No. 05-409

IN THE
Supreme Court of the United States

CARL KIRCHER, ET AL.,
Petitioners,

v.

PUTNAM FUNDS TRUST, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONERS

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February 21, 2006

QUESTION PRESENTED

On January 6, 2006, this Court granted the petition for a writ of certiorari in this case, limited to Question 1 of the petition:

Whether the court of appeals had jurisdiction, contrary to the holdings of three other circuits, to review a district court order remanding for lack of subject-matter jurisdiction a suit removed under the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), notwithstanding 28 U.S.C. § 1447(d)'s bar on appellate review of remand orders based on lack of subject-matter jurisdiction and the district courts' conclusion that petitioners' claims are not preempted by and thus not removable under SLUSA.

LIST OF PARTIES TO THE PROCEEDINGS

Petitioners Carl Kircher, Beth Dudley, Steve Dudley, Avery Jackson, Dorothy Luettinger, T.K. Parthasarathy, Robert Potter, Terry Spurgeon, as Custodian for the Benefit of James E. Spurgeon, and Gary Vogeler were plaintiffs in the district court and appellees in the court of appeals.*

Robert Brockway, Sharon Smith, Stuart A. Smith, and Edmund Woodbury also were plaintiffs in the district court but did not participate in the court of appeals proceedings, and thus are not parties to this appeal.

The following were defendants in the district court and appellants in the court of appeals, and are respondents here:

Artisan Funds, Inc.

Artisan Partners Limited Partnership

Columbia Acorn Trust

Columbia Wanger Asset Management L.P.

Deutsche Investment Management Americas Inc.

Janus Capital Management LLC

Janus Investment Fund

Pacific Life Insurance Company

Putnam Funds Trust

Putnam International Equity Fund

Putnam Investment Funds

Putnam Investment Management, LLC

Scudder International Fund, Inc.

Van Kampen Investment Advisory Corporation

Van Kampen Series Fund, Inc.

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* Petitioners each filed suit as individuals and on behalf of all others similarly situated.

AIM Advisors, Inc., AIM International Funds, Inc., Evergreen International Trust, Evergreen Investment Management Company LLC, T. Rowe Price International Funds, Inc., T. Rowe Price International, Inc., Templeton Funds, Inc., Templeton Global Advisors Limited, Templeton Global Smaller Companies Fund, Inc., Templeton Growth Fund, Inc., and Templeton Investment Counsel LLC also were defendants in the district court but did not participate in the court of appeals proceedings, and thus are not parties to this appeal.

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INTRODUCTION

This case concerns the appealability of an order remanding back to state court a case removed by defendants to federal court. For the better part of two centuries, the general rule has been (and has been codified since 1949 at 28 U.S.C. § 1447(d)) that a remand order based on a district court's conclusion that it lacks subject-matter jurisdiction is *not* appealable. Congress's rationale in establishing that rule is that litigants should not be forced to sustain further delay in reaching the merits of their suit through appellate review of remand orders. That rule applies generally no matter what statutory context is at issue, and the few exceptions Congress has specifically enacted for discrete circumstances (such as appellate review of remand orders involving federal agencies) are not implicated here.

In a departure from this Court's decisions interpreting § 1447(d) and those of every other court of appeals to judge the appealability of remand orders in cases removed under the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), the Seventh Circuit devised a novel and erroneous theory to justify its decision to accept appellate jurisdiction. The court reasoned that SLUSA empowers courts of appeals to sit in judgment of district court orders remanding cases on the ground that the plaintiffs' claims do not in fact fall within SLUSA's preemptive ambit. In so doing, the court ignored both a key phrase in SLUSA's removal provision that limits removal jurisdiction to only those class-action claims that are preempted by SLUSA and the general rule of non-appealability that this Court has reaffirmed numerous times. If remand orders were reviewable anytime the court of appeals disagrees with the district court's reading of a jurisdictional statute – especially where, as here, the district court decisions are all consistent with the holdings of every circuit to have addressed this issue of federal subject-matter jurisdiction and remand under SLUSA – then Congress's prohibition on reviewability would be eviscerated. Because the Seventh Circuit's decision judicially re-writes a congressional

statute, misapplies this Court's precedent, and evades the central policy choice Congress has made generally to deny appellate review of remand orders, the decision below should be reversed.

OPINIONS BELOW

The district courts' opinions granting plaintiffs' motions to remand (Pet. App. 23a-64a) are unreported. The court of appeals' opinions finding appellate jurisdiction (*id.* at 10a-17a), and reversing and remanding the district courts' judgments with instructions to undo the remand orders and to dismiss plaintiffs' state-law claims (*id.* at 1a-9a), are reported at 373 F.3d 847 and 403 F.3d 478.

JURISDICTION

The court of appeals entered its judgment on April 5, 2005. A timely petition for rehearing was denied on May 2, 2005. Pet. App. 65a. On July 22, 2005, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including August 30, 2005, *id*. at 143a, and, on August 26, 2005, further extended the time for filing to and including September 29, 2005, *id.* at 144a. The petition for a writ of certiorari was filed on September 29, 2005, and on January 6, 2006, this Court granted certiorari, limited to Question 1 of the petition (126 S. Ct. 979). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant statutory and regulatory provisions are set forth at App., *infra*, 1a-32a.

STATEMENT OF THE CASE

1. In 1995, Congress enacted the Private Securities Litigation Reform Act ("PSLRA"), Pub. L. No. 104-67, 109 Stat. 737 (codified in part at 15 U.S.C. §§ 77z-1, 78u), to prevent "strike suits," or meritless class actions alleging fraud in the securities market. *See* H.R. Conf. Rep. No. 105-803, at 13 (1998). To deter such suits, the PSLRA imposed stringent pleading and other procedural requirements on securities class actions asserting claims under "this Title," *i.e.*, those statutes (the Securities Act of

1933 ("1933 Act") and the Securities Exchange Act of 1934 ("1934 Act")) pursuant to which courts had implied a private right of action for plaintiffs harmed by fraudulent practices. *See* PSLRA § 101, 109 Stat. 737-49. The PSLRA did not affect any state-law remedy or procedure at all; rather, it was explicitly aimed only at curbing perceived abuses in federal securities actions.

Within three years, however, Congress concluded that the more stringent pleading requirements it had enacted in the PSLRA were being evaded by plaintiffs bringing, in state court under state law, claims that in all pertinent respects were the types of claims that heretofore had been brought as federal claims. But, because those state-law claims did not invoke the federal securities laws, they were not subject to the heightened pleading requirements of the PSLRA. To address what it felt was circumvention of the intent behind the PSLRA, Congress enacted the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), Pub. L. No. 105-353, 112 Stat. 3227.

In explaining its purposes in promulgating SLUSA, Congress made specific findings in § 2 of the Act. In § 2(1), Congress stated that "the [PSLRA] sought to prevent abuses in private securities fraud lawsuits." 112 Stat. 3227. In § 2(2), Congress found that, "since enactment of that legislation, considerable evidence has been presented to Congress that a number of securities class action lawsuits have shifted from Federal to State courts." *Id*. In § 2(3), Congress determined that "this shift has prevented that Act from fully achieving its objectives." *Id.* Accordingly, in § 2(5), Congress found that, "in order to prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of the [PSLRA], it is appropriate to enact national standards for securities class action lawsuits involving nationally traded securities, while preserving the appropriate enforcement powers of State securities regulators and not changing the current treatment of individual lawsuits." *Id.* Nevertheless, in § 2(4), Congress concluded that "State securities regulation is of continuing impor-

tance, together with Federal regulation of securities, to protect investors and promote strong financial markets." *Id.*

To effectuate those findings, Congress amended the 1933 and 1934 Acts to contain identical provisions that preempt certain class actions under state law. SLUSA's preemption and removal provisions – which are at issue in this case – are found in adjacent subsections. *See* 15 U.S.C. § 77p(b)-(c). The preemption provision, § 77p(b), provides:

> **(b) Class action limitations**
>
> No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging –
>
> (1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or
>
> (2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

Id. § 77p(b).

SLUSA's adjacent removal provision, § 77p(c), provides for removal with reference back to the set of claims preempted by subsection (b):

> **(c) Removal of covered class actions**
>
> Any covered class action brought in any State court involving a covered security, as set forth in subsection (b) of this section, shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b).

Id. § 77p(c).[1] Under SLUSA, a "covered class action" is defined as, *inter alia*, a "lawsuit in which . . . damages are sought on behalf of more than 50 persons or prospective class members," *id.* § 77p(f)(2)(A)(i)(I), and a "covered security" includes a security that is either listed on a national securities exchange or issued by an investment company, *id.* §§ 77p(f)(3), 77r(b)(1)-(2).[2]

2. Petitioners are among the more than 90 million individual long-term investors estimated by the Federal Reserve to have more than $4 trillion in long-term savings invested in mutual funds with substantial holdings in international stocks.[3] In 2003, petitioners filed eight separate class actions in state court alleging only state negli-

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[1] These preemption and removal provisions are from SLUSA's amendment to the 1933 Act. As the court of appeals held in this case, those 1933 Act provisions are "functionally identical" to the preemption and removal provisions added by SLUSA to the 1934 Act and codified at 15 U.S.C. § 78bb(f)(1)-(2). Pet. App. 11a; *see also* H.R. Rep. No. 105-640, at 18 (1998) (stating that amendments to the 1934 Act were intended "to effect changes . . . that are substantially similar to, and consistent with, the amendments" to the 1933 Act). Because the court of appeals for simplicity relied solely on the 1933 Act provisions in its analysis, this brief henceforth will do the same.

[2] Section 77p(d), which is not at issue in this case, preserves certain state actions that would otherwise be preempted (and therefore removable) pursuant to § 77p(b) and (c). Specifically, § 77p(d)(1) preserves covered class actions involving the conduct of corporate officers with respect to certain corporate actions including tender offers, exchange offers, and the exercise of dissenter's or appraisal rights; § 77p(d)(2) preserves suits brought by States, their political subdivisions, or their pension plans so long as each plaintiff is named and has authorized the suit; and § 77p(d)(3) preserves state actions concerning bond indentures. *See* H.R. Rep. No. 105-640, at 16-17. In addition, § 77p(d)(4) provides that, if a removed action "may be maintained in State court pursuant to this subsection" – *i.e.*, it is expressly preserved by subsection (d)(1)-(3) despite the fact that it qualifies for preemption and thus removal under § 77p(b) and (c) – then the district court must remand the action back to state court.

[3] *See* Financial Policy Forum, *Special Policy Brief 13 – Overview of Mutual Fund Scandal: "A Gauntlet of Fraud,"* at *3 (Dec. 14, 2003; updated May 21, 2004), *available at* http://www.financialpolicy.org/fpfspb13.htm.

gence and recklessness claims and no federal or state-law fraud claims. Collectively, the complaints charge respondents – several mutual funds and investment advisors, and an insurance company that allows mutual fund investments through its variable annuity products – with negligently and recklessly failing to protect long-term investors adequately from market timing.

a. As alleged in petitioners' suits, "market timing" is a practice by certain traders who time their investments in mutual funds[4] holding international stocks according to shifts in the market that take advantage of stale prices for stocks traded on foreign stock exchanges. Market timing works to devalue the holdings of millions of mutual fund investors who hold for the long term rather than sell their fund shares in the short term. In contrast to the ordinary investor who holds his investments long-term, market timers buy and sell mutual funds in quick succession – often trading in and out of the same shares within 24 hours – to take advantage of international time zone differences that cause a fund holding international stocks to be either undervalued or overvalued at the end of the U.S. trading day.

A mutual fund holding assets that trade in competitive markets must value those assets at their market price. *See* 15 U.S.C. § 80a-2(a)(41)(B)(ii); 17 C.F.R. § 270.2a-4(a). Most mutual funds calculate the net asset (*i.e.*, market) value, or "NAV," of their entire portfolio only once per day, typically at the 4:00 p.m. Eastern Time close of trading on New York exchanges. Funds ordinarily calculate their NAV by valuing each asset in their portfolio at the final price at which it traded on its native exchange that day. For assets listed on the New York exchanges, the NAV generally supplies an up-to-date value. But, for assets listed on foreign exchanges, some of which may have closed as many as 15 hours before the close of the New

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[4] Mutual funds invest in a number of assets, typically individual stocks. *See* www.sec.gov/investor/tools/mfcc/mutual-fund-help.htm (Oct. 17, 2005).

York market, that approach opens a temporary yet wide window for arbitrage. (European markets close 5 or 6 hours before New York and Asian markets close 12 to 15 hours before New York.)

Because the NAV is calculated using the closing price of each asset on its native exchange – and not its real-market value based on information revealed *after* the close of trading on that native exchange – the fund will often give its portfolio an artificially high or low value. Stale information used to calculate the NAV thereby creates opportunities to purchase or sell fund shares at an immediate profit.

Market timers take their short-swing profits by purchasing mutual fund shares on days when the foreign securities in a fund's portfolio are undervalued and redeeming shares on days when the foreign securities are overvalued. Consider, for example, a foreign security in a fund's portfolio that closed at $10 on its native exchange but, through a trend that emerges that day on other international exchanges, is highly likely to rise in price on the following trading day. As sophisticated investors, market timers know that the price of foreign securities on their native exchange will likely track the movements of like market sectors or stocks in the U.S. market and accordingly move in like directions the following day. Market timers profit from this information lag by purchasing shares of mutual funds having an NAV that reflects stale, lower foreign-securities prices, and then selling those same fund shares soon thereafter, after the price of the securities has risen on their native exchanges and the mutual fund NAVs have been recalculated to reflect that rise.[5]

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[5] Judge Easterbrook's opinion for the court below provides the following illustration: "Stock of a Japanese firm that closes in Tokyo at ¥10,000 might trade in Frankfurt at € 75.22 (equivalent to ¥10,500) between the close in Tokyo and the close in New York – but the mutual fund nonetheless would value each share at ¥10,000, because that was its most recent price in the issuer's home market." Pet. App. 2a.

The rationale of petitioners' common-law negligence and recklessness claims is that, while day-trading arbitrageurs are the obvious winners in market-timing schemes, their profits are supplied dollar-for-dollar by long-term holders of mutual fund shares, which are continually devalued by ongoing market timing. When an outdated NAV causes a mutual fund to value its shares at an artificially low price, market timers buy shares in the undervalued mutual fund and receive a greater ownership interest in the fund than they would if the NAV had been accurately calculated. Those purchasing market timers consequently dilute the value of fund shares already held by long-term investors. On the other hand, when an outdated NAV causes the fund to value its shares at an artificially high price, market timers sell the mutual fund and receive a greater price per share for that sale than they would if the fund shares had been valued at an NAV based on up-to-date information. Selling market timers, just like purchasing market timers, disproportionately deplete the pooled assets of the fund's investors. In both scenarios, the parties harmed by market timing are those who *held* their shares while *others* purchased and/or sold.[6]

The effects of market timing on long-term holders are enormous in the aggregate. Studies have confirmed that market timing costs *non-trading* shareholders between *$5 and $10 billion* each year.[7] The mutual fund industry's

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[6] Richard L. Levine, Yvonne Cristovici & Richard A. Jacobsen, *Mutual Fund Market Timing*, 52 Fed. Law. 28, 30 (Jan. 2005) ("market timing can be harmful to long-term investors because it dilutes gains (given that a market-timer's strategy is to buy at a NAV that undervalues the fund and to sell at a NAV that overvalues the fund)").

[7] *See* United States Government Accountability Office, *Mutual Fund Trading Abuses: Lessons Can Be Learned from SEC Not Having Detected Violations at an Earlier Stage* 4-5 (Apr. 2005), *available at* www.gao.gov/new.items/d05313.pdf. *See also*, *e.g.*, Jennifer Barrett, "Inexcusable," MSNBC.com, Nov. 11, 2003 (interview with John Bogle, founder and former CEO of the Vanguard Group, estimating market-timing dilution to cost investors $5 to $10 billion per year), *available at* http://www.msnbc.com/id/3403565/site/newsweek; Eric Zitzewitz, *Who*

main trade organization has acknowledged that "the discovery of trading abuses involving mutual funds . . . put at risk the reputation of the entire fund industry," "shook the industry to its core," and "triggered a degree of Congressional oversight of mutual funds rarely seen in the industry's history."[8] Many cases arising from that scandal have been consolidated in a multidistrict proceeding currently pending before three district judges. *See In re Mutual Funds Inv. Litig.*, 384 F. Supp. 2d 845 (D. Md. 2005).

b. A significant portion of the respondent funds' portfolios consists of foreign securities that are readily susceptible to market timing. Petitioners allege that respondents knew, or should have known, of the existence of market timing, and that they acted negligently[9] or recklessly[10] by failing to adopt procedures that would have prevented petitioners' investments from being diluted by market timing.[11] Petitioners alleged, for example, that respondents should have made pricing adjustments based on correlations between movements in the U.S. and foreign mar-

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Cares About Shareholders? Arbitrage-Proofing Mutual Funds, 19 J.L. Econ. & Org. 245, 260 (2003) ("total annualized dilution in the first three quarters of 2001 can be estimated at $4.9 billion per year").

[8] Investment Company Institute, Trading Abuse Reforms & Actions, *available at* www.ici.org/issues/timing.

[9] *See* JA 181-82, 186 (¶¶ 56, 69) (*Potter*), 205 (¶ 56) (*Kircher*), 230 (¶ 60) (*Parthasarathy*), 255-56 (¶ 49) (*Dudley I*), 273-74 (¶ 49) (*Dudley II*), 290-91 (¶ 49) (*Vogeler*), 307 (¶ 49) (*Jackson*), 326-27 (¶ 62) (*Spurgeon*) (breach of fiduciary duties).

[10] *See* JA 183, 187-88 (¶¶ 60, 73) (*Potter*), 206-07 (¶ 60) (*Kircher*), 231-32 (¶ 64) (*Parthasarathy*), 257-58 (¶ 54) (*Dudley I*), 275-76 (¶ 54) (*Dudley II*), 292-93 (¶ 54) (*Vogeler*), 308-09 (¶ 53) (*Jackson*), 324 (¶¶ 56-57) (*Spurgeon*).

[11] Petitioner Spurgeon also alleged violations of several provisions of the California Business & Profession Code (Count IV). *See* JA 328-29 (¶¶ 67, 69, 73).

kets.[12] Petitioners' claims are based on negligence and recklessness, and do not allege fraud.

Each of petitioners' complaints defined the class to include holders of the relevant securities. The *Kircher* complaint is typical, limiting the class to "all persons in the United States who have owned shares of [the fund] for more than fourteen days from the date of purchase to the date of sale (redemption) or exchange."[13] The *Spurgeon* complaint took the additional step of explicitly excluding from the class "any claims based upon [the fund's] conduct in connection with Plaintiff's or any class member's purchase or sale of any" security. JA 319 (¶ 40). That exclusion is implicit in the negligence and recklessness claims of the other complaints because only a holder may experience damage from market timing.

3. In each of petitioners' cases, the named respondents filed notices of removal to the United States District Court for the Southern District of Illinois, arguing that the cases were subject to removal because they were preempted by SLUSA. Respondents' notices of removal relied on SLUSA's intertwined preemption and removal provisions, § 77p(b)-(c), as well as the general removal

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[12] *See* JA 170-71, 174-75 (¶¶ 17, 32-33) (*Potter*), 193-94, 197-98 (¶¶ 17, 32-33) (*Kircher*), 219, 222-23 (¶¶ 22, 37-38) (*Parthasarathy*), 245, 249-50 (¶¶ 13, 28-29) (*Dudley I*), 263, 267-68 (¶¶ 13, 28-29) (*Dudley II*), 280, 284-85 (¶¶ 13, 28-29) (*Vogeler*), 297, 300-02 (¶¶ 13, 28-29) (*Jackson*), 316-17 (¶¶ 31-32) (*Spurgeon*).

[13] JA 200-01 (¶ 41) (*Kircher*); *see* JA 177-78 (¶ 41) (*Potter*) (same), 226 (¶ 46) (*Parthasarathy*) (same), 252 (¶ 37) (*Dudley I*) (alleging "held" instead of "owned"), 270 (¶ 37) (*Dudley II*) (same), 287 (¶ 37) (*Vogeler*) (alleging "held" instead of "owned"), 303-04 (¶ 37) (*Jackson*) (alleging "held" instead of "owned" and omitting "from the date of purchase to the date of sale (redemption) or exchange"), 319 (¶ 39) (*Spurgeon*) (defining plaintiff class as "all persons in the United States who, through their ownership of [the fund's] products, held units of any [fund] sub-account invested in mutual funds which included foreign securities in their portfolios and which experienced market timing trading activity").

statute, 28 U.S.C. § 1441.[14] In *Kircher*, for example, the removal notice argued that SLUSA makes the "federal courts the exclusive venue for 'covered class actions' alleging fraud in connection with the purchase or sale of 'covered securities,'" thus basing removability under § 77p(c) on the satisfaction of each of the preemption factors set out in § 77p(b).[15] The notices also challenged petitioners' pleading of their state-law negligence and recklessness claims by characterizing them as "in essence" alleging fraud or the use of a manipulative device and then asserting that those claims were "preempted . . . notwithstanding [petitioners'] attempt to artfully plead their securities class action claims as state-law claims."[16]

Petitioners moved to remand to state court for lack of subject-matter jurisdiction.[17] The district judges assigned to petitioners' various cases remanded all of them back to

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[14] *See* JA 346-57 (*Kircher*), 360-61 (*Potter*), 377-89 (*Dudley I*), 394-406 (*Dudley II*), 409-12 (*Jackson*); *see also* JA 332-33 (*Parthasarathy*) (arguing that removal is proper under § 1441 because SLUSA creates a federal question), 370-71 (*Vogeler*) (relying only on § 1441), 418 (*Spurgeon*) (relying only on § 1441).

[15] JA 347 (*Kircher*).

[16] JA 348-50, 353-54 (*Kircher*); *accord* JA 360-61 (*Potter*) (arguing that removal was proper under SLUSA because petitioners' claims were "'in connection with' the purchase or sale of a covered security"), 385 (*Dudley I*) ("Plaintiffs' claims fall squarely within the four corners of SLUSA and, therefore, are preempted . . . . For these reasons, removal under SLUSA is proper . . . ."), 402 (*Dudley II*) (same); *see also* JA 371 (*Vogeler*) (stating that petitioners' claims are "in connection with the purchase or sale of securities, and therefore are removable . . . under [SLUSA]"), 410 (*Jackson*) (stating that removal was proper under SLUSA because plaintiffs alleged "misrepresentations or omissions" and that "[respondents] used . . . a manipulative or deceptive device or contrivance in connection with the purchase or sale of covered securities"), 425-31 (*Spurgeon*) (arguing that removal was proper because SLUSA completely preempted petitioners' claims).

[17] In *Spurgeon*, the district court *sua sponte* ordered briefing on the remand issue, *see* JA 83 (Docket Entry 7), and, in *Vogeler*, the court remanded *sua sponte* without briefing, *see* JA 63-64 (Docket Entry 28).

state court, expressly holding in each case that the court "lacks subject matter jurisdiction."[18]

In all eight cases consolidated for this appeal, the district court judges individually recognized that SLUSA's "in connection with" language derives from § 10(b) of the 1934 Act and SEC Rule 10b-5. They also held, in turn, that a claim could be preempted under SLUSA only if that claim satisfied the "in connection with" requirement of § 10(b) of the 1934 Act and SEC Rule 10b-5. Each individual judge then explained that petitioners' claims were not actionable under § 10(b) and Rule 10b-5 because they brought their claims as holders of securities and their claims did not arise "in connection with the purchase or sale of a covered security" (§ 77p(b)(1)-(2)) as required by SLUSA's preemption provision. Accordingly, each district judge found that petitioners' state-law claims were not preempted.[19] For that reason, they did not address whether petitioners' state-law claims were also outside SLUSA's preemptive ambit because they did not involve allegations of misstatements or omissions of material fact, *i.e.*, fraud.

Because the claims did not fall within the preemption provision, the courts concluded, they were not removable under SLUSA and therefore were outside the courts' subject-matter jurisdiction.[20] As the district court in

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[18] Pet. App. 27a (*Kircher*) ("Because the Court lacks subject matter jurisdiction [over plaintiff's claims], the Court **REMANDS** this action" to state court), 30a (*Dudley I & II*), 40a (*Parthasarathy*), 46a (*Potter*), 51a (*Vogeler*), 57a (*Jackson*), 64a (*Spurgeon*).

[19] *See*, *e.g.*, Pet. App. 26a-27a (*Kircher*), 30a (*Dudley I & II*) ("Only *holders* of fund shares have the dilution of ownership interests and voting rights claims asserted in the complaints."), 40a (*Parthasarathy*) (agreeing that the "'complaint alleges dilution claims that only a holder of securities can bring'") (quoting *Bradfisch v. Templeton Funds, Inc.*, Case No. 03-CV-0760-MJR, slip op. at 6 (S.D. Ill. Jan. 23, 2004)), 44a-45a (*Potter*) (same), 50a-51a (*Vogeler*) (same), 56a-57a (*Jackson*) (same), 61a (*Spurgeon*) (stating that "SLUSA does not preempt" claims by "a *holder* of securities").

[20] Each of the district courts also rejected the argument that petitioners' state-law claims could be removed under 28 U.S.C. § 1441

Kircher put it, "SLUSA does not permit removal of Plaintiffs' claims" because petitioners' claims were not preempted by SLUSA.[21] Accordingly, the district courts remanded all eight cases to state court for a lack of subject-matter jurisdiction.[22]

4. On respondents' appeal of the remand order in *Kircher*, the Seventh Circuit ordered the respondent mutual fund to show cause why its appeal should not be dismissed for lack of jurisdiction under 28 U.S.C. § 1447(d), which precludes appellate review of remand orders based on a district court's conclusion that it lacked subject-matter jurisdiction. The court of appeals then held that it had jurisdiction to review the district court's remand order. *See* Pet. App. 15a-16a.

The court of appeals noted that § 1447(d) prohibits appellate review of an order remanding a case to state court on a ground listed in § 1447(c), which provides that a case must be remanded if the court determines that it lacks subject-matter jurisdiction. The court acknowledged that the district court expressly based its remand on the conclusion that, because SLUSA does not preempt petitioners' market-timing holder claims, "'the Court lacks subject matter jurisdiction,'" *id.* at 12a (quoting *Kircher* remand order, reproduced at Pet. App. 27a). The court of appeals did not accept that explanation, however. *See id.* at 13a. Instead, despite the district court's express statements to the contrary, the court of appeals characterized the district court opinion as holding that removal was "proper,"

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on the ground that they involved a substantial federal question or satisfied the diversity jurisdiction requirements. *See* Pet. App. 27a (*Kircher*), 30a (*Dudley I & II*), 34a-38a, 40a (*Parthasarathy*), 45a-46a (*Potter*), 51a (*Vogeler*), 57a (*Jackson*), 59a-60a (*Spurgeon*). Those holdings are not at issue here.

[21] Pet. App. 26a-27a (*Kircher*); *see also id.* at 30a (*Dudley I & II*), 39a-40a (*Parthasarathy*), 44a-45a (*Potter*), 50a-51a (*Vogeler*), 56a-57a (*Jackson*), 60a-61a (*Spurgeon*).

[22] *See* Pet. App. 27a (*Kircher*), 30a (*Dudley I & II*), 40a (*Parthasarathy*), 46a (*Potter*), 51a (*Vogeler*), 57a (*Jackson*), 64a (*Spurgeon*).

but that remand was required under § 77p(d)(4) because § 77p(b) did not preempt the claims. *Id.* at 13a-14a.

In concluding that an order remanding a claim on the ground that it is not preempted under SLUSA is not based on a lack of subject-matter jurisdiction, the court of appeals opined that SLUSA authorizes removal of *all* "covered class actions" – that is, all class actions that seek damages on behalf of more than 50 investors, *see* § 77p(f)(2)(A). Pet. App. 13a-14a. The court failed to address Kircher's argument that, because the removal provision in § 77p(c) applies only to those actions meeting SLUSA's preemption criteria "as set forth in subsection (b)," an action may be removed under SLUSA *only if* that action is preempted by SLUSA. Instead, the court held that the only condition for removal is that the lawsuit involve a "covered class action," and it is only after a suit has been removed under SLUSA that a district court must make the "substantive decision" whether the suit is preempted by § 77p(b). *Id.* at 14a. Thus, the court concluded, because the determination whether the suit is preempted is a substantive one that occurs only after removal has been found appropriate, a remand following a determination that the suit is not preempted is not based on a lack of jurisdiction; rather, it is based on a substantive determination that SLUSA does not preempt the claims. For those reasons, the court concluded that § 1447(d) did not prohibit appellate review of the remand order. *See id.* at 17a.

The court of appeals further justified its conclusion that the remand order was appealable by explaining that, if it were otherwise, "a major substantive issue in the case [would] escape review." *Id.* at 15a. According to the court, under SLUSA, state judges are incapable of determining whether a claim is preempted by SLUSA; rather, the court stated, SLUSA requires that the preemption determination "be made by the federal rather than the state judiciary." *Id.* Thus, unlike a "[n]ormal" remand order, which "leave[s] all substantive issues open to plenary resolution in the state court," "it is now or never for appel-

late review of the question" whether a state-law action is preempted under SLUSA. *Id.*

5. Having determined that it could exercise appellate jurisdiction over the district court's remand order in *Kircher*, the court of appeals issued orders declaring that appellate jurisdiction was proper in the other seven cases, and it subsequently consolidated all eight cases. The court then reversed the district courts' remand orders in all eight cases and remanded the cases with instructions to dismiss the state-law claims as preempted under SLUSA.

The court began by explaining that each of the class actions was a covered class action under SLUSA and that each involved covered securities. *See* Pet. App. 4a. It then turned to the question whether petitioners' actions alleged fraud or manipulation "in connection with" the purchase or sale of those securities.

The court explained that the "in connection with" language in SLUSA "has the same scope as its antecedent in Rule 10b-5." *Id.* at 5a. The court noted that in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), this Court held that an investor who neither purchases nor sells securities cannot bring a cause of action under § 10(b) and Rule 10b-5. The court concluded that, even if SLUSA's "in connection with" language incorporates *Blue Chip Stamps*' holding, all of the actions except *Spurgeon* were preempted. That was because, the court explained, those complaints defined the class as including investors who held shares of a mutual fund between two dates. According to the court, these actions had to be dismissed under SLUSA, because "some of the investors who held shares during the class period must have purchased their interest . . . during that time; others . . . undoubtedly sold some or all of their investment during the window." Pet. App. 6a. In so ruling, the court stated that it perceived petitioners' suits to be seeking recovery only for respondents' deceit or manipulation, and not for losses resulting from respondents' mismanagement of the fund, despite petitioners' consistent position that they were alleging

only claims of negligent and reckless mismanagement. *See id.* Because, in the court's view, all of the class actions alleged deceit or manipulation in connection with the purchase or sale of a security, the court concluded that SLUSA preempted the claims. *See id.* at 9a.

6. This Court granted certiorari in this case limited to Question 1 in the petition. That question is whether the court of appeals erred in holding that the district courts' remand orders are reviewable on appeal. The second question presented in the certiorari petition, which concerns the court of appeals' second holding that SLUSA preempts petitioners' claims, is before the Court in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, No. 04-1371 (argued and submitted Jan. 18, 2006), on review of the Second Circuit's conclusion (which is contrary to the Seventh Circuit's decision in this case) that SLUSA does *not* generally preempt holder claims because those claims are not "in connection with the purchase or sale" of securities.

SUMMARY OF ARGUMENT

Section 1447(d) prohibits appellate review of a district court order remanding a case to state court if the district court bases the remand on its determination that it lacks subject-matter jurisdiction, regardless of whether that jurisdictional determination is "erroneous or not." *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 343 (1976). That absolute bar on review of such remand orders has a pedigree of more than a century, and it applies to cases, such as this one, removed under a provision other than the general removal provision, 28 U.S.C. § 1441. In each of the cases under review, the district court expressly remanded based on its conclusion that it lacked subject-matter jurisdiction. Those orders therefore are not reviewable.

Even if, contrary to this Court's precedents, it were proper for the court of appeals to second-guess the district courts' conclusions that they lacked subject-matter jurisdiction, the district courts properly determined that whether a claim is preempted under SLUSA is a question of subject-matter jurisdiction. SLUSA confers removal

jurisdiction only over those claims that meet the preemption criteria "as set forth in subsection (b)," SLUSA's preemption provision. 15 U.S.C. § 77p(c). By cross-referencing SLUSA's preemption provision, the plain language of SLUSA's removal provision provides that a class action cannot be removed unless that action satisfies SLUSA's preemption provision. Without that cross-reference, the federal courts would not have subject-matter jurisdiction over the suit, because a federal preemption defense generally does not confer subject-matter jurisdiction for removal purposes. The legislative history confirms that Congress intended to limit removal only to those actions that are preempted by SLUSA.

There is no merit to the court of appeals' conclusion that SLUSA preemption does not bear directly on the district court's subject-matter jurisdiction, but rather is a "substantive decision" that Congress authorized the court to make after it assumed jurisdiction over the removed case. That conclusion simply cannot be reconciled with SLUSA's plain text and legislative history, both of which make clear that preemption is a threshold prerequisite for the exercise of removal jurisdiction under SLUSA.

Moreover, the court of appeals committed two errors in concluding that petitioners' claims are preempted by SLUSA. First, the court of appeals erroneously concluded that petitioners' holder claims raise allegations "in connection with the purchase or sale" of securities within the meaning of § 77p(b). As correctly explained by respondent in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, No. 04-1371, in private securities litigation under § 10(b) and Rule 10b-5, the phrase "in connection with the purchase or sale" has a settled judicial interpretation: A private party does not assert a claim "in connection with the purchase or sale of any security" within the meaning of § 10(b) and Rule 10b-5 unless that party avers that the defendant's act or omission was in connection with her own purchase or sale. *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730-31, 749 (1975). Congress incorporated that interpretation of § 10(b) and Rule 10b-5

when it used that same language in SLUSA. Second, the court of appeals erroneously concluded that petitioners' claims are preempted by SLUSA because those claims do not "alleg[e] . . . an untrue statement or omission of a material fact" or "that the defendant used or employed any manipulative or deceptive device or contrivance." 15 U.S.C. § 77p(b). Instead, petitioners allege that respondents acted negligently and recklessly by failing to follow practices that would protect petitioners' assets from the dilution in value caused by market timing. Accordingly, because petitioners' claims fall outside the ambit of SLUSA preemption in § 77p(b), the district court's remand to state court was appropriate.

Permitting the court of appeals' decision to stand would directly undermine Congress's purpose in prohibiting review of remand orders: to avoid burdening plaintiffs who already have suffered delay through removal with the additional delay and costs associated with appeal. By concluding that appellate review was appropriate because it would generate "little cost in delay beyond" the delay already caused by the removal, the court of appeals impermissibly substituted its own policy view for that enacted into law by Congress in § 1447(d). Nor is there any basis for the court of appeals' assertion that appellate review is warranted because SLUSA requires that the federal judiciary resolve the preemption issue. A federal court *did* decide the SLUSA preemption question, but because Congress made a legislative judgment to make that determination part of the court's subject-matter jurisdiction, it falls squarely within § 1447(d)'s prohibition on reviewability.

ARGUMENT

I. DISTRICT COURT ORDERS REMANDING TO STATE COURT FOR LACK OF SUBJECT-MATTER JURISDICTION UNDER SLUSA ARE NOT REVIEWABLE ON APPEAL

A. By Long-Standing Statutory Prohibition, The General Rule Is That Courts Of Appeals Lack Jurisdiction To Consider Appeals Of District Court Orders Remanding A Removed Case Back To State Court

Since the earliest days of the Republic, "Congress has placed broad restrictions on the power of federal appellate courts to review district court orders remanding removed cases to state court." *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127 (1995). That general prohibition provides the background rule that governs this case.

Under 28 U.S.C. § 1447(c), district courts have the authority to remand a case improperly removed from state court:

> A motion to remand the case on the basis of any defect other than subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

28 U.S.C. § 1447(c).

Such remand orders, however, are not reviewable by an appellate court (with limited statutory exceptions not applicable here). That prohibition derives from § 1447(d), which is the "general statutory provision governing the reviewability of remand orders." *Things Remembered*, 516 U.S. at 127. Section 1447(d) provides:

> An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was re-

> moved pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

28 U.S.C. § 1447(d).[23] This general prohibition on appellate review is clear from not only the plain language of § 1447(d) but also the statutory history of that provision.

1. The text of § 1447(d) generally precludes appellate review of remand orders: "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." This Court has held, however, that "'§ 1447(d) must be read *in pari materia* with § 1447(c), so that only remands based on grounds specified in § 1447(c) are immune from review under § 1447(d).'" *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 711-12 (1996) (quoting *Things Remembered*, 516 U.S. at 127). Thus, notwithstanding the broad prohibitory language of § 1447(d), its scope is limited somewhat by the reach of § 1447(c).

As this Court has noted, § 1447(c) specifies two grounds for remand – "lack of subject matter jurisdiction or defects in removal procedure." *Id.* at 712.[24] "As long as a district court's remand is based on a timely raised defect in removal procedure or on lack of subject-matter jurisdiction – the grounds for remand recognized by § 1447(c) – a court of appeals lacks jurisdiction to entertain an appeal of the remand order under § 1447(d)." *Things Remembered*, 516 U.S. at 127-28. On the other hand, the Court has held that remand orders based on grounds *other* than those mentioned in § 1447(c) are not affected by § 1447(d)'s prohibition on appellate review. *See Quackenbush*, 517 U.S. 706 (remand based on abstention); *Thermtron Products,*

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[23] Section 1443 of Title 28 provides for the removal of civil rights cases. In a few other statutes, Congress has likewise excepted certain other remand orders from § 1447(d)'s general non-reviewability prohibition. *See infra* pp. 29-30.

[24] In 1996, Congress amended § 1447(c) by replacing the above-referenced language, "any defect in removal procedure" (28 U.S.C. § 1447(c) (1994)), with the broader, currently effective language "any defect other than subject matter jurisdiction." *See infra* note 43.

Inc. v. Hermansdorfer, 423 U.S. 336 (1976) (remand based on overcrowded district court docket). The Court has made clear, however, that those limited exceptions "neither disturb nor take issue with the well-established general rule that § 1447(d) and its predecessors were intended to forbid review by appeal or extraordinary writ of any order remanding a case on the grounds permitted by the statute." *Thermtron*, 423 U.S. at 351-52.

2. The general rules now codified in § 1447(c) and (d) have long been mandated by Congress. Except for a short period between 1875 and 1887, remand orders for lack of subject-matter jurisdiction or defects in removal have been unreviewable on appeal. *See United States v. Rice*, 327 U.S. 742, 749 (1946) ("save for a brief interval under § 5 of the Act of 1875, . . . an order of remand was not appealable"). In *Thermtron*, this Court traced the history of the predecessors to § 1447(c) and (d). *See* 423 U.S. at 346-48.

Before 1875, orders remanding a removed case were not reviewable by appeal or writ of error because they were not final judgments. *See id.* at 346 (citing *Railroad Co. v. Wiswall*, 90 U.S. (23 Wall.) 507 (1875)).[25] In the Judiciary Act of 1875, Congress authorized trial courts to remand a removed action (or to dismiss an action filed in federal court) where jurisdiction was lacking, and expressly provided that an order of the "circuit court dismissing or remanding said cause to the State court shall be reviewable by the Supreme Court on writ of error or appeal." Ch. 137, § 5, 18 Stat. 470, 472; *see Thermtron*, 423 U.S. at 346

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[25] Prior to *Wiswall*, this Court reviewed remand orders on several occasions without addressing whether it had jurisdiction to do so. *See, e.g.*, *Gardner v. Brown*, 88 U.S. (21 Wall.) 36 (1875); *McKee v. Rains*, 77 U.S. (10 Wall.) 22 (1870); *Bushnell v. Kennedy*, 76 U.S. (9 Wall.) 387 (1870); *Mayor of Nashville v. Cooper*, 73 U.S. (6 Wall.) 247 (1868); *West v. Aurora City*, 73 U.S. (6 Wall.) 139 (1868); *Green v. Custard*, 64 U.S. (23 How.) 484 (1860); *Wood v. Davis*, 59 U.S. (18 How.) 467 (1856). However, "when questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue." *Hagans v. Lavine*, 415 U.S. 528, 534 n.5 (1974).

& n.10.[26] That provision for review of remand orders, however, was short-lived. In 1887, apparently in response to severe docket congestion resulting from such review, Congress repealed the 1875 review provision and provided instead that "no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed." Act of Mar. 3, 1887, ch. 373, §§ 1, 6, 24 Stat. 552, 553, 555; *see Thermtron*, 423 U.S. at 346-47 & n.11. *See generally* Rhonda Wasserman, *Rethinking Review of Remands: Proposed Amendments to the Federal Removal Statute*, 43 Emory L.J. 83, 95-99 (1994).

The 1887 Act contained the "roots" of the provision now codified in § 1447(d), and from those roots have sprung numerous decisions of this Court and statutory re-codifications by Congress. *Thermtron*, 423 U.S. at 346. This Court remarked on the breadth of the 1887 Act's prohibition on review of remand orders, holding that it "has relation to removals generally – those for prejudice or local influence, as well as those for other causes – and the prohibition has no words of limitation. . . . Its language is broad enough to cover all cases, and such was evidently the purpose of congress." *Morey v. Lockhart*, 123 U.S. 56, 58 (1887). This Court repeatedly reaffirmed the principle announced in *Morey*, continuing to "broadly construe[]" that provision as "prohibiting review of an order of remand, directly or indirectly, by any proceeding." *Gay v. Ruff*, 292 U.S. 25, 29 (1934).[27] In 1911, Congress reenacted the 1887 prohibition on appellate review of remand

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[26] At that time, the district and circuit courts had original jurisdiction over different types of matters. *See generally* Benjamin Curtis, *Jurisdiction, Practice, and Peculiar Jurisprudence of the Courts of the United States* (2d rev. ed. 1896). The federal courts of appeals were not created until 1891. *See* Act of Mar. 3, 1891, ch. 517, 26 Stat. 826.

[27] *See also German Nat'l Bank v. Speckert*, 181 U.S. 405, 406 (1901); *Missouri Pac. Ry. Co. v. Fitzgerald*, 160 U.S. 556, 581-82 (1896); *Chicago, St. P., M. & O. Ry. Co. v. Roberts*, 141 U.S. 690, 694 (1891); *Ex parte Pennsylvania Co.*, 137 U.S. 451, 453-54 (1890) (1887 Act bars *mandamus* challenging remand order); *Gurnee v. Patrick County*, 137 U.S. 141, 143 (1890); *Richmond & D.R.R. v. Thouron*, 134 U.S. 45, 46 (1890); *Sherman v. Grinnell*, 123 U.S. 679, 679-80 (1887).

orders based on a lack of jurisdiction. *See* Judicial Code of 1911, Act of Mar. 3, 1911, ch. 231, § 28, 36 Stat. 1087, 1094-95. *See also Employers Reinsurance Corp. v. Bryant*, 299 U.S. 374, 380 (1937); *Thermtron*, 423 U.S. at 347-48. Thus, in 1946, the Court observed that "the practice in removal cases was, as it had been established from the beginning, save for a brief interval under § 5 of the Act of 1875, that an order of remand was not appealable." *Rice*, 327 U.S. at 749.[28]

Against that virtually uniform history generally prohibiting review of remand orders, Congress enacted 28 U.S.C. § 1447 in 1948. *See* Act of June 25, 1948, ch. 646, § 1, 62 Stat. 869, 939. Because of an oversight, the original § 1447 did not prohibit appellate review of remand orders. That omission was soon corrected in 1949 when Congress added § 1447(d), which provided then as it does now: "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise."[29] Act of May 24, 1949, ch. 139, § 84(b), 63 Stat. 89, 102. As this Court has explained, "[t]he plain intent of Congress, which was accomplished with the 1949 amendment, was to recodify the pre-1948 law without material change." *Thermtron*, 423 U.S. at 350 n.15; *see also* H.R. Rep. No. 81-352 (1949) (stating that § 1447(d) was added "to remove any doubt that the former law as to the finality of an order of remand to a State court is continued"), *reprinted in* 1949 U.S.C.C.A.N. 1254, 1268.

Accordingly, under the plain language of § 1447(d) and the history behind that provision, a district court's order based on a ground specified in § 1447(c) – lack of "subject matter jurisdiction" or "any defect other than subject matter jurisdiction" – is unreviewable.

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[28] The Court likewise held "that an order remanding a cause which is subject to the prohibition against appeals of [the 1887 Act] cannot be reviewed by mandamus." *Rice*, 327 U.S. at 751.

[29] In 1964, Congress added to § 1447(d) the provision permitting appellate review of remand orders in civil rights cases. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, Tit. IX, § 901, 78 Stat. 241, 266.

B. The District Courts' Remand Orders Below Were Expressly Based On Lack Of Subject-Matter Jurisdiction And Are Therefore Unreviewable

Each of the eight district court orders (including the *Kircher* order reviewed by the court of appeals) based remand on an express finding that "the Court lacks subject matter jurisdiction."[30] Under this Court's precedents, those findings are dispositive and the remand orders issued pursuant to those findings are unreviewable.[31] The court of appeals' effort to evade this Court's precedent and to mischaracterize the district courts' actions should be rejected.

1. The proper application of the general rule of § 1447(d) compels reversal of the Seventh Circuit's judgment for two reasons. First, the district courts' characterizations of their holdings are dispositive, and, second, even if those judgments are erroneous, appellate jurisdiction still does not obtain over the remand orders in this case. Well-established precedent supports both principles. "If a trial judge *purports* to remand a case on the ground that it was removed 'improvidently and without jurisdiction,' his order is not subject to challenge in the court of appeals by appeal, by mandamus, or otherwise." *Thermtron*, 423 U.S. at 343 (emphasis added) (quoting 1949 version of § 1447(c)).

This Court has long stressed that "the issue of removability is closed if the federal district court refuses to assume jurisdiction and remands the cause." *Metropolitan Cas. Ins. Co. v. Stevens*, 312 U.S. 563, 568 (1941); *id.*

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[30] Pet. App. 27a (*Kircher*); *see also id.* at 30a (*Dudley I & II*), 40a (*Parthasarathy*), 46a (*Potter*), 51a (*Vogeler*), 57a (*Jackson*), 64a (*Spurgeon*).

[31] Although the Court could decide the question presented solely on this ground, we explain in Part II, *infra*, why the district courts correctly concluded that they lacked subject-matter jurisdiction because SLUSA preemption is a question of subject-matter jurisdiction and petitioners' claims are not preempted by SLUSA.

("Section 28 of the Judicial Code [now § 1447(c)] precludes review of the remand order directly or indirectly after final judgment in the highest court of the state in which decision could be had.") (citations omitted). That prohibition on appellate review applies irrespective of the correctness of the district court's conclusion that jurisdiction is lacking: § 1447(d) "prohibits review of all remand orders issued pursuant to § 1447(c) *whether erroneous or not* and whether review is sought by appeal or by extraordinary writ. This has been the established rule under § 1447(d) and its predecessors stretching back to 1887." *Thermtron*, 423 U.S. at 343 (emphasis added).

Shortly after deciding *Thermtron*, this Court reaffirmed those core principles in *Gravitt v. Southwestern Bell Telephone Co.*, 430 U.S. 723 (1977) (per curiam). The defendant in *Gravitt* had removed a state-law tort suit based on diversity jurisdiction, alleging that it was a Missouri corporation. *See In re Southwestern Bell Tel. Co.*, 535 F.2d 859, 860 (5th Cir. 1976) (per curiam). Based on the defendant's pleadings in a previous, unrelated suit, however, the district court held that the defendant was judicially estopped under Texas law from claiming it was not a Texas citizen. It therefore remanded the case for lack of diversity because it had concluded that at least one plaintiff was also a Texas citizen. On petition for a writ of mandamus, the Fifth Circuit acknowledged the "general rule" that remand orders are unreviewable, but it read *Thermtron* to permit review of the district court's judicial estoppel decision, because that issue in and of itself was not jurisdictional and was therefore not covered by the remand grounds mentioned in § 1447(c). *See id.* ("Thus, the Court concluded [in *Thermtron*], if a district judge's reason for remanding a case is outside the grounds specified in § 1447(c), as Judge Hermansdorfer's was, the barrier to review in § 1447(d) is also inapplicable, and mandamus is a proper remedy to redress the illegal remand order.").

This Court summarily reversed the Fifth Circuit in a three-paragraph, *per curiam* opinion. It rejected the

premise that a district court order that allegedly "had employed erroneous principles in concluding that it was without jurisdiction" could be reviewed on appeal. *Gravitt*, 430 U.S. at 723. Instead, the Court expressly confirmed that "*Thermtron* did not question but reemphasized the rule that § 1447(c) remands are not reviewable." *Id.* at 724. Thus, because "[t]he District Court's remand order was plainly within the bounds of § 1447(c)," the Court concluded, it "was unreviewable by the Court of Appeals, by mandamus or otherwise." *Id.* at 723.

This Court has subsequently read *Gravitt* as holding that, "[w]here the order is based on one of the enumerated grounds, review is unavailable no matter how plain the legal error in ordering the remand." *Briscoe v. Bell*, 432 U.S. 404, 413 n.13 (1977) (citing *Gravitt*, 430 U.S. at 723); *see also Volvo of Am. Corp. v. Schwarzer*, 429 U.S. 1331, 1332 (1976) (Rehnquist, Circuit Justice) (concluding that § 1447(d) bars review of remand order based on lack of jurisdiction, even though "the District Court may have been wrong in its analysis").

2. To avoid those settled legal principles, the court of appeals engaged in a series of unpersuasive deflections of fact and law. The court acknowledged that the district court's remand order was expressly based on the conclusion that, "'[b]ecause the Court lacks subject matter jurisdiction, the Court REMANDS this action.'" Pet. App. 12a (quoting *Kircher* remand order). Under *Gravitt* and similar cases, once the court of appeals recognized that point, its job was at its end: the district court's remand for lack of subject-matter jurisdiction is unreviewable "whether erroneous or not." *Thermtron*, 423 U.S. at 343.[32]

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[32] Indeed, until this case, the Seventh Circuit had understood *Thermtron* to mean that, "[i]f the district court *announced* that its remand order was based on one of the grounds for remand recognized in § 1447(c) . . . , then review was barred." *Adkins v. Illinois Cent. R.R.*, 326 F.3d 828, 831 (7th Cir. 2003) (emphasis added); *id.* ("The Court has made it clear, however, that the *Thermtron* holding was not an open-ended invitation to exercise appellate review over remand decisions.

Although the court of appeals cited *Gravitt*, *see* Pet. App. 12a-13a, it simply disregarded the holding of that case. *Cf. Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 510 (2001) (per curiam) ("[T]he Court of Appeals here recited these principles, but its application of them is nothing short of baffling."). In an attempted end run around the non-reviewability rule, the court of appeals inexplicably mischaracterized the district court's *Kircher* order by asserting that "[r]emoval of this suit was proper, the district judge held; that is why the court proceeded to the question how § 77p(b) affects the litigation." Pet. App. 14a. But the district court held no such thing. It examined the preemption criteria set forth in § 77p(b) only for the purpose of deciding whether removal jurisdiction existed under § 77p(c). *See id.* at 25a-27a. Finding that the claims in the *Kircher* complaint were not preempted because they alleged holder claims that were not "in connection with the purchase or sale of a covered security" (§ 77p(b)), the district court granted the motion to remand "[b]ecause the Court lacks subject matter jurisdiction." Pet. App. 27a.[33]

Beyond mischaracterizing the district court's holding, the court of appeals stated that it simply disagreed with the district court's jurisdictional analysis that, under SLUSA's provision authorizing removal jurisdiction, the question of preemption is inseparable from the question of removal jurisdiction. *See id.* at 14a ("That [*i.e.*, SLUSA preemption] is not the 'lack of subject-matter jurisdiction' that authorizes a remand."). But a disagreement between

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To the contrary, it has three times cautioned that the *Thermtron* exception to § 1447(d) is to be narrowly construed.") (citing *Gravitt*, *Things Remembered*, and *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343 (1988)).

[33] Although a court of appeals might in some cases have to interpret an unclear or ambiguous order to glean the true ground on which remand was based, *see*, *e.g.*, *Adkins*, 326 F.3d at 834 ("reasonable people might disagree over the best reading of the district court's remand order"), here the district courts' orders could not have been clearer in stating that the cases were remanded for lack of subject-matter jurisdiction.

the court of appeals and the district court over whether the district court properly understood the limits on its own subject-matter jurisdiction does not make the district court's order reviewable under § 1447(d). "Otherwise, the rule means nothing at all, because appeals will be taken and sustained in those cases where the district court made a mistake, and rejected in cases where the district court was correct. Even if the district court was wrong that it lacked jurisdiction over the claims that it remanded, the remand would nevertheless be jurisdictional." *Adkins*, 326 F.3d at 834; *id.* ("[T]he only important point is that the district court did not *think* that [anything] saved its jurisdiction.").[34]

Accordingly, whether or not the district courts erred in concluding that SLUSA makes federal-question jurisdiction dependent on whether the state claims are preempted – and they did not err, as explained below in Part II – § 1447(d) plainly bars review of the district courts' remand orders here.

C. SLUSA's Removal Provision Does Not Affect § 1447(d)'s General Prohibition On Appellate Review Of Remand Orders

The general prohibition on appellate review in § 1447(d) applies notwithstanding the presence of a removal provision in SLUSA, § 77p(d). Congress is presumed to be "'aware of the universality of th[e] practice' of denying appellate review of remand orders when Congress creates a new ground for removal." *Things Remembered*, 516 U.S. at 128 (quoting *Rice*, 327 U.S. at 752) (alteration in

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[34] This is not a case where the district court absurdly applied a label of "subject-matter jurisdiction" to a plainly non-jurisdictional remand. *Cf. Thermtron*, 423 U.S. at 343-44 (holding remand based on overcrowded district court docket not jurisdictional; "Neither the propriety of the removal nor the jurisdiction of the court was questioned by respondent in the slightest."). Even if such a patently unreasonable mislabeling could be reviewed, SLUSA's removal provision, all agree, goes to subject-matter jurisdiction. If review could be had on the mere assertion that the district court misinterpreted a jurisdictional statute, then § 1447(d) would be a nullity.

original). Accordingly, "[a]bsent a clear statutory command to the contrary," the prohibition in § 1447(d) on appellate review "applies 'not only to remand orders made in suits removed under [the general removal statute], but to orders of remand made in cases removed under *any other statutes*, as well.'" *Id.* (quoting *Rice*, 327 U.S. at 752) (alteration in original).

Applying these principles, this Court held in *Things Remembered* that § 1447(d) precluded appellate review of a remand order issued under 28 U.S.C. § 1452, which authorizes the removal of bankruptcy actions. The Court observed that there was "no express indication in § 1452" that it was intended to be "the exclusive provision governing removals and remands in bankruptcy," and there was no "reason to infer from § 1447(d) that Congress intended to exclude bankruptcy cases from its coverage." 516 U.S. at 129. While § 1452 contained its own remand provision, the Court held that "[t]here is no reason §§ 1447(d) and 1452 cannot comfortably coexist in the bankruptcy context." *Id.*

Here, there likewise is no indication that § 1447(d) excludes securities cases from its coverage. *See Harter Township v. Kernochan*, 103 U.S. 562, 566-67 (1881) (upholding removal of securities case). And nothing in SLUSA suggests that its removal provision is exempt from § 1447(d), let alone provides the requisite "clear statutory command" to that effect. *Things Remembered*, 516 U.S. at 128. To the contrary, when Congress has intended to carve out exceptions to § 1447(d), it has done so clearly and explicitly. For example, § 1447(d) itself excludes civil rights cases removed pursuant to § 1443 from its reach; two statutes give the Resolution Trust Corporation and the Federal Deposit Insurance Corporation the express right to appeal a remand order;[35] and another

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[35] *See* 12 U.S.C. § 1441a(*l*)(3)(C) (RTC "may appeal any order of remand entered by a United States district court"); *id.* § 1819(b)(2)(C) (FDIC "may appeal any order of remand entered by any United States district court").

permits the United States to appeal remand orders in cases involving the property of Indians.[36] In addition, the recent Class Action Fairness Act of 2005 ("CAFA") authorizes "an appeal from an order of a district court granting or denying a motion to remand a class action to the State court" "notwithstanding section 1447(d)."[37] (That Act expressly excludes securities class actions, and thus SLUSA, from its reach.[38]) Because SLUSA does not contain similar provisions, § 1447(d)'s prohibition on appellate review applies to district court orders remanding a case for lack of subject-matter jurisdiction under SLUSA.

Therefore, the court of appeals erred in exercising appellate jurisdiction over the district courts' remand orders, because their orders were based on those courts' conclusions that they lacked subject-matter jurisdiction under SLUSA over petitioners' cases.

II. SLUSA MAKES REMOVAL JURISDICTION DEPENDENT ON PREEMPTION

A. SLUSA's Removal Provision Creates Federal-Question Jurisdiction For State-Law Claims If And Only If SLUSA Preempts Them

The court of appeals also erred for a second reason: even if, contrary to this Court's precedent, it was proper for the court of appeals to second-guess the district courts' conclusions that they lacked subject-matter jurisdiction, preemption under SLUSA is a question of subject-matter jurisdiction.

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[36] *See* 25 U.S.C. § 487(d) ("the United States shall have the right to appeal from any order of remand" in a suit involving foreclosure or sale of "tribal land").

[37] Pub. L. No. 109-2, § 5(a), 119 Stat. 4, 12 (to be codified at 28 U.S.C. § 1453(c)(1)).

[38] CAFA does *not* apply to "any class action that solely involves . . . a claim . . . concerning a covered security as defined under section 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E))." *Id.* § 4(a)(2), 119 Stat. 11 (to be codified at 28 U.S.C. § 1332(d)(9)(A)); *accord id.* § 5(a), 119 Stat. 13 (to be codified at 28 U.S.C. § 1453(d)).

1. Petitioners alleged in their complaints only state-law causes of action challenging respondents' failure to take measures to prevent market-timing activities, which – because petitioners continued to hold rather than sell their mutual-fund shares – reduced the value of their holdings. *See* Pet. App. 10a ("plaintiffs filed suit in state court, invoking state law alone"). Ordinarily, a defense of federal preemption of state-law claims does *not* create original federal-question jurisdiction and thus does not provide a ground for removal. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 399 (1987). Under the well-pleaded complaint rule, federal preemption is an affirmative defense that must be assessed by the state court in which the action was filed. "[S]ince 1887 it has been settled law that a case may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption." *Franchise Tax Bd. v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 14 (1983); *see* Pet. App. 11a.[39]

Section 77p(c) provides an exception to the well-pleaded complaint rule because it authorizes removal based on a defense of federal preemption. Section 77p(c) permits removal of "[a]ny covered class action brought in any State court involving a covered security, as set forth in subsection (b) of this section." By its terms, § 77p(c) does not permit removal of all covered class actions. Rather, it

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[39] *See also*, *e.g.*, *Gully v. First Nat'l Bank*, 299 U.S. 109, 112 (1936) ("[A] right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action."); *Taylor v. Anderson*, 234 U.S. 74, 75-76 (1914) ("[W]hether a case is one arising under the Constitution or a law or treaty of the United States, in the sense of the jurisdictional statute, must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose.") (citation omitted); *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908) ("Although such allegations show that very likely, in the course of the litigation, a question under the Constitution would arise, they do not show that the suit, that is, the plaintiff's original cause of action, arises under the Constitution.").

provides for removal of a covered class action if and only if it meets the preemption criteria "as set forth in subsection (b)." 15 U.S.C. § 77p(c). By cross-referencing SLUSA's preemption provision in subsection (b), the plain language of SLUSA's removal provision (§ 77p(c)) clearly mandates that a class action cannot be removed *unless* that action satisfies SLUSA's preemption provision. Thus, under § 77p(c)'s plain terms, the district court must determine whether the removed state-law claims are in fact preempted by subsection (b) as a prerequisite to determining whether the case is removable. "[W]here, as here, the statute's language is plain, the sole function of the courts is to enforce it according to its terms." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (internal quotation marks omitted).

SLUSA's legislative history confirms that Congress deliberately crafted SLUSA's removal provision to confer subject-matter jurisdiction only over state actions preempted by SLUSA's preemption provision. Both the House and Senate reports state that § 77p(c) "provides that any class action *described in subsection (b)* that is brought in a State court shall be removable to Federal district court, and may be dismissed pursuant to the provisions of subsection (b)." H.R. Rep. No. 105-640, at 16 (emphasis added); S. Rep. No. 105-182, at 8 (1998) (same). The chairman of the SEC and one of its commissioners likewise explained in prepared testimony on the bill that SLUSA's removal provision "is coextensive with the preemption provision."[40]

Thus, as the Second Circuit has explained, "SLUSA only converts into federal claims those state claims that fall within its clear preemptive scope, thereby confining federal question jurisdiction under this statutory regime to a subset of securities fraud cases." *Spielman v. Merrill*

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[40] Prepared Testimony of The Honorable Arthur Levitt, Jr., SEC Chairman, and The Honorable Isaac C. Hunt, SEC Commissioner, Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing, and Urban Affairs (Oct. 29, 1997), *available at* http://banking.senate.gov/97_10hrg/102997/witness/sec.htm.

Lynch, Pierce, Fenner & Smith, Inc., 332 F.3d 116, 124 (2d Cir. 2003). If, as in this case, a district court "determines that the action is *not* a 'preempted class action' and, therefore, removal was improper, the district court lacks subject matter jurisdiction to further entertain the action." *Id.* at 125.

Respondents, through sets of counsel including counsel of record in this Court, undertook precisely the same analysis in their notices of removal. In *Kircher*, for example, respondents argued that petitioners' claims were "preempted" and, "[f]or th[is] reason[], removal under SLUSA [wa]s proper."[41] They also followed that analysis in opposing petitioners' motions to remand. In *Potter*, for example, respondents expressly opposed remand on the ground that the claims were removable because they were preempted, arguing that "SLUSA's *preemptive* provisions authorize removal." Opposition of Defendants Janus Investment Fund and Janus Capital Management, LLC to Motion to Remand at 5 (emphasis added) (*Potter*, Dist. Ct. Docket Entry 43).[42] Plainly, when they were not attempt-

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[41] JA 353-54 (*Kircher*); *accord* JA 360-61 (*Potter*) (arguing that removal was proper under SLUSA because petitioners' claims were "'in connection with' the purchase or sale of a covered security"), 385 (*Dudley I*) ("Plaintiffs' claims fall squarely within the four corners of SLUSA and, therefore, are preempted . . . . For these reasons, removal under SLUSA is proper . . . ."), 402 (*Dudley II*) (same); *see also* JA 371 (*Vogeler*) (stating that petitioners' claims are "in connection with the purchase or sale of securities, and therefore are removable . . . under [SLUSA]"), 410 (*Jackson*) (stating that removal was proper under SLUSA because plaintiffs alleged "misrepresentations or omissions" and that "[respondents] used . . . a manipulative or deceptive device or contrivance in connection with the purchase or sale of covered securities"), 425-31 (*Spurgeon*) (arguing that removal was proper because SLUSA completely preempted petitioners' claims).

[42] *See also*, *e.g.*, Artisan Defendants' Memorandum in Opposition to Plaintiffs' Motion to Remand at 16 ("Under SLUSA, if an action [meets all four of the preemption criteria] . . . , the case is removable to federal court and subject to dismissal.") (*Parthasarathy*, Dist. Ct. Docket Entry 50); Response to Plaintiff's Jurisdictional Memorandum at 4 ("[SLUSA] preemption has the 'force to provide removal jurisdiction.'") (quoting *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 10 (2003)) (*Spurgeon*, Dist. Ct. Docket Entry 26); Defendants' Memorandum of

ing to read SLUSA in such a way as to permit reviewability of remand orders, respondents understood that removal jurisdiction depends on the satisfaction of SLUSA's preemption provision.[43]

2. That analysis of SLUSA is consistent with the Court's approach in the analogous context of complete preemption. The complete preemption doctrine, which this Court has crafted as a narrow exception to the well-pleaded complaint rule, holds that, "[w]hen the federal statute completely pre-empts the state-law cause of action, a claim which comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law. This claim is then removable under 28 U.S.C. § 1441(b), which authorizes any claim that 'arises under' federal law to be removed to federal court." *Beneficial Nat'l Bank*, 539 U.S. at 8; *see also Franchise Tax Bd.*, 463 U.S. at 24 ("[I]f a federal cause of action completely preempts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law.").

Law in Opposition to Plaintiffs' Motion to Remand at 2 ("SLUSA . . . authorizes removal of any 'covered class action' based on 'the statutory or common law of any State,' alleging misrepresentation or manipulation in connection with the purchase or sale of 'covered securities.' 15 U.S.C. §§ 77p(c) and 78bb(f)(2).") (*Kircher*, Dist. Ct. Docket Entry 40).

[43] Even if a remand based on the determination that a claim is not preempted by SLUSA did not in fact concern subject-matter jurisdiction, it would nevertheless be unreviewable because it would be based on "any defect other than lack of subject matter jurisdiction." 28 U.S.C. § 1447(c). As the Eleventh Circuit has explained, a "defect" in removal exists when any of the "legal requisites" for removal set forth in the applicable removal statute are not satisfied. *Snapper, Inc. v. Redan*, 171 F.3d 1249, 1253 (11th Cir. 1999) (internal quotation marks omitted). By cross-referencing SLUSA's preemption provision, § 77p(c) makes preemption one of the legal requisites for removal. The removal of claims that do not satisfy this requirement is plainly defective from the outset. *See Williams v. AFC Enters., Inc.*, 389 F.3d 1185, 1190 (11th Cir. 2004) (stating that, even if a remand order under SLUSA "was not based upon a lack of subject matter jurisdiction, we would readily conclude that this removal order is one based upon a 'defect' within the meaning of 1447(c) and therefore one we cannot review").

Under the complete preemption doctrine, federal-question jurisdiction exists if and only if federal law completely displaces the state-law claims. In that context, therefore, the preemption decision is a question of subject-matter jurisdiction. It logically follows that a district court's order remanding a case because the claims are not subject to the complete preemption doctrine is also not reviewable, as the courts of appeals (including the Seventh Circuit) have uniformly held.[44]

SLUSA functions in the same way: it provides federal removal jurisdiction over state-law claims if and only if those state claims are preempted. The court of appeals simply got it backwards in determining that the district court had removal jurisdiction over any and all "covered class actions" and that the preemption question had noth-

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[44] *See*, *e.g.*, *Gonzalez-Garcia v. Williamson Dickie Mfg. Co.*, 99 F.3d 490, 491-92 (1st Cir. 1996); *Spielman*, 332 F.3d at 124 (2d Cir.); *O'Neill v. Brannigan*, 54 Fed. Appx. 69, 72 (3d Cir. 2002); *Nutter v. Monongahela Power Co.*, 4 F.3d 319, 321 (4th Cir. 1993) ("Because complete preemption was the basis for the district court's jurisdiction, the court's findings regarding preemption and jurisdiction are indistinguishable. The preemption findings were merely subsidiary legal steps on the way to its determination that the case was not properly removed.") (internal quotation marks and alteration omitted); *Smith v. Texas Children's Hosp.*, 172 F.3d 923, 926 (5th Cir. 1999) ("[T]he district court's conclusion regarding the lack of complete preemption is insulated from appellate review by § 1447(d)."); *Anusbigian v. Trugreen/Chemlawn, Inc.*, 72 F.3d 1253, 1256-57 (6th Cir. 1996) ("[W]here a district court rejects a defendant's claim of complete federal preemption as a basis for removing a case to federal court, the court of appeals does not have jurisdiction to hear the appeal from a remand order."); *Rogers v. Tyson Foods, Inc.*, 308 F.3d 785, 790 (7th Cir. 2002) ("We accordingly conclude that removal of this action to federal court was improper, and we must reverse and remand this case to the district court with directions to remand the action to state court for lack of federal subject matter jurisdiction."); *Transit Cas. Co. v. Certain Underwriters at Lloyd's of London*, 119 F.3d 619, 624 (8th Cir. 1997) ("A remand based on lack of 'complete preemption' . . . is a remand required by 28 U.S.C. § 1447(c).") (internal quotation marks omitted); *Lyons v. Alaska Teamsters Employer Serv. Corp.*, 188 F.3d 1170, 1173 (9th Cir. 1999) ("[T]he remand, while it considers the merits of the preemption defense, is not apart from the jurisdictional determination."); *Glasser v. Amalgamated Workers Union Local 88*, 806 F.2d 1539, 1540 (11th Cir. 1986).

ing to do with jurisdiction. As with this Court's complete preemption doctrine, federal jurisdiction under SLUSA attaches only to those covered class actions that SLUSA preempts. Thus, whether SLUSA preempts a removed claim is a threshold question of subject-matter jurisdiction that a district court must answer before it turns to the merits of the claim.

B. The Court Of Appeals' Interpretation Is Unsupported By The Statutory Text And This Court's Cases

1. The court of appeals concluded that SLUSA preemption is not a question of subject-matter jurisdiction for the district court but rather is "the substantive decision that Congress authorized it to make" after it assumed jurisdiction over the removed case. Pet. App. 14a. The court explained that a district court lacks subject-matter jurisdiction "only when Congress has not authorized the federal judiciary to resolve the sort of issue presented by the case." *Id.* at 13a (citing *Scarborough v. Principi*, 541 U.S. 401, 413-14 (2004), and *Kontrick v. Ryan*, 540 U.S. 443, 454-55 (2004)). According to the court, it was required to "distinguish between a decision that 'this court lacks adjudicatory competence' and a decision that 'the court has been authorized to do X and having done so should bow out.'" *Id.* at 14a. In the court's view, treating the SLUSA preemption question as one of subject-matter jurisdiction would mean that "every federal suit, having been decided on the merits, would be dismissed 'for lack of jurisdiction' because the court's job was finished." *Id.* The court of appeals' reasoning is deeply flawed.

First, the fact that courts are "authorize[d]" to resolve the SLUSA preemption issue stems from the "familiar law that a federal court always has jurisdiction to determine its own jurisdiction." *United States v. Ruiz*, 536 U.S. 622, 628 (2002). Section 77p(c) provides federal jurisdiction *only* over cases that are in fact preempted by § 77p(b). Thus, under SLUSA, a district court must resolve the "merits" of the preemption question to determine whether it has subject-matter jurisdiction over the claim.

Nothing in *Kontrick* or *Scarborough* suggests that the district courts' authority to resolve the preemption issue in ruling on motions to remand under SLUSA somehow meant that the courts' remand orders were not based on a lack of jurisdiction. On the contrary, *Scarborough* explains that the "label" subject-matter jurisdiction refers to statutory prescriptions "'delineating the classes of cases . . . falling within a court's adjudicatory authority.'" 541 U.S. at 413-14 (quoting *Kontrick*, 540 U.S. at 454-55). By conditioning removability on the satisfaction of the preemption criteria "as set forth in subsection (b)," § 77p(c) provides federal "adjudicatory authority" only for that class of cases satisfying the requirements for preemption under SLUSA.

If Congress had intended to authorize the removal of all "covered class actions," it would simply have enacted a statute providing that "any covered class action brought in any State court involving a covered security shall be removable." But that is not what Congress did. Instead, Congress expressly limited removal jurisdiction to only covered class actions that also meet the preemption requirements "set forth in subsection (b)." Although the court of appeals acknowledged that "[d]efendants removed this suit under § 77p(c)," Pet. App. 11a, it never analyzed the text of § 77p(c). Instead, the court asserted without any textual basis that SLUSA creates federal jurisdiction over *any* covered class action in which a defendant chooses to file a notice of removal, and that a district court's preemption ruling is not one of jurisdiction. *Id.* at 13a-14a ("Because . . . this is a 'covered class action[,]' . . . a federal judge is . . . authorized . . . to decide whether any court may entertain the litigation."). Congress, however, chose to permit removal *only* for those covered class actions that also meet the preemption requirements "set forth in subsection (b)." Accordingly, removal is appropriate only in those covered class actions that fall within

SLUSA's preemption provision, and the lower court's judicial revision of the statute should be rejected.[45]

Second, the court of appeals' decision is internally inconsistent. The court conceded that "[a] conclusion that a suit is not a 'covered class action' (say, because just 40 investors stand to recover damages) would imply that removal had been improper, and such a decision would come within § 1447(d)." *Id.* at 14a. Under SLUSA's removal provision, however, determining whether the suit sought to be removed is a "covered class action" is but one of three express conditions for removal laid out in § 77p(c). For a suit to be removable under § 77p(c), not only must it be a "covered class action," but it must also involve "a covered security" and meet the criteria for preemption "as set forth in subsection (b)." 15 U.S.C. § 77p(c). It is illogical to conclude that the failure to meet one of those prerequisites results in a lack of subject-matter jurisdiction, but failing to meet the other two conditions does not. Thus, the court's acknowledgment that jurisdiction would be lacking if the covered class action requirement in § 77p(c)

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[45] In opposing certiorari, respondents relied on the federal officer removal statute authorizing removal of a state-court civil action against a federal officer "for any act under color of such office." 28 U.S.C. § 1442(a)(1); *see* Brief in Opposition at 16-17 (filed Nov. 29, 2005) (citing, *inter alia*, *Jefferson County v. Acker*, 527 U.S. 423 (1999)). That statute upholds important federal sovereignty interests not present in SLUSA. The Court has interpreted it not to require the removing officer to prove a "clearly sustainable defense" but only a "colorable defense." *Acker*, 527 U.S. at 432 (internal quotation marks omitted). SLUSA, on the other hand, expressly bases removability on whether there is preemption *in fact* – not merely on whether that defense is colorable. The Court's interpretation of the federal officer removal statute also relied on what it viewed as the statutory purpose "to have the validity of the defense of official immunity tried in a federal court." *Id.* at 431 (internal quotation marks omitted). Similar concerns are not present here. In every case removed under SLUSA, a federal court determines the "validity" of the argument that the claims are preempted; that determination dictates whether the case was properly removed and subject to dismissal or improperly removed and subject to remand. In any event, *Acker* in no way purports to alter the rule that an order remanding for lack of subject-matter jurisdiction is unreviewable.

were not met demonstrates that jurisdiction likewise would be lacking if the claim did not involve a fraudulent misstatement, was in connection with the purchase or sale of a covered security, or met any other criteria for preemption.[46]

Third, in determining that appellate jurisdiction was proper, the court of appeals erroneously placed substantial reliance on § 77p(d)(4), which provides that, if a district court determines that an action removed from state court "may be maintained in State court pursuant to . . . subsection [(d)]," it must remand the action to state court. 15 U.S.C. § 77p(d)(4).[47] The court perceived that this provision is the basis for a remand if a district court determines that "§ 77p(b) does not thwart plaintiffs' claims," and that such remands are "not within § 1447(c) . . . , for a remand under § 77p(d)(4) comes at the end rather than the outset of federal adjudication." Pet. App. 12a, 13a.

The court erred in concluding that § 77p(d)(4) applies here at all. Although that provision does specifically require a remand, it does so only for certain state actions enumerated in "subsection [(d)]" – in particular, state claims involving tender offers, dissenters' rights, and suits brought by States or their pension plans that otherwise would meet the preemption criteria yet nevertheless are preserved from preemption by subsection (d) of § 77p. *See* 15 U.S.C. § 77p(d)(1)-(3); *see also supra* note 2 (discussing § 77p(d)). But this case does not involve any of the specific carve-outs in § 77p(d), so the remand provision of § 77p(d)(4) does not apply. That is the only sensible reading of "subsection" in § 77p(d)(4). *See Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 61 (2004) (observing that, under the ordinary "hierarchical scheme" of sub-

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[46] To the extent the court might have meant that the covered class action holding would be unreviewable, not because it was jurisdictional but rather because it qualified as "any defect other than lack of subject matter jurisdiction," § 1447(c), that logic would likewise extend to the full preemption analysis required under § 77p(b). *See supra* note 43.

[47] Section 77p(d) is set out in full at App., *infra*, 2a-3a, 17a-18a.

dividing statutes, "subsections" "start[ ] with (a)"). A district court's finding that a case is subject to preemption under § 77p(b), therefore, is subject to the normal remand rules of § 1447.

2. Given the court of appeals' linkage of the preemption "merits" discussion to its removal analysis, we briefly address here why the court also erred in viewing petitioners' claims as preempted by SLUSA. First, the court erred by focusing exclusively on whether petitioners' claims were "in connection with the purchase or sale" of securities. Second, even if petitioners' claims were "in connection with the purchase or sale" of securities after disposition of *Merrill Lynch v. Dabit*, No. 04-1371, their claims do not entail allegations of an "untrue statement or omission of a material fact." 15 U.S.C. § 77p(b)(1). Instead, their claims assert that respondents acted negligently and recklessly by failing to follow practices that would protect petitioners' assets from the dilution in value caused by market timing.[48]

a. The court of appeals erroneously concluded that SLUSA's preemption provision applies in this case because petitioners' holder claims asserted here do not raise allegations "in connection with the purchase or sale" of securities within the meaning of § 77p(b). Respondent in *Merrill Lynch v. Dabit*, No. 04-1371, is correct in arguing that SLUSA does not preempt claims brought by private plaintiffs who neither bought nor sold any security in connection with a defendant's misconduct. The operative language in SLUSA's preemption provision – "in connection with the purchase or sale" – replicates the identical phrase in § 10(b) and Rule 10b-5, both of which proscribe fraudulent conduct "in connection with the purchase or sale of any security." In *Blue Chip Stamps*, this Court held, based on an interpretation of that phrase, that a pri-

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[48] *See* JA 181-82, 183, 186, 187-88 (¶¶ 56, 60, 69, 73) (*Potter*), 205, 206-07 (¶¶ 56, 60) (*Kircher*), 230, 231-32 (¶¶ 60, 64) (*Parthasarathy*), 255-56, 257-58 (¶¶ 49, 54) (*Dudley I*), 273-74, 275-76 (¶¶ 49, 54) (*Dudley II*), 290-91, 292-93 (¶¶ 49, 54) (*Vogeler*), 307, 308-09 (¶¶ 49, 53) (*Jackson*), 324, 326-27 (¶¶ 56-57, 62) (*Spurgeon*).

vate party does not allege misconduct "in connection with the purchase or sale of any security" within the meaning of § 10(b) and Rule 10b-5 unless that misconduct was in connection with the plaintiff's own purchase or sale of a security. *See* 421 U.S. at 730-31, 749. "When . . . judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well." *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998); *see Lorillard v. Pons*, 434 U.S. 575, 581 (1978). The phrase "in connection with the purchase or sale" in SLUSA's preemption provision therefore must have the same meaning as the identical language in § 10(b) and Rule 10b-5. Accordingly, SLUSA's preemption provision does not apply to claims brought by holders of securities, as opposed to purchasers or sellers. *See generally* Resp. Br. at 21-38, No. 04-1371.

Under that correct reading of § 77p(b), petitioners' claims are not preempted by SLUSA. Petitioners do not seek to recover for injuries they sustained in connection with their own purchase or sale of a security. Instead, they seek compensation for the dilution of the value of the mutual-fund shares that they held while others engaged in market timing.[49] Indeed, holders are the only individuals injured by market timing; those who purchase and sell their fund shares benefit in the distorted valuation from which market timers benefit at the expense of holders. The dilution in an investor-holder's investment constitutes an injury uniquely suffered only by holders. Holders should not be denied the opportunity to bring state-law negligence or breach of fiduciary duty claims under a misapprehension that they are § 10(b) fraud claims in disguise. They are not such claims. Holder claims based on market timing cannot be brought as § 10(b) claims under the rule of *Blue Chip Stamps* because

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[49] *See* JA 180-84 (¶¶ 49-61) (*Potter*), 204-07 (¶¶ 51-61) (*Kircher*), 228-33 (¶¶ 53-65) (*Parthasarathy*), 254-59 (¶¶ 44-55) (*Dudley I*), 273-76 (¶¶ 44-55) (*Dudley II*), 289-93 (¶¶ 44-55) (*Vogeler*), 306-10 (¶¶ 44-54) (*Jackson*), 322-25 (¶¶ 49-58) (*Spurgeon*).

they do not involve the holder's own purchase or sale of a security. Rather, such claims to recover for harm caused by purchasers and sellers at the expense of holders can be brought only under state law.[50]

b. Even if the Court were to decide in *Merrill Lynch v. Dabit*, No. 04-1371, that SLUSA preempts class actions brought under state law alleging fraud in connection with the purchase or sale of securities by someone other than the plaintiff, petitioners' claims still are not preempted by SLUSA. For SLUSA's preemption provision to apply, a plaintiff must "alleg[e] an untrue statement or omission of a material fact" or "that the defendant used or employed any manipulative or deceptive device or contrivance." 15 U.S.C. § 77p(c). By its terms, that provision does not encompass claims that do not depend on allegations of fraud or manipulation.[51]

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[50] Contrary to the Seventh Circuit's erroneous view (Pet. App. 6a), such claims cannot be brought as derivative claims. By definition, derivative claims assert harm to the corporation in ways that adversely affect *all* shareholders. *See* 19 Am. Jur. 2d *Corporations* § 1947, at 134 (2004) ("An action brought by a stockholder is derivative if the gravamen of the complaint is an injury to the corporation or *to the whole body of its stock or property*") (emphasis added); *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 528 (1984) ("a derivative suit is one founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff") (internal quotation marks omitted). But market timing does not affect all shareholders the same way. Those who sell at the same time as market timers (through fortuity or design) cause a similar harm to remaining holders of shares and reap a similar benefit for themselves. That is why the market-timing claims asserted by petitioners select a discrete time period and allege claims only for those share holdings investors maintained during that period.

[51] SLUSA's preemption provision therefore does not encompass class actions under state law to recover for harm caused by negligence; breach of contract, *see Falkowski v. Imation Corp.*, 309 F.3d 1123, 1131 (2002), *amended on other grounds*, 320 F.3d 905 (9th Cir. 2003); *Norman v. Salomon Smith Barney Inc.*, 350 F. Supp. 2d 382, 385-88 (S.D.N.Y. 2004); *Xpedior Creditor Trust v. Credit Suisse First Boston (USA) Inc.*, 341 F. Supp. 2d 258, 269-70 (S.D.N.Y. 2004); or breach of fiduciary duties or the implied covenants of good faith and fair dealing, *see Norman*, 350 F. Supp. 2d at 385-88; *Xpedior Creditor Trust*, 341 F.

That conclusion is consistent with this Court's decision in *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462 (1977). In that case, the Court rejected a claim that a majority shareholder had violated § 10(b) and Rule 10b-5 – which together make it unlawful to use "fraud" or a "manipulative or deceptive device or contrivance" in connection with the purchase or sale of a security – by undervaluing shares in buying out minority shareholders during a short-form merger. *Id.* at 470. The Court explained that the complaint had not alleged a misrepresentation of fact, and it concluded that "the transaction, if carried out as alleged in the complaint, was neither deceptive nor manipulative and therefore did not violate either § 10(b) of the Act or Rule 10b-5." *Id.* at 474. Accordingly, the Court concluded, the shareholders' action was simply a state-law claim for breach of fiduciary duty. *Id.* at 479. Because SLUSA's preemption provision tracks the language of § 10(b) and Rule 10b-5, *Santa Fe*'s holding that negligence claims fall outside the ambit of federal securities laws means that such claims also fall outside the preemptive scope of § 77p(b).

Petitioners' complaints allege that respondents acted negligently or recklessly by failing to evaluate whether they were vulnerable to market timing because of changes in the value of shares in respondents' portfolio after the close of the native market but before the calculation of the NAV and by failing to adhere to their published policies designed to discourage or eliminate market timing.[52] Nowhere in the complaints do petitioners allege that they suffered harm because of fraudulent statements made by respondents. Instead, the gravamen of petitioners' complaints is that respondents inadequately protected the funds from market timing. To prevail on those claims,

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Supp. 2d at 269-70; *cf.* Pet. App. 6a (citing *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462 (1977)).

[52] *See* JA 180-84 (¶¶ 49-61) (*Potter*), 204-07 (¶¶ 51-61) (*Kircher*), 228-33 (¶¶ 53-65) (*Parthasarathy*), 254-59 (¶¶ 44-55) (*Dudley I*), 273-76 (¶¶ 44-55) (*Dudley II*), 289-93 (¶¶ 44-55) (*Vogeler*), 306-10 (¶¶ 44-54) (*Jackson*), 322-25 (¶¶ 49-58) (*Spurgeon*).

petitioners need not prove that respondents made a misrepresentation or omission, or engaged in manipulation. They must show only that respondents were aware, or should have been aware, of the risks posed by market timing, but did not take any action to prevent it.[53]

Despite the foregoing, the court of appeals concluded that petitioners' claims were preempted, stating that "[p]laintiffs do not contend that . . . their suits allege mismanagement rather than deceit or manipulation." Pet. App. 6a. That statement is belied by the face of the complaints themselves, all of which clearly allege only claims of negligence and recklessness for respondents' failure to adopt practices that would protect petitioners' assets from the dilution in value caused by market-timing negligence or breach of fiduciary duty.[54] Moreover, because SLUSA preemption raises a question of federal subject-matter jurisdiction, *see supra* pp. 31-34, the court erred in thinking that this argument was subject to waiver. It is not. As this Court has held numerous times, subject-matter jurisdiction "can never be forfeited or waived," because it "involves a [federal] court's power to hear a case." *United States v. Cotton*, 535 U.S. 625, 630 (2002); *see Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 95 (1998) ("Every federal appellate court has a special obligation to

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[53] To state a negligence claim, a plaintiff must allege "a duty the defendant owes to the plaintiff, a breach of that duty by the defendant, a causal connection between the breach and the plaintiff's injury, and actual injury." 57A Am. Jur. 2d *Negligence* § 71, at 141 (2004). To state a claim for recklessness, a plaintiff must allege that he was harmed by an act that the defendant "intentionally perform[ed]" and that was "so unreasonable and dangerous" that the defendant should have known it was "highly probable that harm [would] result." *Id.* § 276, at 340. An "untrue statement or omission of a material fact" or a "manipulative or deceptive device or contrivance" is neither an element of those state-law claims nor a fact asserted to support petitioners' claims.

[54] *See* JA 181-82, 183, 186, 187-88 (¶¶ 56, 60, 69, 73) (*Potter*), 205, 206-07 (¶¶ 56, 60) (*Kircher*), 230, 231-32 (¶¶ 60, 64) (*Parthasarathy*), 255-56, 257-58 (¶¶ 49, 54) (*Dudley I*), 273-74, 275-76 (¶¶ 49, 54) (*Dudley II*), 290-91, 292-93 (¶¶ 49, 54) (*Vogeler*), 307, 308-09 (¶¶ 49, 53) (*Jackson*), 324, 326-27 (¶¶ 56-57, 62) (*Spurgeon*).

satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review, even though the parties are prepared to concede it.") (internal quotation marks and brackets omitted).

Accordingly, because petitioners' claims fall outside the ambit of SLUSA preemption in § 77p(b), the district courts lacked subject-matter jurisdiction over the claims and remand to state court was therefore appropriate. And because the district courts in all of these consolidated cases correctly reached that judgment, the Seventh Circuit erred in thinking that it had appellate jurisdiction to review those remand orders.

III. PERMITTING REVIEW OF SLUSA REMAND ORDERS WOUD CONTRAVENE CONGRESS'S POLICY JUDGMENT IN § 1447(d)

The prohibition on the review of remand orders derives from Congress's long-held "policy of not permitting interruption of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed." *Rice*, 327 U.S. at 751; *see Thermtron*, 423 U.S. at 351 ("There is no doubt that in order to prevent delay in the trial of remanded cases by protracted litigation of jurisdictional issues, Congress immunized from all forms of appellate review any remand order issued on the grounds specified in § 1447(c)"). Such interruptions unfairly increase the delay that a plaintiff must endure when a claim that he has filed in state court has been removed to federal court.

As then-Justice Rehnquist explained in his dissent in *Thermtron*:

> Congress' purpose in barring review of all remand orders has always been very clear – to prevent the additional delay which a removing party may achieve by seeking appellate reconsideration of an order of remand. The removal jurisdiction extended by Congress works a significant interference in the conduct of litigation commenced in state court. While Congress felt that making

> available a federal forum in appropriate instances justifies some such interruption and delay, it obviously thought it equally important that when removal to a federal court is not warranted the case should be returned to the state court as expeditiously as possible. If this balanced concern is disregarded, federal removal provisions may become a device affording litigants a means of substantially delaying justice.

423 U.S. at 354-55 (Rehnquist, J., dissenting). Upholding the Seventh Circuit's erroneous decision will undermine that "strong congressional policy against review of remand orders," *Things Remembered*, 516 U.S. at 136 (Ginsburg & Stevens, JJ., concurring) (internal quotation marks omitted), by unfairly delaying the resolution of claims of litigants who properly brought their claims in state court.

Although giving lip-service to Congress's long-standing policy against burdening litigants with delay caused by appellate review of orders remanding cases for lack of subject-matter jurisdiction, the court of appeals concluded that review of remand orders under SLUSA would result in "little cost in delay beyond" the delay already caused by the removal and that this delay was warranted because SLUSA requires "that one specific substantive decision in securities litigation must be made by the federal rather than the state judiciary." Pet. App. 15a. That analysis is wrong on three counts.

First, the federal judiciary *did* resolve the preemption issue in this case. Each of the district courts in this case determined that petitioners' claims were not preempted by SLUSA. The fact that SLUSA authorizes federal district courts to determine whether a claim is preempted by SLUSA and therefore removable does not mean that that determination must be reviewable on appeal. It has long been recognized that Congress has the power to preclude review of any order in the court of appeals. *See Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850) ("Courts created by statute can have no jurisdiction but such as the statute

confers."). Congress exercised that power when it enacted § 1447(d)'s prohibition on appellate review of orders remanding for lack of subject-matter jurisdiction.

Second, contrary to the court of appeals' apparent view, Congress did not vest the federal judiciary with exclusive power to interpret and apply SLUSA's preemption provision. While SLUSA *permits* removal of preempted claims, it does not *require* removal. "It is black letter law . . . that the mere grant of jurisdiction to a federal court does not operate to oust a state court from concurrent jurisdiction." *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 479 (1981); *see also Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 149-50 (1988) ("[W]hen a state proceeding presents a federal . . . pre-emption issue, the proper course is to seek resolution of that issue by the state court."). Congress's decision not to confer exclusive jurisdiction on federal courts over securities class actions reflects Congress's judgment that state courts are competent to resolve whether SLUSA preempts a particular claim.

Third, by concluding that permitting appeals of remand orders under SLUSA would result in excusable delays, the court of appeals impermissibly ignored the policy concerns advanced in the removal scheme crafted by Congress in SLUSA and § 1447. By authorizing removal of certain claims under SLUSA, Congress determined that the need for the availability of a federal forum to resolve whether a securities class action under state law must be dismissed as preempted justified imposing on plaintiffs the costs and delays associated with removal. But the absence from SLUSA of a provision authorizing appellate review of remand orders reflects Congress's decision not to saddle plaintiffs who already have suffered delay through removal with the additional delay and costs associated with appeal. Instead, "Congress decided to place final responsibility for implementation of its removal scheme with the district courts." *Thermtron*, 423 U.S. at 361 (Rehnquist, J., dissenting). By disregarding the limits on its jurisdiction prescribed by Congress in § 1447(d), the

court of appeals impermissibly substituted its own judgment for that of Congress.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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