

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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DELAWARE, )  
 )  
 ) Plaintiff, )  
 )  
 ) v. ) No. 145, Orig.  
 )  
PENNSYLVANIA AND WISCONSIN, )  
 )  
 ) Defendants. )  
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ARKANSAS, ET AL., )  
 )  
 ) Plaintiffs, )  
 )  
 ) v. ) No. 146, Orig.  
 )  
DELAWARE, )  
 )  
 ) Defendant. )  
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P R O C E E D I N G S

(11:53 a.m.)

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

Mr. Katyal.

ORAL ARGUMENT OF NEAL K. KATYAL

ON BEHALF OF DELAWARE

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

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

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

They were right the first time for

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

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

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

25 And, fourth, while we believe that our

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

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

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

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

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

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

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

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

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

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



1 is, a discrete set of instruments.

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

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

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

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

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

1 name isn't there and possibly some other things.

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

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

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

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

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

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

1 that address information is already being  
2 collected now.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 the primary rule.

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

8 And so --

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

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

1 increase the cost of those items.

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

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

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

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



1 certificates of deposits and the like.

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

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

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

14 JUSTICE ALITO: Nothing?

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

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

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

1 concerns about escheatment and about people not  
2 getting due process and the like.

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

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

19 CHIEF JUSTICE ROBERTS: Mr. --

20 JUSTICE ALITO: Well, you make the --

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

23 JUSTICE ALITO: You make the fair  
24 point that the states could require the banks to  
25 transmit this information to MoneyGram. But

1 just out of curiosity, why doesn't MoneyGram ask  
2 for this information? Would that cost a lot of  
3 money?

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

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

24 These are, of course, large-dollar  
25 instruments, and so the money is much larger.

1 And so there's a much better -- you know, a much  
2 better incentive, particularly for the reasons,  
3 Justice Alito, you wrote about in Yee, to try  
4 and collect and find the rightful owners of this  
5 property.

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

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

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

1 are.

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

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

17 (Laughter.)

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

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

1 (Laughter.)

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

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

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

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

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

25 Same product without the label is what

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

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

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

21 MR. KATYAL: We do.

22 JUSTICE GORSUCH: Okay.

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

1 for courts.

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

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

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

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

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

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



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

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

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

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

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

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

17 MR. KATYAL: Correct.

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

24 MR. KATYAL: Well, I do think it would  
25 be a transfer of information in which address

1 information isn't being collected and a  
2 small-denomination kind of instrument. And so,  
3 here, there's a wide gulf, however you define  
4 "similar," between the two disputed instruments  
5 and -- and agent checks -- excuse me -- and  
6 teller's checks -- traveler's checks and money  
7 orders.

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

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

20           So we think those are three hallmarks.  
21 Does that solve the --

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

1 other things that make Arkansas succeed.

2 MR. KATYAL: We're -- we're not just  
3 randomly picking these, Justice Kagan. It goes  
4 to, I think, Justice Jackson's question to me  
5 earlier, which is the purpose behind this, which  
6 is the address information isn't being  
7 collected. It's burdensome to do so. That's a  
8 statutory finding. And the equity windfall  
9 considerations.

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

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

25 JUSTICE SOTOMAYOR: Counsel, the --

1 MoneyGram treats one of its other official  
2 checks, the agent check money orders, as subject  
3 to the FDA. Justice Thomas asked you what  
4 happens if they remove that tomorrow.

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

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

12 JUSTICE SOTOMAYOR: They take it off.

13 MR. KATYAL: Yeah. If they take it  
14 off --

15 JUSTICE SOTOMAYOR: It's issued by --

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

17 JUSTICE SOTOMAYOR: -- it's issued by  
18 a bank --

19 MR. KATYAL: Right.

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

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

1 JUSTICE SOTOMAYOR: All right. And  
2 what was your third criteria?

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

5 JUSTICE SOTOMAYOR: And they have an  
6 account at the bank.

7 MR. KATYAL: -- and they may have an  
8 account at the bank.

9 JUSTICE SOTOMAYOR: So --

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

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

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

1 limited recourse document; you're making it  
2 something else.

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

7 JUSTICE SOTOMAYOR: That's not the  
8 example I gave.

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

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

18 CHIEF JUSTICE ROBERTS: Thank you,  
19 counsel.

20 Justice Thomas, anything further?

21 JUSTICE THOMAS: No questions.

22 CHIEF JUSTICE ROBERTS: Justice Alito?

23 JUSTICE ALITO: You say that a  
24 third-party bank check is a check that is  
25 effective on the signature of a bank officer.

1 But isn't it the bank's liability and not the  
2 signature that makes an instrument a bank check?  
3 The signature merely indicates that the bank is  
4 liable?

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

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

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



1 products, like teller's checks, and they  
2 specifically exempted them.

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

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

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

17 Now, admittedly, it's not the clearest  
18 of phrases, but we think that's the one that  
19 gives it some meaning and reflects Congress's  
20 1974 knowledge. Teller's checks were around in  
21 '74, and yet Congress didn't enumerate them in  
22 2503, much more narrow statute than the 1966  
23 one.

24 JUSTICE ALITO: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Sotomayor?

2 Justice Gorsuch?

3 JUSTICE GORSUCH: Thank you.

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

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

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

22 And so, to us, you know, going back to  
23 the statutory interpretation question, it's like  
24 a statute that said, you know, rubber bands,  
25 paper clips, or other similar items.

1 JUSTICE KAVANAUGH: Mm-hmm.

2 MR. KATYAL: You know, so yes, could  
3 you find some commonalities? Sure, but I don't  
4 think it means other -- all office products,  
5 like desk chairs or paper or things like that.

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

11 JUSTICE KAVANAUGH: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice  
13 Barrett?

14 JUSTICE BARRETT: No.

15 CHIEF JUSTICE ROBERTS: Justice  
16 Jackson?

17 JUSTICE JACKSON: Yes, just one  
18 question that is confusing me.

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

24 What I don't understand is why that's  
25 the case. I've heard you said -- say that there

1 would be an incentive to include address  
2 information for larger-dollar products, but if  
3 that's true, then, under the common law, we  
4 wouldn't have the inequitable escheatment  
5 problem.

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

13           Do you understand what I'm saying?

14           MR. KATYAL: Absolutely, Justice  
15 Jackson.

16           JUSTICE JACKSON: Yes.

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

24           The reason why it's being collected  
25 has everything to do with money laundering

1 requirements and the like. 31 C.F.R. 1010  
2 requires collection of this information for  
3 anything over \$3,000.

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

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

16 And that would be very destabilizing  
17 not just for the products at issue here but  
18 certified checks, cashier's checks, as the ABA  
19 says.

20 JUSTICE JACKSON: Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,  
22 counsel.

23 Mr. Bronni.

24

25

1 ORAL ARGUMENT OF NICHOLAS J. BRONNI  
2 ON BEHALF OF ARKANSAS, ET AL.

3 MR. BRONNI: Mr. Chief Justice, and  
4 may it please the Court:

5 This case presents the problem the FDA  
6 was enacted to solve. In Pennsylvania versus  
7 New York, this Court concluded that unclaimed  
8 financial instruments escheat to a purchaser's  
9 state of residence or, if that's unknown, to an  
10 issuer's state of incorporation.

11 Because issuers of certain financial  
12 instruments rarely kept purchaser addresses,  
13 that meant a windfall for an issuer's state of  
14 incorporation at the expense of its fellow  
15 states.

16 Just two years later, Congress  
17 responded to that inequity by enacting the FDA.  
18 That statute says that where addresses aren't  
19 typically kept for a class of instruments, those  
20 instruments escheat to the state of purchase.

21 Now, 50 years later, Delaware claims  
22 that it's entitled to the exact same sort of  
23 windfall that led to the enactment of the FDA.

24 To justify that, it argues that the  
25 FDA doesn't cover instruments that function

1 precisely like other money orders but are  
2 marketed differently. But marketing strategies  
3 do not define commercial instruments and they  
4 don't justify \$250 million windfalls.

5           Recognizing the weakness of that  
6 argument, Delaware alternatively claims that  
7 MoneyGram official checks are excluded from the  
8 FDA as third-party bank checks. That argument  
9 fares no better because MoneyGram is not a third  
10 party as that term was used in 1974, and  
11 MoneyGram's official checks are absolutely not  
12 bank checks.

13           Nor, for that matter, does Delaware  
14 explain why Congress would have chosen to  
15 exclude instruments that present precisely the  
16 windfall problem that the FDA targeted.

17           So it's hardly surprising that all  
18 three payment systems experts in this case,  
19 including Delaware's own expert, agreed that  
20 under any ordinary understanding of the phrase  
21 "third-party bank check," MoneyGram official  
22 checks are not third-party bank checks.

23           So we would ask this Court to overrule  
24 the exceptions and adopt the Special Master's  
25 recommendation.

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

4 MR. BRONNI: Sure, Your Honor. I  
5 think it's probably easiest to begin with --  
6 with the example of cashier's checks because  
7 there's been a lot of ink spilled on the  
8 cashier's check at issue in this case. And --  
9 and, for that one, we don't believe that  
10 cashier's checks are necessarily covered by our  
11 definition.

12 So, to -- to begin with, our  
13 definition requires that an instrument be  
14 prepaid. A cashier's check as a class of  
15 instrument is not necessarily a prepaid  
16 instrument. Instead, as the ABA's amicus brief  
17 argues at length, there are many frequent,  
18 common, ordinary, everyday situations where  
19 cashier's checks are not prepaid.

20 So, for instance, if a bank needs to  
21 pay its own obligations, say it needs to pay an  
22 electrician or meet a tax bill, it will issue a  
23 check drawn on its own accounts. That's a  
24 cashier's check. That is not a prepaid  
25 instrument.



1                   If the bank needs to disburse loan  
2 proceeds, it will issue a check drawn on its own  
3 accounts.

4                   JUSTICE KAGAN: So does that mean we  
5 determine cashier's checks one by one by one  
6 depending on whether it's prepaid?

7                   MR. BRONNI: No, Your Honor. I think  
8 this is one of the reasons why we're judging  
9 things sort of on a class of instruments, and as  
10 a class of instruments in contrast to official  
11 checks and money orders, these are not always  
12 prepaid, so that it's a class-wide distinction.

13                   But, even aside from that, there are  
14 other reasons why we believe that cashier's  
15 checks, even aside from our definition, would  
16 not be swept in under the term "money order."

17                   And one of those reasons is I think,  
18 as, Justice Thomas, your question reflects, you  
19 know, so there are instruments in the world that  
20 people would not describe as money orders even  
21 if they share some of the common core features,  
22 and a cashier's check is a good example of that.

23                   We would not in ordinary parlance call  
24 a cashier's check a money order because it is a  
25 unique instrument in that it's issued by the

1 same bank, drawn on that same bank, which makes  
2 it a uniquely secure instrument that is  
3 different.

4 So, in -- in ordinary English, it's a  
5 well-known instrument, as Delaware agrees, as  
6 the American Bankers Association agrees, and  
7 that's a justification for carving it out.

8 And then, finally, another reason why  
9 we would think it wouldn't be covered is  
10 because, in 2501, when Congress is describing  
11 money orders as a class of instruments, it  
12 describes them as a class of instruments for  
13 which addresses are not ordinarily kept as a  
14 business practice.

15 That does not describe cashier's  
16 checks in 1974 and it doesn't describe them  
17 today.

18 JUSTICE JACKSON: Why does it describe  
19 the disputed instruments? Your opposing counsel  
20 says the disputed instruments are a class in  
21 which the addresses are typically kept.

22 MR. BRONNI: So I -- I -- I think that  
23 sometimes the addresses -- I think what the  
24 record actually reflects is that sometimes the  
25 addresses are collected by the selling financial

1 institution, as could be true, frankly, of a  
2 retail money order. So that the statute my  
3 friend was referring to is a requirement that if  
4 you sell at least \$3,000 worth of these  
5 instruments or a retail money order, you're  
6 required to collect information and maintain it  
7 as the seller.

8 That information, however, is not  
9 transmitted to MoneyGram. MoneyGram has a  
10 policy it will not accept that information. It  
11 will not keep it. So what that means is the  
12 issuer, which is the actual holder of the funds  
13 here, because it's not the selling bank that  
14 holds the money, the day after a transaction  
15 takes place, that money is transferred from the  
16 selling financial institution to MoneyGram, and  
17 it's MoneyGram that holds that -- - that

18 CHIEF JUSTICE ROBERTS: Well, but  
19 MoneyGram can -- can -- you can require  
20 MoneyGram to ask for that information. I mean,  
21 that would -- and that would solve your problem  
22 just like that because just like with respect to  
23 the others that you say have to be covered and  
24 keep the existing or keep the address and  
25 purchaser information, MoneyGram would, and then

1 all of that stuff would escheat to your state  
2 rather than Delaware.

3 MR. BRONNI: I think, Your Honor, that  
4 the reason why our states have -- have not  
5 necessarily done that is because I think  
6 Congress really when it passed this statute put  
7 its thumb on the scale and suggested that  
8 keeping that kind of information and having to  
9 maintain that information, which my friend on  
10 the other side admitted would be a burden, it --  
11 it -- Congress decided that was an unnecessary  
12 burden.

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

24 But what Congress actually said, all  
25 of Congress in 2501 in the findings of facts,

1 was not that. Instead, it said address  
2 collection and maintenance would be an  
3 additional burden that is not justified because  
4 most of these instruments are -- are purchased  
5 in one's home state. And that --

6 CHIEF JUSTICE ROBERTS: Well, just to  
7 be clear, there's nothing in the law that  
8 prevents you from requiring MoneyGram to ask for  
9 that information.

10 MR. BRONNI: That -- that's correct,  
11 Your Honor. Our states could --

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

14 MR. BRONNI: It would potentially for  
15 prospective relief but not necessarily for --  
16 for --

17 CHIEF JUSTICE ROBERTS: You -- you --  
18 you said in -- in your opening that the  
19 difference between the instruments that we know  
20 are covered, money orders and -- and traveler's  
21 checks and the others, is simply a -- a matter  
22 of marketing strategy?

23 MR. BRONNI: Yes, Your Honor.

24 CHIEF JUSTICE ROBERTS: But your  
25 friend points out that money orders and

1 traveler's checks, on the one hand, are low  
2 value, high volume, purchased anonymously.

3 On the other hand, the agent and  
4 teller's checks are high value or at least not  
5 limited generally. They're not anonymous.  
6 They're drawn on an existing bank account. And  
7 they're signed by the bank.

8 Now that seems to be very different  
9 than just a marketing strategy.

10 MR. BRONNI: So, Your Honor, I -- I  
11 think what Delaware has described there when  
12 it's describing money orders is really one  
13 segment of the money order market. I don't  
14 think that it's accurately described the money  
15 order market certainly as it existed in 1974.

16 So Delaware's own sources that are  
17 reproduced in the appendix, for instance, the  
18 American Bankers Association report on money  
19 orders from the late 1950s or the Compton's  
20 Encyclopedia, which is also reproduced in their  
21 appendix, they do discuss money orders, yes, as  
22 a product that was frequently sold in low-dollar  
23 amounts at retailers oftentimes to unbanked  
24 customers. Although, again, low-dollar amounts  
25 and things like that, there is some quibblings

1 over that because, as Judge Leval pointed out,  
2 going back to 1939, Western Union, in fact, sold  
3 money order products denominated up to  
4 approximately \$3500, which, if we adjust for  
5 inflation, is about \$25,000 today, so hardly a  
6 low-dollar instrument.

7 CHIEF JUSTICE ROBERTS: Well --

8 MR. BRONNI: But that --

9 CHIEF JUSTICE ROBERTS: -- what was  
10 the -- what was the value of the -- typical  
11 value of the agent and teller's checks?

12 MR. BRONNI: The -- these products did  
13 not exist in -- these specific products did not  
14 exist in 1974. So teller's checks is a class of  
15 instruments. A traditional teller's check did.  
16 But the instruments that MoneyGram labeled --

17 CHIEF JUSTICE ROBERTS: Wait. I'm  
18 sorry. Did -- I'm -- I slipped -- they didn't  
19 exist in 1974?

20 MR. BRONNI: They -- the MoneyGram  
21 products that we are talking about here today,  
22 correct, did not exist in 1974.

23 But, if I can return to the -- the  
24 distinction about the category of money orders  
25 for a moment, they describe them again -- their

1 sources do describe them oftentimes as low --  
2 low-dollar instruments. But those same sources  
3 also describe money orders as instruments that  
4 were also sold at financial institutions in the  
5 1970s without those low-dollar limits and  
6 obviously weren't aimed primarily at unbanked  
7 customers.

8           So their -- their description of the  
9 category of what constituted a money order in  
10 1974 is simply not accurate even on their own  
11 sources. Yes, they describe one segment of the  
12 market, but that's not the entirety of the  
13 market.

14           Congress did not say personal money  
15 orders or low-dollar money orders. Congress  
16 said money orders. And that category in 1974  
17 included -- instruments sold at financial  
18 institutions, and today the agent check money  
19 order, which operates precisely like the  
20 instruments at issue here yet is only sold at  
21 financial institutions in high-dollar amounts,  
22 primarily to banked customers, they admit that's  
23 a money order. But it lacks all of the things  
24 that they say define what a money order is,  
25 except the label.



1                   So this was Justice Thomas's question.  
2     If you -- their argument is essentially, if you  
3     take the label off, it's no longer a money  
4     order, even if you change nothing about the  
5     instrument. So a -- a good example of this  
6     would be the Western Union example. If Western  
7     Union tomorrow made a decision that it was going  
8     to relabel its Western Union money order as the  
9     "Western Gram," it would be Delaware's position  
10    that that's no longer a similar written  
11    instrument -- or that's no longer a money order.

12                   CHIEF JUSTICE ROBERTS: I -- I -- I  
13    guess I'm not quite sure I understand. Do you  
14    disagree that the agent checks and the teller's  
15    checks are typically, generally, whatever, for  
16    significantly higher value than a traveler's  
17    check?

18                   MR. BRONNI: Just like the agent check  
19    money order could be, Your Honor, because it  
20    doesn't have a limit. So, yes, they are  
21    typically bought in higher amounts, but we don't  
22    think that that's -- that's really a substantive  
23    --

24                   CHIEF JUSTICE ROBERTS: I -- okay.  
25    But that is suggesting that as a distinction.

1 Do you disagree that the agent checks and the  
2 teller checks are typically drawn on existing  
3 accounts while the traveler's checks are not?

4 MR. BRONNI: Again, because they're  
5 bought at financial institutions, people will  
6 oftentimes buy them where they do their banking.  
7 I agree with that. But their -- the "drawn on"  
8 language is -- is not actually correct there.  
9 Instead, what you're doing is you're prepaying  
10 for an instrument. You may deduct the money  
11 from your account, but it's a separate financial  
12 instrument. So it's not like an -- an ordinary  
13 check, for instance, is drawn on your bank  
14 account. These instruments are not drawn on  
15 anybody's bank account.

16 JUSTICE KAGAN: If "money order" is as  
17 broad as you're saying it is, what's left for  
18 "similar instrument"?

19 MR. BRONNI: I -- I think, Your Honor,  
20 when -- when Congress uses phrases like "money  
21 orders," "traveler's checks" and then follows it  
22 by a catch-all, I think what that oftentimes  
23 reflects, as this Court has said, is Congress is  
24 -- is concerned with covering the field and not  
25 leaving any loopholes. So it may very well be

1 that in 1974 there wasn't a product that existed  
2 that wouldn't meet the core definition of what a  
3 money order is.

4 JUSTICE KAGAN: It was just like a "in  
5 case"?

6 MR. BRONNI: I -- I -- I think --

7 JUSTICE KAGAN: Just in case something  
8 comes up or we missed something or whatever?

9 MR. BRONNI: That's one way of looking  
10 at it. The other option is it's to ensure -- if  
11 you accept Delaware's front-line argument, to  
12 ensure that you can't simply change the label on  
13 an instrument and have it be something else.

14 JUSTICE KAGAN: Yeah, but it might be,  
15 right? I mean, I think that this is the -- the  
16 strength of Mr. Katyal's argument, that they  
17 were thinking of something called traveler's  
18 checks, they had used traveler's checks, and  
19 they were thinking of something called money  
20 orders, like the prototypical things that the  
21 Chief Justice was talking about, they had seen  
22 money orders, they had used money orders, and  
23 then they said, "you know, maybe there's some  
24 stuff that functions in the same way that does  
25 pretty much the same thing, that has similar

1 characteristics, whatever the relevant  
2 characteristics are, so we'll put that third  
3 thing in, you know, other similar things."

4           So that seems to me a -- a more likely  
5 way of drafting. It's like you have a  
6 particular product in mind and another  
7 particular product in mind, and then you realize  
8 that there are products you don't know about  
9 that might function in the same way.

10           MR. BRONNI: And that -- that is -- we  
11 don't disagree that that's a possibility for  
12 what happened here. I just think that the way  
13 Congress used the -- when it used the term  
14 "money order" in '73, yes, we might now today  
15 typically think of -- of an instrument that's  
16 sold at a retailer. But the fact is Delaware's  
17 own sources describe money orders as instruments  
18 sold at financial and non-financial institutions  
19 and that did not have low-dollar limits.

20           So I -- I think they are money orders,  
21 as Judge Leval said, under any common ordinary  
22 understanding, but I agree that, at a minimum,  
23 they are certainly similar written instruments  
24 because they operate precisely like the  
25 instruments that we all agree are money orders.

1                   And if I can address briefly one of  
2     the labeling points that I think the -- the  
3     other side made, that -- that they pointed out,  
4     you know, people -- generally, things are  
5     labeled consistent with what you would think  
6     they would be. And I think that's right. You  
7     know, most -- they can't -- they don't identify  
8     another product sold by another institution that  
9     works like these.

10                   And that's because this is basically a  
11     product where money order had a business model  
12     of selling money orders, and it didn't want to  
13     alter the structure of how it does things. So  
14     it -- it put a different label on it and sold it  
15     somewhere else in order to appeal to a different  
16     end of the market without fundamentally altering  
17     the product itself because they still operate  
18     exactly like money orders.

19                   Just like a retail money order, you --  
20     you go in, you -- you prepay for it, you get a  
21     written instrument in response. The -- the  
22     selling financial institution is merely an agent  
23     of MoneyGram. It's not a party to the  
24     instrument. It's an agent of MoneyGram. And  
25     the -- the day after a transaction takes place,

1 it forwards the money to MoneyGram. The selling  
2 financial institution does.

3 At that point, whether we're talking  
4 about their so-called teller's checks or agent  
5 checks, that selling financial institution is  
6 entirely out of the transaction. It has no more  
7 role. That is the same role that Western Union  
8 played on classic money orders in the 1970s.

9 JUSTICE ALITO: Can I mention a -- a  
10 number of different things and ask you to tell  
11 me whether you think they are subject to the  
12 FDA?

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

16 MR. BRONNI: I -- so I would say, it's  
17 -- under our definition, it doesn't meet our  
18 definition of a money order. We have not taken  
19 a position necessarily on whether it's a similar  
20 written instrument, but I -- I think that there  
21 are reasons for believing that it is not  
22 because, again, that is not an instrument that  
23 would present the windfall problem, as Your  
24 Honor framed it.

25 JUSTICE ALITO: And what about a -- a

1 conventional cashier's check or teller's check  
2 issued by a local bank and sold to a bank  
3 customer? Same thing?

4 MR. BRONNI: Yeah, again, Your Honor,  
5 they would typically keep addresses in -- in --  
6 in 1974, certainly, for cashier's checks and  
7 classic teller's checks.

8 If I can briefly just add to that,  
9 because we've talked about teller's checks a  
10 lot, these instruments -- I know I've said this,  
11 but to make clear, these instruments are not  
12 traditional teller's checks. They label them as  
13 teller's checks, but they do not operate like  
14 traditional teller's --

15 So a traditional teller's check as it  
16 existed in the 1970s was an instrument, yes,  
17 signed by a -- a bank officer. They're right  
18 about that part, and they stop reading,  
19 basically, at that point. But the rest of the  
20 definition is a -- signed by a bank officer  
21 drawing on funds of his bank at a -- another  
22 financial institution.

23 The difference with these items is  
24 that's not what's happening here. The -- the  
25 signing officer is not drawing on funds of his

1 own bank anywhere, which also indicates that  
2 they -- they don't even meet the definition of  
3 "bank check."

4 JUSTICE JACKSON: But are they still  
5 viable in the teller's check realm?

6 MR. BRONNI: They -- they -- so there  
7 is some jumbling of the record on this point,  
8 unfortunately, Your Honor, but I think what  
9 Delaware's expert ultimately said is, at most,  
10 they might be secondarily liable. But the --  
11 the ultimate liability with the so-called  
12 teller's check instrument is MoneyGram because  
13 MoneyGram is the issuer.

14 JUSTICE ALITO: How about a prepaid  
15 cash card? Some grandparents always used to  
16 send their grandchildren a MoneyGram -- a  
17 MoneyGram for Christmas. And now they want to  
18 become more modern, so they send them a prepaid  
19 Visa cash card.

20 MR. BRONNI: Not covered either as a  
21 money order or a similar written instrument  
22 because it has to have a named payee, and gift  
23 cards do not have named payees.

24 JUSTICE ALITO: How about a gift  
25 certificate that does have a named payee?



1                   MR. BRONNI: A -- a -- I -- I suppose  
2     it's -- it's possible if that instrument were a  
3     draft. There's not really any record  
4     development on this point, that -- that we could  
5     quibble about that. And I know that there are  
6     some states that do cover instruments like --  
7     that have statutes that would cover escheatment  
8     for instruments like that.

9                   The reason why I'm struggling with  
10    that one is I don't know all the characteristics  
11    of a gift certificate as opposed to a gift card.

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

16                  MR. BRONNI: Well, I -- I think, Your  
17    Honor, that when Congress uses -- to -- to go  
18    back to the language of the statute, when it  
19    says money orders, traveler's checks, or similar  
20    written instruments, it's -- it's referring to  
21    two things that had -- traveler's checks and  
22    money orders that had understandings in 1974  
23    that we can rely on.

24                  And by using that terminology and  
25    using those two instruments as an example, it --

1 other similar written instruments must share  
2 some of those core characteristics of what those  
3 two instruments share. So I think Congress  
4 decided to limit it.

5 I -- I -- one point of agreement is I  
6 think there's -- it -- it's probably true, and  
7 the American Bankers Association says this as  
8 well, if Congress wanted to include cashier's  
9 checks, classic cashier's checks, it probably  
10 would have said that. It knew what that  
11 instrument was. They were well-known  
12 instruments at the time, but they -- they didn't  
13 present the windfall problem because, again,  
14 addresses were kept typically for cashier's  
15 checks just as they are today.

16 JUSTICE BARRETT: I assume that gift  
17 cards don't escheat, even if they fall outside  
18 of the FDA, as you say, they're not subject to  
19 the common law rule of escheat, of -- are they?  
20 So that the -- does anyone get them? I thought  
21 the reason why stores like them is because a lot  
22 of times people don't use them and they just get  
23 to keep the money.

24 MR. BRONNI: I -- I think, Your Honor,  
25 there's been a development over time in the law

1 as states have realized that there are these  
2 things out there that certain states have passed  
3 statutes. I don't believe that all states have,  
4 and I think Arkansas does not have such a  
5 statute, but I think it's just been a  
6 development as these things have become more  
7 popular.

8 JUSTICE GORSUCH: Can I ask you a  
9 question that kind of goes sideways? At -- at  
10 -- at places in your brief, you indicate that  
11 you're after not just a declaration of rights  
12 here under the Disposition Act, but you actually  
13 want money damages for past wrongful takings of  
14 monies you think belong to your states.

15 What -- what is the -- what is the  
16 cause of action that permits that? Is that an  
17 implied cause of action under the Disposition  
18 Act? What -- I'm just curious, if -- if -- if  
19 we were to agree with you, what happens next and  
20 on what theory?

21 MR. BRONNI: So I -- I think it is an  
22 implied cause of action under the statute, but I  
23 would add that we have not litigated the damages  
24 issue or the question, those kinds of arguments  
25 haven't been presented to Judge Leval because

1 the parties agreed to bifurcate the proceedings  
2 here. So we haven't addressed any of the  
3 damages issues.

4 But, as for things -- I know Delaware  
5 discusses in its brief, you know, the -- the  
6 possibility that -- that it could need to repay  
7 this money. But what I would -- I would  
8 highlight is, you know, anytime we're dealing  
9 with unclaimed property, the -- the state is  
10 essentially holding it in trust.

11 It's not the State of Delaware's  
12 money. It's not -- not really our state's  
13 money. We hold it in trust for our -- for  
14 the -- the -- the true owners. So requiring it  
15 to pay that money to the appropriate state which  
16 will hold it in trust for the actual owners,  
17 Delaware really doesn't have any reliance  
18 interest there that would be upset.

19 JUSTICE GORSUCH: But whether there's  
20 an -- such an implied cause of action under the  
21 Disposition Act would be something that the  
22 Special Master would have to resolve after this?

23 MR. BRONNI: For the -- for the  
24 damages issue --

25 JUSTICE GORSUCH: Yeah.

1                   MR. BRONNI:  -- yes, Your Honor, I  
2 think that's something that could be resolved in  
3 there.

4                   JUSTICE GORSUCH:  All right.  All  
5 right.  Thank you.  Thank you.

6                   MR. BRONNI:  There's one other point I  
7 wanted to -- or a couple of points I wanted to  
8 briefly address.  I've -- I mentioned briefly  
9 the bank check thing, but I want to make sure I  
10 -- I -- I make this clear.

11                   You know, Delaware's definition of a  
12 third-party bank check, setting aside whether an  
13 issuer or processor could be a third party in  
14 1974, and it can't for the reasons the experts  
15 explain, but these instruments don't even meet  
16 Delaware's own definition of a bank check.  So  
17 Delaware says that in order to be a third-party  
18 bank check, something must first be a bank  
19 check.

20                   As I mentioned earlier when we were  
21 discussing teller's checks, a -- a -- a bank  
22 check -- and this is -- is really you've only  
23 been offered two sort of reasonable readings of  
24 what that term meant in the 1970s or even today,  
25 one of which I'll call the sort of technical

1 definition.

2           This is at page 37 of their exceptions  
3 where they say that a -- a bank check is an  
4 instrument that's signed by a bank officer, and,  
5 as I said before, they stopped reading at that  
6 point, but it actually says drawing on funds  
7 deposited in the officer's own bank, that's a  
8 classic cashier's check, or drawing on funds of  
9 the officer's bank deposited in another  
10 financial institution. That's a classic or  
11 traditional teller's check.

12           Again, that does not describe these  
13 instruments here. When the bank officer signs,  
14 one, he's signing as an agent of MoneyGram. To  
15 the extent that's not already obvious as a  
16 functional matter, the contracts between  
17 MoneyGram and the financial institutions make  
18 very clear the financial institution is an agent  
19 of MoneyGram.

20           So in -- it doesn't -- there -- these  
21 instruments don't meet that definition because  
22 it's -- it's not signing to draw on any funds  
23 that are in any control of the selling bank.

24           Instead, it's MoneyGram that has the  
25 money, and it's MoneyGram that is responsible

1 for paying the drawee bank or for reporting the  
2 unclaimed property.

3 The other definition of bank check  
4 that you've been given is a broader definition  
5 than that, and it's the -- the definition that  
6 Brady's Law of Bank Checks, which is again  
7 reproduced in Delaware's appendix, gives for  
8 bank checks where it describes a bank check as  
9 both those -- that technical definition that I  
10 just mentioned but also ordinary checks.

11 Or -- in -- in the 1970s going all the  
12 way back until World War I, "bank check" had  
13 been used as a terminology -- used as a term  
14 under Brady's Law of Bank Checks to both mean  
15 those -- those specific instruments issued by  
16 banks but also ordinary checks, and that's part  
17 of why a third-party bank check ultimately, what  
18 that phrase means if we're in the "similar  
19 written instrument" provision, is an ordinary  
20 check.

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

25 Is that -- is that a fair --

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

2 I -- I think that we're --

3 (Laughter.)

4 MR. BRONNI: -- we are -- we are,  
5 however, stuck with -- with two things. We have  
6 to at least try and figure out what the  
7 terminology could have meant using similar  
8 phraseology in the 1970s, and, you know, again,  
9 it -- they've agreed that it has to at least be  
10 a bank check. We're in agreement there.  
11 Something must at least be a bank check, and  
12 these don't meet that definition.

13 But, in -- in -- in terms of what the  
14 entire phrase could have meant, again, you --  
15 this is another example where I think you've  
16 only been offered two realistic options based in  
17 the way similar phraseology was used in the  
18 1970s, neither one of which would describe these  
19 instruments.

20 So Delaware says that a -- that in the  
21 phrase third-party bank check, the third party  
22 refers to an outside issuer or payer.

23 The problem with that is that that's  
24 not the way "third party" is used on a financial  
25 instrument. It wasn't used that way in the



1 1970s. All the experts agreed on that.

2           Instead, when -- when somebody  
3 referred to the third party on a check or third  
4 party in a financial instrument, that  
5 third-party reference was always a reference to  
6 a payee or the party that ultimately got paid on  
7 an instrument.

8           So sometimes, for instance, it was  
9 used like in the twice endorsed check  
10 definition, where a third-party check is a  
11 common enough phrase then and today that it's  
12 actually defined in Black's Law Dictionary as a  
13 twice endorsed check. So the third party on  
14 that instrument is the endorsee, the third party  
15 to the original transaction who is the -- the  
16 payee on that instrument.

17           The other way the phrase third party  
18 and check got used in the 1970s was in the  
19 context of third-party payment services or  
20 third-party services, and there again, the  
21 reference was always to the party that  
22 ultimately got paid, the payee.

23           So a third-party payment service, as  
24 the Hunt Commission explained, but it's not the  
25 only example, is a mechanism whereby a deposit

1 intermediary transfers funds to a third-party  
2 payee, a third-party account holder upon the  
3 orders of the depositor. So, again, there, the  
4 phraseology is used to reference the ultimate  
5 payee.

6 It's never been used and Delaware  
7 doesn't cite a single source where it was used  
8 in the 1970s to refer to an outside issuer or  
9 processor. And what that means is they've  
10 offered a definition that is no way anchored  
11 with the way the terminology was used in the  
12 1970s.

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

17 The thing that is a little concerning  
18 to me is that if it is used to exclude  
19 instruments that function like money orders,  
20 then we're talking about a huge carveout to a  
21 statute that was designed to solve the  
22 inequitable escheatment problem in a way that  
23 doesn't seem technical or minor.

24 MR. BRONNI: That -- I absolutely  
25 agree with that, Your Honor, that Treasury, when

1 it requested this, and it's undisputed, it --  
2 yes, it's legislative history in some sense, but  
3 it's really drafting history. Nobody disputes  
4 that -- that Treasury requested this exception.

5 And Treasury characterized it as a  
6 clarifying amendment that was designed to cure  
7 an ambiguity in the statute, which suggests that  
8 it was -- it was -- it was sort of the -- the  
9 narrow change to the statute to make something  
10 doubly clear.

11 And I think the -- defining a  
12 third-party bank check as an ordinary check  
13 really fits that characterization of a  
14 clarifying amendment and a narrow sort of  
15 belt-and-suspenders approach to make sure that  
16 ordinary checks, which obviously do not present  
17 the windfall problem because, one, we have  
18 addresses because we have account information,  
19 right, but also aren't prepaid.

20 So that -- that is entirely consistent  
21 with that -- that sort of legislative history.

22 JUSTICE KAGAN: I -- I guess they  
23 failed in that endeavor to make things doubly  
24 clear.

25 (Laughter.)

1           MR. BRONNI: I -- well, I -- so the  
2 generous version of this, I think, Your Honor,  
3 is that -- that the way the -- the phraseology  
4 was just sort of used at the time, you know,  
5 we're -- we're sitting here 50 years on and, you  
6 know, banking regulators have their own  
7 terminology, but the -- the thing that I would  
8 emphasize is that, you know, third-party payment  
9 was, in fact, as -- as pointed out in Arkansas's  
10 appendix at 177, so common that The Washington  
11 Post said that a third-party payment today means  
12 essentially a checking account.

13                 So that was ordinary phraseology  
14 that -- that maybe has gone by the wayside, but  
15 it is phraseology that was used at the time.

16                 Unless there are --

17           JUSTICE ALITO: Your argument is that  
18 in 1974 everybody would have known what a  
19 third-party bank check means? I actually do  
20 remember 1974.

21                 (Laughter.)

22           MR. BRONNI: I think banking  
23 regulators might have known what it meant.  
24 Maybe not ordinary people. But --

25           CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Justice Thomas, anything further?

3 JUSTICE THOMAS: Nothing.

4 CHIEF JUSTICE ROBERTS: Justice Alito?

5 JUSTICE SOTOMAYOR: Do you think we do  
6 more harm or less harm if we take the Special  
7 Master's suggestion that we decide this case  
8 with -- without adopting a firm definition of  
9 money order?

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

11 JUSTICE SOTOMAYOR: That's what he  
12 tried to do, correct?

13 MR. BRONNI: Correct. I think, Your  
14 Honor, that -- that Judge Leval's approach made  
15 sense in that, under any ordinary understanding  
16 of the term "money order" as the sources,  
17 Delaware's sources -- again, the ABA report on  
18 money orders from the late 1950s, the Compton's  
19 Encyclopedia define money order. It includes  
20 instruments sold by financial institutions, not  
21 in low-dollar amounts, and it includes  
22 instruments like the agent check money order  
23 here.

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

1 --

2 JUSTICE SOTOMAYOR: You haven't  
3 answered my question.

4 MR. BRONNI: I -- I -- I think that it  
5 -- it meets any ordinary definition. So I -- I  
6 -- I don't think that it does any harm to define  
7 it that way. I know they present -- we started  
8 with a parade of horribles, for instance --

9 JUSTICE SOTOMAYOR: Do we do less  
10 parade of horribles if we define it your way?  
11 Because you take care of cashier's checks and, I  
12 presume, certified checks by calling them a  
13 prepaid -- a prepaid draft, correct?

14 MR. BRONNI: Correct. I -- the reason  
15 why I struggle with this is -- is I think both  
16 things are -- are sort of -- neither one does  
17 that much harm because, again, they're alluding  
18 to this possibility of a parade of horribles,  
19 but they don't point to anything that would  
20 present that -- that parade of horribles. You  
21 know, cashier's checks, even if you --

22 JUSTICE SOTOMAYOR: Well, you waited  
23 how long to sue? They're afraid of all the guys  
24 who are going to come after -- come and sue now.  
25 And they have good reason to worry because, once

1 we write a decision, the world will have the  
2 roadmap.

3 MR. BRONNI: So what I would say to  
4 that, Your Honor, is that -- that at least  
5 outside of the context of this case, I'm not  
6 aware of a situation where anybody -- they  
7 allude, for instance, to private realtors, not  
8 to states having brought suits over cashier's  
9 checks, and even in those cases, nobody that I'm  
10 aware of is arguing that a cashier's check is a  
11 money order. Instead, those cases are all about  
12 the "similar written instruments" clause.

13 But either way, I don't think that our  
14 definition, as I started by saying, necessarily  
15 requires treating them that way. I think  
16 they're well-known instruments. And if -- if  
17 Congress had intended to include them, it  
18 probably would have used that language because  
19 they were well-known instruments at the time and  
20 they just don't fit what Congress describes in  
21 2501 as -- as a money order because they're not  
22 instruments for which addresses weren't kept as  
23 a business practice.

24 JUSTICE SOTOMAYOR: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice Kagan?

1 Justice Gorsuch? No?

2 Justice Barrett?

3 Justice Jackson?

4 JUSTICE JACKSON: One final question.

5 So Justice Kagan pointed out that  
6 Congress might have been intending to cover the  
7 field with this statute. And I guess my  
8 question is, so what -- what is the field? It  
9 seems as though your friend says that really  
10 Congress was worried about no addresses, and, as  
11 a result, large-money instruments wouldn't fit  
12 in the statute because there was an incentive to  
13 have addresses.

14 And I understood you to be focusing on  
15 Congress's be -- concern about inequitable  
16 escheatment, in which case these instruments  
17 would be covered. So can you just, as a final  
18 word here, talk about what the purpose of this  
19 statute is?

20 MR. BRONNI: I -- I -- I -- well, I'll  
21 start with the purpose of the statute is to  
22 address those instruments that presented the  
23 windfall inequity problem associated with the  
24 Court's common law rule.

25 I think what they're suggesting is



1     there would be an incentive to keep addresses  
2     for larger-dollar instruments.  However, this  
3     case is a prime example of that hasn't happened.  
4     These are larger-dollar instruments, and  
5     MoneyGram does not keep addresses.

6             And it's the -- the -- the point here  
7     is that it's the issuer.  It's the party that is  
8     actually responsible for paying these  
9     instruments.  It's the party that holds the  
10    unclaimed property.  And it hasn't kept those --  
11    address information.  So, I mean, to the extent  
12    Delaware's suggesting that that somehow makes a  
13    difference here, the record just doesn't bear  
14    that out.

15            But, again, going back to the -- the  
16    -- the other point about -- you know, Congress's  
17    actual concern was not just the low-dollar  
18    instruments.  Congress's concern was that  
19    requiring addresses to be kept for money orders  
20    as a class of instruments and other similar  
21    written instruments would be an additional  
22    burden that is not justified in light of the  
23    fact that people buy these instruments where  
24    they do their banking.  They buy them in their  
25    home state.

1           So, if you required addresses and all  
2     the burdens that go along with that, it's simply  
3     going to reflect the same place. So what  
4     Congress is saying in 2501 is, to use Learned  
5     Hand's phrase, the game is not worth the candle  
6     here. Congress just decided it was easier just  
7     to have these instruments escheat to the state  
8     of purchase, regardless of what their value  
9     would be.

10           JUSTICE JACKSON: Thank you.

11           CHIEF JUSTICE ROBERTS: Thank you,  
12     counsel.

13           Rebuttal, Mr. Katyal?

14           REBUTTAL ARGUMENT OF NEAL K. KATYAL  
15                           ON BEHALF OF DELAWARE

16           MR. KATYAL: Thank you, Mr. Chief  
17     Justice. Five points.

18           First, as the Chief Justice said, they  
19     can solve this problem easily by saying  
20     MoneyGram has to have the information. The  
21     information's already being collected by the  
22     banks. The only question is closing that  
23     informational hiccup. And that's a lot better,  
24     Justice Sotomayor, than the  
25     instrument-by-instrument litigation that will be

1 invited by their approach.

2 His answer to that was -- to say to  
3 the Chief Justice, was, well, Congress put its  
4 thumb on the scale. They did with respect to  
5 those two instruments. The question in this  
6 case is, did they do so for anything more than  
7 that? And the reasons why Congress isolated  
8 those two instruments don't apply here.

9 The other point is Congress is the  
10 solution to this. Even if you don't think  
11 states will have this easy fix, which I can't  
12 understand to this day why they haven't done it,  
13 but Congress can, of course, do that. That's  
14 what you said in the Delaware case in 1993. If  
15 you're worried about equity concerns, Congress  
16 should fix it. And what did you point to in  
17 that -- in that decision? You literally pointed  
18 to 2503 and said that's the solution if you're  
19 worried about equity concerns.

20 Second, with respect to third-party  
21 banks, my friend says that there's no expert  
22 testimony that supports our position. That's a  
23 misreading of the record. The expert, Ron Mann,  
24 just didn't support our position on the words  
25 "directly liable" back down below. As this case

1 comes to the Court, we agree Professor Mann was  
2 wrong with that.

3 But, with the definition of  
4 "third-party bank check," I think, Mr. Chief  
5 Justice, you said, well, nobody really knows  
6 what it means. We actually think the Hunt  
7 Commission does know what it means, and they  
8 told you what it means in that report, and that  
9 says teller's checks are included.

10 Now my friend says -- this is our  
11 third point -- that cashier's and certified  
12 checks are different. Well, first of all, note  
13 that he doesn't necessarily -- he doesn't  
14 disclaim them. He says, well, we're not  
15 necessarily saying it.

16 There's already litigation about  
17 cashier's checks and certified checks, as the  
18 ABA brief points out. There have been qui tam  
19 lawsuits that have been filed. He says, well,  
20 cashier's checks aren't prepaid. Most cashier's  
21 and certified checks are prepaid. The only ones  
22 that aren't prepaid are the ones in which banks  
23 are paying their own expenses, and our brief  
24 explains why we think those types of checks are  
25 covered under the statute.

1                   Fourth thing, Justice Sotomayor, you  
2   -- you had said -- or, excuse me, Justice --  
3   Justice Jackson, you had said the question in  
4   this case is, what is the field that Congress  
5   occupied? Congress knew exactly how to write  
6   the statute they want. They had the 1966  
7   example. They didn't do that here. They wrote  
8   a much more narrow statute.

9                   And if you define, Justice Jackson, a  
10   money order as anything that transmits money  
11   that is prepaid, you blow up the statute. It  
12   means you can't explain what "traveler's checks"  
13   means. You can't explain what is left for  
14   "other similar written instruments." Everything  
15   would be a money order. Nothing would be  
16   similar to a -- nothing would be similar to it.

17                   And that's why Congress -- we think  
18   you should look to the rationales behind what  
19   Congress did. You pointed to the legislative  
20   history and the Treasury Department, but the  
21   Treasury Department just says essentially that  
22   this is a belt-and-suspenders fix. It doesn't  
23   say that -- it doesn't say that -- that -- that  
24   -- something like teller's checks, which the  
25   Hunt Commission defined as being a third-party

1 payment system, wouldn't be included.

2           And, finally and last, if you adopt  
3 our solution, the common law, it incentivizes  
4 exactly the kind of concerns that Justice Alito  
5 was worried about in Yee. It avoids any  
6 questions about these other instruments, from  
7 gift cards to cashier's checks to bearer's bonds  
8 and the like, and it avoids threatening the  
9 common law primary rule because a primary rule  
10 is creditor addresses. And, Justice Thomas,  
11 your opinion in Delaware said that has  
12 venerable, old roots going all the way back to  
13 Old England.

14           If they win, forget about place of  
15 incorporation. If they win, the primary rule of  
16 the FDA will control, which is to move away from  
17 last creditors' addresses. That is something  
18 that there has been zero support that my friend  
19 has offered on the other side for, and that's  
20 why that old presumption that you read statutes  
21 to avoid derogation of the common law has  
22 special force here.

23           We don't doubt, can you read the  
24 statute the way my friend does? You can. But,  
25 if you do so, it doesn't make sense of the

1 statute and threatens all sorts of other  
2 financial instruments. And as the ABA says,  
3 that's something you should be really, really  
4 concerned about in this unique area,  
5 particularly because, as Justice Sotomayor  
6 points out, this litigation can go all the way  
7 back to 1974 and unwind not just the two  
8 disputed instruments here but every other  
9 financial instrument.

10           The safe thing to do is what you've  
11 done in case after case, which is to say, if  
12 we're concerned about equity, that's something  
13 for Congress. It's something for the states.  
14 It's not for this Court.

15           CHIEF JUSTICE ROBERTS: Thank you,  
16 counsel. The case is submitted.

17           (Whereupon, at 1:02 p.m., the case was  
18 submitted.)

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