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 RESPONDENTS

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QUESTION PRESENTED

The first question presented in the petition for a writ of certiorari is:

"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."

RULE 29.6 STATEMENT

Respondent Artisan Partners Limited Partnership has no parent corporation, and no publicly held company owns 10% or more of its stock. This respondent is a limited partnership, the general partner of which is Artisan Investment Corporation, which has no parent corporation, and no publicly held company owns 10% or more of its stock.

Respondent Artisan Funds, Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

Respondent Columbia Wanger Asset Management, LP has no parent corporation, and no publicly held company owns 10% or more of its stock. This respondent is a limited partnership, the general partner of which is CWAM Acquisition GP, Inc., which is a wholly owned subsidiary of Columbia Management Group, Inc., which in turn is a wholly owned subsidiary of Fleet National Bank, which in turn is a subsidiary of Bank of America Corporation, a publicly traded company.

Respondent Columbia Acorn Trust has no parent corporation, and no publicly held company owns 10% or more of its stock.

Respondent Deutsche Investment Management Americas Inc. is a wholly owned subsidiary of Deutsche Bank Americas Holding Corp., which is a wholly owned subsidiary of Taunus Corporation, which is a wholly owned subsidiary of Deutsche Bank AG, a publicly traded company that owns 10% or more of respondent's stock. No other publicly held company owns 10% or more of its stock.

Respondent Janus Capital Management LLC is a wholly owned subsidiary of Janus Capital Group Inc., a publicly traded company that owns 10% or more of respondent's stock. No other publicly held company owns 10% or more of its stock.

Respondent Janus Investment Fund has no parent corporation, and no publicly held company owns 10% or more of its stock.

Respondent Pacific Life Insurance Company is a wholly owned subsidiary of Pacific Life Corporation, a private stock holding company. No publicly held company owns 10% or more of respondent's stock.

Respondent Putnam Investment Management, LLC is an indirect subsidiary of Marsh & McLennan Companies, Inc., a publicly traded company that owns 10% or more of respondent's stock. No other publicly held company owns 10% or more of its stock.

Respondents Putnam Funds Trust, Putnam International Equity Fund, and Putnam Investment Funds have no parent corporation and no publicly held company owns 10% or more of their stock.

Respondent Scudder International Fund, Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

Respondent Van Kampen Investment Advisory Corporation merged on November 30, 2003, into Van Kampen Asset Management, which is a wholly owned subsidiary of Van Kampen Investments, Inc., which is a wholly owned subsidiary of MSAM Holding II Inc., which is a wholly owned subsidiary of Morgan Stanley, a publicly traded company that owns 10% or more of respondent's stock. No other publicly held company owns 10% or more of its stock.

Respondent Van Kampen Series Fund, Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

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BRIEF FOR RESPONDENTS

Respondents respectfully submit that the judgment of the court of appeals should be affirmed.

STATEMENT

After removal, the district court held that petitioners' state-law claims are not precluded by the Securities Litigation Uniform Standards Act of 1998 (SLUSA). The court of appeals held that it had jurisdiction to review the district court's resolution of the SLUSA issue, then reversed and remanded with directions to dismiss petitioners' claims pursuant to SLUSA.

1. In 1995 and 1998, Congress enacted two statutes that, together, sought to regularize private enforcement of the securities laws at the federal level and to significantly limit private securities litigation at the state level. Both statutes amended the two principal pillars of federal securities law: the Securities Act of 1933, 15 U.S.C. §§ 77a *et seq.*, and the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a *et seq*.

a. The Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737, was enacted to "implement[] needed procedural protections to discourage frivolous litigation." H.R. Conf. Rep. No. 369, 104th Cong., 1st Sess. 32 (1995). Congress concluded that the "private securities litigation system is too important to the integrity of American capital markets to allow this system to be undermined by those who seek to line their own pockets by bringing abusive and meritless suits." *Id.* at 31.

The PSLRA imposes rigorous pleading requirements on plaintiffs in federal securities suits. 15 U.S.C. § 78u-4(b)(1), (2); *see Dura Pharms., Inc.* v. *Broudo*, 125 S. Ct. 1627, 1633 (2005). It also imposes an automatic stay of discovery during the pendency of motions to dismiss (15 U.S.C. §§ 77z-1(b), 78u-4(b)(3)), constrains who can serve as lead plaintiff in a securities class action (15 U.S.C. §§ 77z-1(a)(3), 78u-4(a)(3)), and authorizes sanctions for frivolous litigation (15

U.S.C. §§ 77z-1(c), 78u-4(c)). In addition to these procedural reforms, the PSLRA also establishes a "safe harbor" for forward-looking statements, to encourage issuers to disseminate relevant information to the market without fear of open-ended liability. H.R. Conf. Rep. No. 369, *supra*, at 32; *see* 15 U.S.C. §§ 77z-2(c), 78u-5(c).

b. SLUSA, Pub. L. No. 105-353, 112 Stat. 3227, was enacted "in order to prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of the [PSLRA]." SLUSA § 2 (App. to Pet. Br. 15a). "[S]tate-court class actions involving nationally traded securities were virtually unknown" when the PSLRA was enacted. S. Rep. No. 182, 105th Cong., 2d Sess. 4 (1998). But "the decline in federal securities class action suits that occurred after the passage of the PSLRA was accompanied by a nearly identical increase in state court filings." *Riley* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 292 F.3d 1334, 1341 n.12 (11th Cir.), *cert. denied*, 537 U.S. 950 (2002). Congress determined that "[t]he solution to this problem is to make Federal court the exclusive venue for most securities fraud class action litigation involving nationally traded securities." H.R. Conf. Rep. No. 803, 105th Cong., 2d Sess. 15 (1998).

SLUSA precludes any court from hearing a state-law "covered class action" alleging fraud or manipulation in connection with the purchase or sale of a "covered security." 15 U.S.C. § 77p(b). SLUSA also authorizes removal of "[a]ny" covered class action "involving" covered securities, as set forth in the preclusion provision. 15 U.S.C. § 77p(c). A covered class action is one that seeks damages on behalf of 50 or more persons. 15 U.S.C. § 77p(f)(2). Covered securities include mutual fund shares. 15 U.S.C. §§ 77p(f)(3), 77r(b). Expressly excluded from SLUSA's preclusive reach are derivative actions (15 U.S.C. § 77p(f)(2)(B)), actions under the law of the State of incorporation involving proxy solicitations (15 U.S.C. § 77p(d)(1)), actions by States or their securities commissioners (15 U.S.C. §§ 77p(d)(2), 77p(e)),

and actions between an issuer and indenture trustee (15 U.S.C. § 77p(d)(3)).[1]

2. Petitioners are individuals who allegedly purchased shares in mutual funds or their equivalents offered or advised by respondents. *See* Resp. C.A. Br. 1 n.1, 6 n.3. Petitioners filed these putative class actions in Illinois state court (in the circuit courts for Madison and St. Clair Counties), alleging that respondents had engaged in an undisclosed practice of facilitating "market timing"—a term that petitioners use to mean frequent trading of mutual fund shares to take advantage of price arbitrage opportunities in funds holding internationally traded securities. *See* Pet. Br. 6-7.[2]

Petitioners alleged that respondents marketed mutual funds as long-term investments, but then "exposed long term shareholders to market timing traders" by "failing to make daily adjustments" to the value of portfolio securities traded on foreign exchanges. J.A. 174 (*Potter*). Petitioners alleged that respondents thereby "g[a]ve market timing traders the opportunity to earn vastly higher returns at no additional risk," and that these "excess profits . . . c[a]me at the expense of fellow shareholders." *Id.* at 176, 177. Alleging that respondents had facilitated this course of conduct without disclosing it to other investors, petitioners sought damages (including punitive damages) and other relief on behalf of all

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[1] With one exception (*see* note 13, *infra*), SLUSA's amendments to the 1933 Act (15 U.S.C. § 77p) parallel those to the 1934 Act (15 U.S.C. § 78bb(f)). Both petitioners (Pet. Br. 5 n.1) and the court of appeals (Pet. App. 3a, 11a) refer only to the 1933 Act codification; for consistency, respondents will generally do the same.

[2] More than 400 lawsuits alleging "market timing" in various mutual funds, including some of respondents' funds, have been transferred for coordinated proceedings in the District of Maryland. *See In re Janus Mut. Funds Inv. Litig.*, 310 F. Supp. 2d 1359 (J.P.M.L. 2004). That court has held state-law claims analogous to petitioners' precluded by SLUSA. *In re Mut. Funds Inv. Litig.*, 384 F. Supp. 2d 845, 871-72 (D. Md. 2005).

investors who "held" shares in respondents' mutual funds for more than 14 days. *Id.* at 180-84; *see also id.* at 192, 197-200 (*Kircher*); 218, 223-26 (*Parthasarthy*); 244, 249-52 (*Dudley I*); 262, 267-70 (*Dudley II*); 279, 284-87 (*Vogeler*); 296, 301-03 (*Jackson*); 316-18 (*Spurgeon*).

Respondents removed the cases to the United States District Court for the Southern District of Illinois, asserting (*inter alia*) that "[t]he Court has subject matter jurisdiction over this action pursuant to SLUSA." J.A. 360 (*Potter*). Respondents alleged that each aspect of the preclusion defense was met because "this action is a covered class action," petitioners had sued under state law, mutual fund securities are "covered securities," and petitioners' "claims are 'in connection with' the purchase or sale of a covered security because they are based upon statements and alleged manipulative conduct relating to the value and nature of securities sold or consideration received." *Id.* at 360-61; *see also id.* at 331-36, 337-40 (*Parthasarthy*); 341-57 (*Kircher*); 369-72 (*Vogeler*); 373-89 (*Dudley I*); 390-406 (*Dudley II*); 407-12 (*Jackson*); 413-35 (*Spurgeon*). Based on these allegations, respondents concluded that "SLUSA mandates that this action be removed to federal court." *Id.* at 362.

Petitioners' sole objection to removal under SLUSA was that the "in connection with" requirement was not met because the putative classes were comprised of "holders," rather than purchasers or sellers, of mutual fund shares. Pet. App. 6a. In a series of similar orders, the district court concluded that because petitioners ostensibly were suing on behalf of "holders," their claims would not be "cognizable under the 1934 Act"; on that basis, the district court held that "SLUSA does not preempt them." Pet. App. 61a (*Spurgeon*); *see also id.* at 26a-27a (*Kircher*); 30a (*Dudley I*); 39a-40a (*Parthasarthy*); 43a-45a (*Potter*); 50a-51a (*Vogeler*); 56a-57a (*Jackson*). Having rejected respondents' federal defense on the merits, the district court remanded the cases to state court. In each case, the court stated that it was remanding for lack of subject-matter jurisdiction. *See* Pet. Br. 13 & n.22.

3. Respondents appealed the rejection of their SLUSA-preclusion defense to the Seventh Circuit, which issued two opinions by different three-judge panels.

a. The court of appeals (*Easterbrook*, Evans and Williams, JJ.) first determined that it had jurisdiction to consider respondents' appeal. Pet. App. 10a-17a. The court recognized that 28 U.S.C. § 1447(d) precludes appellate review of remand orders that are based on § 1447(c). *Id.* at 12a (citing *Thermtron Prods., Inc.* v. *Hermansdorfer*, 423 U.S. 336 (1976), and *Things Remembered, Inc.* v. *Petrarca*, 516 U.S. 124 (1995)). The court ruled, however, that a remand under SLUSA "is not within § 1447(c) or equivalent to it, for [it] comes at the end rather than the outset of federal adjudication." *Id.* at 13a. As the court noted, "[t]he Supreme Court has itself reviewed remand decisions that fall outside the scope of § 1447(c)." *Ibid.* (citing *Thermtron*; *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706 (1996); and *Carnegie-Mellon Univ.* v. *Cohill*, 484 U.S. 343 (1988)).

The court of appeals rejected petitioners' contention that a SLUSA-based remand connotes a lack of subject-matter jurisdiction, and thus is governed by § 1447(c). "[T]he Supreme Court has observed that a court lacks 'subject-matter jurisdiction' only when Congress has not authorized the federal judiciary to resolve the sort of issue presented by the case (or the Constitution forbids adjudication)." Pet. App. 13a (citing *Kontrick* v. *Ryan*, 540 U.S. 443 (2004), and *Scarborough* v. *Principi*, 541 U.S. 401 (2004)). Under SLUSA, "a federal judge is not only authorized but also required to decide whether any court may entertain the litigation," and "[o]nly after making the substantive decision that Congress authorized it to make did the district court remand." *Id.* at 14a. To "say that jurisdiction evaporated at that juncture . . . would be tautological," the court explained, because "[o]therwise every federal suit, having been decided on the merits, would be dismissed 'for lack of jurisdiction' because the court's job was finished." *Ibid.* (citing *Bell* v. *Hood*, 327 U.S. 678 (1946)).

b. In its second decision, the court of appeals (*Easterbrook*, Ripple and Wood, JJ.) concluded that petitioners' claims are precluded by SLUSA. Pet. App. 1a-9a. Although petitioners "insist[ed] that any private action that is untenable after *Blue Chip Stamps* [v. *Manor Drug Stores*, 421 U.S. 723 (1975),] also is unaffected by SLUSA," the Seventh Circuit held that "[i]t would be more than a little strange if the Supreme Court's decision [in *Blue Chip Stamps*] to block private litigation by non-traders became the opening by which that very litigation could be pursued under state law, despite the judgment of Congress (reflected in SLUSA) that securities class actions must proceed under federal securities law or not at all." Pet. App. 6a-7a, 8a. This Court has expressly approved the Seventh Circuit's merits decision in this case. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Dabit*, 547 U.S. ___ (2006), slip op. 1, 14.

SUMMARY OF ARGUMENT

Petitioners assert that the Seventh Circuit was stripped of appellate jurisdiction by 28 U.S.C. § 1447(d), which provides that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." But that statute does not bar *all* review of remand orders and associated decisions, and it does not apply here.

I. In *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336 (1976), the Court held that § 1447(d) bars appellate review only of remand orders based on the grounds specified in § 1447(c)—defects in removal procedure or lack of subject matter jurisdiction. Because the remand orders in this case were not based on either of these grounds, appellate review was authorized by *Thermtron*, which the Court has repeatedly reaffirmed and implemented. *Things Remembered, Inc.* v. *Petrarca*, 516 U.S. 124 (1995); *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706 (1996).

A. The district court *said* that it was remanding for "lack of subject matter jurisdiction." Petitioners argue that this statement is dispositive in its own right, and correct in any event. They are wrong on both counts.

1. This Court recently observed that courts often label dispositions "jurisdictional" when in fact they are based on a failure to prove some substantive element. *Arbaugh* v. *Y&H Corp.*, 546 U.S. ___ (2006). Such labels have "no precedential effect," and cannot override the federal courts' independent obligation to determine whether appellate jurisdiction exists. *E.g.*, *Liberty Mut. Ins. Co.* v. *Wetzel*, 424 U.S. 737 (1976). In analogous circumstances, this Court has held that the label attached to a district court determination is not controlling for purposes of appellate jurisdiction. *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564 (1977); *United States* v. *Sisson*, 399 U.S. 267 (1970). The label applied by the district court here is, likewise, not controlling.

2. Petitioners' entire case rests on an understanding of the concept of "jurisdiction" that this Court unanimously rejected in *Arbaugh*, which confirmed that subject-matter jurisdiction refers *only* to "the question whether the federal court had authority to adjudicate the claim in suit." Because Congress clearly *authorized* the district court to resolve the substantive question of SLUSA preclusion, the court's ultimate rejection of respondents' federal defense was an *exercise* of jurisdiction, not a determination that jurisdiction was lacking.

a. The Court also held in *Arbaugh* that where Congress does not expressly make a statutory requirement jurisdictional, the courts should treat it as non-jurisdictional. Under that standard, the elements of SLUSA preclusion are not jurisdictional because SLUSA's removal provision is broader than its preclusion provision, such that some actions are removable even if they are not precluded. The text of the removal provision authorizes removal of "any" covered class action "involving" covered securities as set forth in the preclusion provision. These terms of inclusion show that Congress intended the removal provision to be broader than the preclusion provision, which is confirmed by the legislative history. Thus, in *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Dabit*, 547 U.S. ___ (2006), this Court read SLUSA as authorizing removal of *all* "covered class actions," regardless of whether such actions are precluded. The final clause of

the removal provision, which states that removed actions "shall be subject" to the preclusion provision, provides further structural proof that the removal provision is broader than the preclusion provision; if they were coterminous, this final clause would be redundant or superfluous. Congress made the removal provision sweep wider than the preclusion provision to ensure that federal courts would make the substantive determination whether a particular action is precluded by SLUSA.

b. Where Congress has made state-law claims removable on the basis of a federal defense, this Court has held that the federal courts have jurisdiction if the removing defendants establish a "colorable" (non-frivolous) federal defense, based on the defendants' theory of the case at the time of removal, even if that defense is ultimately rejected on the merits. For example, the Court has rejected a "narrow, grudging" interpretation of the federal officer removal statute that would require the officer to prove the federal defense in order to remove the case. *Jefferson County* v. *Acker*, 527 U.S. 423 (1999); *Willingham* v. *Morgan*, 395 U.S. 402 (1969). Congress enacted SLUSA against this established background principle, and thus is presumed to have understood that a district court has removal jurisdiction if the removing defendants establish a colorable defense of preclusion at the time of removal. Certainly, petitioners provide no justification for treating "jurisdiction" under SLUSA differently than this Court has done in other statutory contexts.

c. Where 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. Here, respondents established that their SLUSA preclusion defense was colorable; indeed, petitioners conceded all of the elements but one. The sole argument advanced by petitioners—that an action by "holders" can never satisfy the "in connection with" requirement—was unanimously rejected by this Court in *Dabit*. Respondents' position on this issue was perforce colorable; the district court therefore had subject-matter jurisdiction at the time of removal.

d. The existence of a substantial federal defense of SLUSA preclusion is sufficient to invest the court with jurisdiction over the entire action, even if the defense is ultimately rejected. *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480 (1983); *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417 (1995) (plurality). But because the surviving claims will predominantly (if not entirely) involve state law, the court has the discretionary authority to remand the case to state court. *Carnegie-Mellon Univ.* v. *Cohill*, 484 U.S. 343 (1988). Under *Thermtron*, as applied in *Quackenbush*, such a discretionary remand order is appealable because it is not based on one of the grounds in § 1447(c). Accordingly, the Seventh Circuit correctly exercised appellate jurisdiction over the remand orders in this case.

B. Allowing appellate review of SLUSA decisions would further the statutory objective of uniformity. Petitioners do not contend otherwise; rather, they argue that affirmance would frustrate the policies of § 1447(d). This is an attack on *Thermtron* itself; but *Thermtron* has been settled law for three decades. Congress is presumed to have been aware of the *Thermtron* rule, and thus to have understood that non-jurisdictional SLUSA decisions would be appealable. Adherence to that well-settled rule compels affirmance of the decision below.

II. The decision below could be affirmed on the alternative ground that appellate review was authorized by *Waco* v. *United States Fidelity & Guaranty Co.*, 293 U.S. 140 (1934). In *Waco*, this Court held that the statutory bar on appellate review of remand orders does not apply to an otherwise appealable antecedent decision that would be conclusive in the remanded action. The district court's decision that petitioners' actions are not precluded under SLUSA is reviewable under the *Waco* doctrine, because that decision is both immediately appealable and would not be subject to reconsideration or appeal on remand. Petitioners have failed even to address the *Waco* doctrine in their principal brief.

ARGUMENT

"Because it ends the litigation in federal court, a remand is a 'final decision' that may be appealed under 28 U.S.C. § 1291." Pet. App. 12a (citing *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 711-15 (1996)); *see* note 3, *infra*. Thus, to prevail on the question presented, petitioners must establish that some *other* statute precluded the court below from exercising the appellate jurisdiction conferred on it by Congress in § 1291.

Petitioners place sole reliance on 28 U.S.C. § 1447(d), which provides that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." *See* Pet. Br. 24. But § 1447(d) does not preclude *all* appellate review of remand orders and associated decisions. As the court below correctly held, the orders in this case are reviewable under *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336 (1976), because the district court's remand decisions were not based on a defect in removal procedure or a lack of subject-matter jurisdiction. Moreover, the orders in this case are also reviewable under *Waco* v. *United States Fidelity & Guaranty Co.*, 293 U.S. 140 (1934), because the district court's antecedent decision on the applicability of SLUSA would be functionally unreviewable in the state-court proceedings.

I. The Seventh Circuit Properly Exercised Appellate Jurisdiction Under *Thermtron*

In *Thermtron*, this Court held that "only remand orders issued under § 1447(c) and invoking the grounds specified therein . . . are immune from [appellate] review under § 1447(d)." 423 U.S. at 346. Since *Thermtron*, the Court has reiterated 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)." *Things Remembered, Inc.* v. *Petrarca*, 516 U.S. 124, 127 (1995); *see also Quackenbush*, 517 U.S. at 711-12 (same).

Under the *Thermtron* rule, remand orders based on grounds specified in § 1447(c)—lack of subject-matter jurisdiction and defects in removal procedure—are not appealable. Thus, § 1447(d) bars appellate review where the district court remands for lack of complete diversity. *Gravitt* v. *Southwestern Bell Tel. Co.*, 430 U.S. 723, 723 (1977) (per curiam). A remand based on a procedural defect, such as an untimely removal, is likewise unreviewable. *Things Remembered*, 516 U.S. at 128.

Also under *Thermtron*, remand orders based on grounds *not* specified in § 1447(c) may be reviewed on appeal. For example, the abstention doctrines are not within the scope of § 1447(c), and a remand order based on one of those doctrines is appealable. *Quackenbush*, 517 U.S. at 712. Similarly, the congestion of a district court's docket is not within the scope of § 1447(c), and a remand order based on that factor is reviewable on appeal. *Thermtron*, 423 U.S. at 351.[3]

Because the remand orders in this case were not based on any ground specified in § 1447(c), the Seventh Circuit properly exercised appellate jurisdiction to review those orders under the rule announced in *Thermtron*, adhered to in *Things Remembered*, and followed in *Quackenbush*.

A. The Remand Orders Were Not Based On A Lack Of Subject-Matter Jurisdiction

According to petitioners, the remand orders fall within § 1447(d)'s bar to appellate review because the district court

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[3] The remand order in *Thermtron* was reviewed on writ of mandamus because the Court was of the view that "an order remanding a removed action does not represent a final judgment reviewable by appeal" under 28 U.S.C. § 1291. 423 U.S. at 352-53. This aspect of *Thermtron* was "disavow[ed]" in *Quackenbush* (517 U.S. at 715), which held that a remand order is a final decision appealable under § 1291 because "[w]hen a district court remands a case to a state court, the district court disassociates itself from the case entirely, retaining nothing of the matter on the federal court's docket." *Id.* at 714.

said that its remand orders were based on a "lack[of] subject matter jurisdiction." Pet. App. 12a. Petitioners argue, first, that the district court's jurisdictional label is "dispositive"; and second, that the district court "correctly concluded that [it] lacked subject-matter jurisdiction." Pet. Br. 24 & n.31. Petitioners are wrong on both counts.[4]

1. The Jurisdictional Label Used By The District Court Is Not Conclusive

This Court very recently observed that judicial opinions often recite "that the court is dismissing for 'lack of jurisdiction' when some threshold fact has not been established, without explicitly considering whether the dismissal should be for lack of subject matter jurisdiction or for failure to state a claim." *Arbaugh* v. *Y&H Corp.*, 546 U.S. ___ (2006), slip op. 9 (internal quotation omitted). In *Arbaugh*, the Court made clear that such "'drive-by jurisdictional rulings' . . .

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[4] Although petitioners suggest, half-heartedly, that the remand orders could be held unreviewable as based on a "defect" other than subject-matter jurisdiction (Pet. Br. 20 n.24, 34 n.43), the 1996 amendment to § 1447(c) on which they rely has "no effect on the scope of remands authorized by § 1447(c), and therefore no effect on the scope of remand orders with respect to which § 1447(d) bars appellate review." *Snapper, Inc.* v. *Redan*, 171 F.3d 1249, 1259-60 (11th Cir. 1999); *see* Public Citizen Br. 5 n.2. Respondents established in the district court that there was no "defect" within the meaning of § 1447(c) (*see* J.A. 359-60 (*Potter*)), and petitioners did not timely claim otherwise; thus, the case could not have been remanded on that basis. *See Caterpillar Inc.* v. *Lewis*, 519 U.S. 61, 69 (1996); *Blackburn* v. *UPS, Inc.*, 179 F.3d 81, 90 n.3 (3d Cir. 1999). And even if the district court *had* remanded on the basis of a "defect" not timely raised by petitioners, appellate review of such a remand order is *not* barred by § 1447(d). *In re Continental Cas. Co.*, 29 F.3d 292, 294-95 (7th Cir. 1994). In any event, because petitioners failed even to mention their "defect" theory to the Seventh Circuit or in their certiorari petition, it may not be raised by petitioners for the first time in their merits briefing. *See, e.g.*, *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 646 (1992); *Yee* v. *City of Escondido*, 503 U.S. 519, 537 (1992).

should be accorded 'no precedential effect' on the question whether the federal court had the authority to adjudicate the claim in suit." *Id*. at 9-10. Nothing in this Court's precedents requires courts to take precisely the opposite approach in the context of remand orders. To the contrary, the rule of blind deference petitioners propose directly conflicts with this Court's admonition that the federal courts must independently determine whether appellate jurisdiction exists in a given case (*Liberty Mut. Ins. Co.* v. *Wetzel*, 424 U.S. 737, 740 (1976))—a determination that requires an evaluation of the *substance* of the district court's decision. *Nashville, Chattanooga & St. Louis Ry.* v. *Wallace*, 288 U.S. 249, 259 (1933) ("In determining whether this litigation presents a case within the appellate jurisdiction of this Court, we are concerned, not with form, but with substance").

To be sure, "[i]f a trial judge purports to remand a case on the ground" that it lacked subject-matter jurisdiction, that jurisdictional ruling is unreviewable "whether erroneous or not." *Thermtron*, 423 U.S. at 343; *see Briscoe* v. *Bell*, 432 U.S. 404, 413 n.13 (1977) (dictum). But in determining what the district court "purported" to do, the appellate court must look beyond the *label* affixed to the district court's ruling. *See Things Remembered*, 516 U.S. at 134 (Ginsburg, J., concurring) ("it 'make[s] little sense' to rest reviewability *vel non* on the tag the trial court elects to place on its ruling"). Petitioners concede that a district court may not insulate a non-jurisdictional remand from appellate review by giving it a "patently unreasonable" jurisdictional label (Pet. Br. 28 n.34), but they offer no convincing reason that an appellate court should nonetheless be bound by some less egregious (but incorrect) jurisdictional label. *See Thermtron*, 423 U.S. at 357 (Rehnquist, J., dissenting). Even in close cases, the appellate courts have an obligation to determine whether a remand order was *actually* based on a lack of subject-matter jurisdiction or something else. *See Aliota* v. *Graham*, 984 F.2d 1350, 1354-57 (3d Cir. 1993) (Alito, J.).

Contrary to petitioners' contention, testing the label applied by the district court hardly renders § 1447(d) a "nul-

lity." Pet. Br. 28 n.34. Determining whether the *actual* basis for a district court's remand was "jurisdictional" does not violate § 1447(d) because it does not require a court of appeals to review the correctness of the district court's remand order. Here, for example, the court of appeals determined that the remand orders were not "jurisdictional" before it even *addressed* the district court's substantive analysis of SLUSA preclusion. Pet. App. 17a. In the vast majority of cases, there will be no incongruity between a remand order's substance and its label; after all, "in most instances subject-matter jurisdiction will involve no arduous inquiry." *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 587 (1999). But where such an incongruity does arise, the appellate courts must ensure that the district court correctly understood its own jurisdiction. *Cf. Liberty Mut. Ins. Co.*, 424 U.S. at 743-44 (where district court lacked authority to enter a Rule 54(b) judgment, appellate jurisdiction was lacking "despite the fact that the [court] undoubtedly made the findings required by the Rule").

This is not the first time that the Court has considered whether a district court's label is conclusive for purposes of appellate jurisdiction. The Double Jeopardy Clause and 18 U.S.C. § 3731 preclude review of a judgment of acquittal in a criminal case, even if the court of appeals believes that the district court's ruling "was based upon an egregiously erroneous foundation." *Fong Foo* v. *United States*, 369 U.S. 141, 143 (1962). In applying this bar on appealability, this Court has instructed that "what constitutes an 'acquittal' is not to be controlled by the form of the judge's action." *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977). Rather, a court of appeals "must determine 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." *Ibid.*; *see also United States* v. *Jorn*, 400 U.S. 470, 478 n.7 (1971) ("the trial judge's characterization of his own action cannot control the classification of the action for purposes of our appellate jurisdiction"); *United States* v. *Sisson*, 399 U.S. 267, 279 n.7 (1970)

("The label attached by the District Court to its own opinion does not, of course, decide for us the jurisdictional issue"). Just as a court of appeals may question a district court's labeling of its judgment as an "acquittal" without violating the bar on appeals of even erroneous acquittals, a court of appeals may question a district court's labeling of its remand order as "jurisdictional" without violating the bar on appeals of even erroneous jurisdictional remands.

Not surprisingly, the courts of appeals have generally recognized that "powerful policy considerations and persuasive decisional authority" support their obligation to independently determine the basis for a district court's remand order before holding that § 1447(d) bars an appeal. *Mangold* v. *Analytic Servs., Inc.*, 77 F.3d 1442, 1450-51 (4th Cir. 1996); *see also, e.g.*, *Lindsey* v. *Dillard's, Inc.*, 306 F.3d 596, 598 (8th Cir. 2002); *Dalrymple* v. *Grand River Dam Auth.*, 145 F.3d 1180, 1184 (10th Cir. 1998); *Ferrari, Alvarez, Olsen & Ottoboni* v. *Home Ins. Co.*, 940 F.2d 550, 553 (9th Cir. 1991). These courts and others have properly concluded that a district court's incantation of the phrase "subject-matter jurisdiction" is not a sufficient basis for foreclosing an appeal, nor for relieving the courts of appeals of their obligation to serve as interpreters of their own jurisdiction. *See Liberty Mut. Ins. Co.*, 424 U.S. at 742 (holding that the court of appeals had erred in accepting jurisdiction based on the district court's "recital" that a final judgment had been entered).

This Court has explained that it "must be guided in determining the question of appealability of the trial court's action not by the name the court gave [its decision] but by what in legal effect it actually was." *Sisson*, 399 U.S. at 279 n.7 (internal quotation omitted). That principle is equally applicable to the labels attached by district courts to their remand decisions. The legal effect of the district court's decision in this case was to reject the SLUSA-preclusion defense interposed by respondents; as demonstrated below, that was a decision on the merits of a substantial federal question that the court had jurisdiction to decide, *not* a determination that subject-matter jurisdiction was lacking.

2. The Seventh Circuit Correctly Rejected The District Court's Jurisdictional Label

Petitioners' conception of what constitutes a "jurisdictional" ruling was flatly rejected by this Court's unanimous decision in *Arbaugh*. As the court below explained, "a court lacks 'subject-matter jurisdiction' only when Congress has not authorized the federal judiciary to resolve the sort of issue presented by the case . . . ." Pet. App. 13a (citing *Scarborough* v. *Principi*, 541 U.S. 401, 413-14 (2004), and *Kontrick* v. *Ryan*, 540 U.S. 443, 454-55 (2004)). Petitioners contend that "[n]othing in *Kontrick* or *Scarborough* suggests that the district court['s] authority to resolve the preemption issue . . . somehow meant that the court['s] remand orders were not based on a lack of jurisdiction." Pet. Br. 37. But in *Arbaugh*, this Court confirmed that *Kontrick* and *Scarborough* mean *exactly* that: Subject-matter jurisdiction refers *only* to "the question whether the federal court had authority to adjudicate the claim in suit." Slip op. 9-10; *see also* U.S. Br. in *Arbaugh*, at 21-25. Because Congress clearly *authorized* the district court to resolve the substantive federal question of SLUSA preclusion, its ultimate rejection of respondents' federal defense is an *exercise* of jurisdiction, not a determination that jurisdiction was lacking.

It is well-established that removal jurisdiction (*i.e.*, the *authority* to decide the merits of a case removed from state court) extends to all cases as "might" have been brought originally in federal court. *Tennessee* v. *Union & Planters' Bank*, 152 U.S. 454, 461-62 (1894). The federal courts have original jurisdiction of, *inter alia*, cases presenting a federal question that is not "wholly insubstantial" (*Bell* v. *Hood*, 327 U.S. 678, 682 (1946)), and the federal question ordinarily must appear on the face of the complaint. *Lousiville & Nashville Ry. Co.* v. *Mottley*, 211 U.S. 149, 152-54 (1908). This "well-pleaded complaint" rule can be abrogated by statute, and Congress has acted on occasion to make state-law actions removable *solely* on the basis of a substantial federal question presented as a *defense*. *Mesa* v. *California*, 489 U.S. 121, 136-37 (1989). When 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). *Jefferson County* v. *Acker*, 527 U.S. 423, 431-33 (1999). If the federal court ultimately rejects the federal question, that is a decision on the merits—*not* a jurisdictional determination. *Steel Co.* v. *Citizens for Better Env't*, 523 U.S. 83, 89 (1998). The court therefore retains jurisdiction to decide the remainder of the case. *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 435-36 (1995) (plurality opinion). But if state-law claims predominate following the rejection of the federal defense on the merits, the district court ordinarily has the discretion to remand the case to state court. *Carnegie-Mellon Univ.* v. *Cohill*, 484 U.S. 343, 354-55 (1988). Such a remand order is not based on a lack of subject-matter jurisdiction, and thus 28 U.S.C. § 1447(d) is no barrier to appellate review. *Quackenbush*, 517 U.S. at 711-12.

SLUSA follows this established blueprint. Congress expressly waived the well-pleaded complaint rule by making securities class actions removable on the basis of SLUSA's preclusion defense. 15 U.S.C. § 77p(c). The removal provision applies to "[a]ny" covered class action "involving" a covered security as set forth in the preclusion provision, and requires the federal court to "subject" such actions to the preclusion provision upon removal; thus, the removal provision is *broader* than the preclusion provision, such that some actions that are within the removal jurisdiction are not precluded. The touchstone here, as in other contexts, is whether the federal defense is "colorable" at the time of removal; if it is, then the district court has *jurisdiction* even if the defense is ultimately rejected on the merits. The SLUSA-preclusion defense in this case was clearly colorable; indeed, this Court has since sustained respondents' position on the merits. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Dabit*, 547 U.S. ___ (2006). Accordingly, the district court had subject-matter jurisdiction when the case was removed, and its erro-

neous resolution of the preclusion defense did not serve to divest it of jurisdiction. *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 493 (1983). Its subsequent remand order was therefore discretionary, as authorized by *Cohill*; and the court of appeals properly exercised appellate jurisdiction, as authorized by *Thermtron* and *Quackenbush*.

a. SLUSA's Removal Provision Is Broader Than Its Preclusion Provision

The *Arbaugh* Court adopted a "readily administrable bright line" rule to answer the question "[w]hether a disputed matter concerns jurisdiction or the merits." Slip op. 14 (internal quotation omitted). Under *Arbaugh*'s clear-statement rule, statutory elements are *not* jurisdictional unless Congress *expressly* provides otherwise: "If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. . . . But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional." *Ibid.* (footnote omitted). Under the standard reiterated in *Arbaugh*, the elements of SLUSA preclusion are not jurisdictional.

SLUSA precludes certain securities actions from being maintained in any court:

> 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.

15 U.S.C. § 77p(b). Although this is often referred to as a "preemption" provision, "SLUSA does not actually pre-empt any state cause of action. It simply denies plaintiffs the right to use the class action device to vindicate certain claims." *Dabit*, slip op. 15.

SLUSA also contains a specialized provision authorizing removal of state-law actions on the basis of a federal defense:

> *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) of this section*.

15 U.S.C. § 77p(c) (emphases added). Congress thereby authorized removal based on the federal *defense* of preclusion. *See Oklahoma Tax Comm'n* v. *Graham*, 489 U.S. 838, 841 (1989) (per curiam) ("Congress has expressly provided by statute for removal when it desired federal courts to adjudicate defenses based on federal immunities").[5]

1. The text and structure of the statute, and its history and purpose, establish 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. It necessarily follows that Congress

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[5] Where Congress has expressly provided for federal jurisdiction by statute, the well-pleaded complaint rule—which ordinarily requires the federal question to appear on the face of the complaint—does not apply. *Cf. American Nat'l Red Cross* v. *S. G.*, 505 U.S. 247, 258 (1992). For the same reason, petitioners' reliance on the "complete preemption" doctrine (Pet. Br. 34-36) is misplaced; that doctrine applies only where Congress has *not* expressly provided for federal jurisdiction. *See Beneficial Nat'l Bank* v. *Anderson*, 539 U.S. 1, 8 (2003) ("a state claim may be removed to federal court in only two circumstances—when Congress expressly so provides, . . . *or* when a federal statute wholly displaces the state-law cause of action through complete pre-emption") (emphasis added).

did not "clearly state[]" that each of the prerequisites to preclusion "shall count as jurisdictional." *Arbaugh*, slip op. 14.

The Seventh Circuit held that SLUSA allows removal of all "covered class actions." Pet. App. 13a-14a ("Because . . . this is a 'covered class action' . . . a federal judge is not only authorized but also required to decide whether any court may entertain the litigation"). Although petitioners complain that this holding is "without any textual basis" (Pet. Br. 37), this Court recently read SLUSA's removal provision precisely as the Seventh Circuit had. In *Dabit*, this Court explained that a "key provision of the statute makes *all* 'covered class actions' filed in state court removable to federal court." Slip op. 10 n.7 (emphasis added).

Contrary to petitioners' suggestion (Pet. Br. 37), neither the *Dabit* Court's footnote nor the Seventh Circuit's holding is inconsistent with the "as set forth in subsection (b)" clause of the removal provision, which petitioners would read to mean that an action cannot be removed unless it conclusively meets all of the prerequisites to preclusion. Pet. Br. 32. "To be sure, the removal provision's reference to the preemption provision is not a model of clarity, but it . . . cannot possibly mean that Congress intended to give the removal provision precisely the same scope as the preemption provision. If the removal provision had the same scope as the preemption provision, it would simply reference that provision in its entirety, or it would track that provision's language exactly. But it does neither." Morris & Goss, *Why Claims Under the Securities Act of 1933 Are Removable to Federal Court*, 36 Sec. Reg. & L. Rep. (BNA) 626, 629 (2004).

Congress chose *not* to repeat the preclusion provision *verbatim* in the removal provision. Instead, Congress conferred removal jurisdiction over "*[a]ny* covered class action . . . *involving* a covered security" as set forth in subsection (b). 15 U.S.C. § 77p(c) (emphases added). These are terms of inclusion, not limitation. *See Salinas* v. *United States*, 522 U.S. 52, 57 (1997) ("The word 'any' . . . undercuts the attempt to impose [a] narrowing construction"); *Allied-Bruce*

Terminix Cos. v. *Dobson*, 513 U.S. 265, 273 (1995) ("the word 'involving' is broad"). Congress's use of these inclusive terms to modify the "as set forth" clause shows that the removal provision is broader than the preclusion provision. Indeed, the very title of the removal provision is "removal of *covered* class actions"—*not* "removal of precluded class actions"—confirming that the removal provision is broader than the preclusion provision. *See INS* v. *National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991).[6]

The section-by-section analyses prepared for each chamber state that subsection (c) "provides that any class action described in [s]ubsection (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)." S. Rep. No. 182, *supra*, at 8 (emphases added); *accord*, H.R. Rep. No. 640, 105th Cong., 2d Sess. 16 (1998). The congressional understanding that an action removed under SLUSA "*may* be dismissed pursuant to the provisions of subsection (b)" necessarily means that some actions *might not* be so dismissed. *Jama* v. *ICE*, 543 U.S. 335, 346 (2005) ("The word 'may' customarily connotes discretion"). In other words, an action might be "described in subsection (b)" for purposes of removal, but *not* precluded by subsection (b).

The final clause of the removal provision—which states that removed actions "shall be subject to subsection (b)"—provides further structural proof that the removal provision is broader than the preclusion provision. If only precluded ac-

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[6] The Class Action Fairness Act of 2005 (CAFA), Pub. L. No. 109-2, 119 Stat. 4, exempts from its removal provision "any class action that solely involves . . . a claim concerning a covered security as defined under [SLUSA]"—*not* just claims precluded by SLUSA. 28 U.S.C. § 1453(d)(1). The 109th Congress thus understood actions "concerning" a covered security to be removable under SLUSA. *See Gozlon-Peretz* v. *United States*, 498 U.S. 395, 406 (1991) (view of a later Congress has "'persuasive value'" in construing prior legislation).

tions could be removed, as petitioners contend, then there would be no need for them to be "subject to" the preclusion provision; they would be precluded simply by virtue of their removability. Under the Seventh Circuit's ruling, by contrast, the district court "subjects" a removed action to the preclusion provision by determining whether the action meets each of the limitations in subsection (b), in which case it may not be maintained in any court as a matter of substantive federal law; if the court ultimately concludes that the action does not fall within subsection (b), then—again as a matter of substantive federal law—the action may be maintained in the court in which it was brought.

Congress included the removal provision to ensure that precluded actions do not proceed in state court. H.R. Rep. No. 640, *supra*, at 16 (removal provision "is designed to prevent a State court from inadvertently, improperly, or otherwise maintaining jurisdiction over an action that is preempted pursuant to subsection (b)"). And Congress made the removal provision sweep wider than the preclusion provision to ensure that the *federal* courts would make the determination whether a particular action is precluded by SLUSA. *Cf. Willingham* v. *Morgan*, 395 U.S. 402, 405 (1969) ("the test for removal should be broader, not narrower, than the test for [the federal defense of] official immunity").

2. Petitioners maintain, however, that "the plain language of SLUSA's removal provision clearly mandates that a class action cannot be removed *unless* that action satisfies SLUSA's preemption provision." Pet. Br. 32 (citation omitted). This reading cannot be reconciled with the text, structure, history, or purpose of the statute.

Petitioners assert that SLUSA "provides for removal of a covered class action if and only if it meets the preemption criteria 'as set forth in subsection (b).'" Pet. Br. 32. The problem with this simplistic argument is that SLUSA does *not* say that a case can be removed "if and only if" all requirements for preclusion are met. The removal provision *actually* authorizes removal of "*[a]ny* covered class action

. . . *involving* a covered security, as set forth in subsection (b)." 15 U.S.C. § 77p(c) (emphases added). As signaled by their made-up "if and only if" condition, petitioners want to read the "as set forth" clause in isolation; but this construction simply ignores the modifiers "any" and "involving," which Congress actually used in the statute. Unlike petitioners, however, this Court "follow[s] the cardinal rule that a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context." *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (citation omitted).

In addition to the terms "any" and "involving," petitioners' construction would render the entire final clause of the removal provision—removed actions "shall be subject to subsection (b)"—mere surplusage, in violation of the "cardinal principle of statutory construction" that "no clause, sentence, or word shall be superfluous, void, or insignificant." *Alaska Dep't of Envtl. Conservation* v. *EPA*, 540 U.S. 461, 489 n.13 (2004) (internal quotation omitted). Petitioners provide mute confirmation of this by omitting all reference to that clause from the argument section of their brief.

Petitioners seek solace in the legislative history, which states that actions "described in subsection (b)" are removable. Pet. Br. 32. They have no explanation, however, for the statement in the same passage that upon removal such actions "*may* be dismissed pursuant to the provisions of subsection (b)" (*ibid.* (emphasis added)); as explained above, this can only be read to mean that *some* actions that are removable are *not* precluded.[7]

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[7] Petitioners cite a statement prepared for the Chairman of the Securities and Exchange Commission opining that the removal and preemption provisions are "coextensive." Pet. Br. 32. The same statement goes on to explain, however, that the removal provision "allows a state fraud class action to be removed to federal court . . . so that a federal court could decide whether the state court claims are preempted." *Securities Litigation Abuses: Hearing Before the Subcomm. on Secs., Comm. on Banking,*

[Footnote continued on next page]

Petitioners' final argument is that "[i]f 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.'" Pet. Br. 37. Of course, if Congress had "chose[n] to permit removal *only* for those covered class actions that also meet the preemption requirements in subsection (b)," as petitioners contend (*ibid.*), Congress *could* have passed a statute saying that "any class action that is preempted under subsection (b) shall be removable." It did neither of these things, leaving this Court with the task of determining which reading is better: Petitioners', which is predicated upon one phrase read in isolation, or the Seventh Circuit's, which harmonizes the statute as a whole.

In this regard, it is telling that petitioners do not even attempt to maintain that the purpose of SLUSA would be advanced by limiting the scope of the removal provision to actions that are actually precluded. *See Romero* v. *International Term. Oper. Co.*, 358 U.S. 354, 379 (1959) (a jurisdictional statute should be construed in light "of the history that produced it, the demands of reason and coherence, and the dictates of sound judicial policy"). SLUSA is just one of several statutes that authorize removal on the basis of a federal defense; this Court's construction of similar statutes lays to rest any doubt that SLUSA's removal provision is broader than the preclusion provision—that is, that some cases are removable under but not precluded by SLUSA.

[Footnote continued from previous page]

Housing & Urban Affairs, 1997 WL 687807, at *26. In any event, this Court has traditionally "decline[d] to accord any significance" to statements that are not made by a Member of Congress or included in the Committee or Conference Reports. *Kelly* v. *Robinson*, 479 U.S. 36, 51 n.13 (1986).

b. A Colorable Defense Of SLUSA Preclusion Is Sufficient To Confer Removal Jurisdiction

When Congress has allowed removal on the basis of a federal defense, this Court has consistently held that the removing defendants must establish only a "colorable" (non-frivolous) federal defense; they do not have to go further and *prove* the defense in order to remove. Congress enacted SLUSA against this backdrop, and thus is presumed to have intended a similar construction of SLUSA's removal provision. *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 813 (1989) ("When Congress codifies a judicially defined concept, it is presumed, absent an express statement to the contrary, that Congress intended to adopt the interpretation placed on that concept by the courts"); *cf. Dabit*, slip op. 13. Because SLUSA's removal provision is broader than the preclusion provision, some actions are removable but not precluded; such actions include those in which the removing defendant presents a colorable defense of preclusion, *even if* that defense is later rejected on the merits. The Court's precedents establish that the federal courts have subject-matter jurisdiction to hear such actions.

1. Under the federal officer removal statute (28 U.S.C. § 1442), "suits against federal officers may be removed despite the nonfederal cast of the complaint; the federal-question element is met if the defense depends on federal law." *Acker*, 527 U.S. at 431. In order to remove, a federal officer must establish that a "colorable" federal defense could be interposed to the action. *Mesa*, 489 U.S. at 139.

This Court has "rejected a 'narrow, grudging interpretation' of the statute, recognizing that 'one of the most important reasons for removal is to have the validity of the defense of official immunity tried in a federal court.'" *Acker*, 527 U.S. at 431 (quoting *Willingham*, 395 U.S. at 407). The Court "therefore do[es] not require the officer virtually to win his case before he can have it removed." *Ibid.* (internal quotation omitted). In *Acker*, the removing defendants "*ar-*

gued" a particular defense; the Court held that "that argument, *although we ultimately reject it*, . . . presents a colorable federal defense." *Ibid.* (emphases added); *see also id.* at 448 (Scalia, J., concurring in part and dissenting in part) (agreeing that "their federal defense is colorable"). Removal jurisdiction thus rested on the defensive *argument* advanced by the removing defendants, regardless of its ultimate correctness. Moreover, the *Acker* Court "credit[ed] the [removing defendants'] theory of the case for purposes . . . of our jurisdictional inquiry." *Id.* at 432.

Acker thus stands for two important propositions, both of which are fatal to petitioners' theory of this case. *First*, the removing defendant need only present a colorable argument that the elements of a federal defense have been satisfied to establish removal jurisdiction, even if that argument is later rejected on the merits. 527 U.S. at 431-32. *Second*, where Congress authorizes removal on the basis of a federal defense, the federal courts will accept the removing defendants' theory of the case in determining whether the defense is colorable. *Id.* at 432-33.[8]

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[8] Both propositions are fully consonant with the Court's treatment of jurisdictional grants for causes of action "brought under" a federal statute. "It is firmly established in [this Court's] cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case." *Steel Co.*, 523 U.S. at 89 (citing 5A Wright & Miller, *Federal Practice & Procedure* § 1350 at 196 n.8 (2d ed. 1990)). "[T]he district court has jurisdiction if 'the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another,'" and "[d]ismissal for lack of subject-matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is 'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy.'" *Ibid.* (quoting *Bell*, 327 U.S. at 682-83, 685, and *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 666 (1974)).

2. Petitioners relegate *Acker* to a single footnote in their merits brief, in which they proffer three grounds of ostensible distinction. Pet. Br. 38 n.45. Each is unavailing.

First, petitioners say that the federal officer statute "upholds important federal sovereignty interests," particularly "the statutory purpose 'to have the validity of the defense of official immunity tried in a federal court,'" that "are not present in SLUSA." Pet. Br. 38 n.45 (quoting *Acker*, 527 U.S. at 431). But "[t]he magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated." *Dabit*, slip op. 5; *see* S. Rep. No. 182, *supra*, at 5. And the *sole* purpose of SLUSA's removal provision is to have the preclusion defense—which affords securities defendants with federal immunity from state-law class actions—decided by a federal court. *See* H.R. Rep. No. 640, *supra*, at 16. Congress thus expressed an unmistakable preference for a federal forum for determining the viability of the SLUSA-preclusion defense. *Cf. El Paso Natural Gas Co.* v. *Neztsosie*, 526 U.S. 473, 484-85 (1999).

Petitioners also say that whereas "[t]he Court has interpreted [the federal officer removal statute] not to require the removing officer to prove a 'clearly sustainable defense' but only a 'colorable defense,' SLUSA "expressly bases removability on whether there is preemption *in fact*—not merely on whether that defense is colorable." Pet. Br. 38 n.45 (quoting *Acker*, 527 U.S. at 432). But SLUSA no more contains such an "express" requirement than does the federal officer statute. In fact, to prevail on an official immunity defense, an officer must prove that he is being sued for acting under color of office (*Barr* v. *Matteo*, 360 U.S. 564, 572 (1959)), and to remove he must "establish that the suit is '*for* a[n] act under color of office.'" *Acker*, 527 U.S. at 431 (quoting 28 U.S.C. § 1442(a)(3)). The removal statute thus "cross-references" one of the substantive elements of the defense in much the same way that SLUSA does, but this Court has held that "demanding an airtight case on the merits" of this element would "defeat the purpose of the removal statute."

Id. at 432; *see also id.* at 448 (Scalia, J., dissenting) (removing officer need *not* "prove that the act prompting suit is, beyond doubt, an official one").

Finally, petitioners say that "[i]n 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." Pet. Br. 38 n.45. But this Court has held in analogous circumstances that the "validity" of a federal defense "has no connection whatever with the question of jurisdiction." *Mesa*, 489 U.S. at 129 (internal quotations omitted). For this reason, petitioners err in relying (Pet. Br. 36) on the proposition that "a federal court always has jurisdiction to determine its own jurisdiction" (*United States* v. *Ruiz*, 536 U.S. 622, 628 (2002)); to establish removal jurisdiction, the Court has "only required [the removing defendants] to allege a colorable defense under federal law." *Mesa*, 489 U.S. at 129; *see Willingham*, 395 U.S. at 407. The *availability* of the defense is jurisdictional; its *success* is not. Petitioners have identified no reason to apply the opposite construction to SLUSA.

c. Respondents Asserted A Colorable Defense Of SLUSA Preclusion

A federal court has subject-matter jurisdiction if the removing defendant asserts a colorable (non-frivolous) federal defense on its theory of the case; if that defense is rejected, the decision is not jurisdictional, but on the merits. *Fauntleroy* v. *Lum*, 210 U.S. 230, 234-35 (1908); *see also Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 812-13 (1993) (Scalia, J., dissenting). And where 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. *Acker*, 527 U.S. at 432-33; *see also Franchise Tax Bd.* v. *Construction Lab. Vac. Trust*, 463 U.S. 1, 11 n.9 (1983) (where well-pleaded complaint rule is inapplicable, "the defendant's petition for removal could furnish the necessary guarantee that the case necessarily presented a substantial

question of federal law") (citing *Railroad Co.* v. *Mississippi*, 102 U.S. 135, 140 (1880), and *Gold-Washing & Water Co.* v. *Keyes*, 96 U.S. 199, 203-04 (1878)). Such a case can be dismissed or remanded for want of subject-matter jurisdiction only where the district court finds the defense, on the removing defendants' theory, to be frivolous and thus "not colorable." *Cf. Arbaugh*, slip op. 12 n.10; *Levering & Garrigues Co.* v. *Morrin*, 289 U.S. 103, 105 (1933).[9]

It is beyond reasonable dispute that the SLUSA preclusion defense advanced by respondents in this case was "colorable"; indeed, petitioners *conceded* every element of the defense save one, and this Court has since resolved that one in favor of respondents. The district court therefore had subject-matter jurisdiction at the time of removal. Its subsequent rejection of the preclusion defense was not a determination that the court lacked *power* to decide the parties' dispute, but rather an erroneous resolution of that dispute on the merits in favor of petitioners.

1. The only disputed merits issue in the lower courts was whether SLUSA's "in connection with" requirement limits the statute's preclusive reach to actions brought by purchasers and sellers of securities. Because respondents stood to "win" (by securing dismissal) under one construction of SLUSA, and to "lose" (by failing to establish the preclusion defense) on the other, the district court had federal jurisdiction to construe the statute. *Steel Co.*, 523 U.S. at 89; *see Willingham*, 395 U.S. at 409 ("[The removing defendants] sufficiently put in issue the questions of official justi-

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[9] For example, because SLUSA provides that a removable action must be brought "on behalf of more than 50 persons" (15 U.S.C. § 77p(f)(2)(A)), "[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)." Pet. App. 14a. Contrary to petitioners' contention (Pet. Br. 38), there is no "interna[l] inconsisten[cy]" in the decision below.

fication and immunity; the validity of their defenses should be determined in the federal courts"). The district court made no finding that respondents' position on the "in connection with" issue was "frivolous or immaterial," as would have been required to reject it on jurisdictional grounds. *Steel Co.*, 523 U.S. at 89. Nor could the district court have made such a finding, because respondents' position was well-founded on extant decisions of this Court—particularly *SEC* v. *Zandford*, 535 U.S. 813 (2002), and *United States* v. *O'Hagan*, 521 U.S. 642 (1997)—and this Court recently, and unanimously, *agreed* with respondents' position on the merits. *Dabit*, slip op. 16 ("For purposes of SLUSA pre-emption, . . . the identity of the plaintiffs does not determine whether the complaint alleges fraud 'in connection with the purchase or sale' of securities") (citing *Zandford* and *O'Hagan*).[10] The district court's erroneous resolution of this issue therefore did *not* result in a remand for lack of subject-matter jurisdiction.

2. In their merits brief in this Court, petitioners argue for the first time that their actions are not precluded by SLUSA because they "do not depend on allegations of fraud or manipulation." Pet. Br. 42. Petitioners not only failed to make this argument in the court below but, as the Seventh Circuit noted, they affirmatively repudiated it at oral argument. Pet. App. 6a ("they did not argue in their briefs—and did not maintain at oral argument despite the court's invitation—that their suits allege mismanagement rather than deceit or ma-

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[10] Under *Dabit*, the Seventh Circuit's resolution of this case on the merits—*i.e.*, that petitioners' "claims . . . are blocked by SLUSA" (Pet. App. 9a)—is clearly correct. And because *Dabit* is binding on both federal and state courts, petitioners' actions must be dismissed regardless of the correctness of the Seventh Circuit's acceptance of appellate jurisdiction. Accordingly, the Court could affirm the judgment below without resolving the jurisdictional issue. *Norton* v. *Mathews*, 427 U.S. 524, 530-31 (1976); *see Steel Co.*, 523 U.S. at 98 (explaining *Norton*).

nipulation"); *hear* http://www.ca7.uscourts.gov/fdocs/docs.fwx?caseno=04-1495&submit=showdkt&yr=04&num=1495 (audiofile of Seventh Circuit argument). While petitioners now dispute this concession (Pet. Br. 44), it is not before the Court because they did not seek, and the Court did not grant, certiorari on this issue. *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 31 n.5 (1993).

Undaunted by their express waiver to the Seventh Circuit, petitioners now assert that the characterization of their complaints is a matter of "subject-matter jurisdiction" that can "'never be forfeited or waived.'" Pet. Br. 44 (quoting *United States* v. *Cotton*, 535 U.S. 625, 630 (2002)). The Court recently confronted an analogous issue in *Arbaugh*, where a party who failed to contest a statutory element tried to put it in issue later by calling it jurisdictional. This Court disagreed on the ground that "[n]othing in the text of [the relevant statute] indicates that Congress intended courts, on their own motion, to assure that the [late-disputed] requirement is met." Slip op. 12. So, too, here: Nothing in the text of SLUSA indicates that Congress expected the district courts to independently analyze the elements of a preclusion defense that the party resisting removal failed or neglected to put in dispute. To the contrary, the *Dabit* Court undertook no such independent analysis, noting only that the plaintiff in that case "d[id] not dispute . . . that the complaint alleges misrepresentations and omissions of material facts." Slip op. 11. This is an element of the preclusion defense that *can* be waived, as the plaintiff did in *Dabit* and petitioners did in this case; it therefore is non-jurisdictional.[11]

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[11] In any event, petitioners are flatly wrong to assert that their complaints do not allege false statements or omissions, or manipulative or deceptive devices, under SLUSA. *See* Resp. C.A. Br. 12 n.4. As respondents explained in their removal papers (*see, e.g.*, J.A. 348-50 (*Kircher*)), this is made clear by the complaints themselves. *See* J.A. 169, 174-77 (*Potter*); 192, 197-200 (*Kircher*); 218, 223-25 (*Parthasarthy*); 244, 249-

[Footnote continued on next page]

d. Because It Had Removal Jurisdiction, The District Court's Remand Orders Were Discretionary

The foregoing discussion establishes (a) that SLUSA's removal provision is broader than its preclusion provision, such that some actions are within the removal jurisdiction even though they are not precluded on the merits; (b) that such actions include those in which the removing defendants raise a colorable defense of preclusion; and (c) that respondents in this case advanced a colorable defense of SLUSA preclusion, thus investing the district court with jurisdiction at the time of removal. Because the district court made no finding that the federal question asserted by respondents was frivolous or insubstantial, it necessarily follows that the district court retained jurisdiction even after rejecting the preclusion defense on the merits. Accordingly, the remand orders were *not* based on a want of subject-matter jurisdiction; rather, the decision to remand in these circumstances is discretionary, and appellate review of such a remand order is not barred by § 1447(d) under *Thermtron*.

1. In light of the federal interest in regulating securities (*Dabit*, slip op. 5), there can be no doubt that Congress has the *power* to invest the federal courts with jurisdiction to hear all cases presenting a substantial federal question of SLUSA preclusion. *Verlinden*, 461 U.S. at 492 ("Congress may con-

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[Footnote continued from previous page]

52 (*Dudley I*); 262, 267-70 (*Dudley II*); 279, 284-87 (*Vogeler*); 296, 301-03 (*Jackson*); 312, 316-18 (*Spurgeon*). Indeed, in their motions to remand, petitioners argued that SLUSA does not preclude claims brought by "current holders who are *fraudulently lulled* into continuing to hold" securities. J.A. 47 (Dkt. 20), at 7 (*Kircher*) (emphasis added). In *Dabit*, the complaint similarly "alleged that brokers were fraudulently induced . . . to retain or delay selling their securities." Slip op. 4. The Court's recognition that such a claim "unquestionably qualifies" for SLUSA preclusion (*id.* at 16) should be dispositive here.

fer on the federal courts jurisdiction over any case or controversy that might call for the application of federal law"); *see Osborn* v. *Bank of United States*, 22 U.S. (9 Wheat.) 738, 822 (1824). Nor is there any question but that Congress did so by enacting SLUSA. *Dudek* v. *Prudential Secs., Inc.*, 295 F.3d 875, 879 n.3 (8th Cir. 2002) ("The express removal provisions of SLUSA are clearly sufficient to confer Article III 'arising under' jurisdiction"); *see also Greenwood* v. *Peacock*, 384 U.S. 808, 833 (1966).[12]

Because a federal court has subject-matter jurisdiction over an action removed under SLUSA that presents a colorable claim of preclusion, it necessarily follows that the court retains jurisdiction even after concluding, on the merits, that the defense is inapplicable. *See Verlinden*, 461 U.S. at 493 (1983) ("a suit" that "necessarily raises questions of substantive federal law at the very outset . . . clearly 'arises under' federal law, as that term is used in Art. III"). A plurality of this Court has applied *Verlinden* to conclude in analogous

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[12] Instead of authorizing *removal* of a covered class action involving the things set forth in subsection (b), Congress could have authorized the defendant in such an action to seek a declaratory judgment in federal court that the action is precluded by federal law. Such a declaratory relief action would ordinarily be barred by the well-pleaded complaint rule (*Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 671-72 (1950)), but Congress can waive that aspect of the rule (*Franchise Tax Board*, 463 U.S. at 18 n.17)—as, indeed, it did with respect to removals in SLUSA. *Cf. Mesa*, 489 U.S. at 136 (removal statute "serves to overcome the 'well-pleaded complaint' rule which would otherwise preclude removal even if a federal defense were alleged"). So long as the allegations are colorable (non-frivolous), the federal court would have *jurisdiction* over the declaratory relief action regardless of whether each element of preclusion was met, just as a court has jurisdiction to hear a Title VII case even if the plaintiff does not ultimately win. And, as in the Title VII case, if the court ultimately rejects the federal question (the claim in *Arbaugh*, the defense under SLUSA), "then dismissal of the case would be on the merits, not for want of jurisdiction." *Bell*, 327 U.S. at 682.

circumstances that "a nonfrivolous federal question . . . when the case was removed to federal court" is sufficient to confer subject-matter jurisdiction over the entire case even where the court decides the federal question against the removing party. *Gutierrez de Martinez*, 515 U.S. at 435 (opinion of Ginsburg, J.); *see also, e.g.*, *Jamison* v. *Wiley*, 14 F.3d 222, 239 (4th Cir. 1994) ("That the federal court ultimately rejects the federal defense that supported removal . . . does not mean that it thereby loses subject matter jurisdiction over the removed action").

This Court has held that the district courts have discretionary authority to remand state-law actions to state court *even if* the federal court would have jurisdiction to see the case through to its end. *Cohill*, 484 U.S. at 354-55 ("when a court has discretionary jurisdiction over a removed state-law claim and the court chooses not to exercise its jurisdiction, remand is an appropriate alternative"). *Cohill* involved a case that originally asserted both federal and state claims; once the federal claims were dismissed, the district court retained pendent jurisdiction over the state claims, but decided to remand them. This Court expressly approved that procedure. *Ibid.*; *see also* 28 U.S.C. § 1367(c).

This case is analytically indistinguishable from *Cohill*: Because jurisdiction is determined at the time of removal (*St. Paul Mercury Indem. Co.* v. *Red Cab Co.*, 303 U.S. 283, 293 (1938)), the district court *had* subject-matter jurisdiction over a federal defense (under SLUSA) and related state claims; once the federal defense was rejected on the merits, the court retained jurisdiction to decide the state-law claims. *See* 14C Wright & Miller, *Federal Practice & Procedure* § 3739 at 435 (3d ed. 1998) ("the subject matter jurisdiction of a federal court over a properly removed action will not be defeated by later developments in the suit"). This Court has recognized, however, that "district courts do not overstep Article III limits when they decline jurisdiction of state-law claims on discretionary grounds . . . ." *Ruhrgas*, 526 U.S. at 585. Thus, the district court had the *power* to remand this

case to state court after rejecting the preclusion defense on the merits, even though it had jurisdiction to retain the case.

Construing SLUSA as authorizing a *Cohill*-type discretionary remand in these circumstances is entirely consistent with the statutory language: Congress specified that certain kinds of actions removed under SLUSA (*i.e.*, those that Congress expressly exempted from preclusion) "*shall* be remanded," but was silent on what a court is to do in other circumstances (such as when it ultimately rejects a colorable defense of preclusion in a non-exempt case).[13] The natural inference from its use of "shall" in specified instances is that Congress intended that other actions "*may* be remanded." *Martin* v. *Franklin Capital Corp.*, 126 S. Ct. 704, 709 (2005).

2. "[V]arious Courts of Appeals have relied on *Thermtron* to hold that § 1447(d) bars appellate review of § 1447(c) remands but not remands ordered under *Cohill*." *Things Remembered*, 516 U.S. at 130 (Kennedy, J., concurring) (citing cases); *see also*, *e.g.*, *Trans Penn Wax Corp.* v. *McCandless*, 50 F.3d 217, 224 (3d Cir. 1995) (holding that § 1447(d) does not bar review of a discretionary decision not to exercise jurisdiction over pendent state claims and noting that "[a]t least

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[13] SLUSA states that "if the Federal court determines that the action may be maintained in State court pursuant to *this subsection*, the Federal court shall remand such action to such State court." 15 U.S.C. §§ 77p(d)(4), 78bb(f)(3)(D) (emphasis added). As petitioners point out (Pet. Br. 39), in the context of the 1933 Act "this subsection" means subsection (d), which describes certain actions specifically exempted from SLUSA preclusion; thus, the mandatory remand provision does not by its terms apply to other actions, such as this case. In the 1934 Act, however, "this subsection" picks up all of subsection (f), which would include not only the express exemptions but the rest of SLUSA as well; that is how the court of appeals read it. Pet. App. 12a-13a. The statutory history shows that the "this subsection" language was adopted in the context of the 1933 Act, and then transposed to the 1934 Act. H.R. Rep. No. 640, *supra*, at 18. Thus, the mandatory remand provision is inapplicable here.

eight other circuit courts have agreed"). The reasoning of those cases is undoubtedly correct: A district court's discretionary decision to remand a case over which it could retain jurisdiction is, by definition, not based on lack of subject-matter jurisdiction within the meaning of § 1447(c).

Shortly after *Things Remembered*, this Court unanimously confirmed that § 1447(d) does not preclude appellate review of a discretionary remand order entered by a district court invested with subject-matter jurisdiction. *Quackenbush*, 517 U.S. at 712. There, the district court had diversity jurisdiction, but abstained under *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943), and on that basis "remanded the entire case to state court." 517 U.S. at 710. This Court held

> that § 1447(d) interposes no bar to appellate review of the remand order at issue in this case. As we held in [*Thermtron*], and reiterated this Term in [*Things Remembered*], § 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). This gloss renders § 1447(d) inapplicable here: The District Court's abstention-based remand order does not fall into either category of remand order described in § 1447(c), as it is not based on lack of subject matter jurisdiction or defects in removal procedure.

Id. at 711-12 (citations and internal quotations omitted).

The remand orders entered by the district court in this case, like the order in *Quackenbush*, are appealable under *Thermtron*. There were no defects in removal procedure, and the district court's ultimate rejection of the SLUSA preclusion defense was a decision on the merits, not a jurisdictional determination. The court had removal jurisdiction by virtue of the colorable federal defense stated in respondents' removal papers (*Acker*, 527 U.S. at 431); its decision not to retain that jurisdiction after deciding the substantial federal question was both permissible (*Cohill*, 484 U.S. at 357) and appealable (*Quackenbush*, 517 U.S. at 712). As the Seventh

Circuit correctly concluded: "This suit was properly removed. The district judge made a substantive decision under authority granted by a federal statute. It follows that the remand is unaffected by § 1447(d)." Pet. App. 15a. That conclusion should be affirmed.

B. Affirmance Would Further The Objectives Of SLUSA Without Undermining The Policy Of § 1447(d)

1. The "ungainly acronym SLUSA" (Pet. App. 11a) stands for the Securities Litigation *Uniform* Standards Act. Congress sought greater uniformity in private securities litigation by generally precluding state-law class actions alleging securities fraud, requiring securities suits to proceed (if at all) in federal court under federal law. *Dabit*, slip op. 9-10, 15; *see* H.R. Conf. Rep. No. 803, *supra*, at 13 (SLUSA "makes Federal court the exclusive venue for most securities class action lawsuits" and "establishes uniform national rules for securities class action litigation involving our national capital markets").

It is not difficult to ascertain whether affirmance or reversal of the decision below would better serve Congress's expressed interest in uniformity in private securities litigation. Petitioners' proposal would mean that SLUSA would be independently construed in each judicial district, with no review by the courts of appeals or this Court in the event of a remand. This would only serve to perpetuate uncertainty, confusion, and disarray concerning the correct implementation of SLUSA. The Seventh Circuit's approach, by contrast, means that the inevitably varying district court decisions on an important federal defense are subject to review in the regional circuits, with any resulting conflicts subject to resolution by this Court. *See* Pet. App. 15a ("Appellate review of decisions under [SLUSA] will promote accurate and consistent enforcement of that statute, at little cost in delay beyond what the authorized removal itself creates"). Whereas petitioners' interpretation would practically guarantee disuniformity, the approach adopted by the court below best helps

ensure that the uniform standards enacted by Congress actually remained uniform. *See Rowinski* v. *Salomon Smith Barney Inc.*, 398 F.3d 294, 299 (3d Cir. 2005) (Congress intended "a broad interpretation of SLUSA to ensure the uniform application of federal fraud standards").

Indeed, there really is no dispute that the policies underlying SLUSA favor affirmance of the decision below, as *amici curiae* supporting affirmance have ably demonstrated. Petitioners and their *amici* do not even attempt to argue otherwise: Their briefs are entirely silent on whether the decision below is consistent with the policies and goals underlying SLUSA.

2. Rather than addressing the policies *of SLUSA*, petitioners and their *amici* argue only that the decision below is contrary the policies *of § 1447(d)*. Pet. Br. 45-48; Public Citizen Br. 9-14. The *Thermtron* rule, however, has stood the test of time and proven to be workable in practice. Although petitioners' *amici* assert that "*Thermtron* does not give lower courts sufficient guidance about where to draw the line between what is appealable and what is not" (Public Citizen Br. 11), this assertion is belied by the fact that this Court has only once in the past three decades reversed a court of appeals for reviewing a remand order. *Gravitt*, 430 U.S. at 723. During that time, this Court has itself twice reviewed remand orders (in *Quackenbush*, 517 U.S. at 712, and *Cohill*, 484 U.S. at 347), and, in its most recent decision enforcing the § 1447(d) bar, the Court expressly endorsed the *Thermtron* rule. *Things Remembered*, 516 U.S. at 127. To the extent *amici*'s concern is not with *inconsistency*, but with the fact that *Thermtron* "permit[s] appellate review of district court remand orders in a wide variety of circumstances" (Public Citizen Br. 10-11), that is simply an attack on *Thermtron* itself that cannot be reconciled with this Court's subse-

quent reaffirmation and implementation of the *Thermtron* rule in *Things Remembered* and *Quackenbush*.[14]

Petitioners recite the commonplace that Congress has the power to preclude judicial review of particular cases. Pet. Br. 46. But where Congress wishes to preclude appellate review of orders that would be reviewable under *Thermtron*, it well knows how. *See, e.g.*, 28 U.S.C. § 1452(b) (authorizing remand of certain bankruptcy cases on grounds not specified in § 1447(c), and expressly providing that such a remand "is not reviewable by appeal or otherwise by the court of appeals"). Congress's decision not to enact a similar limitation in SLUSA necessarily means that it expected the *Thermtron* rule to apply.

Petitioners next contend that "Congress did not vest the federal judiciary with exclusive power to interpret and apply SLUSA's preemption provision." Pet. Br. 47. This is mere semantics; Congress *did* vest the federal judiciary with the exclusive power to decide SLUSA preclusion *at the defendant's election*. Some defendants, for tactical or strategic reasons, might choose not to remove a covered class action, in which case the defense of SLUSA preclusion could be available in state court; but such cases will be relatively rare, and for the vast majority of cases Congress did make federal court the exclusive forum for deciding SLUSA preclusion

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[14] Petitioners accept *Thermtron* as settled law, and do not question the distinction drawn in *Thermtron* between § 1447(c)-based remand orders and all other remand orders. Pet. Br. 20-21. For this reason alone, the Court should reject the thinly veiled request of petitioners' *amici* to reconsider or abandon the *Thermtron* rule. *See, e.g.*, *UPS, Inc.* v. *Mitchell*, 451 U.S. 56, 60 n.2 (1981). In any event, "Congress has had almost 30 years in which it could have corrected [the Court's] decision in [*Thermtron*] if it disagreed with it, and has not chosen to do so." *Hilton* v. *South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991). In light of the "special force" that *stare decisis* carries in the statutory arena (*ibid.*), the Court should continue to adhere to the construction afforded § 1447(d) in *Thermtron*.

issues. Pet. App. 15a ("SLUSA ensures that only the federal judiciary makes the [preclusion] decision"). It did so to advance the goal of uniformity that underlies SLUSA—a goal that would be furthered by affirming the decision below.

Petitioners assert that "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." Pet. Br. 47. To the contrary, *Quackenbush* and *Things Remembered* had reaffirmed the *Thermtron* rule less than two years before SLUSA was enacted; Congress is thus deemed to have adopted this long-standing construction of § 1447(d). *See, e.g.*, *Midlantic Nat'l Bank* v. *New Jersey Dep't of Envtl. Prot.*, 474 U.S. 494, 501 (1986). Because remands based on a district court's rejection of a colorable SLUSA preclusion defense do not fall within either of the § 1447(c) categories, Congress had no need to create an express exception to § 1447(d) to permit review of such remands.[15]

In any event, petitioners' purported concern with "delay" is misplaced: Section 1447(d) is designed "to prevent delay in the trial of remanded cases by protracted litigation of *jurisdictional issues*." *Thermtron*, 423 U.S. at 351 (emphasis added). Since the question of SLUSA preclusion is not jurisdictional, this concern is not implicated. The issue here is not whether petitioners' claims are decided in federal or state court, but whether federal law permits them to be heard at all.

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[15] By contrast, Congress clearly *did* need to legislate an express exception to § 1447(d) to permit appellate review of remand orders under CAFA, which amends 28 U.S.C. § 1332 to grant district courts jurisdiction over certain class actions based on minimal diversity (*see* 28 U.S.C. § 1332(d)(2)); a remand based on a district court's conclusion that the jurisdictional requirements set forth in § 1332 (as so amended) have not been met clearly falls within the ambit of § 1447(c). *See Gravitt*, 430 U.S. at 723.

Moreover, Congress has countenanced a certain amount of judicially supervised delay in securities litigation. The PSLRA, for example, provides for an automatic stay of discovery during the pendency of a motion to dismiss (15 U.S.C. §§ 77z-1(b)(1), 78u-4(b)(3)(B)), and SLUSA permits a federal court to stay discovery in state court proceedings when "necessary in aid of its jurisdiction, or to protect or effectuate its judgments, in an action subject to a stay of discovery" under the PSLRA (15 U.S.C. §§ 77z-1(b)(4), 78u-4(b)(3)(D)). And the courts of appeals have ample power to screen out frivolous or dilatory appeals, and to expedite meritorious appeals if warranted. *See Abney* v. *United States*, 431 U.S. 651, 662 n.8 (1977).

Petitioners' final argument is that "[b]y 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." Pet. Br. 47-48. But the court below neither "disregard[ed]" § 1447(d) nor recognized "a new implicit exception to § 1447(d)" (Public Citizen Br. 9); rather, it engaged in a straightforward application of the 30-year-old *Thermtron* rule. Continued adherence to that rule compels affirmance of the decision below.

II. The Seventh Circuit Also Had Appellate Jurisdiction Under *Waco*

In *Waco* v. *United States Fidelity & Guaranty Co.*, 293 U.S. 140 (1934), this Court held that the statutory bar on appeals of remand orders does not preclude review of an otherwise appealable decision made by a district court before it remands an action, if that decision will be "conclusive" upon a party in state court. 16 *Moore's Federal Practice* § 107.44[2][a] at 107-254.3 (3d ed. 2005) ("[E]ven if the issue is intrinsic to the district court's decision to remand, if the decision on that issue alters the contours of the remanded action, the decision is reviewable" under *Waco*). Rather, § 1447(d) only precludes review of the remand itself—*i.e.*, the denial of the defendant's asserted right to a federal forum. 293 U.S. at 143. Thus, even if the Court were to conclude

that the remands in this case were based on a lack of subject-matter jurisdiction, the Court would have to decide whether the court of appeals properly exercised appellate jurisdiction under *Waco* to review (and reverse) the district court's rejection of respondents' SLUSA defenses.

1. *Waco* began as a state-court action by a citizen of Texas against the City of Waco. The City by cross-action joined the Fidelity Company, a citizen of Maryland, and removed the entire case on the basis of diversity. The plaintiff argued that "the company was improperly joined under state law and such joinder could not give the federal court jurisdiction." *Id.* at 141-42. In a single decree, the district court dismissed the cross-action because the Fidelity Company "was 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." 293 U.S. at 142. The City appealed, arguing that the dismissal of the cross-action "was contrary to the law of Texas." *Ibid.* The court of appeals dismissed the appeal on the ground that "no appeal lies from an order of remand." *Ibid.*

The City argued before this Court that the unavailability of appellate review left it in an "anomalous position," because the "District Court's order will be treated as conclusive upon the question of the City's right to maintain its cross-action." 293 U.S. at 143. The Court agreed with the City, explaining that

> no appeal lies from the order of remand; but 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. Indisputably this order is the subject of an appeal; and, if not reversed or set aside, is conclusive upon the petitioner.

Id. at 143.

Waco is not so much an exception to § 1447(d) as a recognition of that statute's limited scope. Section 1447(d) is designed to "avoid[] interruption of the litigation of the mer-

its of removed causes." *United States* v. *Rice*, 327 U.S. 742, 752 (1946). It precludes review of a remand because "[t]he only thing that is at stake is the forum that will hear a claim. This is certainly not an unimportant matter, but it is not so fundamental that a second or third layer of judges must test its correctness." *Adkins* v. *Ill. Cent. R.R. Co.*, 326 F.3d 828, 832 (7th Cir. 2003). But *Waco* makes clear that where—as here—a district court's remand is preceded by a substantive decision that will alter the contours of the state-court action, the appealability of *that* decision is unaffected by § 1447(d).

2. Like the district court's decision dismissing the cross-action in *Waco*, the district court's decision that these actions are not precluded by SLUSA would have been conclusive in state court, leaving respondents in the "anomalous position" of having lost a total defense to liability without any opportunity to secure appellate review of the district court's decision. 293 U.S. at 143; *see* Pet. App. 15a ("it is now or never for appellate review of the question whether an action under state law is preempted" by SLUSA). That decision was appealable even *if* § 1447(d) technically barred review of the resultant decision remanding the actions to state court.

Upon removal, the district court was statutorily required to "subject" petitioners' actions to the preclusion provision of SLUSA (15 U.S.C. § 77p(c)), and necessarily decided the contested question whether the actions are, in fact and law, precluded. Accordingly, the issue of SLUSA preclusion was "actually litigated and determined" by the district court, and therefore would have precluded respondents from raising their SLUSA defense on remand. *C.I.R.* v. *Sunnen*, 333 U.S. 591, 598 (1948); *see Baldwin* v. *Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 525-26 (1931).

The district court's ruling on the SLUSA preclusion defense is likewise plainly "the subject of an appeal." *Waco*, 293 U.S. at 143. Its decision "conclusively determine[d] the disputed question" of SLUSA preclusion; that question is one of great importance to respondents and is "completely separate" from the merits of the petitioners' claims under state

law; and the district court's decision not only will be "effectively unreviewable on appeal from a final judgment," but will be *actually* unreviewable. *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 11-12 (1983) (internal quotations omitted). Indeed, the denial of a SLUSA preclusion defense is likely immediately appealable under *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), even in a case initiated in federal court. *Cf. Will* v. *Hallock*, 126 S. Ct. 952, 959 (2006).

3. Although petitioners have elected not to address *Waco* in this Court, they did do so in the court of appeals.[16] Since they may resurrect these arguments for their reply brief, respondents offer some anticipatory rebuttals.

a. Petitioners argued below that this case is not within the *Waco* doctrine because the district court made "only" a jurisdictional ruling. In fact, the district court also had before it respondents' motions to dismiss petitioners' actions as precluded by SLUSA, which it simultaneously denied as "moot." But even if, *arguendo*, the district court's *remand* order was based on a want of subject-matter jurisdiction, a necessary predicate to that order was that petitioners' actions are *not* within the preclusive reach of SLUSA. On petitioners' reading of the statute, a case is removable only if it is precluded; a necessary corollary of that reading is that a case that is *not* removable is *not* precluded. The preclusion decision itself is not jurisdictional even if its consequences can be so described.

b. Petitioners also argued below that the district court's decision would not be "conclusive" in state court, staking out

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[16] Respondents relied on the *Waco* doctrine both before the court of appeals (*see*, *e.g.*, Juris. Memo. for the Janus Appellants (7th Cir. Mar. 16, 2004), at 7-10) and in their brief in opposition to the petition for a writ of certiorari (at 17 & n.7). This issue is therefore properly before the Court. *Schweiker* v. *Hogan*, 457 U.S. 569, 585 n.24 (1982). Nevertheless, petitioners chose not to address it in their merits brief.

several positions that are directly contrary to this Court's precedents.

First, petitioners argued that it is not the province of the federal courts to prejudge a state court's application of the collateral estoppel doctrine. But as this Court has explained, States cannot give federal judgments whatever preclusive "effect they would give their own judgments"; rather, they "must accord them the effect that this Court prescribes." *Semtek Int'l Inc.* v. *Lockheed Martin Corp.*, 531 U.S. 497, 507 (2001). This Court has prescribed that "where the judgment or decree of the federal court determines a right under a federal statute, that decision is 'final until reversed in an appellate court, or modified or set aside in the court of its rendition.'" *Stoll* v. *Gottlieb*, 305 U.S. 165, 170 (1938).

Second, petitioners suggested that a federal court's decision is not entitled to preclusive effect if made in the context of a jurisdictional inquiry. "This Court has long recognized," however, "that '[t]he principles of *res judicata* apply to questions of jurisdiction as well as to other issues'" (*Underwriters Nat'l Assur. Co.* v. *North Carolina Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 706-707 & n.13 (1982)), and has explicitly instructed that "[i]ssue preclusion in subsequent state-court litigation [after remand] . . . may . . . attend a federal court's subject-matter [jurisdiction] determination." *Ruhrgas*, 526 U.S. at 585; *see also Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371, 376 (1940) ("[Federal court] determinations of [jurisdictional] questions, while open to direct review, may not be assailed collaterally").[17]

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[17] Nor does a statutory bar to appellate review vitiate the preclusive effect of a federal court's decision on matters of federal law. *See Johnson Co.* v. *Wharton*, 152 U.S. 252, 261 (1894) ("The existence or non-existence of a right, in either party, to have the judgment in the prior suit reexamined, upon appeal or writ of error, cannot, in any case, control"); *see also United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 38-39 (1950).

Third, petitioners argued that respondents could ultimately seek review in this Court upon the conclusion of the state court proceedings. This Court has held, however, that when a federal court remands a case, and the state court thereafter proceeds to final judgment, the action of the federal court is not reviewable on writ of error to such judgment. *Missouri Pac. Ry. Co.* v. *Fitzgerald*, 160 U.S. 556, 582-83 (1896). "A state court cannot be held to have decided against a Federal right when it is the [federal court], and not the state court, which has denied its possession." *Id.* at 582.; *accord*, *McLaughlin Bros.* v. *Hallowell*, 228 U.S. 278 (1913); *Yankaus* v. *Feltenstein*, 244 U.S. 127 (1917).

4. *Waco* does not swallow—or even affect—the rule that remand orders are not appealable, because review under *Waco* does not upset the district court's determination that the action must proceed, if at all, in state court. Section 1447(d)'s bar on continued litigation over choice of forum is thus fully respected, as *Waco* itself demonstrates. Although reversal of the dismissal of the cross-action would have demonstrated that the City indeed had the right to a federal forum, it would not serve to return the case to federal court. 293 U.S. 143-44 ("A reversal cannot affect the order of remand, but it will at least, if the dismissal of the petitioner's complaint was erroneous, remit the entire controversy, with the Fidelity Company still a party, to the state court for such further proceedings as may be in accordance with law").

Under *Waco*, the underlying actions here would be returned to state court pursuant to the remand orders; but 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. That is precisely what the state courts did here upon being notified of the federal decisions. *See* J.A. 5 (*Parthasarthy*); 11-12 (*Potter*); 28 (*Vogeler*). Accordingly, if the Court were to hold *Thermtron* and *Quackenbush* inapplicable to this case, the Seventh Circuit's acceptance of appellate jurisdiction could be affirmed on the alternative ground articulated in *Waco*. As a treatise co-authored

by one of petitioners' *amici* explains, "[t]he *City of Waco* rule is correct" because "the federal judicial system is built on the premise that district court rulings on the merits are appealable as a matter of right, and that the appeal should go to a federal court. Appeal upon completion of the federal proceedings is the only answer available in the present system." 15A Wright & Miller, *Federal Practice & Procedure* § 3914.11 at 712 (2d ed. 1992).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

Title 28 U.S.C. § 1291 provides, in pertinent part:

§ 1291. Final decisions of district courts

The courts of appeals * * * shall have jurisdiction of appeals from all final decisions of the district courts of the United States, * * * except where a direct review may be had in the Supreme Court. * * *

Title 28 U.S.C. § 1367 provides, in pertinent part:

§ 1367. Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. * * *

* * *

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

* * *

Title 28 U.S.C. § 1442 provides, in pertinent part:

§ 1442. Federal officers or agencies sued or prosecuted

(a) A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

> (1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.
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> * * *
>
> (3) Any officer of the courts of the United States, for any act under color of office or in the performance of his duties.
>
> (4) Any officer of either House of Congress, for any act in the discharge of his official duty under an order of such House.

* * *

Title 28 U.S.C. § 1453 provides, in pertinent part:

§ 1453. Removal of class actions

* * *

(b) **In general**.—A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(b) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such

action may be removed by any defendant without the consent of all defendants.

(c) **Review of Remand Orders**.—

(1) **In General**.—Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not less than 7 days after entry of the order.

* * *

(d) **Exception**.—This section shall not apply to any class action that solely involves—

(1) 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));

* * *

Title 18 U.S.C. § 3731 provides, in pertinent part:

§ 3731. Appeal by United States

In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

* * *