IN THE SUPREME COURT OF THE UNITED STATES

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CARL KIRCHER, ET AL., :

Petitioners :

v. : No. 05-409

PUTNAM FUNDS TRUST, ET AL. :

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Washington, D.C.

Monday, April 24, 2006

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:59 a.m.

APPEARANCES:

DAVID FREDERICK, ESQ., Washington, D.C.; on behalf of the Petitioners.

MARK A. PERRY, ESQ., Washington, D.C.; on behalf of the Respondents.

C O N T E N T S

ORAL ARGUMENT OF	PAGE
DAVID FREDERICK, ESQ.	
On behalf of the Petitioners	3
MARK A. PERRY, ESQ.	
On behalf of the Respondents	25
REBUTTAL ARGUMENT OF	
DAVID FREDERICK, ESQ.	
On behalf of the Petitioners	54

P R O C E E D I N G S

(10:59 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Kircher v. Putnam Funds Trust.

Mr. Frederick.

ORAL ARGUMENT OF DAVID FREDERICK

ON BEHALF OF THE PETITIONERS

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

This case concerns the appealability of remand orders under the Securities Litigation Uniform Standards Act, or SLUSA.

Our position is that the general rule prohibiting appealability applies in this case for three reasons.

First, section 1447(d) has been consistently construed to prohibit appeal of remand orders based on a district court's lack of subject-matter jurisdiction. That rule governs even if the district court incorrectly construes a subject-matter jurisdiction provision.

Second, SLUSA section 77p(c) concededly defines removal jurisdiction and it does so by incorporating the criteria for preemption. Thus, the court's subject-matter jurisdiction is coextensive with

those cases that SLUSA preempts.

And third, Congress knows how to make remand orders appealable when it wants to, but SLUSA contains no provision for appellate review of remand orders. Under Respondent's approach, the Federal courts would obtain jurisdiction in cases not subject to SLUSA preemption, but there's no indication that Congress intended that result.

JUSTICE SCALIA: Under your approach, Mr. Frederick, the Federal court would decide the principal substantive issue in the case, the principal legal issue, nonfactual perhaps, and then decide that is has no jurisdiction if it finds that it doesn't come within -- within (c), sends it back to the State court. Is -- is the State court bound by -- by that finding by the Federal court?

MR. FREDERICK: No, it's not.

JUSTICE SCALIA: Why not?

MR. FREDERICK: Because under this Court's longstanding precedent, for there to be preclusion, there must be a right of appellate review. So if you agree that the general rule of 1447(d) applies and there is no right to appeal the remand order, then the basis on which that order is -- is founded, the preemption of SLUSA is open for the State court to

address on remand.

JUSTICE KENNEDY: And for this Court, I assume, at least theoretically, on petition for certiorari?

MR. FREDERICK: That's correct, through the State court system.

JUSTICE KENNEDY: What -- what was the basis then, or was there a basis, for Judge Easterbrook's comment, it's now or never?

MR. FREDERICK: He was wrong. He was wrong. The issue of preemption under SLUSA can be raised by the defendants on remand in the State courts. It can be litigated. It's important to note that the removal provision says, shall be removable. It's at the defendants' discretion whether they want to ask the Federal court to test whether SLUSA preempts the case or to keep it in State court for the State court to apply SLUSA and thereby hold that the class action would be unsustainable.

JUSTICE KENNEDY: Do we have a standard --

JUSTICE SCALIA: Do we have any cases that -- that are like this one which are like this one which involve not just res judicata of -- of the -- of the finding by the Federal court, but the law of the case? I mean this is the same case when it's remanded.

You've already had a court that has found a particular element with respect to this case. It seems to me highly unusual to have the same issue in the same case then decided by a second court. Do you have any -- any parallel?

MR. FREDERICK: There are cases in the lower courts, Your Honor, in the complete preemption area that have held that a removal based on the doctrine of complete preemption was not sustainable because the case was not completely preempted, but holding that preemption, implied conflict preemption, can be applied by the State courts on remand.

And it's important to note here that there --

JUSTICE SCALIA: You don't have any case of ours, though.

MR. FREDERICK: Not that I'm aware of, but what the City of Waco case says, upon which they base their reliance, is that the reason why there was appeal of that particular order was because it would be held preclusive. Here, it would not be held preclusive because there is no right of appellate review.

JUSTICE SOUTER: Well, is -- is there -- correct me if I'm wrong, but I -- I had thought there was an -- an easier answer, and that is that the -- the decision that ultimately the State court will make, as

to whether there is or is not preclusion, is not identical to the decision that the Federal court -- that the district court makes on the motion for remand because on the -- and this is the way I was going about it.

On the motion for remand, all a Federal court decides is whether, in fact, there is a colorable basis for the removal. When it goes back, if it does go back, to the State court, there will be an opportunity not to go merely to the stage of colorable basis, but to litigate it ultimately on the merits. So -- so that what we have is a -- in effect, a kind of quick-look finding at the Federal level, and that does not preclude a -- a complete development of the issue on the merits in the State court, if that's where it goes.

MR. FREDERICK: That is certainly true, although I would take issue with the notion of there being a colorable claim. I don't think that the SLUSA removal is analogous to the Federal officer removal statute where the statute itself says the defense has to be under color of law, and this Court in the Mesa v. California case said that phrase is where the colorable claim creates article III jurisdiction.

JUSTICE SOUTER: Okay, but do you take the position --

MR. FREDERICK: But I -- I don't -- sorry. If I could just finish. I don't contest the rest of it, which is that on remand, preemption can be developed through amended pleadings, through facts that are developed --

JUSTICE GINSBURG: Yes, but you must take issue with the this is only a quick determination, unless you also agree with -- disagree with Justice -- Judge Easterbrook when he said, the decision for the Federal court is only two things. It's either remand or dismiss the action. That is, the Federal court under no circumstances will keep this case for trial. Either it will dismiss it outright or it will remand.

MR. FREDERICK: Well, under their theory, though, Justice Ginsburg, the court could, because of their construction of the removal jurisdiction provision, would retain jurisdiction.

JUSTICE GINSBURG: Yes, but that was not -- certainly not the Seventh Circuit's understanding.

MR. FREDERICK: Well, and we think that that position that they have advanced in this Court is incorrect, and I would agree with your postulate that what the Federal district court does and it has jurisdiction to do is to decide whether preemption applies and then remand the case, or if preemption does

apply, to dismiss it.

JUSTICE SCALIA: Whether preemption applies or whether there's a colorable basis for saying? I thought you were saying that the district court decides whether preemption applies.

MR. FREDERICK: It does -- it does do that. It's actually --

JUSTICE SCALIA: So you don't -- you don't agree with what Justice Souter was saying, that all it's -- all it's making is a colorable basis.

MR. FREDERICK: I thought I expressed my position there.

JUSTICE SOUTER: In other words, you take the position that -- and -- and you may well be right, but I mean, you take the position that there is a complete determination on the merits at the -- at the stage at which the district court rules on the motion to remand.

MR. FREDERICK: That's -- on the basis of the record then before it.

JUSTICE SOUTER: Yes.

MR. FREDERICK: Yes.

JUSTICE SOUTER: Well, you say on the basis of the record then before it. I mean, they can -- they can -- can they put in any evidence they want?

MR. FREDERICK: The court always has the

authority to have evidence taken to determine its own jurisdiction. That's routinely done by district courts.

JUSTICE GINSBURG: Mr. Frederick, as I understand it, at least the Seventh Circuit's fix on this case was that the Federal courts have adjudicatory authority to do one thing and to do that one thing finally, that is, to decide whether this is a case that cannot be brought in any court or whether it's a case that Congress has left over for the States still to deal with. That was the whole theory of the Seventh Circuit, that this is no quick look. The -- the Federal courts are making a final determination. And I think that would exclude what Justice Souter has suggested.

MR. FREDERICK: I -- I agree with you that that is how the Seventh Circuit described the opinion and what -- what the adjudicatory authority was, and that is why we take issue with the Seventh Circuit. We do think that the State court on remand has any issue that the defendants want to raise before it. All that the Federal district court has done is to decide that -- that there was no basis for a SLUSA preemption because the requisites of subsection (b) had been satisfied.

But I want to point out that the issue before you is whether or not that decision, correct or not, is appealable. And what is important in the error of the Seventh Circuit was that they held that that decision was appealable, and under the Thermtron rule, as applied in Gravitt and Things Remembered, even a district court decision that is erroneous in its construction of a subject-matter jurisdiction provision is still a remand based on subject-matter jurisdiction and therefore falls within the four corners --

JUSTICE BREYER: Well, it doesn't -- what Thermtron says is that we read (d) in conjunction with (c). Now, the reason that (c) is relevant here is because it says, if at any time before final judgment it appears that the district court lacks subject-matter jurisdiction, the case shall be remanded.

Presumably what (c) is thinking of are cases where subject-matter jurisdiction is not the whole issue before the -- the Federal court. It's thinking that subject-matter jurisdiction in certain instances, like a defect in a removal proceeding, is something that the -- that the Federal court could get to prior to a final judgment.

But here, the final judgment in the Federal court is the very question of whether this is preempted

or not. And therefore, I guess what Easterbrook is thinking is that that isn't the kind of subject-matter jurisdiction dismissal to which (c) refers. Consequently, it is not within the scope of (d)'s no appellate review rule.

MR. FREDERICK: And our problem with that, Justice Breyer, is that all eight district court decisions here thought that they were deciding subject-matter jurisdiction, and they thought that because Federal preemption ordinarily is not a basis for removal. And --

JUSTICE BREYER: No. It's no doubt that all the lower courts then would be wrong. But the reason he says that they are wrong is because they looked at the word, subject-matter jurisdiction, in (c) without realizing that the reference in (c) is a reference to instances where subject-matter jurisdiction is not the whole issue; i.e., it's something other than the final Federal court decision.

MR. FREDERICK: It -- it is --

JUSTICE BREYER: That would be the argument he's making. I would like your response.

MR. FREDERICK: Well, functionally it is the equivalent of codifying the complete preemption doctrine, which is how SLUSA actually works. And in

the complete preemption cases, Beneficial Bank is what spells out this --

JUSTICE BREYER: I agree with you. You would also have to say that the same rule applies, one, to the complete preemption cases and, two, to sovereign immunity determinations under the Foreign Sovereign Immunity Act. But he would say that may be so, but nonetheless, Judge Easterbrook would say, well, so be it. That's what Congress intended. That is wrong to deprive someone of a right to appeal when it turns on a misreading of (c) and an incorporation of the misreading into (d).

MR. FREDERICK: It would be a strikingly odd result, though, for this Court to reach that, given that Congress has clearly provided for appellate review of remand orders in other contexts, including in the Class Action Fairness Act, under tribal property disputes, the FDIC, the RTC, and specifically in 1447(d) itself, civil rights cases. So Congress knows how to do this if that's what Congress had intended.

JUSTICE SOUTER: No, but isn't the -- isn't the argument --

JUSTICE STEVENS: Mr. Frederick, can I ask you a question?

JUSTICE SOUTER: -- that in those cases in

which Congress has provided, we -- we are not dealing with a situation in which the -- the removal or not, the preemption or not is the end of the litigation. Here, we've got a case in which there -- there are basically two kinds of preemption, as -- as you've recognized. There is -- there is regular preemption, on the basis of which there may or may not be a removal, and there is a preclusion of any litigation whatsoever.

And in the cases in which Congress has made specific provision, were they -- the instances -- were they instances in which it was the second issue which precluded any litigation whatsoever? The answer may be yes. I just don't know.

MR. FREDERICK: Well, I think that the closest analogy, again, is in the complete preemption area where the Court has held that, you know, the removal is based on complete preemption, and if that is found by the district court, that functionally terminates the litigation.

But I would point out that even in the Federal officer removal statute, there's no appellate review of a district court's decision that the Federal officer statute was improperly invoked to remove an action. So what the securities defendants here are

asking for is something Congress didn't even give to Federal officers.

JUSTICE STEVENS: Let me ask you one preliminary question just to be sure I understand the case. Is it your view -- when the petition for removal was filed, did the district -- Federal district court have jurisdiction to decide the preemption issue in your view?

MR. FREDERICK: It had the -- it had the power to determine whether SLUSA applied.

JUSTICE STEVENS: All right.

MR. FREDERICK: And that's what section 77p(c), when it says, as set forth in subsection (b), is referring to. So the district court analyzed those factors and it came --

JUSTICE STEVENS: So the -- there -- there was jurisdiction in the Federal court to entertain the removed case.

MR. FREDERICK: Yes.

JUSTICE STEVENS: Then -- then why -- then how can you say the -- the remand was based on a lack of -- of jurisdiction?

MR. FREDERICK: Because the courts held that the requisites of SLUSA of subsection (b) had not been satisfied.

JUSTICE STEVENS: Well, but they -- they had held it acting on an interpretation of SLUSA before our decision in Dabit.

MR. FREDERICK: That's correct.

JUSTICE STEVENS: And isn't it at least possible that they would -- would have decided that issue had they reviewed --

MR. FREDERICK: It is possible, but that's why the issue of the underlying district court's determination is not before you. The issue before you is can appellate jurisdiction be asserted to review that decision.

But I would further point out, Justice Stevens, that the Dabit court assiduously avoided the kinds of claims that are present in our case, which is whether or not negligence can be asserted against the securities defendants for failure to fair-value price. Dabit was strictly a fraud case, as this Court made clear. This is a negligence case, and there is a part of subsection (b) which makes very clear that what SLUSA is getting at are claims based on fraud.

But even if you were to disagree that the -- the district court had, you know, an alternate basis that had not been properly ventilated or addressed by the district court because it went off on the holder

theory that this Court rejected in Dabit, you still wouldn't have jurisdiction to decide that because of the general rule of 1447(d), which provides, as I have stated, that a court doesn't have jurisdiction to review -- appellate review of a remand order.

CHIEF JUSTICE ROBERTS: How --

JUSTICE GINSBURG: Mr. Frederick, will -- would you please explain something to me that you just said? You said that our complaint isn't about fraud. It isn't about deception. It's about negligence. But the Seventh Circuit reported and seemed to have no doubt about it that the complaints in this set of cases were based on allegations of deceit and manipulation, not mismanagement.

MR. FREDERICK: That's incorrect, Justice Ginsburg. We've put the complaints before you. They are in the joint appendix. We have cited every paragraph in which those claims are asserted.

The Seventh Circuit based its decision about that on a misunderstanding of the colloquy at oral argument in the Seventh Circuit, which Respondent's have recited the Web site. You can listen to the argument yourself. It did not contain any type of concession by counsel for the class that these claims were anything other than the negligence claims, which on the four

corners of the complaint, they assert themselves to be.

JUSTICE GINSBURG: The -- the Seventh Circuit said precisely, in particular, 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 manipulation. So is that totally wrong, that you did do it -- mention it in your briefs?

MR. FREDERICK: The briefs recounted what the claims are, which are negligence claims.

JUSTICE GINSBURG: Then how could the Seventh Circuit have gotten it that wrong?

MR. FREDERICK: Well, the Seventh Circuit made five crucial errors, that it was wrong to describe the district court as saying that removal was proper. The district court didn't say that.

They were wrong to say that the remand was based on section 77(d)(4). That's not what the district court did.

They were wrong to evaluate section 77p(c) without even reciting or construing the language.

They were wrong to say that SLUSA's substantive decisions, quote, must be made by the Federal rather than the State judiciary. That's not correct.

And they were wrong to say that it was now or never for appellate review whether an action under State law is preempted.

CHIEF JUSTICE ROBERTS: But it -- it might have been that prior to Dabit, you would have been emphasizing -- or whoever would have been emphasizing the -- the fraud character of -- of the claims, and after Dabit, perhaps the negligence boat is the only one left for you.

MR. FREDERICK: But the point, Mr. Chief Justice, is that this is on a basis of subject-matter jurisdiction. It's not waivable and we're permitted to say that a district court decision based on subject-matter jurisdiction can look at the relevant claims. It is true that the perception at the time was that these holder theories evaded SLUSA. All of the courts up until that time of Kircher II had held that, and that's not an unreasonable position for a lawyer to take.

Now, certainly after Dabit, those claims are foreclosed where there are holder fraud claims. We do -- we obviously don't take issue with that.

But here, the claims in the complaint themselves are based on negligence, and it is certainly fair --

CHIEF JUSTICE ROBERTS: Maybe this is not a fair -- how likely is it, given our determination in Dabit about how Congress intended to treat fraud claims, that negligence claims are going to fare any better?

MR. FREDERICK: Well, this Court in the Santa Fe case, Mr. Chief Justice, said that negligence claims are not within 10b-5. Those are claims that are properly brought under State law.

JUSTICE BREYER: Would it make sense --

MR. FREDERICK: So if the -- if the State court applies Dabit and Santa Fe, it will come to the conclusion that the holder theory is preempted under Dabit, but the negligence theory is not preempted under the Santa Fe case.

JUSTICE BREYER: Does it make -- what's worrying me in the back of my mind is we have decided Dabit since this case was brought. Then I thought, well, could we remand this case in light of Dabit. Now, if we did that, we wouldn't decide the issue that you all want decided, and we'd let this, unfortunately, slightly confused situation continue to exist.

What would be the consequence of that? Are there -- are there a lot of cases, or is this something that comes up often?

MR. FREDERICK: It does come up often because the securities bar, every time they get a district court decision that they don't like, they want to appeal it, notwithstanding the general bar of appealability. So this issue is something that is very important to both sides in the development of this law.

But I would further point out, Justice Breyer, that as this case has come up, your -- your view would have to be based on do you have appellate jurisdiction, and our submission is that you don't, subject for purposes of remanding the case in light of Dabit.

JUSTICE BREYER: I'm trying to think. It seems if you -- it ought to work out similarly to what happens in a case where there's a Federal issue that you remove under. Now you've removed. And there also is a State issue pendent. Now, what the judge does is he says, defendant, you win on the Federal issue, and I'm going to send this thing back now, remand it, because I don't think I want to maintain here the State issue. And so it's a remand order. The case is remanded.

Now, I think you get an appeal on your Federal issue there. And then -- then why shouldn't -- if that's so, shouldn't this work out the same way?

MR. FREDERICK: Well, in the Cohill case, this Court addressed the situation where there was a Federal dismissal of the claims and the -- and the Federal district court remanded the State claims for consideration under -- under State jurisdiction. And the Court had internal discussion about whether or not, you know, there was appealability of what was left in the case.

Our -- our position is that ordinarily a dismissal of a Federal claim is an appealable matter and that that is subject to appeal, but that a remand decision, which is what the district court made in this case, is not.

JUSTICE BREYER: Shouldn't it work out the same?

MR. FREDERICK: No, it shouldn't and the reason it shouldn't is because Congress has decided that it shouldn't. Congress has decided that there is a paramount interest in having decisions made on their merits, which is why there is not appellate review of remand orders. That's --

JUSTICE ALITO: But aren't you -- aren't you urging a very strange result that the -- the decision on the merits of the SLUSA preclusion issue should be decided by the State courts when the whole purpose of -- of that provision was to take matters out of the

State courts because there was a view in Congress that they were not being handled properly there?

MR. FREDERICK: No, Justice Alito, to the contrary. They are being decided by Federal district courts. They're just no subject to appellate review, and it was because --

JUSTICE ALITO: I thought you said the merits of the issue was not going to be decided by the Federal court.

MR. FREDERICK: No. Well, the -- the merits of the case are going to be decided by the State court. The question of whether there's a Federal defense based on SLUSA in the first instance is decided by the district court in remanding the case, and then if there becomes a basis through evidence or amendment to the pleadings or whatnot, if the defendants want to re-raise their SLUSA preemption argument, they are certainly free to do that.

JUSTICE SCALIA: So he's right that it's ultimately not decided by the Federal court.

MR. FREDERICK: No, it is decided.

JUSTICE SCALIA: You're saying the Federal court makes a decision which is not binding in the case. That decision can be undone by the State court.

MR. FREDERICK: It is decided by the Federal

court within the confines of what Congress has determined based on its wording of SLUSA and its fact that, as this Court has said in Things Remembered, the Congress is presumed to accept the general rule of nonappealability unless it says so.

JUSTICE SCALIA: Yes, I understand that.

Can you answer my question? You -- you were saying that the -- that the decision by the Federal court on this issue is not final.

MR. FREDERICK: I'm saying that it is final for purposes of remand.

JUSTICE SCALIA: Okay, but it is not final --

MR. FREDERICK: And that in terms --

JUSTICE SCALIA: -- for purposes of the lawsuit.

MR. FREDERICK: Because -- because what SLUSA does is it has an interplay between the removal jurisdiction provision and it says, as set forth in subsection (b).

JUSTICE SCALIA: I understand that, but as long as you say that, the point that -- that Justice Alito makes is -- is well taken, that we -- we thought that this was a -- a statute designed to have the Federal courts determine this issue, and it turns out that the Federal court just takes the first swing at

it, and if a State court disagrees, it's -- it's free to do so.

MR. FREDERICK: That is a policy choice that Congress made when not providing a special mechanism for appellate review of remand orders.

JUSTICE GINSBURG: Of course, if the Federal district court says there is preclusion, therefore, case dismissed, that would be reviewable.

MR. FREDERICK: That's correct, and that's where the uniformity of decisions would come from, the reviews by plaintiffs who's had their -- who have had their cases dismissed. Those are subject to appeal.

I'd like to reserve the balance of my time.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Frederick.

Mr. Perry.

ORAL ARGUMENT OF MARK A. PERRY

ON BEHALF OF THE RESPONDENTS

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

It was quite a litany of errors that Judge Easterbrook is alleged to have committed in this case. I would submit, Your Honors, he committed none.

Judge Easterbrook correctly recognized that the only issue put into play by these Petitioners was

the Dabit question. In their motion to remand this docket, docket number 20 in the Kircher case, they said, it is the fourth requirement, the in-connection-with requirement, which is at issue in the present case.

We pointed out in every subsequent brief that they had waived all other issues, and they never responded to that waiver. It is that, Justice Ginsburg, to which Judge Easterbrook was responding when he said plaintiffs never argued in their briefs and they did not maintain an argument that any other requirement --

JUSTICE STEVENS: Could we just -- can I ask you suppose they didn't waive it? Would their -- would their position have any merit?

MR. PERRY: No, Your Honor. Their complaint rests on two factors that are clearly within SLUSA. First, misrepresentations. They claim that our prospectuses misled them into investing in these mutual funds and then --

JUSTICE STEVENS: Let me put the question just a little differently. Suppose the -- in Dabit, we decided that the distinction between the purchaser-seller rule and the scope of 10b-5 did not prevent SLUSA from preempting. But does SLUSA preempt a claim

that is beyond the scope of rule 10b-5?

MR. PERRY: Your Honor, SLUSA precludes precisely what subsection (b) says it precludes, which is beyond the scope of 10b-5. For example, 10b-5 requires scienter. SLUSA has no scienter requirement. So a non-scienter-based State law claim is still precluded under SLUSA.

What SLUSA requires is a misrepresentation, omission, manipulation, or deceptive device in connection with the purchase or sale of securities. Period. All of that is present in this complaint. They allege omissions.

JUSTICE GINSBURG: But they can always amend the complaint and pare it down and say now -- we -- we complained all along about negligence. Now, Judge, we are complaining about mismanagement on the defendants' part, nothing more. No manipulation. Cut out -- they could have such a complaint, and would that be precluded if -- if they started afresh in the State court and they said, we are complaining about mismanagement? We're not charging anyone with fraud or deception. Couldn't -- isn't that a viable claim?

MR. PERRY: Your Honor, in this case they could not amend their complaint because the Federal jurisdiction is determined on the complaint that we

removed. And at the time of removal, it was clearly precluded by SLUSA. And the Court's cases are very clear that a plaintiff may not amend. For example, you can't lower the amount in controversy below $75,000 to get back to State court. At the time of removal, the Federal court both had jurisdiction over this case and it was clearly precluded under SLUSA.

CHIEF JUSTICE ROBERTS: And -- and I understand your submission -- and perhaps it's distinct from the Seventh Circuit holding in this respect -- to suggest that those are different standards, the standard for removal and the standard for preclusion.

MR. PERRY: Your Honor, I think we're the same as the Seventh Circuit. We may have articulated it slightly different, but yes, they are different standards.

CHIEF JUSTICE ROBERTS: So that under your view at least, it's possible that you could have removal jurisdiction and then determine that the -- the case is not, in fact, preempted.

MR. PERRY: Yes, Your Honor.

CHIEF JUSTICE ROBERTS: And so that an entirely State law case would proceed in Federal court.

MR. PERRY: Mr. Chief Justice, let me give you an example. The answer is yes.

In a case in which there is removal jurisdiction because the defense is colorable, there may be a factual issue as to whether the in-connection-with requirement is met. In 10b-5 cases, it's not uncommon that that is a factual question, not a legal question. The Federal court would then retain jurisdiction to decide that question on summary judgment, at trial, or whatever. It won't know until it finally disposes of the --

CHIEF JUSTICE ROBERTS: Is there another instance in which we've upheld Federal court jurisdiction over a purely State law cause of action, apart from the Federal officer situation?

MR. PERRY: You have the Federal officer situation and you have the FSIA, Foreign Sovereign Immunities Act situation, Your Honor.

CHIEF JUSTICE ROBERTS: But those are the only two.

MR. PERRY: Correct.

CHIEF JUSTICE ROBERTS: So this would be a pretty unusual creature that you're asking us to sanction.

MR. PERRY: No, Your Honor. It would be precisely the same creature that happens every time Congress makes a case removable on the basis of a

Federal defense. Every time Congress does that, which is not very often, the Court has held that the colorable defense is sufficient to invest the Federal court with jurisdiction.

JUSTICE GINSBURG: But then, Mr. Perry, there's a whole case. See, what's peculiar about this is Congress says it's not really preemption. I think Justice Stevens pointed that out in Dabit. It is preclusion. It says this action shall not exist. Period. Not as a State claim, not as a Federal claim. And it wanted the Federal courts to monitor that determination. It surely didn't want -- if -- if the State claim is outside that preclusion, didn't want the Federal courts to sit and have a whole trial on what is a non-diverse, no Federal question case. I mean, it just seems -- if you're going to imagine what Congress wouldn't want in the Federal court, that would be it.

MR. PERRY: Justice Ginsburg, three answers.

First, Congress wanted Federal courts to make the decision, not monitor the decision.

Second, we agree the Federal court has the power to remand the case. If all that's left is State law claims, the court doesn't have to keep it.

And third, that is what -- the regime that Congress set up was designed because there is a risk of

error. Some district courts will get some SLUSA preclusion questions wrong. And the question before this Court really is would Congress have wanted those cases to stay in the Federal courts subject to Federal appellate review or --

JUSTICE GINSBURG: But now there you must admit that you are departing from Judge Easterbrook because Judge Easterbrook said this statute gives the Federal court adjudicatory authority to do one thing, to decide whether there's preemption or preclusion or, if not, then to remand. So they make -- they make one determination and bow out he said. And you're telling us, no, they don't bow out. They can, if they want to, keep the State law claim and adjudicate it on the merits.

MR. PERRY: Your Honor, Judge Easterbrook read section -- subsection (d)(4) to require remand. Petitioners and Respondent's are in agreement in this Court for the first time that (d)(4) does not apply to the remand in this case. It only applies to remands for expressly exempted actions. The -- (d)(4), it says, shall be remanded.

The corollary to that, we would submit, is that where Congress recognizes that certain cases shall be remanded, even though they're within the removal

jurisdiction, other cases, such as this one, may be remanded. Otherwise, Congress could have said all cases that are not precluded shall be remanded.

And -- and, Justice Ginsburg, it's not as counterintuitive as -- as I think Petitioners are trying to make it seem because there may be Federal issues that continue past the preclusion --

JUSTICE GINSBURG: Yes. I'm simply asking about the Seventh Circuit's understanding of the case. It says, after making the decision that 77p(b) requires, the district court has nothing else to do. Dismissal and remand are the only options. So Judge Easterbrook or the Seventh Circuit clearly did not think that there was any adjudication on the merits of a State law claim to be made. He said it twice. One is at 14a of the joint appendix, and the other is 11a.

MR. PERRY: And, Justice Ginsburg, the reason he said that was because of -- of section -- subsection (d)(4), which is quoted in full at the top of page 12a of the petition appendix. That is because the Second Circuit had held that (d)(4) applies to remands in this situation, and both Petitioners and Respondent's in their Seventh Circuit briefing took that position. When we got to this Court and we both looked harder at the statutory scheme, we both realized that we were

wrong. Therefore, Judge Easterbrook -- you know, the one mistake he made was the one we led him into making.

But that doesn't change the validity of his jurisdictional analysis, which is to say that the only requirement of SLUSA that goes to the jurisdiction on removal is whether this is a covered class action. The elements of the preclusion defense are then the substantive question of Federal law that Congress authorized the Federal court to make, and it authorized the Federal court to make final.

JUSTICE BREYER: I'm confused now. You're saying both sides agreed that section 1447(d) does not apply?

MR. PERRY: No, Justice Breyer. Both sides agree that SLUSA, section 77p(d)(4) --

JUSTICE BREYER: All right. Now, then -- then I understand that.

What I don't understand is the question about something remaining to be done. What -- what 77p(b) says is the covered class action, I take it, is any private party alleging. And when I see the word alleging, I think you're supposed to look at the complaint to see what they allege, not some other thing about what's going to happen later. But you're telling me that's wrong.

MR. PERRY: Your Honor --

JUSTICE BREYER: And if you're right that that's wrong, I don't see how you could possibly get out of (c) in 1447(c) which talks about a decision before final judgment, that it lacks subject-matter jurisdiction. Because if you're right, then this is before final judgment, it lacks subject-matter jurisdiction. That's the end of your case.

MR. PERRY: Justice Breyer, I disagree respectfully.

JUSTICE BREYER: All right. You have to disagree with -- I guess -- go ahead. Disagree. I'd like to hear the answer.

(Laughter.)

MR. PERRY: If it is a covered class action, that is, 50 plaintiffs and so forth --

JUSTICE BREYER: Yes.

MR. PERRY: -- it is removable and within the subject-matter jurisdiction of the Federal courts so long as the defendant has presented, either on the complaint or in the removal papers, a colorable defense of preclusion. Only --

JUSTICE BREYER: Yes, which would have to be a colorable defense that there is an allegation by the plaintiff that falls within (b).

MR. PERRY: An allegation by the plaintiff as elaborated on by the removal notice, if necessary, because where Congress has waived the well-pleaded complaint rule, the removal court will look beyond the four corners of the complaint to include affidavits and other materials provided by the defendant. That has always been held the case in -- in the rare instances where Congress has made a Federal defense removable. The Court said that in the Franchise Tax Board case, for example, and it's well supported by history from the 1870's --

JUSTICE GINSBURG: But I don't think that any of those cases are comparable, in that the removed case is going to be tried someplace.

Take a diversity case. The Federal court has to decide -- and it's removed -- whether the parties are really diverse. If it decides that they are really diverse, it keeps the case and it's adjudicated in Federal court. If it decides they're not, the case is adjudicated in the State court.

But here, the determination is, is there a claim to be tried anyplace? And if there is preclusion under SLUSA, then it's not a question of, as Judge Easterbrook put a menu, where is -- it's not a where question. It's a whether question. And so that makes

-- makes SLUSA quite different from other cases where the -- the case is going to be tried someplace. Here, the decision to be made is, is this going to be tried or not? Is it -- is it a claim or is not a claim?

MR. PERRY: I entirely agree with you, Judge -- Justice Ginsburg, and I think that supports Judge Easterbrook's opinion.

In the where will it be tried case, the lack of appellate review is less important because the merits of the case will go to State court and up through the system, and any Federal issues can reach this case.

In the SLUSA case, where the district court erroneously, as we know the district court erroneously did here, denies the preclusion and sends the case back to State court, that is a final determination of Federal law that we submit is not reviewable in State court and can't be reviewed by this Court up on review through the State system. So that --

JUSTICE SOUTER: Why do you say it is not -- why do you say that it cannot be examined in State court if there's no appeal in the Federal forum?

MR. PERRY: Your Honor, this Court has always held and reiterated in the Munsingwear case that where a collateral estoppel attaches because an issue has

been fully and finally litigated in a court of competent jurisdiction between the same parties, that the availability of an appeal --

JUSTICE SOUTER: Yes, but the --

MR. PERRY: -- does affect collateral estoppel.

JUSTICE GINSBURG: Yes, but -- but there is also exceptions to the rule of claim and issue preclusion, and when you don't have an opportunity to appeal because the system doesn't let you appeal, then you can say, Judge, don't give this preclusive effect. I did not have that full and fair opportunity because I was unable to appeal. And I think that that's a solid preclusion law.

MR. PERRY: Justice Ginsburg, this Court has never held that an appeal is required to give collateral estoppel effect. Therefore, on remand, the court could -- the Madison County State court could give collateral estoppel effect. In fact, I expect Petitioners would argue precisely that. And no decision of this Court stands as a barrier to that. The Court would have to change preclusion law to say that the lack of an appeal is a prerequisite to an approval. I agree with you, Your Honor, that it can be taken into account by a court, but it does not --

JUSTICE GINSBURG: And a Nassau County court could say, we're not going to treat that as preclusive. They didn't have a fair chance to appeal. And that would be all right.

MR. PERRY: And if they came out the other way and said, I am going to treat it as preclusive, because the Supreme Court says you don't have to have a right to appeal, we'd be stuck with that.

JUSTICE SOUTER: Well, you wouldn't be stuck with it. I mean, that would be a Federal preclusion decision and that would ultimately be reviewable here.

MR. PERRY: That -- that decision would be reviewable here, Your Honor. It's an unnecessary multiple layers of appeals and going through the State system to decide a Federal question that Congress wanted to have decided in the Federal courts.

JUSTICE GINSBURG: But in any case, you said Easterbrook made only one mistake.

MR. PERRY: Only one mistake.

JUSTICE GINSBURG: But he made another one when he said, it's now or never for appellate review. That preclusion question could come to this Court if it went -- the case went back and the Nassau County said, well, I'm going to follow the Federal court, I'm not going to -- at the end of the road, the preclusion

question would be open for this Court to review.

MR. PERRY: I respectfully disagree with you, Justice Ginsburg. The -- if the State court gave preclusive effect to the Federal court judgment, the preclusion question would be open to question -- the collateral estoppel question would be open to review. But the substance of the remand order would not be. It would still be barred by 1447(d), if Petitioners are right, and this Court held exactly that in the Missouri Pacific Railroad case in 1896 and has never revisited that. So that we cannot get the SLUSA issue up back through the State system.

Judge Easterbrook was exactly right. It is now or never, Your Honor. And Congress certainly could not have expected on an issue of this magnitude where it passed a law 3 years after the PSLRA --

JUSTICE GINSBURG: Now or never. The question is not can you -- is there an appeal or does 1447(d) bar it. The question is whether an action under State law is preempted.

And suppose this case had gone along in the Federal -- in the State court, and the defense of preclusion is made in the State court. The State court could certainly decide that question. Nobody removed it. So the State court has competence to decide that

question, doesn't it?

MR. PERRY: Certainly, Your Honor.

JUSTICE GINSBURG: And in -- this Court could decide it on review.

MR. PERRY: In a non-removed case, yes. Petitioners' theory, though, is if this is a 1447(d) bar, and it was removed to Federal court, decided that it was not precluded by SLUSA and remanded it, this Court could not review it directly or indirectly, could not review the issue of SLUSA preclusion decided by the Federal court.

JUSTICE SOUTER: I -- I don't understand that. Why can't it?

JUSTICE KENNEDY: And your best case on that is Munsingwear?

MR. PERRY: No, Your Honor. Our case on that, where the Court held exactly that, is Missouri Pacific Railroad v. Fitzgerald.

JUSTICE KENNEDY: Oh, the Missouri Pacific case.

JUSTICE GINSBURG: Was that a case where there was no possibility of reviewing the decision of the court of first instance?

MR. PERRY: Yes, Your Honor. It was a case --

JUSTICE KENNEDY: On -- on the merits of the issue as opposed to diversity?

MR. PERRY: On the merits of the final judgment in the case, correct, Your Honor.

JUSTICE GINSBURG: And why --

JUSTICE BREYER: In other words, if -- I mean, it's awfully surprising -- I think that's why you're getting this resistance -- that there's an issue in a case, does -- is the -- the State action preempted or not. They've never had an appeal. So they get it tried. The whole case is tried out, and then the -- some State court says, in our opinion it is preempted. But they can't decide that. They can't decide it because there was a Federal judge who said the opposite in the same case before the case was final.

MR. PERRY: Justice Breyer, I think the State court could decide that. It's not --

JUSTICE BREYER: And if they don't -- and if they refuse to decide it, why wouldn't this Court say, this is the same case? There is only one case. It isn't over yet, and we're reviewing that, and we think that district judge was wrong. We think that Federal district judge never read Dabit, which isn't surprising since it was decided after he wrote the opinion.

(Laughter.)

MR. PERRY: Justice Breyer, we would certainly hope that if Petitioners were to prevail on the 1447(d) issue, this Court would make clear both that we could relitigate the question to State court and bring it to this Court.

What we are saying is under the current state of this Court's law, laid out in our brief and not challenged in any regard by Petitioners, that is not obviously the case, so that we are left with the fact that a State court could give preclusive effect to an obviously wrong Federal judgment that could not be reviewed in this Court.

JUSTICE SOUTER: So you're saying we would have to overrule Missouri Pacific?

MR. PERRY: I think you would have to clarify at least that Missouri Pacific does not apply to SLUSA removals and remands, Justice Souter.

JUSTICE KENNEDY: Is part of the dynamic here, Mr. Perry, that if this goes back to the State court, that affects the dynamics of the litigation because you now have a class action that has to proceed, and that a large part of the litigation strategy in these cases is determined by whether or not there's going to be a full trial on the merits of the class action to effect a settlement, and so forth, so

that Congress wanted to have this reviewed quickly and in the Federal courts?

MR. PERRY: Correct, Your Honor. And --

JUSTICE STEVENS: May I ask this question? Because I hadn't, frankly, realized the importance you attach to the Missouri Pacific case. And the way you describe it as saying that the -- the State court cannot be held to have decided against a Federal right -- well, anyway, the -- the point is there are two things that are decided by the Federal court when it remands a case. One, there was no preemption, and two, therefore, there shall be a removal.

Now, as I understood the principle underlying that case, the -- the correctness of the remand could not be reviewed. That's litigated. But could not the correctness of the reason given for the remand, namely there was no preemption, be removed by us on certiorari?

MR. PERRY: Not under Petitioners' theory, Your Honor, because their theory is that the inquiries are completely and totally coextensive. That the jurisdictional inquiry, the -- the remand inquiry is precisely the same as the preclusion inquiry. Our position is that --

JUSTICE STEVENS: Under their theory, but it

seems to me very strange to say that we could not, when we do get the case on a petition for certiorari -- couldn't review whether it was -- whether it was in fact preemption.

MR. PERRY: Your Honor, I'd submit that it's very strange that this would not be just reviewable straight up through the Federal system, as Judge Easterbrook and the Seventh Circuit correctly held.

CHIEF JUSTICE ROBERTS: But the reason is there are two separate questions. They just happen to be identical. But I mean, the State court isn't going to worry about whether removal is appropriate or not. It doesn't have to answer that question, but it may well have to answer the question whether it's preempted. It happens to be the same analysis, at least under a reading of the statute, but that doesn't meant that you -- that just because a review of the removal decision -- the remand decision is -- is precluded, that review of the preemption decision is precluded.

MR. PERRY: Your Honor, that -- that may well be a fair distinction of the Missouri Pacific case. We come to the Court today with the law as it stands and not knowing whether such a distinction will be drawn in the future --

JUSTICE BREYER: But it's so odd.

MR. PERRY: -- the Seventh Circuit.

JUSTICE BREYER: Suppose -- suppose the -- it came up under the Foreign Sovereign Immunities Act. The district court judge remands the case. In his opinion Romania is not a country. That's what he thinks. Never heard of it.

(Laughter.)

JUSTICE BREYER: So -- so it goes back to the State court and the State court says, yes, that's right. We've not heard of Romania either. It's not a country.

All right. Now, you're saying there we are for all time. Everybody is stuck with this holding.

MR. PERRY: Your Honor --

JUSTICE BREYER: Is that right? Maybe that's why I'm so surprised that such could be the law.

MR. PERRY: If -- if it works the same way with SLUSA, such could be the law. The Court certainly has the opportunity to clarify that.

Again, I'll return to the simpler way --

JUSTICE GINSBURG: You're -- you're positing a -- a State court that's going to, by golly, give that Federal decision preclusive effect even though, say, the Restatement of Judgments says -- now if a decision

didn't -- if there was no opportunity for review, then that's a ground for refusing preclusive effect.

MR. PERRY: And in -- and in Munsingwear, Your Honor, the United States cited that precise provision of the Restatement of Judgments to this Court, and six Justices of this Court held, no, if there's no appeal, we are still going to give this judgment collateral estoppel effect. Certainly a State court would not be unreasonable in following this Court's lead, since this Court has never retreated from that statement.

JUSTICE GINSBURG: I thought Munsingwear was about mootness.

MR. PERRY: Your Honor, it was about mootness and the result of the -- the Government's complaint there was that it was going to have to live with the collateral estoppel effects of the judgment. One of the arguments they made was, well, because we can't get an appeal, we won't be bound, and the Court disagreed with that en route to saying, and to avoid that problem, precisely that problem, you should have asked for vacatur. But since the Solicitor General didn't do it, the Court -- the decision stood and it had collateral estoppel effect. That -- that is the holding of Munsingwear, Your Honor.

JUSTICE SOUTER: But in -- in any case, Munsingwear turned on -- not on the availability of -- of an appeal generally, but on the mootness of the case. In other words, Munsingwear said, look, your case disappeared, and the -- the only way to get rid of the order you don't like is -- is vacatur. And if you didn't take that opportunity to get rid of it, then the -- the decision that was made survives, and that gets preclusive effect. It -- it doesn't -- Munsingwear would not apply of its own force in this case.

MR. PERRY: Well, Munsingwear reaffirmed Johnson v. Wharton which said that where Congress takes away the right to appeal, there is still collateral estoppel effect of the district court judgment. That -- that was the previous decision that Munsingwear affirmed.

JUSTICE GINSBURG: But not if the litigant asks to have it vacated under Munsingwear, the litigant would be entitled to have it vacated. So it was a foot fault and the -- the Court held the counsel to the mistake that had been made.

MR. PERRY: Your Honor, the -- the holding of Munsingwear is that Johnson v. Wharton is good law, and a court need not give -- may give preclusive effect to a case without an appeal.

CHIEF JUSTICE ROBERTS: Counsel --

MR. PERRY: If the Court would like to change that law, it's -- it's up to this Court, but that's how we come to this case.

CHIEF JUSTICE ROBERTS: Counsel, if you -- on the removal question, if there's a dispute about whether it's a covered class action, dispute about the number of people involved, the dollar amount, I take it that is litigated at the jurisdictional stage?

MR. PERRY: Correct, Your Honor. I think --

CHIEF JUSTICE ROBERTS: Okay. But you say that when it gets to whether it's a -- there's a -- involving a covered security, for some reason that can't be litigated at the jurisdictional stage.

MR. PERRY: No, Your Honor. That is the merits determination. And -- and the statute tracks --

CHIEF JUSTICE ROBERTS: I'm sorry. No or yes? That that is not litigated at the jurisdictional stage?

MR. PERRY: That the preclusive elements are the merits question of the case, not the jurisdictional question.

CHIEF JUSTICE ROBERTS: Why is that? There -- it's the same clause. What you can remove is a covered class action involving a covered security. So

why do we have such different approaches to the different prongs?

MR. PERRY: Your Honor, I'm agreeing with you on covered security. I'm -- I'm saying that there then is the further inquiry of whether all of the preclusive elements of subsection 77p(b) are met, which is the merits inquiry.

CHIEF JUSTICE ROBERTS: Right. And --

MR. PERRY: There -- there are very few cases that don't involve covered securities because virtually every security is covered. There are very few cases that aren't covered class actions because if they involve more than 50 people, that's about all the requirement there is. Those are the jurisdictional prerequisites. That, if established, gives the court subject-matter jurisdiction.

Then we have the substantive elements of the SLUSA preclusion defense provided in a different statute that is not jurisdictional, just like this Court described in Arbaugh. The covered security and covered class action Congress made jurisdictional by putting them in the statute. The substantive elements of the defense Congress did not make jurisdictional because they're in another statute.

That's the disconnect that Judge Easterbrook

understood so that on the face of the opinion of the district court, where it recites the defendants maintain that the in-connection-with requirement was met, that defense, if colorable -- and it clearly was. This Court has accepted it in Dabit -- conferred jurisdiction on the court, and then the substantive decision on the merits was the merits determination. That is the decoupling that Congress did in SLUSA, that Judge Easterbrook correctly recognized, and that puts this case squarely within the Thermtron exception to 1447(d).

JUSTICE GINSBURG: How do you answer the argument, the third argument, that Mr. Frederick stressed that is, that Congress provided specifically in the Class Action Fairness Act, a couple of other acts, and 1447 itself with respect to civil rights actions removable under 1443? In all those cases, it provided specifically for review of remand decisions, and here the silence is deafening.

MR. PERRY: In those cases, Your Honor, they work differently than SLUSA for two reasons. One, they're the whether -- not whether it will be tried, but where it will be tried. And when Congress -- and when it was only a where question, Congress puts in a specific provision.

The other is CAFA, for example, is expressly jurisdictional. It amends the diversity statute. So there's no argument that it would be within Thermtron. Every CAFA question is a 1447(c) issue. Congress had to make it.

Here, Congress knew about Thermtron. Congress has known about Thermtron for 30 years. This Court reaffirmed Thermtron while they were debating SLUSA. And Congress knew that this question was not jurisdictional. Congress decoupled them, just as this Court described in Arbaugh.

JUSTICE GINSBURG: I don't know what -- what Congress' knowledge about Thermtron was a district judge who said, they removed this case, but I'm much too busy. This court is much too busy to mess with stuff that belongs in the State court. I'm remanding it. That was just too much, and the Federal court --

MR. PERRY: And, Justice Ginsburg, if Judge Hermansdorfer had said, I'm much too busy and therefore I lack subject-matter jurisdiction, it is inconceivable that the Thermtron case would have been decided any differently. Congress understands the difference between jurisdiction and merits. This Court understands the difference between jurisdiction and merits. Judge Easterbrook certainly understood that

distinction. This determination made by the district court here was a merits determination not controlled by 1447(c), and therefore, appeal was not barred by 1447(d).

CHIEF JUSTICE ROBERTS: But -- but I still don't -- and this gets back to the question I asked before. I mean, subsection (c) of 77p -- it's unfortunate we've got a lot of subsection (c)'s here but -- of -- of SLUSA incorporates subsection (b).

MR. PERRY: No, Your Honor. It references subsection (b).

CHIEF JUSTICE ROBERTS: Well, it says what can be removed is the covered class action involving a covered security, as set forth in subsection (b).

MR. PERRY: Just as title VII says what can be brought is an action under this title or just as the environmental statute in Steel Company said what can be brought is an action under subsection (a).

The cross reference of another provision containing substantive elements of Federal law does not make those elements jurisdictional. That's the holding of Arbaugh. That's the holding of Steel Company. There's no reason that the same principle shouldn't be applied when Congress makes a Federal defense removable as when it makes a Federal claim subject to suit within

the original jurisdiction of the Federal courts.

JUSTICE SOUTER: But -- but here, what is set out in subsection (b) is exactly the reason for Congress' wanting to place these restrictions on it, and that, it seems to me, is the sensible reason for reading it the way your -- your brother on the other side does.

MR. PERRY: Well, Justice Souter, we know from Mesa that if Congress had just made all covered class actions removable, we would have to find some Federal defense to support article III jurisdiction. Congress, by cross-referencing subsection (b), just pointed the Federal courts to the particular Federal defense that is sufficient, clearly sufficient, to make article III satisfied under the Mesa case. That's all that that cross reference is doing.

It's not, however, picking up every element. If Congress wanted to include every element of title VII, that environmental statute of SLUSA, it would have put them in the jurisdictional provision. Arbaugh says --

CHIEF JUSTICE ROBERTS: Why would it have done that? That would have been a waste of time. I mean, you just say, as set forth in subsection (b). You're saying if they had repeated subsection (b)

there, we'd have -- the case would come out the other way?

MR. PERRY: Yes, Your Honor. We have not only the -- the reference there, but we have the final sentence of that clause where we say after removal, after the court establishes that it has removal jurisdiction, it shall subject the action to subsection (b). That clause is entirely redundant under Petitioners' reading of the statute. Entirely redundant. I've read the reply brief a number of times. I don't understand their explanation for that. The only explanation is that Congress made removability contingent on the subsection (c) factors.

Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Perry.

Mr. Frederick, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF DAVID FREDERICK

ON BEHALF OF THE PETITIONERS

MR. FREDERICK: Thank you. I think it's really important for you to look at the complaints in these cases because every single one of them asserts claims on the basis of negligence and the value -- the fair-value pricing of the securities. They are not based on misrepresentations. The other side has attempted to make them look like misrepresentations,

and they've quoted things out of context in order to do so. But the complaints themselves are pure negligence claims that would fall outside of SLUSA.

But even if you were to disagree with that and even if you were to disagree with the district court's basis for saying that remand was proper because it lacked subject-matter jurisdiction, the general rule of Thermtron, Things Remembered, and importantly, the Gravitt case applies. And this Court does not have appellate jurisdiction. The Seventh Circuit does not have appellate jurisdiction because of the plain language of section 1447(d).

Respondents concede that State courts can decide SLUSA questions. It is up to defendants to decide whether to try to remove them. And subsection (d), about which Mr. Perry spoke, expressly provides that certain kinds of securities actions shall be remanded because Congress was not so concerned that Federal courts decide everything concerning securities cases, but only as to those that are expressly set forth in subsection (b).

And, Mr. Chief Justice, respectfully, what subsection (c) is doing with its references to subsection (b) are to incorporate those criteria as one of the three elements or criteria for removability. It

has to be a covered security, has to be a covered class action, and it has to meet the requisites of subsection (b). That's the only reasonable way to read that. And the last clause is simply confirmatory that if those are -- are met, then the district court has to find that the case shall be precluded.

In the Gravitt case, in which this Court through a per curiam dismissed the appeal, there was a dispute between the district court and the court of appeals over whether the district court had properly applied subject-matter jurisdiction principles in deciding whether or not there was diversity. This Court said, no matter. That is outside the -- the requisite -- that is outside 1447(d), and the general rule against appealability applies.

Now, importantly, they argue that they would be precluded by -- from arguing against SLUSA preemption in State court, but in fact, the last brief -- the last page of our brief, our reply brief, cites the Standefer case in which this Court held, under contemporary principles -- and I'm quoting now -- under contemporary principles of collateral estoppel, the inability to pursue an appeal is a factor strongly militating against giving a judgment preclusive effect.

JUSTICE KENNEDY: Do you agree that there

would be Federal court review in this Court from a State court determination on the applicability of SLUSA in this case?

MR. FREDERICK: Yes, there would be. And there would be -- their argument about the Missouri Pacific case is wrong because what the -- what was going on there was the remand determination, not the underlying Federal right. And that's what would be appealed, and there would also be appeal of the preclusive consequences because that would be a question of Federal law under this Court's longstanding determination. The Restatement --

JUSTICE STEVENS: May I ask you one question, Mr. Frederick? Because it's important to me.

Would you agree that a complaint that alleged that the defendant negligently used or employed manipulative devices and so forth would be covered by SLUSA -- would preempt it?

MR. FREDERICK: That would be covered. And -- and the reason is that it is -- involved a manipulation. The wording of SLUSA involves a manipulation of -- of the security.

JUSTICE STEVENS: So the mere fact that it's negligently caused would not preclude preclusion.

MR. FREDERICK: What -- what we're talking

about here, Justice Stevens -- it's important -- is that in how these securities get priced, was there negligence in the pricing of those, that had deleterious effects on one class of holders but not on market-timers that we were moving in and out of the market.

And so, frankly, Judge Easterbrook was wrong for a sixth reason, and that was in saying that there would have been a derivative claim here too because a derivative case has to be brought on behalf of the corporation on behalf of all shareholders --

JUSTICE BREYER: Then the district court was wrong too I guess because the district court made the same --

MR. FREDERICK: The district court was wrong in not anticipating what this Court held in Dabit, but it was not wrong insofar as it held that there was no subject-matter jurisdiction because this case is based on negligence and not fraud.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Frederick.

The case is submitted.

(Whereupon, at 11:59 a.m., the case in the above-entitled matter was submitted.)