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No. 22O146, Original

IN THE

Supreme Court of the United States

STATE OF ARKANSAS, STATE OF TEXAS,
STATE OF ALABAMA, STATE OF ARIZONA,
STATE OF COLORADO, STATE OF FLORIDA,
STATE OF IDAHO, STATE OF INDIANA,
STATE OF KANSAS, COMMONWEALTH OF KENTUCKY,
STATE OF LOUISIANA, STATE OF MICHIGAN,
STATE OF MONTANA, STATE OF NEBRASKA,
STATE OF NEVADA, STATE OF NORTH DAKOTA,
STATE OF OHIO, STATE OF OKLAHOMA,
STATE OF SOUTH CAROLINA, STATE OF UTAH,
AND STATE OF WEST VIRGINIA,

Plaintiffs,

v.

STATE OF DELAWARE,

Defendant.

On Motion for Leave to File Bill of Complaint

BRIEF OF *AMICUS CURIAE* MONEYGRAM PAYMENT SYSTEMS, INC. IN SUPPORT OF THE MOVANTS

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INTEREST OF *AMICUS CURIAE*

MoneyGram Payment Systems, Inc. ("MoneyGram") is a wholly-owned subsidiary of MoneyGram International, Inc., a global provider of money transfer, commercial payment processing, and consumer financial services.[1] The Motion for Leave to File a Bill of Complaint in this matter presents an interstate dispute over which state has superior authority to take custody of unclaimed MoneyGram "Official Checks." Specifically, the states dispute whether unclaimed, address-unknown MoneyGram Official Checks should be escheated[2] to the state of purchase pursuant to a federal statute governing the escheat of sums payable on a "money order . . . or other similar written instrument,"[3] or to MoneyGram's state of incorporation pursuant to the general priority rules of *Texas v. New Jersey*, 379 U.S. 674 (1965).

As described in greater detail below, MoneyGram's involvement here is much like Sun Oil's entanglement

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[1] All parties have consented to the filing of this brief. *Rule* 37.2. Pursuant to *Rule* 37.6, MoneyGram states that no counsel for a party authored any part of this brief, and no person or entity other than MoneyGram made a monetary contribution to the preparation or submission of this brief.

[2] A word about nomenclature: at common law, a sovereign took custody of unclaimed personal property pursuant to the doctrine of *bona vacantia* rather than as an "escheat." *See Delaware v. New York*, 507 U.S. 490, 497 n.9 (1993). In modern parlance, however, the latter term is widely used to describe the process by which states take custody of unclaimed intangible property. Accordingly, the term is used in this brief. *See* Note, *The Origins and Development of Modern Escheat*, 61 Colum. L. Rev. 1319, 1319-20 (1961) (contrasting modern law of escheat with its common law predecessor).

[3] The Disposition of Abandoned Money Orders and Traveler's Checks Act, 12 U.S.C. § 2501, *et seq*.

in the seminal *Texas v. New Jersey* case: MoneyGram has "disclaimed any interest in the property for itself, and asks only to be protected from the possibility of double liability." 379 U.S. at 676. As a result of this dispute among some two dozen states,[4] MoneyGram has been audited, threatened with millions of dollars in interest and penalties, and sued (twice)—all by states acknowledging that the funds they seek have already been escheated to Delaware. Adding insult to injury, when MoneyGram sought indemnification for these claims from Delaware (to which MoneyGram is entitled under Delaware's Escheat Act[5]), MoneyGram received no formal response other than a notice that Delaware intends to conduct its *own* audit of MoneyGram.

The Court's intervention in this case is necessary to resolve the issue of which state has a superior right to escheat the disputed funds. While MoneyGram concurs with the Plaintiffs' arguments in support of this Court's exercise of jurisdiction, MoneyGram respectfully submits this brief to raise additional facts gleaned from its status as a captive participant in this interstate tug-of-war, and to present further considerations supporting the exercise of jurisdiction that have not been addressed.

STATEMENT OF THE CASE

The interstate dispute presented by the motion concerns the characterization, for unclaimed property purposes, of a MoneyGram product known as an "Official Check." State of Arkansas, et al., Proposed

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[4] *See also* Mot. for Leave to File Bill of Complaint, *Delaware v. Pennsylvania*, Docket No. 22O145 (filed May 26, 2016).

[5] *See* Del. Code Ann. tit. 12, § 1203(c).

Bill of Compl. ("Compl.") ¶ 3. MoneyGram's Official Check product is a prepaid payment item generally sold at a financial institution. *Id.* ¶ 10. In exchange for a transaction fee and the value of the payment, the Official Check seller issues an instrument to the purchaser upon which MoneyGram is liable, and thus an Official Check may be considered more creditworthy than a personal check. *Id.* Usually, the financial institution sellers of Official Checks do not record the name or address of the purchaser of the instruments. *Id.*

MoneyGram has historically escheated uncashed, address-unknown Official Checks to its state of incorporation, Delaware, in accordance with the priority rules of *Texas v. New Jersey*. *See* Compl. at Ex A. However, given the hybrid nature of the Official Check item, questions arose as to whether the items should be escheated pursuant to the traditional *Texas v. New Jersey* priority rules or the exception created by 12 U.S.C. § 2503 (addressing escheat of money orders and "similar written instruments"). *Id.* Accordingly, MoneyGram sought Delaware's confirmation that MoneyGram's handling of these unclaimed funds was correct. *Id.* MoneyGram's letter to Delaware described the Official Check product, explained MoneyGram's historical escheatment of the items, and noted other states' contentions that Official Checks were money orders or "similar written instruments" escheatable to the state of purchase.[6] *Id.*

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[6] In particular, MoneyGram's letter noted the other states' contentions that such items were escheatable pursuant to "Section 4(d) of the 1981 Uniform Unclaimed Property Act." *Id.* That provision adopts the priority rules set forth in 12 U.S.C.

Delaware's response was unequivocal. In a letter from the Department of Finance, Delaware advised that MoneyGram "has been properly reporting and delivering unclaimed property in accordance with the strict rules established by the Supreme Court of the United States." *Id.* at Ex. B. In light of Delaware's response, MoneyGram continued its practice of escheating address-unknown Official Checks to Delaware. Compl. ¶ 18.

In May 2014, MoneyGram received notice from Treasury Services Group ("TSG"), a private auditing firm, that TSG had been retained to perform an unclaimed property audit of MoneyGram Official Checks on behalf of twenty states (the "Audit States"). *See* Mot. for Leave to File Compl., *Delaware v. Pennsylvania*, S. Ct. Docket No. 22O145, Gregor Decl. at Ex. A (filed May 26, 2016). At the conclusion of the audit, TSG demanded that MoneyGram pay the Audit States tens of millions of dollars that MoneyGram previously escheated to Delaware. *Id.* MoneyGram requested that the Audit States contact Delaware for resolution as the funds were now in Delaware's custody. *See* Compl. at Ex. F.

Ultimately, Pennsylvania filed suit against both MoneyGram and Delaware State Escheator David Gregor in the U.S. District Court for the Middle District of Pennsylvania. *See* Compl. ¶ 32. Pennsylvania sought judgment against MoneyGram in the amount of $10.3 million, plus interest and penalties on that amount, all while explicitly acknowledging that the $10.3 million sought was escheated by

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§ 2503. *See* Comment, 1981 Unif. Unclaimed Prop. Act. § 4 (noting that subsection (d) "adopt[s] the rules . . . provided by congressional legislation [in] . . . 12 U.S.C. §§ 2501, *et seq.*").

MoneyGram "to the Delaware State Escheator." *See* Mot. for Leave to File Compl., *Delaware v. Pennsylvania*, S. Ct. Docket No. 22O145, at A-12, ¶ 43; A-23, ¶¶ 104-09 (filed May 26, 2016). A similar situation played out in Wisconsin. The Wisconsin Department of Revenue sued MoneyGram and Delaware Escheator Gregor in the U.S. District Court for the Western District of Wisconsin for sums payable on Official Checks purchased in that state. *See id.*, A-27 to A-39. Again, MoneyGram was sued (this time for $13 million plus interest, penalties, attorneys' fees and costs) notwithstanding Wisconsin's acknowledgment the amounts sought were "sent [by MoneyGram] to the Delaware State Escheator." *Id.* at A-31 ¶ 30; A38.

On May 26, 2016, Delaware filed a Motion for Leave to File a Bill of Complaint against Pennsylvania and Wisconsin, raising substantially the same issues as presented in the current motion. *See* Mot. for Leave to File Compl., *Delaware v. Pennsylvania*, S. Ct. Docket No. 22O145 (filed May 26, 2016). On June 3, 2016, the State of Wisconsin filed a brief in the Delaware matter, concurring in Delaware's request that the Court exercise jurisdiction and seeking leave to file a counterclaim. Wisconsin Mot. for Leave to File Counterclaim, S. Ct. Docket No. 22O145 (filed June 3, 2016). On June 14, 2016, the Commonwealth of Pennsylvania filed a brief in the Delaware matter seeking similar relief. Pennsylvania Br. in Resp. to Delaware's Mot. to File Bill of Complaint, S. Ct. Docket No. 22O145 (filed June 14, 2016).

On June 9, 2016, the states of Arkansas, Texas, Alabama, Arizona, Colorado, Florida, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, South Carolina, Utah, and West Virginia (the "Moving

States") filed the present motion, raising precisely the same issue of priority to escheat unclaimed MoneyGram Official Checks. *See* Mot. for Leave to File a Bill of Complaint, *Texas v. Delaware*, Docket No. 22O146 (filed June 9, 2016).

SUMMARY OF THE ARGUMENT

This case bears the quintessential attributes of a matter properly subject to the Supreme Court's original and exclusive jurisdiction. The controversy presents a conflict regarding the states' respective rights to escheat unclaimed property—rights that flow from the states' sovereign powers. The dispute is significant in scope and scale, potentially affecting all states and involving millions of dollars. The case cannot be decided in an alternative forum; no other court can exercise jurisdiction over all the parties or grant the relief sought. In sum, this case is precisely the type of dispute that is in the "appropriate" original jurisdiction of this Court.

In addition, cases of this kind are particularly well-suited for resolution by this Court. The underlying dispute is primarily legal in nature, does not raise any significant technical, scientific, or political questions, and is not readily amenable to resolution absent this Court's intervention. Moreover, in light of the recent proliferation and expansion of state escheat laws, this Court's guidance is necessary to clarify the applicable priority rules and to reaffirm an unclaimed property holder's right to be free from duplicative escheat liabilities.

For these reasons, and as described in greater detail below, MoneyGram respectfully submits that the

Motion for Leave to File a Bill of Complaint should be granted.[7]

ARGUMENT

I. THE COURT SHOULD EXERCISE JURISDICTION OVER THIS INTERSTATE DISPUTE

The Supreme Court has "original and exclusive jurisdiction of all controversies between two or more states." 28 U.S.C. § 1251(a). The present case—involving some two dozen states, all acting in their sovereign capacities—is precisely the type of matter that falls within that description. That said, the Court has repeatedly warned that its original jurisdiction is to be used "sparingly" and is "obligatory only in appropriate cases." *Mississippi v. Louisiana*, 506 U.S. 73, 76 (1992) (quoting *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972)). The determination of whether a case is "appropriate," in turn, focuses on "the seriousness and dignity of the claim" pressed by the state(s) and whether there is an alternative forum "where appropriate relief may be had." *City of Milwaukee*, 406 U.S. at 93. Here, both factors unquestionably demonstrate that this is an "appropriate" case for the exercise of the Court's original jurisdiction.

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[7] While MoneyGram respectfully submits that the present motion should be granted, MoneyGram denies any and all allegations in the proposed Bill of Complaint insofar as any of them can be construed as accusing MoneyGram of wrongdoing or concluding that MoneyGram is in violation of the law of any state.

A. The Seriousness and Dignity of the Moving States' Interests Warrant the Exercise of Jurisdiction

In assessing the "dignity" of a state's claim for purposes of original jurisdiction, the Court's inquiry focuses upon whether that claim "implicate[s] the unique concerns of federalism forming the basis of the [Court's] original jurisdiction." *Maryland v. Louisiana*, 451 U.S. 725, 743 (1981). Here, there is little question that the Moving States' claims are of sufficient seriousness and dignity to warrant jurisdiction. A state's right to escheat intangible property arises directly from its status as a sovereign. *Delaware v. New York*, 507 U.S. at 502 (noting that "disposition of abandoned property is a function of the state, a sovereign exercise of a regulatory power over property and the private legal obligations inherent in property.") (citing *Standard Oil v. New Jersey*, 341 U.S. 428, 436 (1951) (internal quotations omitted)). Where, as here, states' sovereign rights come into conflict, federalism concerns are clearly implicated. *See, e.g., Wyoming v. Oklahoma*, 502 U.S. 437, 451 (1992) (where clashes of state sovereignty take place, "[i]t is beyond peradventure" that dispute is "of sufficient seriousness and dignity" to warrant exercise of original jurisdiction) (internal quotations and citation omitted). This is no less true when those conflicts involve competing escheat claims. *See Delaware v. New York*, 507 U.S. at 510; *Pennsylvania v. New York*, 407 U.S. 206 (1972); *Texas v. New Jersey*, 379 U.S. at 680.

In addition, the amounts involved here are substantial. According to the Moving States, the disputed unclaimed Official Checks have a value in excess of

$150 million. Moving States' Br. at 6; *see Wyoming*, 502 U.S. at 453 and n.11 (potential lost revenue of $500,000 per year "rose to a level suitable to our original jurisdiction"). Whether or not such a significant sum would amount to a *casus belli* were the states completely sovereign, this is no doubt a situation where the Court may properly discharge its function "as a substitute for the diplomatic settlement of controversies" among the states. *Kansas v. Nebraska*, __ U.S. __, 135 S. Ct. 1042, 1051 (2015) (quoting *North Dakota v. Minnesota*, 263 U.S. 365, 372-73 (1923)).

B. No Alternative Forum Can Provide Complete Relief

No other forum can afford complete relief in this case. No state court can properly exercise jurisdiction over the parties to this dispute, and "the States separately are without constitutional power . . . to settle" escheat disputes among themselves. *Texas*, 379 U.S. at 677; *see also* U.S. Const. art. III, § 2. As to the federal courts, the plain language of 28 U.S.C. § 1251 not only confers this Court with the power to entertain interstate disputes but also denies that power to the lower federal courts. *See Mississippi v. Louisiana*, 506 U.S. at 77-78 ("Though phrased in terms of a grant of jurisdiction to this Court, the description of our jurisdiction as 'exclusive' [in § 1251(a)] necessarily denies jurisdiction of such cases to any other federal court.").

Likewise, the constitutional and statutory hurdles to lower court jurisdiction cannot be overcome via clever pleading or artful defendant selection. To the extent that claims are brought by or against the officials responsible for the administration of state escheat laws, this Court has made clear that it will "look behind and beyond the legal form" in which the

claims are presented and "determine whether in substance the claim is that of the State." *Arkansas v. Texas*, 346 U.S. 368, 371 (1953); *see also In re State of New York*, 256 U.S. 490, 500 (1921) ("As to what is to be deemed a suit against a State . . . it is now established that the question is to be determined not by the mere names of the titular parties but by the essential nature and effect of the proceeding . . . ."). Here, of course, the pertinent state officials only have the power to assert custody over unclaimed property to the extent that federal common or statutory law gives the state (*qua* state) such power. *See Texas*, 379 U.S. at 682 (concluding that where holder has no owner address, property is "subject to escheat by the ***State*** of corporate domicile") (emphasis added); 12 U.S.C. § 2503(1) ("[I]f the books and records . . . show the State in which such money order . . . was purchased, ***that State*** shall be entitled exclusively to escheat.") (emphasis added).

Finally, though not for lack of trying,[8] the claimant states are unable to permissibly obtain the relief they seek by suing MoneyGram for property that has already been escheated to Delaware. As this Court has repeatedly held, a state violates the Due Process Clause where it requires a private party "to pay a single debt more than once and thus take its property without due process of law." *Western Union Telegraph Co. v. Pennsylvania*, 368 U.S. 71, 77 (1961); *Standard Oil*, 341 U.S. at 443 ("[T]he same debts or demands [taken by New Jersey] against appellant cannot be taken by another state."); *Texas*, 379 U.S. at 676 ("[T]he Due Process Clause of the Fourteenth Amendment prevents more than one State from escheating a given item of property.").

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[8] *See* Compl. ¶ 32.

Accordingly, the motion should be granted, and the Court should exercise jurisdiction over this matter.

II. OTHER CONSIDERATIONS SUPPORT THE EXERCISE OF THE COURT'S ORIGINAL JURISDICTION

The Court has previously explained that "the issue of appropriateness in an original action between States must be determined on a case-by-case basis." *Maryland v. Louisiana*, 451 U.S. at 743. As such, in addition to the two-pronged test set forth in *Illinois v. City of Milwaukee*, the Court has often looked to other factors in order to determine whether the exercise of its original jurisdiction is warranted. In the present case, these additional factors also support the exercise of jurisdiction.

A. This Case Presents a Primarily Legal Dispute Between States Within the Court's Core Competency

Even where jurisdiction is present, the Court has expressed its reluctance to wade into disputes involving copious fact finding, disputes primarily technical or scientific (as opposed to legal) in nature, or disputes representing only part of a larger public or political controversy. *See, e.g.*, *Ohio v. Wyandotte Chem. Corp.*, 401 U.S. 493, 503-04 (1971) (declining to exercise original jurisdiction over case raising primarily disputed factual and scientific issues).

The factual issues presented in this case, however, are not particularly complex, nor do they raise complicated political, technical, or scientific subjects. *See id.* at 498 (explaining need to limit exercise of Court's original jurisdiction "to those matters of federal law and national import as to which we are the primary overseers."). Indeed, the underlying facts relating to

the MoneyGram instruments at issue (the characteristics of the items, the terms of payment, the means of sale and issuance, etc.) are likely to be undisputed and could be the subject of a stipulation. *See United States v. Alaska*, 501 U.S. 1248 (1991) (allowing original jurisdiction action to be adjudicated on stipulated facts). While the parties dispute how those acknowledged facts apply to the underlying law, this case does not present the specter of complex or extensive fact-finding.

Moreover, the particular area of the law presented by the proposed complaint—the priority of states to take custody of unclaimed property—is one the Court has addressed on numerous occasions. *See Texas*, 379 U.S. at 677 (noting that Court has "responsibility in the exercise of our original jurisdiction" to address unclaimed property priority disputes that "the States separately are without constitutional power . . . to settle."); *Delaware*, 507 U.S. at 500 (stating escheat priority rules arise from Supreme Court's "'authority and duty to determine for [ourselves] all questions that pertain' to a controversy between States.") (quoting *Kentucky v. Indiana*, 281 U.S. 163, 176 (1930)).

In sum, the dispute in this case is primarily one of law, rather than fact, and involves an area of jurisprudence well within the Court's historical métier. Accordingly, exercise of the Court's original jurisdiction is appropriate.

B. The Proliferation and Expansion of Escheat Laws Warrants Additional Guidance from the Court

More than fifty years ago, this Court noted that "[t]he rapidly multiplying escheat laws, originally

applying only to land and other tangible things but recently moving into the elusive and wide-ranging field of intangible transactions have presented problems of great importance to the States and persons whose rights will be adversely affected by escheats." *Western Union*, 368 U.S. at 79. Since this Court last addressed the topic of unclaimed property law,[9] the coverage of state escheat laws, the aggressiveness with which those laws are enforced, and the states' reliance on unclaimed property "revenues" to replenish the state fisc have increased exponentially. *See, e.g.*, D. Lindholm & F. Hogroian, *The Best and Worst of State Unclaimed Property Laws*, Council on State Taxation (Oct. 2013), *available at* http://www.cost.org/WorkArea/DownloadAsset.aspx?id=85349 (last visited June 30, 2016); Note, *Inequitable Escheat? Reflecting on Unclaimed Property Law and the Supreme Court's Interstate Escheat Framework*, 74 Ohio St. L.J. 515 (2013).

Today, in many states, property need not be abandoned to be subject to state escheat laws (hence the change in traditional nomenclature from "abandoned" property to "unclaimed" property). *See* Massachusetts Act of Aug. 3, 2011, Ch. 90, § 6 (Aug. 3, 2011) (changing statutory references from "abandoned" to "unclaimed"). For example, Pennsylvania recently amended its unclaimed property laws to shorten the "dormancy period" for most items to a mere three years and to require an owner's affirmative "indication of interest" to prevent property from being abandoned. *See* Pennsylvania Act of Jul. 10, 2014, P.L. 1053, No. 126 (July 10, 2014). Thus, a brokerage firm with a Pennsylvania accountholder is required to turn over

[9] *Delaware v. New York*, 507 U.S. at 497.

the assets in that client's account to Pennsylvania after three years of client inactivity, even where (1) the broker knows the whereabouts of the owner; (2) the owner is receiving regular account statements; and (3) the account was established as part of a long-term investment strategy.

In addition to expanding the coverage of the unclaimed property laws through new legislation, states have also increased their unclaimed property collections by various interpretations of this Court's *Texas v. New Jersey* priority rules. The State of Delaware, for example, takes the position that *Texas v. New Jersey* establishes that property is escheatable by the holder's state of incorporation where the owner's address "is in a foreign country." Delaware Department of Finance, *Escheat Handbook* at 11 (2015 ed.) *available at* https://www.delaware.findyourunclaimedproperty.com/docs/Revhandbook15.pdf (last visited June 27, 2016). The State of Washington takes the position that the *Texas v. New Jersey* "backup" rule of escheat to the state of the holder's corporate domicile is controlling unless the holder has an owner address "sufficient for the purpose of the delivery of mail" (as opposed to simply indicating the owner's state of residence). Wash. Rev. Stat. §§ 63.29.010(13); 63.29.030(3). Other states, such as New Jersey, have tried to make the place where an item was purchased stand as a proxy for address information. *See N.J. Retail Merchants' Ass'n. v. Sidamon-Eristoff*, 669 F.3d 374, 393 (3d Cir. 2012) (striking down "place of purchase" address presumption for escheat of gift cards as preempted by *Texas v. New Jersey*).

As the scope of state escheat laws broaden, they increasingly come into conflict with the rights of other states, and no less importantly, the rights of holders.

This case presents a prime example. Not only are some two dozen states fighting over which of them has priority to escheat MoneyGram Official Checks, it has been MoneyGram that has been the recipient of state demands, threats of penalties, and lawsuits by states ***acknowledging*** that the property in question has already been escheated to a sister state.

For example, in the Pennsylvania district court lawsuit referenced in paragraph 32 of the proposed Complaint, the Commonwealth of Pennsylvania seeks judgment "against MoneyGram, in an amount . . . [no] less than $10,293,869.50" plus interest and penalties. *See* Mot. for Leave to File Compl., *Delaware v. Pennsylvania*, S. Ct. Docket No. 22O145, Gregor Decl. at A-25 (filed May 26, 2016). Elsewhere in that complaint, however, Pennsylvania explicitly acknowledges that "the Treasury Department learned MoneyGram sent to the Delaware State Escheator the sum of $10,293,869.50" between 2000 and 2009. *Id.* at A-12, ¶ 43. In other words, the $10.3 million Pennsylvania seeks from MoneyGram is precisely the same $10.3 million that Pennsylvania acknowledges is in Delaware's custody. Notwithstanding the fact that this demand runs afoul of this Court's ruling in *Western Union v. Pennsylvania*, Pennsylvania and other states persist in seeking to hold MoneyGram liable to more than one state for the same property.

It was specifically this threat of double liability, recognized by the Court in *Western Union*, which led to the recognition that

> Our Constitution has wisely provided a way in which controversies between States can be settled without subjecting individuals and companies affected by those controversies to a deprivation of their right to due process of

> law. Article III, § 2 of the Constitution gives this court original jurisdiction of cases in which a State is a party.

Western Union, 368 U.S. at 77. Moreover, because of the conflicting nature of state claims for the same property, the Court noted that it was "imperative that controversies between different States over their right to escheat intangibles be settled in a forum where all of the States that want to do so can present their claims for consideration and final authoritative determination. **Our Court has jurisdiction to do that.**" *Id.* at 79 (emphasis added).

CONCLUSION

For the foregoing reasons, MoneyGram respectfully requests that the Court grant the Motion for Leave to File a Bill of Complaint.

Respectfully submitted,

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