No. 22O145, Original

IN THE

Supreme Court of the United States

STATE OF DELAWARE,

Plaintiff,

v.

COMMONWEALTH OF PENNSYLVANIA AND STATE OF WISCONSIN,

Defendants.

On Motion for Leave to File Bill of Complaint

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

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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] Delaware's Motion for Leave to File a Bill of Complaint 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, the 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. Review 1319, 1319-20 (1961) (contrasting the 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 Delaware, Wisconsin, Pennsylvania, and more than a dozen other states, 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[4]), 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 analyses proffered by the parties to support 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 Delaware's motion concerns the characterization, for unclaimed property purposes, of a MoneyGram product known as an "Official Check." Delaware Mot. for Leave to File Bill of Compl. ("Del. Mot."), ¶ 10. MoneyGram's Official Check product is a prepaid payment item

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

generally sold at a financial institution. *Id.*, ¶ 12. 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 may be considered more creditworthy than a personal check. Del. Mot. App. at A-8, ¶ 17. Generally, the financial institution sellers of Official Checks "do not record the address of the purchaser of the instruments." *Id.* at A-10, ¶ 33.

In accordance with *Texas v. New Jersey*, MoneyGram escheats uncashed address-unknown Official Checks to its state of incorporation, Delaware. Del. Mot., ¶10. However, given the nature of the Official Check item – in some ways similar to a traditional teller's check, in other ways similar to a money order – 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"). *See* Mot. for Leave to File Complaint, *Texas v. Delaware*, S. Ct. Docket No. 22O146 at Ex. A (filed Jun. 9, 2016). In light of these questions, MoneyGram sent a letter to the Delaware Department of Finance seeking 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.[5] *Id.*

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[5] In particular, MoneyGram's letter noted the other states' position 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. Del. Mot., ¶ 10.

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 Pennsylvania, Wisconsin, and eighteen other states (the "Audit States"). *See* Del. Mot., Gregor Decl., at Ex. A. At the conclusion of that audit, TSG demanded that MoneyGram pay the Audit States tens of millions of dollars (including $9.6 million to Pennsylvania and $15.6 million to Wisconsin) 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* Mot. for Leave to File Compl., *Texas v. Delaware*, S. Ct. Docket No. 22O146 at Ex. F (filed Jun. 9, 2016).

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* Del. Mot. at A-5. Pennsylvania sought judgment against MoneyGram in the amount of $10.3 million, plus interest and penalties on that amount, all while explicitly acknowledging

§ 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*.").

that the $10.3 million sought was escheated by MoneyGram "to the Delaware State Escheator." *Id.* at A-12, ¶ 43; A-23, ¶¶ 104-109. 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 that the amounts sought were "sent [by MoneyGram] to the Delaware State Escheator." *Id.* at A-31, ¶ 30; A38.

On May 26, 2016, Delaware filed the instant motion. On June 3, 2016, the State of Wisconsin filed a brief concurring in Delaware's request that the Court exercise jurisdiction, and seeking leave to file a counterclaim. Wisconsin Mot. for Leave to File Counterclaim (filed June 3, 2016). On June 14, 2016, the Commonwealth of Pennsylvania filed a brief seeking similar relief. Pennsylvania Br. in Resp. to Delaware's Mot. to File Bill of Complaint (filed June 14, 2016). The underlying Pennsylvania and Wisconsin district court matters have been stayed pending this Court's resolution of Delaware's motion. Del. Mot., ¶ 18; Order Staying Case (Dkt. No. 12), *Wisconsin Dep't. of Rev. v. Gregor*, Case No. 3:16-cv-00281-wmc (W.D. Wis. Jun. 21, 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 filed their own Motion for Leave to File a Bill of Complaint 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 at least a quarter of a billion dollars. The case cannot be decided in an alternative forum; no other court could 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 within the core competency of this Court's original jurisdiction. 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 especially 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 State of Delaware's Motion for Leave to File a Bill of Complaint and the State of Wisconsin's Motion for Leave to File a Counterclaim should both be granted.

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 Delaware, Wisconsin, and Pennsylvania, 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 of these factors unquestionably demonstrate that this is an "appropriate" case for the exercise of the Court's original jurisdiction.

A. The Seriousness and Dignity of the Disputing 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). A state's right to escheat arises directly from its status as a sovereign. *Delaware v. New York*, 507 U.S. at 502 (noting that the

"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)). When states' sovereign rights come into conflict, concerns of federalism are doubtlessly present. *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 the dispute is "of sufficient seriousness and dignity" to warrant the 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 Delaware's brief, the disputed unclaimed Official Checks have a value "in the hundreds of millions of dollars," and the potential loss of those funds would significantly impact Delaware's revenue. Del. Br. at 12; *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"). Wisconsin and Pennsylvania similarly take the position that Delaware's possession of these funds is a sufficient affront to their sovereign dignity to warrant this Court's intervention. *See* Wis. Br. at 11-12; Pa. Br. at 12 (stating that "[w]ere Pennsylvania an independent sovereign, the annual thwarting of its [escheat] rights by an adjoining sovereign would certainly be a '*casus belli*'"). While that may be rhetorical flourish, there is no doubt that this is a situation where the Court may properly discharge its function "as a substitute for the diplomatic settlement

of controversies" among dueling sovereigns. *Kansas v. Nebraska*, __ U.S. __, 135 S. Ct. 1042, 1051 (2015) (*quoting North Dakota v. Minnesota*, 263 U.S. 365, 372-373 (1923)).

B. There is No Alternative Forum that Can Provide Complete Relief

No other forum can afford complete relief in this case. No state court could 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 upon this Court the power to entertain interstate disputes, it 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 federal 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, 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[s] 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.").

Accordingly, Delaware's 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 whether the exercise of its jurisdiction is appropriate "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 likewise 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, presenting a dispute primarily technical or scientific (as opposed to legal) in nature, or 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 the need to limit the 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 the 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 (Escheat priority rules arise from the 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 this Court's original jurisdiction is appropriate.

B. The Proliferation and Expansion of Escheat Laws Warrants Additional Guidance from This 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,[6] 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 even 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 deemed unclaimed. *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 the assets in that client's account to Pennsylvania after three years of client inactivity,

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

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 through 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 to the holder's state of incorporation where the owner's address "is in a foreign country." Delaware Department of Finance, *Escheat Handbook* at p. 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 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, the Commonwealth of Pennsylvania seeks a judgment in the stayed district court matter "against MoneyGram, in an amount . . . [no] less than $10,293,869.50" plus interest and penalties. Del Mot. at A-25. Elsewhere in the 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. Del. Mot at A-12, ¶ 43 (emphasis added). This admission makes clear that 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 precisely 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 *Western Union* 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 Delaware's Motion for Leave to File a Bill of Complaint, and Wisconsin's Motion for Leave to File a Counterclaim.

Respectfully submitted,

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