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

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For centuries, the general rule has been that orders remanding cases to state court are not reviewable on appeal. That rule governs when the remand is based on a lack of subject-matter jurisdiction. Without even a passing nod to the history of 28 U.S.C. § 1447(d), respondents attempt to extrapolate from this Court's narrow exceptions to the general rule of non-appealability a rule that gives defendants in securities cases a right to appellate review that other civil defendants do not enjoy. This Court should reject that plea. Although Congress knows how to draft a right of appellate review when it wants to, it did not do so in SLUSA. Rather, Congress made clear that 15 U.S.C. § 77p(c) – which concededly governs subject-matter jurisdiction – defines removal jurisdiction to be coextensive with SLUSA's preemptive scope. That reading advances Congress's multiple purposes of ensuring that Rule 10b-5 claims masquerading as state-law claims may be brought only in federal court and that non-preempted claims will proceed in state court without burdening the federal system with appeals of remand orders.

I. REMAND ORDERS FOR LACK OF SUBJECT-MATTER JURISDICTION UNDER SLUSA ARE NOT REVIEWABLE ON APPEAL

A. This case concerns the district courts' construction of SLUSA's removal provision, 15 U.S.C. § 77p(c), which respondents agree "confers subject-matter jurisdiction in the federal courts" over removed cases. Br. 19. The district courts below construed § 77p(c)'s phrase, "as set forth in subsection (b)," to mean that Congress intended to condition removal on a defendant's satisfaction of each element of the preemption defense set out in § 77p(b). Indeed, respondents' own notices of removal argued that removal was proper precisely because each of the § 77p(b) requirements for preemption was met. *See* Pet. Br. 33-34. After finding no preemption, the district courts expressly dismissed these actions for a "'lack[of] subject matter jurisdiction.'" Resp. Br. 12 (quoting Pet. App. 12a).

Respondents concede that the district courts explicitly based remand on a lack of subject-matter jurisdiction. *See*

id. Respondents' concession resolves this case. As the Court explained in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), "[i]f 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." *Id.* at 343 (emphasis added, quotation marks omitted). That prohibition on appellate review applies to *all* remands based on a district court's determination that it lacks subject-matter jurisdiction, whether "erroneous or not." *Id.* Given the district courts' express conclusions that they lacked subject-matter jurisdiction, the remand orders issued pursuant to those findings are unreviewable. *See Gravitt v. Southwestern Bell Tel. Co.*, 430 U.S. 723, 723-24 (1977) (per curiam).

Respondents attempt (at 13) to avoid *Thermtron*'s mandate by claiming that a court of appeals is not bound by the "label" the district court gives to its remand order. Citing *Arbaugh v. Y & H Corp.*, 126 S. Ct. 1235 (2006), respondents argue that a court of appeals may review a remand order to determine whether the district court's jurisdictional determination was correct. But *Arbaugh* did not construe or even cite § 1447. There, the district court had vacated a plaintiff's Title VII jury verdict for lack of jurisdiction on the ground, raised for the first time after trial, that the defendant employer had fewer than 15 employees. This Court reversed, finding that the employee-numerosity requirement in Title VII went to the merits and not jurisdiction and was therefore waived.

Under § 1447(d), by contrast, inquiring into the reasoning underlying a remand order based on lack of subject-matter jurisdiction is precisely what *Thermtron* proscribes: "remand orders issued under § 1447(c) and invoking the grounds specified therein – that removal was improvident and without jurisdiction – are immune from review under § 1447(d)." 423 U.S. at 346. In view of the district courts' express statements that they remanded for lack of subject-matter jurisdiction, those orders are unreviewable, even if the courts plainly erred in concluding

that jurisdiction was lacking. "[T]he 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); *see* Pet. Br. 24-28.

B. In any event, respondents wrongly maintain that this case turns on a dispute about a "label." In *Arbaugh*, the employee-numerosity provision was not jurisdictional, whereas § 77p(c) concededly *is* jurisdictional. *See* Resp. Br. 19 ("SLUSA's removal provision . . . confers subject-matter jurisdiction"). Respondents' disagreement thus is not with the *label* attached to the district courts' rulings, but with those courts' *construction* of § 77p(c) as incorporating the preemption criteria "set forth in subsection (b)" for purposes of subject-matter jurisdiction. That fundamentally is a disagreement with the correctness of the district courts' jurisdictional analysis – both in statutory construction and in application of facts to law – under a statute that governs subject-matter jurisdiction.

Thus, even if respondents were correct that an order expressly based on a lack of jurisdiction could be reviewed if the court wrongly "labeled" the statutory provision as jurisdictional when in fact it was not – and *Thermtron* and its progeny reject that proposition – such a principle would not apply here. Respondents' argument would effectively limit the reach of § 1447(d) to issues of fact (*e.g.*, citizenship of a party), but would make reviewable alleged errors of law made by the district court in construing a jurisdictional statute. Respondents' position that *Thermtron*'s narrow exception is in fact a baseline "*Thermtron* rule" (Br. 9, 11, 38-41), to which § 1447(d) provides a limited exception, is squarely contrary to this Court's longstanding precedent and turns on its head Congress's policy that remand orders are not reviewable. *See* Pet. Br. 20-23 (detailing history of § 1447(d)); *id.* at 28 n.34.

Moreover, respondents' theory cannot be reconciled with *Gravitt*, which concerned a district court's application of judicial estoppel to bar the defendant's assertion that it was diverse from all plaintiffs. The court of appeals found the remand order reviewable because judicial estoppel is

not a ground mentioned in § 1447(c). This Court rejected that notion. It held that, because the remand was based on lack of diversity, it was unreviewable. *See* Pet. Br. 25-26. That is the same as the jurisdictional holding here, which was based on the district courts' conclusions that § 77p(c) incorporated the preemption factors "as set forth in subsection (b)," and that those factors were not met.[1]

C. Contrary to respondents' view, prohibiting appellate review of a remand order expressly based on a lack of subject-matter jurisdiction does not conflict with the doctrine that "federal courts must independently determine whether appellate jurisdiction exists in a given case." Resp. Br. 13. A court of appeals always has jurisdiction to determine its own power to review a remand order, that is, "to determine its own jurisdiction." *United States v.*

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[1] Respondents' additional cases are inapposite. *See* Br. 13. Like *Arbaugh*, two of the decisions cited from this Court neither addressed § 1447(d) nor concerned a remand to state court. *See Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737 (1976) (holding final judgment on liability that declined to award a remedy was non-final and unreviewable); *Nashville, C. & St. L. Ry. v. Wallace*, 288 U.S. 249 (1933) (state legislative judgments concerning declaratory actions not controlling as to whether an Article III "case or controversy" exists). Justice Ginsburg's statement concerning a "tag" in her concurring opinion in *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995), was made in the context of rejecting a law/equity distinction under a bankruptcy code statute, and had nothing to do with § 1447(d) orders. *See id.* at 134; *id.* at 135 ("A restrictive definition of what is 'equitable' could invite wasteful controversy over the reviewability of bankruptcy case remand orders *that are not reached by § 1447* and rest on grounds a common-law pleader might type 'legal.'") (emphasis added). The Third Circuit in *Aliota v. Graham*, 984 F.2d 1350 (3d Cir. 1993) (Alito, J.), did address § 1447(d), but not in a way that assists respondents. There, the court found that the district court had exceeded its authority in finding erroneous a determination made by the Attorney General, which by statute was deemed "conclusive" as to "subject matter jurisdiction" and therefore *unreviewable*. *Id.* at 1357 (analogizing to *Thermtron*'s holding that a district court lacks authority to remand based on an overcrowded docket, "'*grounds that he had no authority to consider*'") (quoting 423 U.S. at 351) (emphasis added in *Aliota*). Here, by contrast, there can be no dispute that the district courts were authorized – indeed, required – to construe § 77p(c)'s requirements for subject-matter jurisdiction over removed cases.

Ruiz, 536 U.S. 622, 628 (2002). When a district court bases remand on a lack of subject-matter jurisdiction, the court of appeals must conclude that it lacks jurisdiction to review that order, particularly when the district court is construing a subject-matter jurisdiction provision.

Respondents next attempt to analogize to decisions construing the bar on appellate review of judgments of acquittal in a criminal case in 18 U.S.C. § 3731. They note the Court's instruction that "'what constitutes an "acquittal" is not to be controlled by the form of the judge's action'"; instead, it depends on "'whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.'" Resp. Br. 14 (quoting *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977); citing other cases). Respondents view those cases as establishing that "a court of appeals may question a district court's labeling of its remand order as 'jurisdictional' without violating the bar on appeals of . . . jurisdictional remands." Br. 15; *see id.* (asserting that court should "independently determine the basis for a district court's remand order before holding that § 1447(d) bars an appeal").

Respondents' analogy is inapt. The purpose of the label rule in the acquittal cases is not to prevent delay suffered by plaintiffs in litigating removal issues on appeal and thereby to tolerate some risk of inaccuracy (as with § 1447(d)), but rather to achieve the fullest accuracy possible to protect a criminal defendant's right to avoid double jeopardy and thus to preclude the government from bringing a second criminal prosecution. No such overarching constitutional right is implicated here. Instead, the respect for the "label" given by the federal courts to foreclose appellate review of remand orders advances the constitutional principle that federal courts are courts of limited jurisdiction. Respondents cite no case suggesting that judgments of acquittal should be treated the same as remand orders. *Thermtron* explained that § 1447(d) prohibits review when the district court "purports" to base remand on a determination that it lacks subject-matter

jurisdiction. 423 U.S. at 343. In any event, under any reasonable view, the district courts' remand orders here concerned subject-matter jurisdiction under § 1447(c), which brings them within the prohibition on appellate review of § 1447(d).[2]

Finally, respondents claim that review "would better serve Congress's expressed interest in uniformity in private securities litigation." Br. 37. In SLUSA, Congress sought certain uniformity between state and federal law by preempting disguised Rule 10b-5 claims brought under state law. Respondents invoke the very different interest in uniformity of decision among "each judicial district" in the federal system. *Id.* But Congress simply did not prescribe an unrelenting uniformity. Instead, Congress codified a "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." *United States v. Rice*, 327 U.S. 742, 751 (1946). This Court has long "assume[d] that Congress is '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 original). In SLUSA, Congress declined to include "a clear statutory command to the contrary," *id.*, despite having done so in other statutes. *See* Pet. Br. 29-30. That congressional policy must be applied here.[3]

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[2] *Cf.* Law Professors Amicus Br. 10 ("'gradual evisceration' of the § 1447(d) bar"); *Dalrymple v. Great River Dam Auth.*, 145 F.3d 1180, 1185 n.8 (10th Cir. 1998) ("We fear such maneuvering [to avoid § 1447(d)] unnecessarily convolutes the law in this area and runs afoul of strong congressional policy against review of remand orders 'in order to prevent delay in the trial of remanded cases by protracted litigation of jurisdictional issues.' *Thermtron Prod., Inc.*, 423 U.S. at 351.").

[3] Congress has made similar policy judgments in other contexts. *Compare Cal. Pub. Empl. Ret. Sys. v. WorldCom, Inc.*, 368 F.3d 86, 103 (2d Cir. 2004) (federal interest in "centralizing bankruptcy litigation in a federal forum"); *and* U.S. Const. art. I, § 8, cl. 3 ("uniform Laws on the subject of Bankruptcies"), *with Things Remembered*, 516 U.S. at 128-29 (no review of jurisdictional remand orders in bankruptcy cases).

II. SLUSA MAKES REMOVAL JURISDICTION DEPENDENT ON PREEMPTION

The district courts correctly construed § 77p(c) to permit removal only of claims satisfying the preemption criteria "as set forth in subsection (b)." By cross-referencing SLUSA's preemption provision, § 77p(c) mandates that a covered class action involving a covered security cannot properly be removed unless it is preempted. *See* Pet. Br. 30-34. Because preemption is a jurisdictional prerequisite to removal under SLUSA, § 1447(d) bars review of the district courts' remand orders.

Respondents' contrary claim is that "SLUSA's removal provision is broader than its preclusion provision – that is, it confers subject-matter jurisdiction in the federal courts over some claims that are not precluded." Br. 19; *see* Br. 18-24. Thus, respondents contend, § 77p(c) requires only a "colorable" assertion of preemption. Br. 25-31. They then posit that, if the claim is found not to be preempted, remand is not required and the district court has "discretion" to order a remand. Br. 32-37. Respondents' theory conflicts with SLUSA's text and purposes, and produces the unintended result that state-law claims *not* preempted by SLUSA may remain in federal court.

A. SLUSA's removal provision is coextensive with its preclusion provision.

1. Congress's inclusion of the phrase "as set forth in subsection (b)" in § 77p(c) reflects that, under SLUSA, state-law claims that are in fact disguised Rule 10b-5 claims must be pursued in federal court subject to, *inter alia*, heightened pleading requirements, a stay of discovery while a motion to dismiss is pending, and a safe harbor for forward-looking statements by issuers. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 126 S. Ct. 1503, 1511 (2006) (SLUSA enacted "'to prevent *certain* State private securities class action lawsuits *alleging fraud* from being used to frustrate the objectives of the [PSLRA]'") (quoting SLUSA § 2(5)) (emphases added); H.R. Conf. Rep. No. 105-803, at 13 (1998) ("Under the legislation, class actions relating to a 'covered security' . . .

alleging fraud or manipulation must be maintained pursuant to the provisions of Federal securities law, in Federal court"); Resp. Br. 1-2.

But Congress expressed no intent to re-channel state claims *not* subject to the PSLRA into federal court for a trial applying state-law principles of liability. *See* Pet. Br. 3-4. As respondents maintain, "Congress included the removal provision to ensure that *precluded* actions do not proceed in state court." Br. 22 (emphasis added). Thus, the "removal provision 'is designed to prevent a State court from inadvertently, improperly, or otherwise maintaining jurisdiction over an action *that is preempted*.'" *Id.* (quoting H.R. Rep. No. 105-640, at 16 (1998)) (emphasis added).

That reading is confirmed by § 77p(d), which specifically preserves certain state claims that would otherwise be preempted by § 77p(b) and mandates remand of those preserved actions to state court. *See* 15 U.S.C. § 77p(d); Pet. Br. 5 n.2; Resp. Br. 35. There is no reason to think that Congress intended a different result for other purely state-law claims not preempted in the first place.

2. Respondents (at 19-20) invoke *Arbaugh*'s statement that a statutory element should be treated as jurisdictional "[i]f the Legislature clearly states" that it is "jurisdictional." 126 S. Ct. at 1245. In *Arbaugh*, however, the Title VII employee-numerosity requirement at issue was contained in a "definitions" section of the statute defining 13 terms; Title VII's jurisdictional provision was in an entirely different section.[4] There is no such structural separation here. Section 77p(c) clearly authorizes removal of "[a]ny covered class action brought in any State court involving a covered security, as set forth in subsection (b)." Whether a federal question exists to support removal of purely state-law claims plainly raises a question of subject-matter jurisdiction and each statute must be read on its own terms. *See id.* at 1245 n.11 ("Congress

[4] *See Arbaugh*, 126 S. Ct. at 1245 (Congress could have made the employee-numerosity requirement "jurisdictional" if it had wanted to).

has exercised its prerogative to restrict the subject-matter jurisdiction of federal district courts based on a wide variety of factors, some of them also relevant to the *merits* of a case.") (emphasis added).

Respondents (at 20) next defend the Seventh Circuit's ruling that the "covered class action" element of § 77p(c) is jurisdictional while the preemption element is not, citing a footnote in *Dabit*, 126 S. Ct. at 1512 n.7 ("Another key provision of the statute makes all 'covered class actions' filed in state court removable to federal court."). SLUSA's removal provision was not at issue in *Dabit* – that case was filed in *federal*, not state, court (*see id.* at 1507) – and this Court has held numerous times (including in *Arbaugh*) that such passing dicta is not precedential. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925).[5]

Respondents assert that the words "any" and "involving" as used in § 77p(c) indicate that non-preempted claims are nevertheless removable because "[t]hese are terms of inclusion, not limitation." Br. 20; *see* Br. 20-21, 22-23. But that contention ignores the context in which those terms appear. "*Any* covered class action brought in any State court *involving* a covered security, as set forth in subsection (b)" is most naturally read to encompass those actions described in "subsection (b)," not to broaden removability beyond those actions so described. *See*, *e.g.*, *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (meaning of words in statute depends on context). The words "any" or "involving" signify only that claims

[5] CAFA does not reflect an understanding that SLUSA bases removal solely on the existence of a "covered security." *See* Resp. Br. 21 n.6. As noted in the text, even respondents concede (as did the Seventh Circuit) that removal jurisdiction also requires, at a minimum, that the case involve a "covered class action." Br. 29 n.9; *see also United States v. Price*, 361 U.S. 304, 313 (1960) (views of later Congress a "hazardous basis for inferring the intent of an earlier one").

meeting the three removability criteria – the action is a covered class action, it involves a covered security, and it is preempted under § 77p(b) – may be removed.[6]

Respondents next contend (at 21-22, 23) that reading the clause "as set forth in subsection (b)" to authorize removal only of preempted claims would render superfluous the final clause of 77p(c), which states that removed actions "shall be subject to subsection (b)." The two clauses can easily be read to perform different functions, however. The first clause defines *which* actions may be removed; the second clause directs that such a removable action shall be dismissed as preempted. *See Scheidler v. NOW*, 126 S. Ct. 1264, 1273 (2006) (rule against surplusage is not violated if each clause performs a function). Even assuming some overlap in those related commands, they need not be read as coextensive and thus superfluous. *Cf. Shook v. District of Columbia Fin. Responsibility & Mgmt. Assistance Auth.*, 132 F.3d 775, 782 (D.C. Cir. 1998) ("Sometimes Congress drafts statutory provisions that . . . appear duplicative of others – simply, in Macbeth's words, 'to make assurance double sure.'"). In any event, construing the last clause of § 77p(c) as merely confirmatory of the earlier clause is far more faithful to Congress's purposes than is respondents' construction, which ascribes to Congress an intent wholly at odds with SLUSA. Given what Congress was trying to accomplish in SLUSA – stemming the tide of Rule 10b-5-type claims that had flowed into state court – it would be anomalous to read

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[6] The title of § 77p(c) – "Removal of covered class actions" – does not erase the limiting phrase "as set forth in subsection (b)" in the text of the statute. *See United States v. Minker*, 350 U.S. 179, 185 (1956) ("the title of a statute and the heading of a section cannot limit the plain meaning") (quotation marks omitted). Indeed, applying respondents' same logic to the phrase "involving a covered security" would read that limitation out of the statute as well. In *INS v. National Center for Immigrants' Rights, Inc.*, 502 U.S. 183 (1991), relied on by respondents (at 21), the Court deferred to the "agency's reasonable, consistently held interpretation of its own regulation" in relying on the title of an ambiguous regulation. *See* 502 U.S. at 189-90. No such principle of agency deference applies here.

§ 77p(c) to launch into federal court *non*-Rule 10b-5 (and therefore non-preempted) claims to be adjudicated on the merits by the district court.

Respondents next focus on the sentence in the legislative history stating that § 77p(c) "'provides that any class action described in subsection (b) that is brought in a State court *shall* be removable to a Federal district court, and *may* be dismissed pursuant to the provisions of subsection (b).'" Br. 21 (quoting H.R. Rep. No. 105-640, at 16; S. Rep. No. 105-182, at 8 (1998)) (emphases added by respondents). Respondents assert that this use of "shall" and "may" "can only be read to mean that *some* actions that are removable are *not* precluded." Br. 23. Whatever ambiguity may have been created in that sentence is clarified in the report's very next sentence, which makes clear that Congress's concern was solely with the removal of claims that SLUSA actually (not arguably) preempts: "This provision [§ 77p(c)] is designed to prevent a State court from inadvertently, improperly, or otherwise maintaining jurisdiction over an action that is preempted pursuant to subsection (b)." H.R. Rep. No. 105-640, at 16.

That sentence confirms that Congress's focus was on keeping preempted claims out of state courts; but nowhere did Congress suggest in SLUSA that (in the absence of complete diversity) it wanted to re-channel non-preempted state claims into the federal courts for federal adjudication of the merits of purely state-law claims. *See supra* pp. 8-9. Accordingly, any ambiguity arguably shown by respondents in parsing selected words and phrases of the statute and its legislative history – and they have shown none – necessarily disappears in light of the goals Congress sought to achieve in SLUSA.[7]

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[7] Respondents claim that Congress's use of "shall" in § 77p(d)(4) indicates that other, non-preempted actions "'*may* be remanded.'" Br. 35 (citing *Martin v. Franklin Capital Corp.*, 126 S. Ct. 704, 709 (2005)). Unlike here, in *Martin* "may" was used in juxtaposition to several other uses of "shall" in the same statutory subsection.

Indeed, Congress expressly provided that certain claims meeting § 77p(b)'s preemption criteria nonetheless are preserved by § 77p(d) and "shall" be remanded to state court. 15 U.S.C. § 77p(d)(4). Congress was silent on the remand of claims that did not meet the preemption criteria. The logical inference, given SLUSA's text, structure, and purpose, is that Congress assumed such claims are not properly removable to begin with.

B. SLUSA requires a successful defense of preemption – a "colorable" argument is insufficient for removal.

1. Respondents concede that, under the well-pleaded complaint rule, they ordinarily would have no right to remove based on a federal preemption defense. *See* Br. 16, 31. They correctly note that "Congress has acted on occasion to make state-law actions removable *solely* on the basis of a substantial federal question presented as a *defense*," thus abrogating the well-pleaded complaint rule in certain contexts. Br. 16. But respondents erroneously assert that, "[w]hen Congress has done so, it has always been recognized that the removing defendants need not prove the merits of the defense to invoke the subject-matter jurisdiction of the federal court; rather, such a case is within the removal jurisdiction if the federal defense is 'colorable' (non-frivolous)." Br. 16-17; *see also* Br. 25.

The text and structure of SLUSA, however, align squarely with the "complete preemption" doctrine, under which this Court has held repeatedly that state-law claims are removable *if and only if* federal law completely preempts them; a "colorable" preemption defense is inadequate to justify removal. *See* Pet. Br. 34-36. Respondents relegate the complete preemption doctrine to a passing footnote, arguing that it "applies only where Congress has *not* expressly provided for federal jurisdiction." Br. 19 n.5. But it is immaterial whether Congress provided "expressly" for complete preemption or this Court interpreted Congress's regulation to have done so. SLUSA operates the same way as the complete preemption doctrine. *See* Pet. Br. 35-36; Law Professors Amicus Br. 15-16.

That is precisely how respondents understood SLUSA to work at the removal stage in the district court – before they sought to avoid the non-reviewability bar of § 1447(d). Respondents' own removal papers argued that the cases here were removable precisely because they were preempted, setting forth all four of the § 77p(b) preemption criteria and claiming that each criterion was met. *See* Pet. Br. 33-34 & nn.41-42. In this Court, respondents decline to explain their multiple removal pleadings in any other way, and, indeed, acknowledge that, "[w]here a case is removable on the basis of a federal defense, the courts look to the removal papers to establish the bases for federal jurisdiction." Br. 8, 28.[8]

2. Respondents point to cases interpreting the federal officer removal statute in asserting that only a "colorable" federal defense is necessary to create removal jurisdiction under SLUSA. *See* Br. 25-28. But merely because Congress *can* base removal on the assertion of a "colorable" federal defense, as it has in that context, does not mean that SLUSA must be interpreted in the same way. Like the complete preemption doctrine, actual (rather than colorable) preemption is the *sine qua non* of SLUSA removal.

Moreover, the federal officer removal cases rest on "the very basic interest in the enforcement of federal law through federal officials." *Willingham v. Morgan*, 395 U.S. 402, 406 (1969). Determining whether a federal officer was in fact acting within the scope of his or her official duties may often be a fact-intensive inquiry, and the

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[8] Respondents' counsel of record in this Court argued to the district court to justify removal jurisdiction: "SLUSA's *preemptive* provisions authorize *removal* and dismissal of lawsuits filed in state court that meet four basic requirements: (1) the underlying suit must be a 'covered class action'; (2) the claim must purport to be based on state law; (3) the defendant must be 'alleged to have misrepresented or omitted a material fact (or to have used or employed any manipulative or deceptive device or contrivance)'; and (4) the defendant must be 'alleged to have engaged in conduct described by criterion (3) "in connection with" the purchase or sale of a "covered security."' *Green v. Ameritrade, Inc.*, 279 F.3d 590, 596 (8th Cir. 2002)." Defs.' Opp. to Mot. to Remand at 5 (*Potter*, Dist. Ct. Docket Entry 43) (emphases added).

federal interest in having a federal rather than a state jury pass on such questions is obvious. *See id*. at 409 ("If the question raised is whether [the federal officers] were engaged in some kind of 'frolic of their own' in relation to [the federal prisoner], then they should have the opportunity to present their version of the facts to a federal, not a state, court."). Under SLUSA, by contrast, the allegations in the complaint need only be measured against SLUSA's preemption criteria. This Court's complete preemption decisions likewise have simply compared the allegations in the complaint to the statutory scheme.[9]

Respondents also assert that "the *sole* purpose of SLUSA's removal provision is to have the preclusion defense . . . decided by a federal court." Br. 27. Just as in the complete preemption context, however, the federal court must determine whether SLUSA preemption applies; if it does, then the case is removable. Respondents cite the "'magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities.'" *Id.* (quoting *Dabit*, 126 S. Ct. at 1509). But they ignore that SLUSA's purpose was not to re-channel *non*-preempted claims arising solely under state law into federal court for adjudication on the merits. Instead, Congress sought to re-channel preempted state-law claims into federal court for dismissal.

Respondents implicitly recognize that their reliance on the federal interest in securities regulation does not extend to the adjudication of non-preempted, purely state-law claims in federal court, and thus assert that such

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[9] *See*, *e.g.*, *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 7 (2003) ("'*Avco* stands for the proposition that if a federal cause of action completely pre-empts a state cause of action *any complaint* that comes within the scope of the federal cause of action necessarily "arises under" federal law.'") (quoting *Franchise Tax Bd. v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 23-24 (1983)) (emphasis added); *Aetna Health Inc. v. Davila*, 542 U.S. 200, 211 (2004) (assessing complete preemption under ERISA by examining the "complaints, the [state] statute on which the[] claims are based . . . , and the various [employer health benefit] plan documents").

claims should be *remanded* to state court. Respondents first concoct the counterfactual theory that the district courts' orders in this case were "discretionary" remands, rather than mandatory remands for lack of subject-matter jurisdiction. Br. 32. They then seek to justify those so-called "discretionary" remands as similar to remands of pendent state claims once the federal claims giving the court original federal-question jurisdiction have been dismissed. *See* Br. 32-37. But those machinations only reinforce the illogic of respondents' theory. There was never a federal claim to begin with, and therefore nothing to which petitioners' state-law claims could be "pendent."

3. Because SLUSA preempts only state-law covered class actions alleging Rule 10b-5-like fraud or manipulation, petitioners' negligence and recklessness claims are not preempted. *See* Pet. Br. 42-45. Although *Dabit* held that holder claims meet the "in connection with" criterion and thus fall within the ambit of Rule 10b-5 and § 77p(b), it did not address whether market-timing claims alleging negligence fall within those provisions, and respondents make no such claim. Thus, while the state court will certainly be required to apply *Dabit*'s ruling that holder claims fall within the "in connection with" language of Rule 10b-5 and § 77p(b), it may examine in the first instance whether petitioners' non-fraud claims fall within those provisions.

Accordingly, the Court should make clear that, on remand, the state court is not bound by the Seventh Circuit's April 5, 2005 opinion (*see* Pet. App. 1a-9a), which was rendered without jurisdiction and is therefore null and void. In that opinion, the court of appeals erred in concluding that petitioners "affirmatively repudiated" the argument that their claims do not depend on allegations of fraud or manipulation. Resp. Br. 30. Because SLUSA preemption raises a question of federal subject-matter jurisdiction, these arguments cannot be waived. *See* Pet.

Br. 44-45.[10] And, in any event, petitioners repeatedly stressed in their brief and oral argument before the Seventh Circuit that they were not alleging fraud, but were claiming that respondents acted negligently and recklessly in failing to adopt practices that would protect petitioners' assets from the dilution in value caused by market timing.[11] Respondents' assertions and the Seventh Circuit's view are at odds with an undisputed record.

Respondents further assert that petitioners' complaints depend on allegations of fraud. Although respondents quote nothing in support, they apparently rely on the allegations that respondents failed to protect their funds from market timing,[12] while at the same time "convincing investors . . . to hold their fund shares by urging investors to invest for the long term and by effectively marketing the various advantages of long term ownership of funds over direct investment."[13] But petitioners have not sought relief based on respondents' fraudulent representations about their funds. Instead, they seek relief on the ground that respondents acted negligently and recklessly by failing to follow practices that would protect petitioners'

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[10] Respondents (at 31) mistakenly assert that, because this Court did not independently analyze whether fraud was alleged in *Dabit*, it must have held that element to be non-jurisdictional. *Dabit* was filed in federal court based on complete diversity, so the Court had no occasion to decide any removal jurisdiction issues. *See supra* p. 9.

[11] *See*, *e.g.*, 7th Cir. 1/7/05 Tr. 18:18-20 ("[Petitioners] [we]re not bringing a claim that they were misled in any way to buy the stock."); *id.* at 21:6-7 ("The allegation is negligent valuation of the shares under state law."); Pet. C.A. Br. 4 ("[Petitioners] have sued the Funds and the Funds' Managers for negligently or recklessly failing to calculate the Funds' share prices accurately."); *see also* Pet. Br. 44. Respondents tellingly do not quote the transcript, because nothing in it can be read to support the court of appeals' "affirmative repudiation" ruling.

[12] *See* JA 174-77 (*Potter*), 197-200 (*Kircher*), 223-25 (*Parthasarathy*), 249-52 (*Dudley I*), 267-70 (*Dudley II*), 284-87 (*Vogeler*), 301-03 (*Jackson*), 316-18 (*Spurgeon*).

[13] JA 169 (*Potter*), 192 (*Kircher*), 218 (*Parthasarathy*), 244 (*Dudley I*), 262 (*Dudley II*), 279 (*Vogeler*), 296 (*Jackson*), 312 (*Spurgeon*).

assets from the dilution in value caused by a failure to set price at fair value. *See* Pet. Br. 44 & n.53.

Respondents also quote out of context petitioners' statement that SLUSA does not preclude claims brought by "'current holders who are fraudulently lulled into continuing to hold.'" Br. 32 n.11 (quoting Pls.' Mot. to Remand at 7 (*Kircher*, Dist. Ct. Docket Entry 20)) (emphasis omitted). The full quotation, however, makes clear that petitioners made that statement only to illustrate that *all* holder claims, *including* those based on allegations of fraud, did not meet the "in connection with" requirement based on then-existing law.[14] Accordingly, holder claims *not* asserting fraud are not preempted by SLUSA. Petitioners never indicated in their remand motions (or elsewhere) that their claims depended on allegations of fraud. Rather, petitioners emphatically stated in their remand motions that they "have ***not*** contended[] 'that defendants misrepresented that the Funds were appropriate for long-term buy-and-hold investors,' nor have [they] made any allegation that the defendants 'misrepresented the NAVs of the Funds' shares' or 'that defendants misrepresented and omitted material facts concerning plaintiffs' investments and the value of the Funds' shares.'" *Kircher* Mot. to Remand at 5 (quoting Notice of Removal ¶ 16 (JA 349)).

III. *WACO* DOES NOT AUTHORIZE REVIEW

Because the Seventh Circuit's erroneous rulings on the fraud element of SLUSA preemption were rendered without appellate jurisdiction, they cannot stand. To avoid that result, respondents assert as a fallback that, "even if the Court were to conclude that the remands in this case were based on a lack of subject-matter jurisdiction," Br.

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[14] It read: "Non-sellers and non-purchasers, such as prospective purchasers who are fraudulently deterred from purchasing or current holders who are fraudulently lulled into continuing to hold their securities, do not have cognizable claims under the '34 Act as a matter of thoroughly well-established law." *Kircher* Mot. to Remand at 7. That statement merely advanced the pre-*Dabit* view that all holder claims – even those based on fraud – were not preempted by SLUSA. Petitioners here have not brought fraud claims in their complaints.

41-42, SLUSA preemption decisions are nevertheless reviewable under *City of Waco v. United States Fidelity & Guaranty Co.*, 293 U.S. 140 (1934). Respondents then reason (at 46) that "the Seventh Circuit's determination that the actions are precluded by SLUSA – which has since been approved by this Court in *Dabit* – would be binding and the cases would be dismissed by the state courts." Respondents misunderstand *Waco* and misstate the preclusive effect in state court of the district courts' jurisdictional determinations.

In *Waco*, a citizen of Texas sued the City of Waco, Texas, in state court. Waco filed a cross-complaint for indemnity against Fidelity, a citizen of Maryland, and Fidelity removed the entire case to federal court based on diversity (claiming that the cross-suit was a "separable" controversy obviating the need for complete diversity). The district court agreed that a separable controversy was presented and jurisdiction was thus proper, but it then dismissed Fidelity as "an unnecessary and improper party"; and "since, upon that dismissal, there was no diversity of citizenship of the remaining parties, the court held it lacked jurisdiction, and remanded the cause to the state court." *Id.* at 142. The City appealed, "not from the order of remand, but from that dismissing its action against . . . Fidelity." *Id.* This Court held that, although "no appeal lies from the order of remand," appellate review of the order of dismissal was proper because "in logic and in fact the decree of dismissal preceded that of remand and was made by the District Court while it had control of the cause." *Id.* at 143. The Court made clear that it was "[i]ndisputably this order," and not the remand order, that was "the subject of . . . appeal." *Id.*[15]

Respondents' theory ignores that *Waco* found jurisdiction proper because the City appealed "not from the order of remand, but from that dismissing its action against . . .

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[15] This Court has cited *Waco* only once, in order to reaffirm the rule that § 1447(d) "precludes review of the remand order directly or indirectly." *Metropolitan Cas. Ins.*, 312 U.S. at 568 (citations omitted).

Fidelity." By contrast, respondents' notices of appeal appealed only from orders "remanding" the actions.[16] No district court here entered a separately appealable order concluding that petitioners' claims were not preempted. Rather, the district courts examined the preemption question only to determine whether they had removal jurisdiction (indeed, that was the same theory of SLUSA advanced in respondents' removal papers). Courts have understood *Waco* to mean that, "[i]f the court looks to an issue *for the purpose* of determining subject matter jurisdiction, the issue is not separable because it cannot be said to have preceded the remand decision 'in logic *and in fact*.'" *Powers v. Southland Corp.*, 4 F.3d 223, 228 (3d Cir. 1993) (quoting *Waco*, 293 U.S. at 143) (emphasis added by *Powers*).

Waco does not apply when a court addresses a question of substantive law that is "intrinsic to the district court's decision to remand for lack of subject matter jurisdiction." *Calderon v. Aerovias Nacionales de Columbia*, 929 F.2d 599, 602 (11th Cir. 1991) (remand decision holding that Warsaw Convention did not preempt plaintiff's state-law claims held unreviewable); *see also*, *e.g.*, *Nutter v. Monongahela Power Co.*, 4 F.3d 319, 321 (4th Cir. 1993) (rejecting reliance on *Waco* where "the court's findings regarding preemption and jurisdiction are indistinguishable"). Under SLUSA, the preemption decision is intrinsic to the jurisdictional determination. Respondents identify no case applying *Waco* to find reviewable a preemption ruling on which subject-matter jurisdiction was based, and they do not dispute that courts of appeals uniformly hold that orders by district courts rejecting a complete preemption defense are unreviewable. *See* Pet. Br. 35 & n.44 (citing cases); Law Professors Amicus Br. 16 n.8.[17]

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[16] *See* JA 41 (Parthasarathy), 49 (Kircher), 56 (Potter), 64 (Vogeler), 69 (Dudley I), 75 (Dudley II), 79 (Jackson), 84 (Spurgeon).

[17] Respondents' reliance on learned treatises is misplaced. *Compare* Resp. Br. 41, 47, *with* 16 *Moore's Federal Practice* § 107.44[2][a][ii], at 107-254.3 (3d ed. 2005) (*Waco* inapplicable where the decision is "nec-

Respondents also assert that they will be precluded in state court from litigating the SLUSA preemption issue. *See* Br. 44. Not so. "Under contemporary principles of collateral estoppel," the inability to pursue an appeal is a "factor strongly militat[ing] against giving a [judgment] preclusive effect." *Standefer v. United States*, 447 U.S. 10, 23 (1980) (judgment of acquittal). Respondents ignore the many cases rejecting reliance on *Waco* because "a district court's findings incident to an order of remand have no preclusive effect." *Nutter*, 4 F.3d at 322 (rejecting reliance on *Waco*) (citing cases); *see* Chamber of Commerce Amicus Br. 16 (discussing state-court holdings that litigation of SLUSA preemption is not precluded).[18]

The state court on remand will apply *Dabit*'s ruling that holder claims fall under the "in connection with" language of Rule 10b-5 and thus § 77p(c). And, because the Seventh Circuit had no jurisdiction for its holding with respect to the fraud criterion – and it is not justified by *Waco* – the state court may address in the first instance petitioners' argument that their complaints, fairly read, do not allege fraud and are not preempted by SLUSA.

CONCLUSION

The judgment of the court of appeals should be reversed.

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essary to determine whether the [district] court has subject matter jurisdiction"), *and* 15A Charles Alan Wright, *et al.*, *Federal Practice and Procedure* § 3914.11, at 711-12 (2d ed. 1992) (appeal may lie from "disposition on the merits before the balance of the case is remanded" but the "remand order [can]not be reviewed as part of the appeal").

[18] *See also*, *e.g.*, *Rogers v. Tyson Foods, Inc.*, 308 F.3d 785, 791 (7th Cir. 2002) (preemption question open on remand despite rejection of complete preemption defense in finding no jurisdiction); *Lyons v. Alaska Teamsters Employer Serv. Corp.*, 188 F.3d 1170, 1173 (9th Cir. 1999) (no preclusion on remand because "any consideration of the merits of the preemption defense was in the context of determining jurisdiction"); *Soley v. First Nat'l Bank of Commerce*, 923 F.2d 406, 410 (5th Cir. 1991) (interpreting remand order "as jurisdictional," so state court "will have an opportunity to consider the appellants' preemption defense and the district court's order will have no preclusive effect").

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