No. 03 918 DEC 22 2003

IN THE

Supreme Court of the United States

CHEVY CHASE BANK, F.S.B., ET AL.,
Petitioners,

v.

DALE WELLS, ET AL.
Respondents.

On Petition for a Writ of Certiorari to the Maryland Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

MICHAEL A. CARVIN
Counsel of Record
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

DAVID J. CYNAMON
GERARD M. BABENDREIER
ERICA S. SIMPSON
SHAW PITTMAN LLP
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000

Counsel for Petitioners

December 22, 2003

QUESTION PRESENTED

Where the federal government has occupied the field, can a state court interpret a standard contractual choice-of-law provision to impose otherwise preempted state law on the contracting parties?

LIST OF PARTIES

1. Chevy Chase Bank, F.S.B. and Bank One Delaware, N.A. (formerly First USA Bank, N.A.) are the petitioners in this Court, defendants in the Circuit Court for Baltimore City, Maryland and were appellees in the Maryland Court of Appeals.

2. Dale Wells, Sharon Goldenberg and John Dovel are the respondents in this Court, plaintiffs in the Circuit Court for Baltimore City, Maryland and were appellants in the Maryland Court of Appeals.

CORPORATE DISCLOSURE STATEMENT

Petitioners provide the following corporate disclosures pursuant to Supreme Court Rule 29.6:

1. Chevy Chase Bank, F.S.B. states that 80% of its stock is owned by the B.F. Saul Real Estate Investment Trust. No other publicly-held corporation owns 10% or more of its stock.

2. Bank One Delaware, N.A. states that it is a wholly-owned subsidiary of Bank One Corporation.

TABLE OF CONTENTS

TABLE OF CONTENTS—*continued*

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—*continued*

Constitutional and Statutory Provisions

TABLE OF AUTHORITIES—*continued*

Federal Regulations

PETITION FOR A WRIT OF CERTIORARI

Chevy Chase Bank, F.S.B. ("Chevy Chase") and Bank One Delaware, N.A. hereby petition for a writ of certiorari to review the judgment of the Maryland Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Maryland Court of Appeals (App. 1a-43a) is reported at 377 Md. 197, 832 A.2d 812 (2003). The opinion and order of the Circuit Court for Baltimore City, Maryland (App. 44a-52a) is unreported.

JURISDICTION

The judgment of the Maryland Court of Appeals was entered on September 23, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (2003).

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED

The constitutional provision, statutes and regulations involved are Art. VI, cl. 2 of the United States Constitution; Section 5(a) of the Home Owners' Loan Act, 12 U.S.C. § 1464(a) (2003); 12 C.F.R. § 560.2 (2003); and Title 12, Subtitle 9 of the Maryland Commercial Law Article, MD. CODE ANN., COM. LAW §§ 12-901 *et seq.* (2002) (hereafter "Subtitle 9"). They are reproduced in Appendix C. (App. 53a-100a.)

STATEMENT OF THE CASE

1. *Introduction.* The Office of Thrift Supervision ("OTS") "occupies the entire field of lending regulation for federal savings associations." 12 C.F.R. § 560.2(a). (App. 54a.) *See also* 12 U.S.C. § 1464(a). (App. 53a-54a.) The express purpose of OTS's occupation of the field is "[t]o enhance the safety and soundness and to enable federal savings associations to conduct their operations in accordance with best practices (by efficiently delivering low-cost credit to the

public free from undue regulatory duplication and burden)." 12 C.F.R. § 560.2(a). (App. 54a.) OTS's field preemption regulations specifically preempt, among other things, state laws, such as Maryland's Subtitle 9, that require disclosures of certain information in credit-related documents. 12 C.F.R. § 560.2(b). (App. 55a-56a.)

In the case below, the Maryland Court of Appeals held that, notwithstanding OTS's field preemption of state lending laws governing federal savings associations, Subtitle 9 could be imposed on a federal lender simply because that state law is referred to in the choice-of-law provision in the lender's contract with its credit cardholders. The court's decision directly conflicts with the decisions of this Court and every other federal court that has considered the issue, as well as with the position of OTS itself. Moreover, the Court of Appeals' decision creates a dangerous precedent for other state courts to undermine the federal government's occupation of the field not only in the regulation of federal lenders but in any area in which ubiquitous contractual choice-of-law provisions could be "interpreted" to override preemptive federal law.

2. *Statement of Facts.* This case arose from a lawsuit on behalf of former credit cardholders of Chevy Chase, a federal savings association. The Cardholder Agreement embodying the terms of the credit card contract between Chevy Chase and its customers contained a change-in-terms provision that permitted Chevy Chase to "amend the terms of [the] Agreement in accordance with applicable law at any time." (App. 46a.) The Cardholder Agreement also contained a choice-of-law provision, entitled "Governing Law," which defined the "governing law" of the contract as "Subtitle 9 of

Title 12 of the Commercial Law Article of the Maryland Annotated Code and applicable federal laws." (App 47a.)[1]

On January 16, 1996, Chevy Chase, with the approval of OTS, relocated its "home office," as defined by applicable federal regulations, from Maryland to Virginia. (App. 4a.) In connection with that relocation, Chevy Chase amended the choice-of-law provision to provide that the Cardholder Agreement "is subject to and governed by Virginia law and applicable federal laws and regulations." *Id.* Chevy Chase subsequently amended other provisions of the Cardholder Agreement, including finance charges and other fees. (App. 4a-5a.) Notice of the amendments was provided in

[1] The choice-of-law provision referred to Subtitle 9, rather than Maryland law generally, because Maryland maintains several different usury laws potentially applicable to lenders. Unlike most states that do so, Maryland specifically requires lenders to designate the "new" and more flexible usury laws (of which Subtitle 9 is a part) in writing in their credit agreements in order to avoid being subjected to the more restrictive provisions of the "old" usury laws set forth in Subtitle 3 of Title 12 of the Maryland Commercial Law Article and elsewhere. *See* MD. CODE ANN., COM. LAW § 12-913.1 (2002). Thus, Chevy Chase needed to designate Subtitle 9 as the governing *state* law in order to ensure that it would govern any aspect of the Cardholder Agreement that might not be governed by preemptive federal law, and in order to obtain maximum flexibility with respect to interest rates and related charges, as to which federal regulations look to state law. *See* 12 U.S.C. § 1463(g) (2003); 12 C.F.R. § 560.110(b) (2003) (authorizing federal savings institutions to "export" the "most favored lender" interest rate and charges of the state in which they are located).

accordance with the Truth-in-Lending Act ("TILA"), which is the applicable law pursuant to OTS regulations. *See Lending & Investment*, 61 Fed. Reg. 50951, 50965-66 (Sept. 30, 1996).

3. *The Proceedings Below.* The three named plaintiffs in the case below continued to use their credit cards subject to the amended terms and conditions without protest or objection for three years. On January 15, 1999, one day short of the applicable statute of limitations, they commenced this action in the Circuit Court for Baltimore City, Maryland, against Chevy Chase and Bank One Delaware, N.A., which had purchased Chevy Chase's credit card business in 1998. (App. 5a.) The complaint alleges that Chevy Chase breached the Cardholder Agreement and committed unfair and deceptive trade practices when it amended the Cardholder Agreement in 1996, because Chevy Chase allegedly failed to give notice of the amendments in accordance with the provisions of Subtitle 9, which impose disclosure requirements beyond those required by TILA. (App. 5a-6a.)

Chevy Chase moved to dismiss the complaint on the ground that Subtitle 9 was preempted by federal law. Plaintiffs acknowledged that fact but contended that Chevy Chase had obligated itself to follow the notice provisions of Subtitle 9 by referring to that statute in the choice-of-law provision of the Cardholder Agreement. (App. 45a-46a.)

The circuit court granted Chevy Chase's motion, characterizing plaintiffs' argument as "both ingenious, and a trifle disingenuous." (App. 51a.) The court noted, "It seems both implausible and inconsistent with federal preemption to claim that a state regulatory scheme was agreed to between the parties by a mere reference to Subtitle 9 [in the choice-of-law clause]." *Id.* The court explained that "[the parties] could not waive federal preemption and could only have intended that state law apply as 'governing law' should 'federal law' not apply." (App. 52a.)

Plaintiffs sought review of this decision in the Maryland Court of Appeals. Initially, the Court of Appeals denied plaintiffs' petition for a writ of certiorari. Subsequently, however, the court granted certiorari on its own initiative, and reversed the circuit court in a 6-1 decision. (App. 1a-43a.)

The Court of Appeals necessarily acknowledged that OTS has occupied the field and that Subtitle 9 is therefore preempted. (App. 19a-21a.) The court nonetheless held that, because the choice-of-law provision in the Cardholder Agreement refers to state law, that provision could be interpreted to mean that Chevy Chase had contractually obligated itself to comply with the notice provisions of the otherwise preempted state law. (App. 22a-42a.) In reaching that conclusion, the court relied heavily on this Court's decision in *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), which held that express contractual obligations are not preempted by federal law. (App. 24a-29a.) The Court of Appeals concluded, therefore, that the mere reference to Subtitle 9 in the choice-of-law provision could be interpreted as an incorporation by reference of all of the terms of Subtitle 9 as express contractual obligations. (App. 38a-42a.)

While *Wolens* did not involve the question presented in this case – whether a contractual choice-of-law provision can ever be read as an election by the contracting parties to override preemptive federal law – the court below distinguished another decision of this Court that addressed this precise issue and definitively answered it in the negative. *Fid. Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141 (1982) ("*Fidelity*"). The Court of Appeals erroneously read *Fidelity* as applying only to cases where the chosen state law is in direct conflict with federal law. (App. 35a-36a.) The court similarly purported to distinguish the subsequent decisions of lower federal courts that uniformly hold that a choice-of-law provision cannot be interpreted to allow the application of preempted state law instead of preemptive federal law. (App. 36a-38a.)

In view of its holding that plaintiffs' breach of contract claims based on Subtitle 9 were not preempted, the court remanded the case to the circuit court to determine, pursuant to state law canons of contract construction, whether the Cardholder Agreement obligated Chevy Chase to follow the notice requirements of Subtitle 9. (App. 42a.)

REASONS FOR GRANTING THE PETITION

The decision below flatly contradicts this Court's decision in *Fidelity*, 458 U.S. 141, and the uniform decisions of the lower federal courts that a contractual choice-of-law provision cannot be read to "choose" a designated state's laws over preemptive federal law. Those decisions are based on the fundamental principle, enunciated by this Court in *Fidelity*, that pursuant to the Supremacy Clause, Art. VI, cl. 2, "the Constitution, laws and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution." 458 U.S. at 157. Thus, while a contractual choice-of-law provision can designate which state law will govern the parties' agreement (since none is superior to the other), the parties cannot elect to impose a subordinate state law in favor of superior federal law. Since the Maryland Court of Appeals' decision, if left in place, will create both confusion and a sweeping exception to this heretofore well-established principle of federal preemption, this Court should grant review.

It takes little imagination to recognize the destructive effect the decision below will have on OTS's effort to establish consistent regulation of the lending operations of federal savings associations. Under the decision below, all it takes for a concededly preempted "consumer protection" state law to be applied to a federal lending institution is a choice-of-law provision that refers to state law. Because choice-of-law provisions are virtually universal in credit and loan agreements, all of these state laws will be revived, even though they were preempted precisely because OTS believed

federal savings institutions should not be "subject to a hodge-podge of conflicting and overlapping state lending requirements." 61 Fed. Reg. 50951, 50965. Although the federal courts have consistently rejected this result, this is the first decision of a state's highest court on the subject. As such, it provides a roadmap for all other state courts to subject federal savings institutions to inconsistent and onerous state law regulation through the back door of "contract interpretation." Needless to say, states have a vested and well-documented interest in bringing federal savings institutions within their regulatory ambit, thereby significantly undermining the uniform, national regulatory scheme that OTS has established to promote the safety and soundness of those institutions.

Nor will this abrogation of well-settled preemption principles be limited to federal savings or other financial institutions. Because choice-of-law provisions are common in all types of commercial contracts, the decision below will be used to reassert state law through the back door in other areas of regulation, such as the Employment Retirement Income Security Act, 29 U.S.C. § 1144(a) (2003) ("ERISA"), in which the federal government has occupied the field. This Court should not condone the lower court's transparent effort to undermine the careful balance struck by federal regulators through its impermissible manipulation of "contract interpretation" principles.

I. THE DECISION BELOW DIRECTLY CONFLICTS WITH THE UNIFORM DECISIONS OF THIS COURT, OTHER FEDERAL COURTS AND OTS

Until the court below issued its decision, every court that has considered this issue, including this Court, held that a contractual choice-of-law provision cannot be read to override preemptive federal law. In *Fidelity*, this Court struck down a California state law prohibiting due-on-sale clauses in mortgage agreements on the ground that it was preempted by

federal regulations that permitted such clauses. (A due-on-sale clause allows the lender to declare the entire balance of a loan immediately payable when the property securing the loan is sold, and OTS's predecessor had authorized federal savings associations to include such clauses in their loan contracts.) 458 U.S. at 145-46. The plaintiffs in that case argued that, notwithstanding preemptive federal law, the more restrictive state law should apply because the governing law provisions of the loan documents in question provided that they would be "governed by the law of the jurisdiction in which the Property is located." *Id.* at 148. Unlike Chevy Chase's Cardholder Agreement, which explicitly referred to federal law as well as Maryland's Subtitle 9, the governing law provisions in *Fidelity* did not even mention federal law.

Nonetheless, this Court held that "the incorporation of state law does not signify the inapplicability of federal law, for a 'fundamental principle in our system of complex national polity' mandates that 'the Constitution, laws and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution.'" *Id.* at 157 (quoting *Hauenstein v. Lynham*, 100 U.S. 483, 490 (1880)). The Court therefore rejected the plaintiffs' argument that the choice-of-law provision meant that the parties to the contract agreed to be bound by the restrictive state law. The Court noted in this regard that "the 'law of the jurisdiction' includes federal as well as state law." *Id.* at 157 n.12. The Court also pointed out that the purpose of the contractual reference to local law was "not to elevate state law over federal law, but to provide a uniform choice-of-law provision to be used when interstate disputes arose regarding the interpretation of a mortgage." *Id.*

In short, both because private parties are obviously powerless to elevate state law over federal law and because state law necessarily incorporates federal law, reference to state law in a choice-of-law provision cannot be interpreted as a promise to be bound by otherwise preempted state law. This prudent rule, of course, also avoids presenting lending

institutions with the Hobson's Choice of either foregoing choice-of-law provisions or having a state court subsequently "interpret" these provisions to expose them to the host of consumer protection laws that federal regulators have deemed unduly burdensome or otherwise inconsistent with the national regulatory scheme. Perhaps most important, the *Fidelity* rule avoids the undermining of the distinct regulatory balance struck by federal regulators that would result from indirectly exposing federally regulated institutions to a patchwork of non-uniform and conflicting state laws.

To be sure, federal lending institutions, like all contracting parties, can *directly* promise to provide consumers with benefits in addition to those required by federal law and of the sort mandated by preempted state law. Thus, the savings association in *Fidelity* could have promised that the balance of the loan would not be due when the securing property was sold, or Chevy Chase could have promised to provide cardholders with notice in addition to that required by TILA. This simply reflects the fact that contracting parties may promise anything not prohibited by law and that a court can enforce such voluntarily undertaken contractual obligations without disrupting the federal regulatory scheme. This Court's decision in *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995) makes this obvious point.

In *Wolens*, this Court held that the Airline Deregulation Act ("ADA"), which preempts state laws purporting to regulate airlines' rates, routes or services, precluded private claims against the airline based on state consumer protection laws. *Id.* at 226-28. The Court nevertheless allowed claims seeking to enforce "self imposed undertakings" expressly promised in the "contract terms" by the airline, because the "terms and conditions airlines offer and passengers accept are privately-ordered obligations," which can be enforced like other voluntarily offered consideration for a contract. *Id.* at 228. The Court thus distinguished between claims seeking to enforce express promises contained within the four corners of

the contract, which are not preempted, and claims that involve "enlargement or enhancement based on state laws or policies external to the agreement," which are preempted. *Id.* at 233.

Thus, *Wolens* and *Fidelity* set forth a quite straightforward preemption principle. While companies subject to extensive federal regulation may voluntarily undertake to commit themselves to actions not required by federal law (or putatively required by preempted state law), a contractual choice-of-law provision stating that a particular state's law governs cannot be interpreted as a commitment by the promisor to abide by such preempted state law. This "distinction between what the State dictates and what the [promisor] itself undertakes confines courts, in breach-of-contracts actions, to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement." *Wolens*, 513 U.S. at 233.

The Maryland Court of Appeals – alone among lower courts – flipped this straightforward rule on its head by concluding that a choice-of-law provision referencing state law is *equivalent* to an express agreement to voluntarily undertake to do all that is required by the preempted state law. In this regard, the court below contemptuously stated that the distinction set forth in *Wolens* – between contractual obligations contained directly in the agreement and state laws external to the agreement – "make[s] absolutely no sense"

because it "fails to distinguish between the preemption issue and the contract interpretation issue." (App. 39a.)[2] But, of course, it is the Maryland Court of Appeals that mangles both contract interpretation and preemption doctrine by invoking the plainly inapposite *Wolens* rule that applies to specific promises in the document, rather than the obviously controlling *Fidelity* rule that applies to choice-of-law provisions that reference state law external to the agreement. The Court of Appeals' fundamental error is in stark conflict with the uniform view of the lower federal courts and OTS's own interpretation of the preemptive force of its field preemption regulation.

---

[2] In this regard, the court reasoned that the issue of whether a choice-of-law provision may incorporate external state policies is "a question of state law" and thus, apparently, immune from this Court's rulings specifying which contractual language can form the basis for a contractual challenge to enforce preempted state law. (App. 39a.) Incredibly, to support this facially erroneous result, the court relied on a series of cases that in no way suggest that the requirements of a preempted state law can become private contractual rights merely because the state law is mentioned in a choice-of-law provision. Indeed, the cases relied on expressly hold that, under *Wolens*, the contractual provisions were "preempted by the ADA" because they sought to "impose common law principles and policies on the agreement between the two parties . . . ." *Breitling USA, Inc. v. Fed. Express Corp.*, 45 F. Supp. 2d 179, 183-84 (D. Conn. 1999) (quoted at App. 40a). *See also Smith v. Comair, Inc.*, 134 F.3d 254, 258 (4th Cir. 1998) (holding contract claim was "preempted under the ADA" because plaintiff's "contract claim can only be adjudicated by reference to law and policies external to the parties' bargain") (also quoted at App. 40a).

For example, in *Atkinson v. General Electric Credit Corp.*, 866 F.2d 396 (11th Cir.), *cert. denied*, 493 U.S. 815 (1989), the Eleventh Circuit found that the plaintiff's usury claim under Georgia law was preempted because the loan contract at issue complied with the requirements of governing federal regulations. 866 F.2d at 397, 399. The loan agreement specified that the governing law was the law of Georgia, with no reference to federal law. Applying the principle set forth in *Fidelity*, however, the court held that the governing law provision could mean only that Georgia state law would govern matters not controlled by preemptive federal law. *Atkinson*, 866 F.2d at 398. *See also Brown v. Investors Mortgage Co.*, 121 F.3d 472, 476 (9th Cir. 1997) (holding that provision stating that loan "shall be governed by the laws of the State of Washington" did not waive lender's federal preemption defense); *Fantastic Fakes, Inc. v. Pickwick Int'l, Inc.*, 661 F.2d 479, 483 (5th Cir. 1981) (holding that contractual choice-of-law provision "merely designates the state whose law is to be applied to the extent its use is not preempted by nor contrary to the policies of" federal copyright law). As the court explained in *Jones v. United States Fidelity & Guaranty Co.*, Civ. A. No. 90-5005, 1992 U.S. Dist. LEXIS 12303, at *10 (E.D. La. Aug. 5, 1992), "the purpose of a choice-of-law provision in a contract is to ensure that the law of State A, as opposed to State B, will govern the contract. The parties may not use a choice-of-law provision to provide that state law, instead of federal law, will apply to a federal question."

All of these cases recognize that where the federal government has chosen to regulate a particular activity or field, as it has done with respect to the lending activities of federal savings banks like Chevy Chase, neither states nor private parties can elect to ignore such federal law in favor of preempted state law, because state law necessarily incorporates the preemptive federal scheme.

Thus, in analyzing the effect of a choice-of-law provision in an arbitration agreement, the Third Circuit differentiated between what it called "horizontal" choice-of-law – "whether the laws of State X or State Y supply the relevant rule of decision" – and "vertical" choice-of-law: "whether the rule of decision is supplied by the laws of State X or by federal law." *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 293-94 (3d Cir.), *cert. denied*, 534 U.S. 1020 (2001). On the latter choice, the court explained:

> Judge-made choice-of-law doctrines (and, accordingly, attempts by contracting parties to influence their application with choice-of-law clauses) have no applicability to answering this question because the relevant rule is supplied by the Constitution itself: a valid federal law preempts any state law purporting to regulate the same issue. *See* U.S. Const. Art. VI.

Id. at 293-94. In other words, the Supremacy Clause precludes courts from ruling that parties have elected state law over preemptive federal law by means of a contractual choice-of-law provision.

Similarly, in *Fantastic Fakes, Inc.*, 661 F.2d 479, the Fifth Circuit specifically considered whether a choice-of-law provision in a copyright license that designated Georgia law meant that such state law would supersede rights and obligations created by federal copyright law. *See id.* at 482-83. The court held that the choice-of-law provision could not be read in that fashion because preemptive federal law cannot be nullified by state law. *Id.* at 483. Accordingly, the court held that the choice-of-law provision could be read only to mean that Georgia law applied to the extent not otherwise preempted by federal law. *Id. See also Atkinson*, 866 F.2d at 398.

OTS itself has reached the same conclusion. In an opinion letter issued just two weeks after the decision below, OTS

stated that "reference to federal law and state law in a choice-of-law provision includes the preemptive effect of federal law" and does not obligate the lender to follow the preempted New York state law. OTS Opinion Letter P-2003-7 (Oct. 6, 2003). (App. 101a-108a.) Citing *Fidelity*, OTS explained that the reference to state law in the choice-of-law provision "does not nullify or negate the preemptive effect of federal law." (App. 106a.) Accordingly, OTS opined that the lender was not obligated to pay interest on escrow accounts, which is required by New York law but not by federal law.[3]

The court below attempted to evade the clear conflict with *Fidelity* and the lower federal courts' interpretation of it by "distinguishing" these cases on facially erroneous grounds that merely confirm the court's fundamental misunderstanding of the controlling law. The court below claimed that *Fidelity* was different than the instant case because *Fidelity* involved a "direct conflict between federal regulations permitting due-on-sale clauses in mortgage agreements and restrictions placed by the California Supreme Court on the exercise of the clauses." (App. 36a.)[4] But this

---

[3] OTS's interpretation and application of its own field preemption regulations is, of course, entitled to substantial deference. *See Lyng v. Payne*, 476 U.S. 926, 939 (1986); *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

[4] In a similar vein, the Court of Appeals mistakenly concluded that there is no conflict between the notice requirements of TILA and the notice requirements of Subtitle 9 because TILA does not preempt state disclosure laws. (App. 35a-36a.) The court failed to take into account that because OTS has occupied the field of lending regulation, including regulation of disclosures, TILA effectively becomes the applicable disclosure standard for federal savings associations and, insofar as they are concerned, preempts state

Footnote continued on next page

purported distinction is both factually inaccurate and legally erroneous. First, the conflict here is precisely the *same* as the *Fidelity* conflict. In neither *Fidelity* nor the instant case did state law prohibit what federal law *required*. As this Court noted, federal law permitted, but did not require, the due-on-sale clauses allegedly proscribed by state law. *Fidelity*, 458 U.S. at 155. Here, federal regulations permitted, but did not require, Chevy Chase to give notice of amendments to its cardholders that are prohibited as insufficient under Maryland's Subtitle 9. In both cases, then, state law is preempted because it prohibits what federal law *allows* and therefore creates an "obstacle to the accomplishment and execution of the full purposes and objectives" of the federal government. *Fidelity*, 458 U.S. at 156 (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)). *See also, Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 31 (1996). Indeed, this is undisputed, since, as respondents conceded and the Court of Appeals held, Maryland's "Subtitle 9 is preempted" because it imposes "additional requirements [on] a credit agreement with a federal savings association" and thus is "inconsistent with OTS's expressed intention to 'occupy the entire field of lending regulation for federal

---

Footnote continued from previous page
disclosure laws. *See Bank of Am. v. City & County of San Francisco*, 309 F.3d 551, 565-66 (9th Cir. 2002) (anti-preemption provision of Electronic Fund Transfer Act does not preserve state or local laws preempted by the Home Owners' Loan Act). OTS made this point explicitly in promulgating its field preemption regulations. *See* 61 Fed. Reg. 50951, 50965-66. Yet the Court of Appeals either ignored or did not understand this basic fact. (App. 35a-36a.)

savings associations.'" (App. 21a.)[5] Thus, as in *Fidelity*, the restrictions placed by the Maryland Court of Appeals on the notice provided by Chevy Chase – through interpretation of a choice-of-law provision – is in direct conflict with federally *authorized* activity. (App. 36a.)

In any event, it is legally irrelevant whether state law is preempted because it directly conflicts with federal law or because the federal government has occupied the field. In either case, the preemptive federal law is incorporated into state law and thus, under *Fidelity*, a choice of Maryland law necessarily incorporates the preemptive federal law. Thus, the kind or source of federal preemption is utterly immaterial to the question of whether a choice-of-law provision may incorporate federal law. Consequently, the lower court's interpretation of *Fidelity* as disapproving only those choice-of-law provisions where the promisor binds itself to a state law that affirmatively *violates* a "conflicting federal law" is clearly without merit. (App. 35a.) Indeed, so interpreting *Fidelity* would nonsensically reduce it to reflect nothing more than the basic contract law principle that a promise to perform an illegal act is unenforceable.

---

[5] This conclusion simply recognizes the obvious point that Subtitle 9 is preempted because OTS occupies the entire field of regulation of the lending operations of federal lenders, "leaving no room for the States to supplement federal law." *N.W. Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 509 (1989). *See also Cal. v. ARC Am. Corp.*, 490 U.S. 93, 100 (1989) (state laws are preempted either when they conflict with federal law or when the federal government has occupied the field); *La. Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 368-69 (1986) (states may not regulate where Congress or a federal agency acting within the scope of its delegated authority has occupied the field).

For the same reason, the Court of Appeals' attempt to distinguish *Jones* is unavailing. The decision below stated that *Jones* was "inapposite" because it involved ERISA, "a 'deliberately expansive' statute designed to make regulation of employee benefit plans an exclusively federal concern." (App. 38a (quoting *Jones*, 1992 U.S. Dist. LEXIS 12303, at *7).) Again, this does not factually distinguish the instant case because OTS, pursuant to broad statutory authorization, has likewise promulgated "deliberately expansive" regulations designed to make lending regulation of federal savings institutions "an exclusively federal concern." And, again, there is no legal significance to this "distinction" because it is conceded that Subtitle 9 is preempted by the OTS regulation, and *Fidelity* applies to all preempted laws, without regard to how they are preempted.

The lower court's efforts to distinguish other squarely conflicting cases were similarly meritless. *Fantastic Fakes* and *Roadway Package System* were "distinguished" on the ground that they did not involve "preemption," but rather "contract interpretation." (App. 37a.) As established above, however, both cases squarely held that a choice-of-law provision *could not* be "interpreted" to mean that a subordinate state law was elected over a superior federal law – reasoning that is irreconcilable with the result reached by the Maryland Court of Appeals.

Moreover, for the reasons already indicated, *Wolens* provides no support for the decision below.[6] Neither *Wolens* nor any of the other cases cited by the court below even suggests that the requirements of a preempted state law can become private contractual undertakings merely because the

[6] The cases applying *Wolens* have recognized that its exception to the preemptive effect of federal law "is a narrow one." *Breitling*, 45 F. Supp. 2d at 184.

state law is mentioned in a choice-of-law provision. (App. 29a.)[7] *Wolens* teaches only that, if Chevy Chase had voluntarily included specific provisions in the Cardholder Agreement promising to give notice of amendments to the Agreement in a manner not required by federal law, such express contractual obligations could be enforced without regard to preemption. But Chevy Chase did not do so. The supposed contractual notice requirements that the plaintiffs seek to impose on Chevy Chase can be found only by looking *outside* of the contract to Subtitle 9 and importing that preempted law's requirements into the Cardholder Agreement

---

[7] *See Volt Info. Scis. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989) (Federal Arbitration Act does not preempt state procedures governing the conduct of arbitration proceedings, and therefore parties may contract to apply state rules and procedures to such proceedings); *Ass'n of Int'l Auto. Mfrs. v. Comm'r, Mass. Dep't of Envtl. Prot.*, 208 F.3d 1 (1st Cir. 2000) (Massachusetts emission standards are preempted by federal Clean Air Act and were not embodied in any independent contractual obligations); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) (express terms and conditions of contract are not preempted by the federal Copyright Act); *Cent. States S.E. & S.W. Areas Health & Welfare Fund v. Pathology Labs.*, 71 F.3d 1251 (7th Cir. 1995), *cert. denied*, 517 U.S. 1233 (1996) (ERISA did not preempt bills for medical services that were not covered by welfare benefit plan). The remaining cases cited by the lower court hold simply that express contractual warranty claims are not preempted by federal law. *See Martin v. Ford Motor Co.*, 914 F. Supp. 1449 (S.D. Tex. 1996); *Kawamata Farms, Inc. v. United Agric. Prods.*, 948 P.2d 1055 (Haw. 1997); *Wallace v. Parks Corp.*, 629 N.Y.S.2d 570 (App. Div. 1995).

by means of the choice-of-law provision. Such an endeavor is exactly what *Wolens* (and *Fidelity*) prohibits. 513 U.S. at 233.

In short, *Wolens* in no way suggests that the mention of Subtitle 9 in the "Governing Law" provision of the Cardholder Agreement could represent an incorporation by reference of that law's requirements as private contractual undertakings. (App. 38a-40a.) In fact, *Fidelity* and the uniform line of lower federal authorities subsequent to *Fidelity* emphatically state that the Supremacy Clause prohibits such an interpretation.

In sum, the Maryland Court of Appeals' decision not only conflicts directly with *Fidelity* and the decisions of other federal courts; it misapplies *Wolens* in a way that is likely to create mischief and confusion, particularly among the state courts, about the proper application of the Supremacy Clause in contract cases. This Court should grant certiorari in order to eliminate the conflict and to restore order in a previously settled area.

II. THE DECISION BELOW WILL SUBVERT UNIFORM OTS REGULATION OF FEDERAL LENDERS AND WILL UNDERMINE PREEMPTION IN OTHER AREAS IN WHICH THE FEDERAL GOVERNMENT HAS OCCUPIED THE FIELD

The decision below, although manifestly erroneous, cannot be disregarded as the isolated product of a lower federal or state court. Rather, it is a detailed pronouncement by the highest court of the State of Maryland, and the first decision on this issue by the highest court of any state. Choice-of-law provisions exist in virtually every consumer and commercial contract. *See Roadway Package Sys.*, 257 F.3d at 292. Pursuant to the opinion below, any such contract between a federal lender and its customers could be interpreted pursuant to state law contract principles to mean that the lender has obligated itself to comply with otherwise preempted state law.

Thus, unless it is promptly reversed, the decision will serve as precedent for other states to impose their regulatory and consumer protection laws on federal lenders, regardless of OTS's uniform national regulatory scheme. OTS's regulatory scheme would have little vitality in such circumstances.[8]

The Maryland court's decision is particularly damaging because it turns the OTS regulations on their head. Those regulations contain a "savings clause," which preserves basic state "contract and commercial laws" to the extent such laws "only *incidentally* affect the lending operations of federal savings institutions." 12 C.F.R. § 560.2(c) (emphasis added). (App. 56a.) The "savings clause" merely reflects that federal savings institutions are not immune from the basic infrastructure of generally applicable laws, such as state uniform commercial codes and tort laws, that underlie commercial transactions. *See* 61 Fed. Reg. 50951, 50966. It obviously does not provide a basis for interpreting a choice-of-law provision to incorporate concededly preempted state laws that *directly and substantially* affect lending operations. *See id.* Not only does *Fidelity* preclude such "contract interpretation" as a general matter, but OTS, as noted, has

---

[8] Nor can the effect of the decision be minimized simply because the Court of Appeals did not finally decide the contract interpretation question but rather remanded the case to the trial court to determine whether the Cardholder Agreement obligated Chevy Chase to follow the notice provisions of Subtitle 9. (App. 42a.) The mischief results from the Court of Appeals' holding that a choice-of-law provision *can* be interpreted to nullify preemptive federal law. Once that proposition is accepted, state courts can ignore the Supremacy Clause and apply state law contract principles to convert preempted state law into private contractual obligations.

expressly confirmed that its regulations *do* preempt any such application of choice-of-law provisions to revive preempted "consumer protection" statutes. Any potential ambiguity in this regard was eliminated by what OTS stated in promulgating this provision:

> OTS wishes to make clear that the purpose of paragraph (c) is to preserve the basic infrastructure of basic state laws that undergird commercial transactions, *not to open the door to state regulation of lending by federal savings associations*. . . . For these purposes, paragraph (c) is intended to be interpreted narrowly. *Any doubt should be resolved in favor of preemption.*

61 Fed. Reg. 50951, 50966-67 (emphases added).

Contrary to that admonition, the court below held that, under 12 C.F.R. 560.2(c), a state regulation that *directly* affects lending operations can be imposed on a federal savings association through a contractual choice-of-law provision. Because the court determined that a reference to a state's laws in a choice-of-law provision should be analyzed under state contract law, pursuant to the exception in 12 C.F.R. § 560.2(c), rather than analyzing whether the particular state law allegedly being "chosen" is preempted by OTS under 12 C.F.R § 560.2(a) and (b), the court widened the exception to swallow the rule. The whole purpose of contractual choice-of-law provisions is to designate which state law to apply to a given contract (to the extent not preempted by federal law). *See Roadway Package Sys.*, 257 F.3d at 293-94; *Fantastic Fakes*, 661 F.2d at 483. Therefore, the lower court's misreading of the OTS regulations serves as precedent for other state courts hostile to preemptive federal regulation to eviscerate the OTS's uniform national regulatory regime. Federal savings institutions would once again be subject to "undue regulatory duplication and burden." 12 C.F.R. § 560.2(a).

This is not merely a hypothetical concern. The federal Office of the Comptroller of the Currency ("OCC") has recently proposed regulations for national banks that would preempt state law in a manner similar to the OTS regulations for federal savings institutions. *See Bank Activities & Operations, Real Estate Lending & Appraisals*, 68 Fed. Reg. 46119 (Aug. 5, 2003). In response, the Attorneys General for all fifty states, as well as the Virgin Islands and the District of Columbia, have submitted comments strenuously opposing the adoption of such regulations and insisting that national banks should be subject to the states' consumer protection laws. (App. 109a-141a.) The decision below provides a powerful weapon to the states' Attorneys General and courts to overcome any attempt by OCC, as well as OTS, to implement and maintain a uniform national set of regulations that free federal lenders from duplicative and conflicting state law requirements.

The potential ramifications of the Maryland decision go well beyond the field of lending regulation. The extent to which ERISA preempts state regulation of HMO's and medical insurance decisions is a subject of continuing controversy. *See, e.g., Difelice v. Aetna U.S. Healthcare*, 346 F.3d 442 (3d Cir. 2003); *Arana v. Ochsner Health Plan*, 338 F.3d 433 (5th Cir. 2003); *Singh v. Prudential Health Care Plan, Inc.*, 335 F.3d 278 (4th Cir.), *cert. denied*, 03-478, 2003 U.S. LEXIS 9007 (2003). Because contracts in this area also contain choice-of-law provisions, the decision below will be used to circumvent ERISA, even on matters in which it is intended to completely preempt state laws. More generally, since states understandably seek the broadest scope for their regulatory requirements, the decision provides a clear roadmap for evading the federal government's occupation of any field to maintain state regulatory control of any parties that have contracts with choice-of-law provisions.

To ensure that this does not occur and to maintain the integrity of OTS's uniform national regulatory regime, this

Court should grant review of the Maryland Court of Appeals' decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL A. CARVIN
Counsel of Record
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

DAVID J. CYNAMON
GERARD M. BABENDREIER
ERICA S. SIMPSON
SHAW PITTMAN LLP
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000

Counsel for Petitioners

December 22, 2003