylvania* v. *New York* to allow exceptions to the backup rule. Recognizing that the backup rule logically gives priority to the issuer's State, rather than the State of the conduit intermediary, involves construing and applying the backup rule (not creating an exception to it).

[6] In the cited instances of a mutual fund or a collateralized obligation trust, *see id.* 8 n.11, the solution to the hypothetical problem Delaware poses is simple: the relevant principal executive office is that of the fund or trust, which is the issuer of the security. Delaware does not dispute that in other, non-securities cases—which are not before the Court—the holder would also be either the originator or the only known party to the transaction, and would certainly know the State of its own principal executive offices. *See* Ala.

nition of the location of issuers would upset the reliance interests of private parties.[7]

It is, moreover, particularly inappropriate to discuss *Pennsylvania* v. *New York* in *stare decisis* terms since Congress subsequently altered the result announced in that case—and in ways favoring our position, not that of Delaware. Ala. Br. 27, 53-54 n.81. Delaware's contention (Del. Reply Br. 3) that this Court should decide this case inconsistently with that legislation, which rejects "State of incorporation" as a proxy for location, because that statute specifically applies only to money orders and traveler's checks, has an especially hollow ring. As we have already shown (Ala. Br. 27, 53 n.81)—again without any reply—the Court traditionally takes guidance in federal common law cases from federal statutes even when they do not speak directly to the question before the Court. *E.g.*, *Mobil Oil Corp.* v. *Higginbotham*, 436

Br. 53 n.80. Delaware merely questions whether the holder "can conclusively decide this issue." Del. Reply Br. 8 n.10. Even in the rare case in which there could be a genuine factual dispute, the holder's own recorded description of where its principal executive offices are located would be determinative under the Court's priority rules (just as its records are determinative under the primary rule). Furthermore, Delaware ignores our point that, in any event, a holder's good faith payment to one State protects it from liability to any other State. *See* Ala. Br. 51 & n.77.

[7] Delaware provides no specific examples for this assertion, and merely cites in passing the SIA *Amici Brief*. Del. Reply Br. 1. The practice of SIA member companies and other intermediary *amici*, however, has been to turn over owner-unknown unclaimed securities distributions to New York irrespective of where the holder (much less any issuer) is incorporated. We have shown at length (without response from Delaware) that the *amici*'s alleged concerns are unwarranted. Ala. Br. 31-34. Like the argument that the Special Master's construction of the backup rule creates undue reporting burdens—even though the intermediary *amici* currently remit unclaimed securities distributions under the primary rule to all fifty States—Delaware's dire warnings about reliance interests and administrative confusion are simply not borne out by the record, as the Master correctly concluded. *See* Report at 42-50.

U.S. 618, 624-25 (1978). Certainly, the fact that Congress has not spoken directly to the issue presented here does not foreclose this Court from acting. Rather, Congress " 'has largely left to this Court the responsibility for fashioning the controlling rules.' " *Moragne* v. *State Marine Lines, Inc.*, 398 U.S. 375, 405 n.17 (1970) (citation omitted). That the Court would do so in a manner consistent with congressional guidelines on the subject (albeit in a different context) is to be expected.

CONCLUSION

For the reasons stated, the undersigned States respectfully request that the Court adopt the Special Master's recommendations in their entirety.

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