Nos. 22O145 & 22O146

IN THE

Supreme Court of the United States

DELAWARE,
Plaintiff,
v.
PENNSYLVANIA AND WISCONSIN,
Defendants.

ARKANSAS, *et al.*,
Plaintiffs,
v.
DELAWARE,
Defendant.

SUPPLEMENTAL BRIEF OF THE STATE OF DELAWARE IN SUPPORT OF THE SPECIAL MASTER REVISING RECOMMENDATION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES:

STATUTES:

TABLE OF AUTHORITIES—Continued

Page(s)

REGULATIONS:

OTHER AUTHORITIES:

TABLE OF AUTHORITIES—Continued

Page(s)

INTRODUCTION

Delaware supports the Special Master's conclusion that bank checks fall outside the FDA—and that MoneyGram teller's checks are just teller's checks. Delaware pressed this argument repeatedly. *See, e.g.*, Exceptions Br. 10, 29, 31, 35, 43-45; Sur-Reply Br. 8-13, 19. Delaware does not reiterate every argument here. Instead, Delaware offers these points to aid the Special Master in revising his report.

In 1974, a "money order" referred to one of two products: The telegraphic service for transmitting funds across long distances, long associated with Western Union. Or a low-dollar instrument, sold by a variety of retailers and typically used by the unbanked as substitutes for personal checks. *See* Exceptions Br. 17-31. Like any product, money orders could sometimes be used atypically, or possess atypical features. But a "money order" was—and still is—defined by typical characteristics: who buys it, where, for how much, and for what purpose. To communicate these characteristics to consumers, issuers label these products "money orders."

These commercial realities explain why Congress targeted money orders in the FDA. In 1974—and still today—sellers did not collect addresses for low-dollar, low-cost money orders. Congress knew "that many low-income families use money orders instead of checking accounts to pay their bills, because they are readily available and because of their low cost." Del. App. 580. Congress worried that state "recordkeeping requirements" "would drive up the cost of these instruments to the

consumer." *Id.*; *see* 12 U.S.C. § 2501(1), (5). Congress passed the FDA to evenly distribute abandoned money orders among the states without harming lower-income Americans.[1] 12 U.S.C. § 2501(3)-(4).

In 1974, Congress's policy concerns did not—and still do not—apply to bank checks, which served a different function in the marketplace. Consumers with bank accounts used bank checks to securely transmit large sums. Banks also used bank checks to pay their own bills. As a result, bank checks were not favored by price-sensitive consumers, and Congress had no reason to fear that state remedial legislation might raise the marginal cost of these particular instruments.

Moreover, banks *recorded* creditors' addresses for bank checks. As a result, bank checks escheated evenly across all states under the common law primary rule. Finally, banking regulations required banks to be domiciled in the state in which they operated—meaning banks were domiciled in every state. Thus, in the event that banks did not record addresses for bank checks, the common law secondary rule *also* evenly distributed bank checks to each state. *See* Sur-Reply Br. 10. This all meant Congress had no need—whatsoever—to extend the FDA to bank checks.

The instruments in this case are bank checks. MoneyGram helps smaller financial institutions administer their bank-check operations. A MoneyGram teller's

[1] Traveler's checks posed similar record-keeping problems, were also smaller-dollar, low-cost instruments, and were largely issued by American Express, presenting a concern that escheatment could concentrate in one state. *See infra* pp. 19-20.

check is the financial institution's own teller's check processed through MoneyGram. A MoneyGram agent check is a substitute for the bank's own checks—a classic function of bank checks—also processed through MoneyGram.[2]

Neither of these instruments are low-dollar, low-cost substitutes for personal checks. MoneyGram prohibits banks from labeling teller's checks and agent checks "money orders." *See* Del. App. 270, 326. And banks record creditors' information for these instruments, even if they do not transmit that information to MoneyGram. Sur-Reply Br. 12. Defendants can thus enact record-keeping legislation that would allow them to escheat these instruments through the common-law priority rules.

That last point merits emphasis: Defendants hold the keys to solving their complaint. Defendants need only require selling banks to transmit the creditor information these banks already record to MoneyGram. Once Defendants bridge the informational gap, the disputed instruments will prospectively escheat more evenly among Defendants under the common law primary rules.[3]

Requiring Defendants to use legislation, not litigation, is fair. Delaware accepted the disputed instruments based on a good faith application of the FDA. The

[2] Delaware has focused on teller's checks to aid the Special Master's revised recommendation. Delaware does not forfeit its arguments regarding agent checks.

[3] Defendants have never asserted a claim to the precise funds in this case based on the existing common-law primary or secondary rules. Defendants have forfeited any such common-law claim to previously escheated funds. *See* Sur-Reply Br. 12 n.7.

Supreme Court should not require Delaware taxpayers to pay hundreds of millions of dollars to Defendants—who belatedly advanced a novel interpretation of the FDA after hiring creative consultants—when Defendants can easily pass laws that would enable them to escheat these products prospectively under the common law.[4]

ARGUMENT

I. THE SPECIAL MASTER CAN SUBMIT AN UPDATED REPORT.

The Special Master is an arm of the Supreme Court, and has the authority to provide a revised recommendation at any time. He should not hesitate to offer the Supreme Court the full benefit of his analysis.

A. The Special Master's authority derives from the Court, and he exercises that authority "at all times and in many ways." *Guide for Special Masters in Original Cases Before the Supreme Court of the United States* 3 (2004). The order appointing the Special Master directs him "to submit Reports as he may deem appropriate." Dkt. 31. Given his role as the Court's adjunct and his broad discretion in discharging that role, the Special Master should not remain silent.

[4] Pennsylvania's suggestion (at 2-3) to overturn the common law is a non-starter. The Supreme Court rejected that request twice before. *See Delaware v. New York*, 507 U.S. 490, 510 (1993); *Pennsylvania v. New York*, 407 U.S. 206, 215 (1972). The common-law priority rules have venerable roots, *see Delaware*, 507 U.S. at 498, provide administrable rules for any scenario, *see id.* at 499-500, and have engendered strong reliance interests among holders and states. The common law also results in more owners recovering abandoned property. Sur-Reply Br. 22-23. And this case proves why the common law works. Defendants can easily escheat these instruments by requiring selling banks to transmit addresses to MoneyGram.

Nor would submitting a report be unprecedented. Federal magistrate judges sometimes find themselves in a similar position to the one the Special Master faces. Like a Special Master, a magistrate judge acts as a district court's adjunct, and provides non-binding recommendations to the ultimate decision maker. And "ample authority supports the practice of magistrate judges revising their recommendations when mistakes become apparent." *Winston & Strawn LLP v. FDIC*, 841 F. Supp. 2d 225, 228-229 (D.D.C. 2012) (rejecting theory magistrate cannot revise recommendation once parties "lodged their objections to the recommendation" with district court).[5] A Special Master—with discretion to advise the Court "as he may deem appropriate," Dkt. 31—likewise has authority to revise his recommendation.

In contrast, under these circumstances, declining to submit a revised recommendation could be affirmatively unhelpful. The Special Master has already informed the Court he cannot "subscribe to the entirety" of his "recommendations" and that he intends to "advise the Court" of his updated conclusions. Dkt. 124. The Court knows it cannot fully rely on the first interim report. The Special Master should explain his thinking, not leave the Court to wonder.

Moreover, it is imperative the Court decide this matter correctly. Interpreting the FDA is not simple. The term "third party bank check" is "obscure" and has "no

[5] *See also, e.g., Agee v. City of McKinney*, No. 4:12-CV-550, 2014 WL 1232644, at *1 (E.D. Tex. Mar. 22, 2014); *Hidalgo Corp. v. J. Kugel Designs, Inc.*, No. 05-20476-CIV, 2005 WL 8155948, at *1 (S.D. Fla. Sept. 21, 2005).

established legal meaning." Dkt. 122 at 72. The FDA does not define "money order" or "similar written instrument." 12 U.S.C. § 2503. And the case implicates a topic—negotiable instruments—the Court rarely confronts. Yet the Court is the exclusive venue for interstate escheat disputes. *See Texas v. New Jersey*, 379 U.S. 674, 677 (1965). It alone can definitively interpret the FDA. When the Court resolves this matter, it will not only determine the status of disputed MoneyGram instruments, but will also provide much needed guidance for every state and all holders, and its decision could resolve pending litigation over cashier's checks.

In another case raising difficult questions, the Court could weigh competing appellate opinions. But in original jurisdiction actions, the issue does not percolate through lower courts. Instead, the Special Master provides the Court with the only other judicial analysis of "important public issues." *Guide for Special Masters*, *supra*, at 3. The Special Master's role as the Court's sole objective guide means that accuracy is a priority in the Special Master's discharge of his duties.

B. Defendants concede (at 3) that the Special Master has the authority to submit a revised recommendation. Defendants simply ask the Special Master not to. But their reasons fall flat.

First, Defendants (at 5) analogize the Special Master to a district court, and suggest the same reasons that divest a district court of jurisdiction during an appeal counsel in favor of him remaining silent. But that analogy breaks down. The Special

Master and the Supreme Court exercise the same authority under the same jurisdiction. Nor does the Special Master issue an independent judgment. Instead, he aids the Court in reaching the correct judgment and, like a magistrate judge, can revise his recommendation "when mistakes become apparent," *Winston & Strawn*, 841 F. Supp. 2d at 229, or at any other time "he may deem appropriate," Dkt. 31.

Second, Defendants argue a report would be unhelpful. They suggest (at 6) that the Supreme Court could never benefit from "a report discussing arguments that the Court itself heard." And they warn (at 4) the Court might not wait for a revised report. But the Special Master informed the Court he intends to submit a revised report. The Court is unlikely to ignore him. And the Court would certainly benefit from a judicial colleague's objective analysis. The Court is not required to accept the Special Master's recommendation, but that does not make it unhelpful.

Third, Defendants' concern (at 5) that the Court deserves "a fixed" "record" holds no merit. The Special Master is not reopening the factual record. Defendants' argument (at 5) that "the parties are entitled to have a stable set of conclusions of law" is similarly flawed. The Special Master provided the parties ample opportunity to offer comments, curing any conceivable prejudice. And Defendants' arguments ignore the importance of this case. This matter will provide much-needed guidance to every state and all holders. Meanwhile, Defendants warn (at 4-5) that the parties might have to provide further briefing or argument to the Court. But the Court

should not reach an unjust and incorrect result—which would bind all parties—to avoid the possibility of a supplemental brief. Indeed, the Court requests supplemental briefing when necessary. *See, e.g.*, *Biden v. Texas*, 142 S. Ct. 2702 (2022); *Frank v. Gaos*, 139 S. Ct. 475 (2018).

II. A MONEYGRAM TELLER'S CHECK IS A TELLER'S CHECK.

The Special Master is correct: MoneyGram teller's checks are ordinary teller's checks. They have the same form. Like all teller's checks, MoneyGram teller's checks are drafts drawn by a bank on another bank. And they serve the same purpose in the marketplace. Like all teller's checks, MoneyGram teller's checks are used by consumers for larger transactions requiring secure payment. MoneyGram teller's checks are therefore bank checks not subject to escheatment under the FDA.

A. Teller's checks first emerged because banking regulations prevented savings and loan associations from providing checking services, including issuing cashier's checks. The savings and loan associations acted as the drawer on a teller's check, but drew the check on a different bank. *See* Lary Lawrence, *Making Cashier's Checks and Other Bank Checks Cost-Effective: A Plea for Revision of Articles 3 and 4 of the Uniform Commercial Code*, 64 Minn. L. Rev. 275, 333 (1980).

When Congress passed the FDA in 1974, the "uses of teller's checks" paralleled "those of cashier's checks." *Id.* Consumers used teller's checks in transactions involving "quite substantial funds," and financial institutions imposed

"no limit" on teller's checks. Del. App. 459-460 n.92. Teller's checks were "infrequently purchased with cash." *Id*. at 459. Instead, financial institutions withdrew funds from a customer's account. *Id*. Because teller's checks were bank checks sold to customers with bank accounts, sellers knew their customers, and recorded creditors' addresses. *See id*. at 400; *cf. id*. at 599.

Today, teller's checks maintain their settled definition as a check drawn by a bank on a different bank (or payable at or through a different bank). *See, e.g.*, U.C.C. § 3-104(h); 12 C.F.R. § 229.2(gg); *Check*, Black's Law Dictionary (11th ed. 2019). Because a teller's check is a clearly defined obligation of the drawer bank, a teller's check offers a more secure method of payment. The Uniform Commercial Code automatically discharges obligations paid by teller's checks, and imposes consequences when issuers fail to pay teller's checks. U.C.C. §§ 3-310, 3-411. Under federal law, teller's checks are "good-funds instruments." A depositor's bank must make funds available the next day. *See* 12 C.F.R. § 229.10(c)(1)(v). Those rules reflect teller's checks' purpose: as a bank check providing secure payment.

MoneyGram teller's checks are teller's checks. Start with form. MoneyGram teller's checks are drawn by a bank on a different bank. The selling bank is the drawer, and a different clearing bank is the drawee. Del. App. 259, 269, 272, 326. As a result, banks afford MoneyGram's teller's checks next-day availability. *Id*. at 326.

Form reflects function. Consumers with bank accounts purchase a MoneyGram teller's check when they need "a good funds check"—for instance to "put a deposit on a car" or "money towards purchasing a home." Del. App. 260. To sell a teller's check, the selling bank withdraws "money out of the customer's account." *Id*. The record indicates selling banks collect creditors' information at the point of sale, although selling banks do not transmit this address information to MoneyGram. *See* Sur-Reply Br. 12; Del. App. 599. Tellingly, MoneyGram prohibits banks from labeling a teller's check "money order." Del. App. 326.

B. The Defendants and Pennsylvania resist the conclusion that MoneyGram's teller's checks are teller's checks or bank checks by pointing to characteristics that have no effect on the instruments' form or function. For example, Defendants (at 11) note that MoneyGram acts as an issuer, making both MoneyGram and a bank liable on the teller's checks as drawers. *See* U.C.C. § 3-105(c). But no law prevents a teller's check—or any bank check—from having multiple drawers.[6] If anything, that a bank and MoneyGram jointly draw the instrument makes these teller's checks even more secure than a typical teller's check or other bank check because they are backed not only by a bank, but also by MoneyGram. In some ways, that means a

[6] Pennsylvania's expert stated that "another financial company such as MoneyGram can be liable as an 'issuer' " on a teller's check. Dkt. 67 at 7.

MoneyGram teller's check is an even better tool for larger transactions requiring secure payment—and consequently *even less* like a money order.

Defendants similarly point (at 11) to the fact that MoneyGram, not the selling bank, formally maintains the "account" "with the clearing bank." Again, that distinction lacks relevance to the form or function of the instrument. Whether a drawer bank coordinates with a drawee bank—or outsources that task to its co-drawer MoneyGram—does not affect the rights of a holder in due course.[7] Nor does that decision alter the instrument's purpose in the marketplace: Consumers use MoneyGram teller's checks as bank checks. And despite Defendants' suggestion that every historical source required the drawing bank to maintain the account with the drawee bank (at 11), historical sources define teller's checks simply as "a check drawn by one bank" "upon another bank." Lawrence, *supra*, at 278.

Pennsylvania takes a different tack. It suggests (at 9-10) that MoneyGram's contracts with banks transform the bank into MoneyGram's "agent" and eliminate a bank's "responsibility" on teller's checks. This argument fails for two reasons. First, it's wrong. MoneyGram's corporate designee unequivocally testified that "the financial institution is the drawer of that instrument." Del. App. 272. The contract confirms that MoneyGram teller's checks are "drawn by [the] Financial Institution."

[7] To avoid any confusion: In this section, Delaware refers to a "holder in due course" under negotiable instrument law, not a "holder" for unclaimed property law.

Dkt. 86 at 146. MoneyGram appoints the financial institution "as its limited agent and authorized delegate for the sole purpose of using and selling the Products." *Id*. MoneyGram likewise promises to pay the instrument, so long as the bank properly transmits the funds to MoneyGram, and MoneyGram holds the funds. *Id*. at 147 (¶¶ 11-12). But these provisions do not limit the drawer bank's relationship to a third-party holder. Thus, in MoneyGram's eyes and in the contract's terms, the selling bank is a drawer—as is MoneyGram. Second, even if the contract sought to eliminate the bank's responsibilities as a drawer, a hidden contract generally cannot modify the rights of a holder-in-due course. *See* U.C.C. § 3-106(a). Thus, no matter what MoneyGram's contract says, the drawing bank remains liable as a drawer.

III. "BANK MONEY ORDER" DOES NOT MEAN "TELLER'S CHECK."

Because they cannot meaningfully dispute that MoneyGram teller's checks are bank checks, Defendants offer a distraction: Defendants accuse the Special Master of excluding "bank money orders" from the FDA, and argue that "money order" in Section 2503 must include "bank money orders," which they in turn suggest must include all teller's checks and every other bank check. That syllogism is all wrong. For Delaware to prevail, the Special Master need not exclude bank money orders from the FDA's definition of "money order." The Special Master need only find that MoneyGram's teller's checks are teller's checks—not bank money orders. That is easy: Sources from 1974 clearly treated "bank money orders"

as distinct instruments from teller's checks, cashier's checks, and other bank checks. In their form and function, MoneyGram teller's checks are teller's checks. They are not bank money orders. As the Special Master has noted, "it's not the usual practice" for banks to issue bank money orders. Dkt. 126 at 10. This case does not involve bank money orders, and it is unlikely any dispute would arise over that instrument.

A. Start again with history. In 1956, the American Bankers Association (ABA) released a report on money orders. It distinguished three instruments sold at banks: older "bank money orders," more modern "personal money orders," and "official bank checks." Del. App. 385. Banks were drawers on bank money orders. *Id*. at 392. By contrast, for personal money orders, purchasers were the drawer. *Id*. at 397. The ABA deemed personal money orders more efficient and described banks transitioning away from bank money orders. *See id.* at 396-402.

The report also differentiated "bank money orders" from "official bank checks." *Id*. at 385. According to the report, bank money orders shared the "legal status" "of an official check or instrument of the issuing bank" "the same as Cashier's or Treasurer's Checks." *Id*. at 389. But the report did not equate these instruments. Instead, the ABA explained that banks imposed maximum limits on bank money orders, *id.*, but not for "an official check," *id.* at 400. Thus, like all money orders, bank money orders were primarily low-cost, low-dollar substitutes for personal checks.

In addition to that 1956 report, numerous historical sources distinguished among bank money orders, personal money orders, and bank checks. Thus, an influential 1967 law review article separately addressed—in the very same sentence—"personal money orders," "bank money orders," "teller's checks," "cashier's checks," and "traveler's checks." *Id.* at 430-431. Treatises distinguished between these various instruments. *See id.* at 483-486 (*The Law of Bank Checks*); *id.* at 487-494 (*The Law of Bank Deposits*). And shortly after Congress passed the FDA, the 1981 Uniform Unclaimed Property Act proposed different dormancy periods for money orders and bank checks. Exceptions Br. 26-27. These sources—and others, *see, e.g.*, *id.* at 26 (historical statutes)—establish that "money order" referred to a different instrument from a "teller's check" or other bank check. When interpreting the FDA, the Special Master should accord significant weight to how the FDA's terms were ordinarily used at the time Congress adopted the statute.

Meanwhile, Defendants cannot identify a single source that defines "money order"—or "bank money order"—as including "all teller's checks" or "all bank checks." Nor can Defendants point to sources defining all teller's checks as "money orders." That silence is deafening. If "money order" meant every teller's check and bank checks of all kinds—as Defendants imply—surely some source would say so.

Today, bank money orders remain uncommon. The "most common form of money order sold by banks is that of an ordinary check drawn by the purchaser."

U.C.C. § 3-104, cmt. 4. This case does not involve any bank money orders. MoneyGram is the drawer on all retail money orders and all agent check money orders. MoneyGram additionally seeks to limit its own liability by including "limited recourse" language on the back of all money orders and agent check money orders. *See* Del. App. 213, 214, 244, 256, 270, 294. To reflect that limited status, the purchaser signs all MoneyGram money orders and agent check money orders.

The bottom line: "Money orders" and "bank money orders" are different instruments from "teller's checks" and other bank checks. MoneyGram's teller's checks are typical teller's checks; they are not money orders. This dispute does not involve bank money orders, and it is unlikely any such dispute would ever develop.[8]

B. Defendants' counterargument (at 9-10) assumes the Special Master recommends excluding bank money orders from the FDA—an interpretation Defendants say the FDA cannot bear. But Defendants fundamentally misconstrue the question in this case.

1. For Delaware to prevail, the Special Master need not recommend that the FDA excludes bank money orders. Instead, the Special Master need only recognize that, because of their form and function, MoneyGram's teller's checks are prototypical teller's checks—not money orders. The Special Master could

[8] In contrast, numerous lawsuits *already* incorporate Defendants' maximalist interpretation of the FDA and allege that holders wrongfully escheated cashier's checks. *See* ABA Amicus Br. 11 & n.3.

recommend that the FDA applies to bank money orders but not well-known bank checks, including teller's checks.[9] He also could avoid deciding the status of bank money orders—a question that is not presented and will likely never arise given these instruments' rarity. This case does not hinge on bank money orders.

If the Special Master wanted to define "money order" to exclude bank money orders, he also could—although he need not. The FDA's text indicates that Congress was not focused on bank money orders. Section 2501 found that sellers did not record "addresses of purchasers" of "money orders." 12 U.S.C. § 2501(1). But historically, banks recorded purchaser addresses for bank money orders. Del. App. 390. By contrast, sellers did not record that information for personal money orders. *Id*. at 400. The statutory finding suggests Congress targeted personal money orders.

Defendants note (at 9) that the words "on which a banking or financial organization or a business association is directly liable" apply to "a money order, traveler's check, or other similar written instrument." 12 U.S.C. § 2503. From this, Defendants conclude (at 10) that the FDA "contemplates that banks can be liable on

[9] The Special Master could recommend (as Delaware has argued) that "money order" includes all prepaid instruments labeled "money order," including those drawn on a bank. A label-based approach—which reflects ordinary meaning in 1974—would easily distinguish bank money orders from bank checks. Banks have incentives to accurately label products for consumers. The American Banking Association has told the Court (at 1) that "banks are indifferent as to which State is entitled to escheat." Finally, this approach would mirror the definition of a traveler's check, which is drawn on a bank but must be labeled "traveler's check." U.C.C. § 3-104(i).

money orders." This argument—which, again, Delaware does not need to rebut in order to prevail—fails for two separate reasons.

First, even if the FDA does not apply to bank money orders on which a bank is the drawer, banks would still have a degree of liability on personal money orders, albeit less than the clearly-defined liability on bank checks. A purchaser signs a personal money order as the drawer—which is why personal money orders are not bank checks or "good funds instruments." *See* 53 Fed. Reg. 19372, 19396. But a personal money order nonetheless "involves an underlying obligation of the issuing bank to pay the person whose name is subsequently inserted as payee." Barkley Clark, *The Law of Bank Deposits, Collections and Credit Cards* 2-71 (1981); Del. App. 491. The exact nature of banks' liability on personal money orders is an unsettled legal question. Courts have found, however, that a measure of liability exists because consumers (and one suspects Congress too) understood that banks would not sell money orders without collecting funds to prepay the instrument.[10]

Second, Defendants' interpretation of the FDA is not the only plausible reading of the text. The Court could also read the FDA such that banks are liable on traveler's checks or similar written instruments, whereas business associations are

[10] Thus, one court imposed direct liability because banks "receive[] sufficient moneys from the remitter." *Unger v. NCNB Nat'l Bank*, 540 So. 2d 246, 247 (Fla. Dist. Ct. App. 1989). This question was even more unsettled in 1974. Because Congress intended the FDA to encompass personal money orders, an issuer's liability must constitute "direct liability" under the FDA.

liable on all three types of instruments. That interpretation gives every word of the text meaning, but could still exclude bank money orders from the statute.

To be clear: Delaware need not exclude bank money orders from the FDA to prevail. The Special Master need only recommend that MoneyGram teller's checks are not bank money orders. Every source deems "bank money orders" different instruments from teller's checks. But if the Special Master recommended excluding bank money orders from the FDA, every word in the FDA would retain full meaning, and Delaware would still prevail in this case.

2. Defendants misstate the history. Defendants argue (at 9) bank money orders were "common." Even if true, this would not transform "bank money orders" into "teller's checks." But bank money orders were not common. In 1956, banks supplied "only a small part of the" money-order "market"—and some of that was through bank-sold personal money orders. Del. App. 384. Defendants' citation (at 8) to *Cory v. Golden State Bank*, 157 Cal. Rptr. 538, 539 (Ct. App. 1979) is surprising. *Cory* contains a photograph of a "*personal money order*," *id*. at 540, and demonstrates how banks had transitioned to personal money orders by that time.[11]

Nor are bank money orders common today. Defendants (at 8) and Pennsylvania (at 3) point to the Uniform Commercial Code. But it states that "most"

[11] The sources Defendants cite (at 8) often use "issue" in a non-technical sense to mean "produce," and at times use "issue" with respect to personal money orders.

money orders sold by banks are "drawn by the purchaser." U.C.C. § 3-104, cmt. 4. Nor does the Code say that *all* money orders are teller's checks, or vice versa. Bank money orders remain rare, and a "money order" does not mean a "teller's check."

IV. TELLER'S CHECKS ARE NOT SIMILAR INSTRUMENTS.

A. Bank checks—including MoneyGram teller's checks—are also not "similar written instrument[s]." 12 U.S.C. § 2503. Had Congress intended to abolish the common-law rule for well-known bank checks that existed in 1974, Congress would have pointed to those products by name. Congress did not. Instead, the FDA surgically targeted two named instruments but preserved the common law for bank checks—including teller's checks, cashier's checks, and certified checks. Congress did so because bank checks did not pose "similar" escheat concerns to money orders and traveler's checks. *Id*. Consider three important dissimilarities.

First, the FDA targets instruments typically issued for small amounts, *see* Exceptions Br. 22, 25, because Congress was concerned that states might pass address-collection laws that could raise the prices on these products, *see* 12 U.S.C. § 2501(5). Congress particularly sought to protect "low-income families" who used "money orders instead of checking accounts to pay their bills" "because of their low cost." Del. App. 580. In contrast, consumers with bank accounts use bank checks for high-dollar transactions. Meanwhile, banks paid their own bills via bank check. As a result, bank-check users are less price sensitive to marginal increases in cost.

Second, unlike money orders and travelers checks, banks record "the last known addresses of purchasers" when selling bank checks to consumers. 12 U.S.C. § 2501(1); *see* Del. App. 400. Banks similarly record their own creditors' addresses when they pay bills via bank check. *See* ABA Amicus Br. 9. This means that most bank checks escheat fairly evenly "among the several States" under the common law primary rule. 12 U.S.C. § 2501(3). Indeed, even today, selling banks record creditor information when they sell MoneyGram teller's checks; banks simply do not transmit that information to MoneyGram. *See* Del. App. 599, 602.

Third, in 1974, bank checks *also* escheated evenly "among the several States" under the common law secondary rule—in contrast to money orders and traveler's checks. 12 U.S.C. § 2501(3). At that time, banks were required to incorporate in their state of operation. Sur-Reply Br. 10. By contrast, Western Union and American Express were incorporated in New York, and dominated the telegraphic money order and traveler's check markets respectively. Del. App. 498, 570-572.

Thus, in 1974, Congress had no reason to extend the FDA to well-known bank checks. Bank checks did not pose "similar" escheat concerns to money orders and traveler's checks. Nor does anything in the FDA's text or legislative history indicate Congress intended "similar written instrument" to abolish the common law for all financial instruments. Had Congress intended that result, surely something more than a reference to two dissimilar products would indicate that breathtaking scope.

Finally, if the Court has any doubt about the meaning of "similar written instrument," three tie-breaking principles counsel in favor of interpreting that term narrowly. *First*, the Court should read the statute to avoid derogating the common law. Congress' "desire to enhance the common law in specific, well-defined situations does not signal its desire to extinguish the common law in other situations." *United States v. Texas*, 507 U.S. 529, 535 n.4 (1993). *Second*, in this particular field, the Court strongly prefers an administrable regime. *See Delaware*, 507 U.S. at 510. Adopting Defendants' interpretation of "similar written instrument" risks upsetting long settled practice—and could require redistributing among all states every teller's check, cashiers' check, or certified check escheated since 1974. *Third*, Delaware's approach is fair. States can require selling banks to transmit creditors' addresses to MoneyGram. That simple step—one made even easier in the computer-age—would evenly distribute escheated MoneyGram teller's checks among the states, while protecting Delaware's good faith reliance on the FDA's plain text.

B. Defendants offer no compelling arguments for reading "similar written instrument" to include "teller's checks" or "bank checks." Defendants argue (at 14) that a similar instrument is one "for which purchasers' addresses usually aren't kept." That *proves* Delaware's point. In 1974, banks recorded addresses on bank checks. That is *why* Congress did not extend the FDA to bank checks.

Contrary to Pennsylvania's assertion (at 13), the common law does not create "a grossly inequitable escheatment paradigm." States that want to escheat these bank checks need only require banks to transmit addresses to MoneyGram. Despite knowing Delaware would make this argument, Pennsylvania does not bother addressing it. Meanwhile, Defendants and Pennsylvania ignore the other major policy concern motivating the FDA: Congress wanted to avoid raising the marginal cost of small-dollar instruments. The fact that teller's checks are larger-dollar instruments explains why these instruments are not "similar." 12 U.S.C. § 2503.

Defendants state (at 13) "the fact that bank liability exists for traveler's checks indicates bank liability alone doesn't make an instrument dissimilar." The key word is "alone." Traveler's checks possess other core characteristics that affect their role in the marketplace, which in turn means they pose different escheat concerns: They are *low*-value instruments with a cumbersome counter-signature requirement to authenticate remitters in *small* retail transactions. Bank checks, like teller's checks, lack those characteristics because they serve different purposes in the marketplace—and their role in the marketplace means they do not pose the same escheat concerns.

Defendants concede (at 14) that "bank liability on an instrument makes commercial and legal differences." Those same commercial and legal differences explain why these instruments did not pose similar escheat concerns to the Congress that enacted the FDA.

V. "THIRD PARTY BANK CHECK" SHOULD NOT BE READ OUT OF THE STATUTE.

The Special Master asked the parties to brief the meaning of the third-party bank-check exception and its application to "a money order" and "traveler's check."

A. Under the best interpretation, "third party bank check" means a bank check paid through a third party. *See* Exceptions Br. 39-42. Of the definitions offered by the parties, only Delaware's definition gives meaning to every word. Delaware applies the ordinary meaning of a "bank check." And Delaware interprets the word "third party" by identifying a "third party": The party through which the check is paid, who is a third party to the transaction between the payee and the payor bank.

The disputed instruments are third party bank checks. MoneyGram teller's checks are bank checks. *See supra* pp. 8-12. Similarly, banks primarily use agent checks to pay the bank's own bills—a classic function of a bank check. Agent checks "aren't often used to issue checks for customers." Del. App. 275.[12] The abandoned agent checks in this case were mostly paid to a bank's creditors (such as

[12] The first interim report (at 26-27 & n.18) focused on the fact that a few agent checks might have been sold to retail customers. Delaware respectfully submits that this fact should not be dispositive. On the infrequent occasion when a retail customer purchases an agent check, the customer intends to purchase "a bank check," and the bank employee signs the check. Del. App. 275. But to the extent the Special Master believes agent checks sold to retail customers do not qualify as bank checks, the Special Master could narrowly recommend that *only* agent checks sold to retail customers fall within the FDA's scope. By contrast, agent checks used to pay bank bills both fall outside the FDA and qualify as third party bank checks.

the bank's landlord) and never cashed. Befitting their status as bank checks, a bank employee signs every agent check. And both teller's checks and agent checks are third party bank checks paid through MoneyGram and its clearing bank.

By contrast, the two other interpretations of "third party bank check" offered in this case either render some words in the statute superfluous or add new words that don't appear in the text. *First*, as the Special Master recognized, a third party bank check cannot mean an indorsed bank check. It "is impossible to determine whether" an abandoned check "has been 'indorsed to a third party.' " Dkt. 122 at 73.

Second, a "third party bank check" cannot mean a personal or business check because that interpretation makes the first three words—"third party bank"—surplusage. Additionally, this interpretation requires injecting the additional words "personal" or "business" before the word "check." Nor would it make sense for Congress to refer to a checking account in a roundabout manner. Indeed, the Treasury Department asked for this exception because it thought that the FDA might unintentionally encompass these instruments. Del. App. 575. There is no risk, however, that a court could read the FDA to apply to personal or business checks written on checking accounts. The FDA applies only to those instruments that are "purchased"—*i.e.* prepaid in advance. 12 U.S.C. § 2503(1)-(3). An ordinary check

is not prepaid. Defining a "third party bank check" as a business or checking account therefore makes that term a nullity.

Nor does Bailey's *The Law of Bank Checks* indicate that an ordinary meaning of "bank check" was a personal or business check. *See* Dkt. 122 at 75-76. Instead, the treatise self-consciously used "bank check" idiosyncratically. The treatise warned readers that the "term 'bank check' as used in *this volume* is . . . interchangeable with the term 'check.' " *Id*. at 76 (emphasis added and citation omitted). The treatise then explained that "bank check"—again, as used idiosyncratically in that volume—"does not necessarily denote a direct bank obligation, such as a cashier's check, certified check, or bank draft." *Id*. (citation omitted). The treatise thus confirmed that "bank check" ordinarily meant "a direct bank obligation"—otherwise, no disclaimer would have been necessary.

The Hunt Commission report also counsels against a narrow construction of "third party bank check." The Hunt Commission defined a third party payment service broadly as "any mechanism whereby a deposit intermediary transfers a depositor's funds to a third party or to the account of a third party upon the negotiable or non-negotiable order of the depositor." Del. App. 350 n.1. While the Hunt Commission included "[c]hecking accounts" as "one type of third party payment service," checking accounts *are not the only type*. *Id.* The Commission also provided "credit cards" as another example of a "third party payment service." Del.

App. 358-359. And the Hunt Commission indicated that some savings and loan associations were offering "third party payment services using customers' interest bearing accounts"—in other words, the recently developed teller's checks. *Id.* at 357. If the Hunt Commission report served as the inspiration for the FDA, a third party bank check includes a "bank check" that transfers a depositor's funds to a third party. This definition includes the disputed instruments in this case. MoneyGram teller's checks typically transfer funds from a customer's account at the bank to a third party (e.g., a car dealer). MoneyGram agent checks transfer the bank's own funds from the bank's account to a third party (e.g., the bank's landlord).

Finally, Defendants may argue that Delaware's expert rejected Delaware's approach. That is not true. Delaware's expert concluded it is "possible" a third party bank check means a teller's check. Dkt. 70 at 16. Moreover, the expert's hesitation stemmed, in part, from the fact that he interpreted "directly liable" to mean unconditionally liable. *See id*. at 8. In contrast, the Special Master interpreted "directly liable" to mean ultimately liable. Dkt. 122 at 65-66. Delaware has fully adopted this interpretation before the Supreme Court.

B. Textually, the third-party-bank-check exception can plausibly be read to apply narrowly to a "similar written instrument," or also to apply to "a money order" and "traveler's check." The latter interpretation dovetails with the Special Master's recommendation—which Delaware fully adopts—that the language regarding direct

liability immediately following the parenthesis applies to each of the three instruments identified in the FDA. Dkt. 122 at 70-71. Under this reading, teller's checks and agent checks would be expressly exempted from the FDA.

If the third-party-bank-check exception does not apply to money orders, the exception at a minimum informs the meaning of a "money order." In particular, the exception confirms that Defendants must be wrong to define a money order as all prepaid drafts. A "third party bank check" is also a kind of prepaid draft. *See supra* pp. 23-24. Defendants' definition would therefore render the third-party-bank-check exception a nullity. Anytime the exception would apply, Defendants' definition of a money order would pull the "third party bank check" right back into the statute.

That surplusage problem reflects Defendants' flawed theory of the statute. Defendants' maximalist definition of "money order" turns everything into a money order—from traveler's checks and any conceivable similar written instruments, to teller's checks, cashier's checks, and certified checks. That reading does violence to the text. It also threatens to embroil the Supreme Court and states in disputes over all kinds of abandoned instruments escheated over the last six decades—the very thing the Supreme Court has sought to avoid. *Cf. Texas*, 379 U.S. at 679. The Court should not go down that perilous road. Instead, the Court should give the FDA the plain meaning Congress intended.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Counsel for Delaware in Case Nos. 22O145 & 22O146 certifies that on November 18, 2022, this document was served by email on counsel for all Defendants identified in the Amended Service list.

November 18, 2022

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